

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL CASE NO. 103 OF 2019

CLAUS KILONGOMTWA t/a CHANYA TRADERS PLAINTIFF

VERSUS

KCB BANK TANZANIA LIMITED DEFENDANT

JUDGMENT

27th March & 5th April, 2023

KISANYA, J.:

Claus Kilongomtwa t/a Chanya Traders, the plaintiff herein, is suing the defendant, a limited liability company dealing in the business of banking in Tanzania. He prays for judgment and decree against the defendant as follows:

- i) That the Defendant be ordered to pay special damages to the tune of USD 375,000 ...*
- ii) That the Defendant be ordered to pay interest at compound commercial interest of 30% per annum from the date of institution of this suit to the date of judgment.*
- iii) That the Defendant be ordered to pay interest to the decretal amount at Court's rate from the date of judgment to the date of the decretal amount shall be paid.*
- iv) That the Defendant be ordered to pay general damages subject to the court's assessment.*
- v) That the Defendant be ordered to pay costs of this suit.*

vi) Any other relief this Court deems fit and just to grant.

In terms of the pleadings, the facts of this case may be briefly stated as follows. Sometimes in 2011, the defendant granted the plaintiff with a loan facility of TZS 137,384,000.00/=. The said loan was secured by the plaintiff's property described as Plot No. 2052, Block C, Sinza, Kinondoni Municipality, Dar es Salaam (henceforth "the collateral" or "the mortgaged property"). In 2017, the Tanzania National Roads Agency (TANROADS) earmarked the collateral as among the properties that would be affected by expansion of Ubungo Intersection Bridge.

In order to recover her money, the defendant moved the High Court, Commercial Division in Misc. Commercial Application No. 153 of 2017, seeking to restrain TANROADS from paying compensation to the plaintiff pending determination of the suit which was intended to be instituted. Following a deed of settlement by the parties, the Commercial Court vide a drawn order dated 27th July, 2017, ordered TANROADS to pay the defendant a sum of TZS 133,000,000 from the money to be compensated to the plaintiff and that the plaintiff to be discharged of liabilities upon payment of the said sum.

It contended that subsequent to the said order, the defendant was paid the outstanding sum by TANROAD and that Creditinfo Tanzania Limited was informed of that fact.

It is alleged that, in October, 2018, the plaintiff entered into an Agency Agreement with Greener Homes and Cars Hi-Tech Limited (henceforth "Greener Homes"), a corporate established in the Republic of China. According to the plaintiff, the Agency Agreement was for sale of car accessories in Tanzania on behalf of Greener Homes. The plaintiff alleges that in order to qualify to do business with Greener Homes, he was required, among others, to have not defaulted on performing his obligations to any entity in and outside Tanzania, at the time of executing the Agency Agreement.

It is the plaintiff's case that, on 5th October, 2018, Greener Homes, through Trill & Associates Advocates, conducted due diligence and found out that he (the plaintiff) was indebted to the defendant. The plaintiff contends that, on 9th November, 2018, Greener Homes rescinded the Agency Agreement on reason that the plaintiff was indebted to the defendant while that facts not been disclosed to her (Greener Homes).

According to the plaintiff, the expected minimum sale under the Agency Agreement was USD 25,000.00/= per year for a period of five years consecutively. He claims that the defendant's failure to discharge the collateral denied him to earn income of UDS 375,000/= being 30% commission payable out net cash sales under the Agency Agreement. He therefore instituted this suit for the above stated reliefs.

The defendant herein filed a written statement of defence and refuted all the plaintiff's claims. She averred, among others, that, the plaintiff did not enter into the Agency Agreement with Greener Homes as alleged by the plaintiff. It is further averred that, since TANROADS liquidated the debt on behalf of the plaintiff, the claim for title deed was baseless and unfounded. The defendant went on to state that, upon payment of TZS 133,000,000 by TANROADS, the collateral no longer belonged to the plaintiff. As for the search referred by the plaintiff, the defendant states that it was not made bonafide. She further replied that Greener Homes is a ghost company and the Agency Agreement is not genuine and it cannot conduct business in the magnitude of USD 250,000 per year as alleged. That being the position, the defendant asked the Court to dismiss the plaint for being devoid of merit with costs.

Before the hearing could commence, this Court in agreement with both parties, recorded the following issue for determination in this suit:

- 1. Whether the defendant discharged the plaintiff from the liabilities as per the Settlement Order.*
- 2. Whether the plaintiff entered into an Agency Agreement with Greener Homes & Car Hi-Tech Limited of 2nd Floor, Overseas, Trading Mall, No. 2 Tang XI, BAO Hal Line, Street, Guangzhou, China, for sale of car accessories.*
- 3. Whether the Plaintiff suffered loss of anticipated earnings to the extent of USD 375,000/= arising from termination of the Agency Agreement entered by the Plaintiff and Greener Company.*

4. To what reliefs are parties entitled.

During the trial, the plaintiff enjoyed the legal services of Mr. Godwin Muganyizi, learned advocate while the defendant was represented Mr. Elisa Abel Msuya, learned advocate, assisted by Ms. Regina Kiumba and Ms. Ndehurio Ndesamburo, also learned advocates.

The plaintiff called three witnesses and tendered four exhibits, while the defendant marshaled one witness and tendered six exhibits. Before deliberating on the issues pertaining to this suit, I find it appropriate to sum-up the testimonies adduced by the witnesses for both parties.

The first witness for the plaintiff is Mr. Claus Kilongamtwa (PW1). He testified that he trades as Chanya Traders. It was his evidence that, in 2011, the defendant gave him a loan facility of TZS 137,500,000. He testified to have serviced the loan in accordance with the terms of the facility agreement. PW1 recalled that in 2017, the collateral (house on Plot No. 2052, Block C, Sinza Kinondoni Municipality, Dar es Salaam) was taken by TANROADS for the road project. He went on to testify that the defendant filed Commercial Application No. 153 of 2017 against TANROADS, Attorney General, Claus Kilongomtwa and Felix Andrew and that the said case was resolved out of court as per the Drawn Order which was admitted in evidence Exhibit P1.

PW1 further testified that Exhibit P1 required the defendant to discharge him from all liabilities. It was also his evidence that he paid the outstanding

loan and interest in the late 2017. To supplement that oral testimony, PW1 tender in evidence the defendant's letter dated 13th March, 2018 (Exhibit P2) in which the defendant informed Creditinfo of Tanzania that the plaintiff had cleared the loan.

It was further testified that despite the fact the loan was paid, the plaintiff was not discharged. Thus, when PW1 requested for the title deed of the collateral, as per his letter dated, 6th November, 2017 (Exhibit P3), the defendant, through Trust Mark Attorneys' letter dated 21st November, 2017 (Exhibit P4) directed him to consult TANROADS as per Exhibit P4. PW1 stated that TANROADS informed him that they were not responsible. As the plaintiff consulted the defendant on the same matter, he was referred to the defendant's attorney one Abel Msuya who caused him to sign a Deed of Indemnity dated 27th November, 2017 which was tendered in evidence as Exhibit P5.

PW1 stated on oath that upon receiving Exhibit P5, he thought that the matter had ended and he proceeded with his business. In so doing, he entered into an agency agreement with Greener Homes in which it was agreed that the former (plaintiff) would be an agent of Greener Homes from 2018 to 2023. The said agreement was admitted in evidence as Exhibit P6.

PW1 testified that, two weeks after signing Exhibit P6, he started to find customers in different regions and returned in Dar es Salaam in January, 2019. He stated that on arrival to Dar es Salaam, his partner told him to meet one Mr.

Wang who served him with a letter from Greener Home's letter dated 9th November, 2018 (Exhibit P7). PW1 testified that vide Exhibit P7, Greener Homes cancelled the Agency Agreement on the account that he (PW1) had breached clause 3.7 of the Agency Agreement which required him to have no pending liability.

It was further testified that Greener Homes informed him that it arrived at that recourse after conducting due diligence which revealed that he (PW1) had liability with the defendant. At that stage, PW1 decided to conduct a search with the Ministry of Land. He also stated to have obtained the Ministry of Land's search report which was relied upon by Greener Homes. According to him, both reports indicated that he had mortgaged his house to the Defendant. The search reports were admitted in evidence as Exhibit P8 collectively.

Referring to Exhibit P6, PW1 stated that he was expecting to earn income of USD 375,000 being 30% commission of the minimum sale for five years. He therefore asked the Court to grant all prayers listed in the plaint.

When cross-examined, PW1 stated that his business is registered. He stated that he was informed to collect the termination letter (Exhibit P7) at Kariakoo. PW1 admitted that Exhibit P8 suggests that the search was conducted after cancellation of the agency agreement.

When PW1 was referred to the Agency Agreement, he stated that it was signed on 1/10/2018 and that he was in China on that date. He stated that

Ipyana Mwaijele who testified as PW2 informed him that the search report which led to the cancellation of the agreement was sent to China. PW1 went on to testify that he was aware that debtors are named in the report issued by the Bank of Tanzania (BOT) through, the Credit Reference Bureau. However, he stated that he was not aware whether Greener Homes was required to consult the Credit Reference Bureau of BOT.

On further cross-examination, PW1 admitted that TANROADS acquired the collateral. However, he maintained his stance he was entitled to be discharged.

In his evidence in re-examination, PW1 stated that Exhibit P2 was not sufficient to discharge him and that the defendant did not inform the Registrar of Titles to discharge him.

To further support his case, the plaintiff called Ipyana Mwaijele (PW2), an advocate from Trill and Associates Advocates. PW2 recalled to have been engaged by Mr. Wang to conduct a search in respect of Plot No. 252 Block C Sinza. It was his further testimony that the search report revealed that the said land had encumbrances. PW2 went on to testify that, in 2019, PW1 instructed him to conduct search in relation to same land, whereby the report thereto revealed that the land had encumbrances of TZS 137,548,000/=. When cross-examined, PW2 admitted that debtors' record is with the Credit Reference Bureau of BOT.

The last witness is Peter Thomas (PW3). He stated that Greener Homes deals with car accessories and that it is registered in Hong Kong and operating in China. It was his further testimony that Greener Home has subsidiaries in other countries and that he had been working with the said company for six years as a translator

PW3 recalled to have met PW1 at Greener Homes in 2018. He stated to have acted as interpreter when PW1 was negotiating with director of Greener Homes, on the agency agreement. According to PW3, the crucial clause was 3.7 on liability. He stated that it was agreed that PW1 should be a trusted person in Tanzania in order to work with Greener Homes and be able to clear a debt of the product supplied to him. PW3 went to testify that PW1 informed Greener Homes that he had no debt. He adduced that Greener Home engaged his agent in Tanzania namely, Mr. Wang who reported that PW1 had a debt. According to PW3, that report made Greener Homes to cancel the Agency Agreement with PW1.

During cross-examination, PW3 stated that he is not a full time employee of Greener Homes. He further stated that the directors of Greener Homes are available and that he was not aware as to why they were not called to testify. PW3 went on stating that Mr. Wang was asked to conduct due diligence on PW1. He told the Court that he was not aware whether the directors knew that reputable businessman in Tanzania must be a member of the business institution or organization.

PW3 further stated that he neither read nor translated the search report sent to Greener Homes. However, he testified to have translated the cancellation letter. PW3 told the Court that he was instructed by Mr. Lee to testify and that he was not aware whether Mr. Lee is aware of the Bureau which registers loan defaulters in Tanzania.

Mr. Damas Mwangange (DW1) appeared as the sole witness on the part of the defence case. He happened to be the defendant's Manager of Litigation. DW1 stated that the defendant issued a loan facility in favour of Mr. Claus (PW1). He stated that the defendant was intending to sell the collateral in order to recover the loan but noted that PW1 was going to be paid compensation on the collateral. It was his further testimony that when TANROADS was consulted on the matter, the defendant was informed that she would not be paid. According to DW1, the defendant decided to file a suit against the PW1 and that the suit ended through the deed settlement as depicted in Exhibit P1.

Referring to Exhibit P1, DW1 stated that TANROADS acquired the collateral and paid the defendant a sum of TZS 133,000,000/ which was part of compensation thereof. He went on to testify that PW1 was informed through letter dated 21st November, 2017 that he was no longer the owner of the collateral and that the title deed would be disposed on TANROADS's instruction. DW1 further stated that upon consulting TANROADS, the defendant was, through letter dated 17th November, 2020, directed to surrender the title deed

to them (TANROADS) for transmission to the Ministry of Lands for transfer and cancellation.

It was DW1's evidence that the bank's procedure requires the Bank to issue discharge form and title deed to the client. He insisted that their client was TANROADS and that the duty to discharge the title shifted to TANROADS who was also required to file the discharge form with the Registrar of Titles.

Making reference to Exhibit P2, DW1 testified that Creditinfo Tanzania is an institution with information of loan's defaulters. He testified that PW1 started to default in 2016 and he was reported to the Credit Reference Bureau of BOT. He went on stating that the defendant confirmed that PW1 had paid the debt and that he issued him loan clearance certificate which cleared him from all liabilities.

As for the cancellation letter and search reports, DW1 stated that the cancellation was conducted before the search. He further adduced that much as PW1 was issued with the clearance certificate, he ought to have shown the same to his counterpart. It was his further testimony that the author of the cancellation ought to have conducted the search with the Credit Reference Bureau.

DW1 further adduced that the search conducted by the defendant at BRELA revealed that Greener Homes and Car Hi-Tech Limited was registered in Tanzania and that its place of business is located in Arusha. To support his oral

testimony DW1 tendered in evidence the BRELA's letter dated 12/11/2019, Form No. 14a and MEMARTS of Greener Homes and Car Hi-Tech Limited (Exhibit D2 collectively). He contended that the signatures of Chan Lee on Exhibits P6 and Obgbaike on Exhibit D1 are similar.

DW1 went on to testify that the amount stated in Exhibit P6 is business target and not actual income which cannot be claimed as special damages. He further stated that Exhibit P6 was to last for three years. In conclusion, DW1 told the Court that the plaintiff's claim lacks merit. He prayed that the case be dismissed with costs.

During cross-examination, DW1 admitted on the fact that, a company may be registered in two countries; the particulars of the company registered in China cannot be obtained at BRELA; he is not an expert of handwriting; and that the discharge form submitted to TANROADS was not tendered in evidence. DW1 further admitted that the loan clearance certificate was not tendered in evidence and that Credit Reference Bureau does not discharge the mortgage.

At the end of the trial, the parties' counsel filed final written submissions. I have had an opportunity to go through the contending arguments in the final written submissions. Having done so, I noted that one issue which conclusively determine the matter between the parties was not framed before the commencement of the trial. Therefore, I summoned the parties to appear on 27th March, 2023 at which new additional issue was framed as follows:

“Whether the Greener Homes terminated the agency agreement after learning that the plaintiff was indebted to the defendant.”

The learned counsel were invited to address the Court on the additional issue. Their respective submissions will be considered in the course of determining the issues pertaining to this case.

Before going into determination of the issues, I wish to restate one of the principles governing civil cases. In terms of sections 110 of the Evidence Act [Cap. 6, R.E. 2022], a person who alleges on existence of certain facts must prove. This principle has been underlined in a number of cases including, **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2015 (unreported) cited by Mr. Msuya. In that case, the Court of Appeal held:

It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.

I shall be guided by the foregoing principle in the course of disposing the issues pertaining to this suit.

The first issue is whether the defendant discharged the plaintiff from the liabilities as per the settlement order. It is common ground that PW1 mortgaged Plot No. 2052, Block C, Sinza, Kinondoni Municipality to secure loan facility advanced to him by the defendant. Both parties are at one that, the mortgaged property was acquired by TANROADS for expansion and construction of Ubungo Intersection. It is in evidence that, on application filed by the defendant in the High Court of Tanzania, Commercial Division, parties filed a deed of settlement which was registered to constitute an order of the Court in Misc. Commercial Application No. 153 of 2017(Exhibit P1).

Some of the terms of the deed of settlement recorded as part of the decree in Misc. Commercial Application No. 153 of 2017 (Exhibit P1) were as follows: *One*, PW1 undertook and acknowledged that he was liable to pay the sum of TZS 133,000,000/= to the defendant. *Two*, parties agreed that TANROADS would deduct the sum amounting to TZS 133,000,000/= out of the sum payable to PW1 as compensation of acquiring and demolishing the collateral in order pave way for construction of Ubungo intersection/Morogoro Highway. *Three*, parties agreed that upon payment of the sum of TZS 133,000,000/=, the plaintiff would be discharged of all liabilities regarding the loan advanced to him by the defendant,

In their respective testimonies, PW1 and DW1 stated that TANROADS paid the sum of TZS 133,000,000/= to the defendant. This fact is also reflected

in Exhibits P2 and P5. Now, was the respondent discharged from the liabilities in respect of the loan facility? The answer to this question is not hard to find. The plaintiff tendered the defendant's letter dated 13th March, 2018 (Exhibit P2) in which Creditinfo Tanzania Limited was duly notified that the plaintiff had cleared his facility under the settlement agreement and issued with loan clearance certificate. In his evidence, PW1 did not state whether he was not issued with clearance certificate referred to in Exhibit P2. Furthermore, PW1 admitted that all defaulters are listed in the report of the Credit Reference Bureau of the Bank of Tanzania. However, he did not tell the Court whether the report of Credit Reference Bureau named him as defaulter of the loan advanced to him by the defendant

It turned out that the plaintiff wanted to be availed with certificate of the mortgaged property. This fact is also reflected in Exhibits P3, P5 and final submission of Mr. Muganyizi. At the outset, the clause 4 of the settlement order (Exhibit P1) which is the basis of the issue under consideration provided for discharging the plaintiff from the liability of the loan facility advanced to him by the defendant. Nothing to suggest that the discharge was by handing over the certificate of title to the plaintiff.

That aside, I am alive to the provision of section 121 of the Land Act, Cap. 113, R.E. 2019 which provides that the mortgagee discharges the mortgage, upon payment of all moneys and the performance of all other

conditions and obligations secured by the mortgage and at the request and costs of the mortgagor. However, it is not disputed that ownership of the mortgaged property changed hands from PW1 to TANROADS. In the circumstances, I agree with Mr. Msuya that the defendant could not hand over the certificate of title to the plaintiff. Pursuant to section 122 (1) and (2) (a) of the Land Act, TANROADS was an entity with interest on the right of occupancy. That being the case, she (TANROADS) was required to move the defendant to transfer the mortgage to a person named in the request. The provision stipulates:

"122.-(1) The current mortgagor or any person mentioned in subsection (2) may at any time, other than a time when the mortgagee is in a possession of mortgaged land, in writing request the mortgagee to transfer the mortgage to a person named in the written request.

(2) Subject to the consent of the mortgagor, which consent shall not be unreasonably withheld, the persons who may make the written request under subsection (1) are –

(a) any person who has an interest in the right of occupancy, lease or mortgage that has been mortgaged"

It is deduced from the evidence of DW1 and Exhibit D1 that, on 23rd November, 2017, the defendant's lawyer consulted TANROADS on how to deal with the title deed of the mortgaged property. In her letter dated 17th December, 2020, TANROADS directed the defendant's lawyer as follows:

"You requested our confirmation for your client (KCB Bank) to return the Certificate of Title No. 79539 to the previous owner of the Plot No. 2052 Block 'C' Mr. Claus Aloys Kilongamtwa after liquidated his debt.

Kindly be informed that Government of Tanzania through TANROADS acquired the above mentioned plot for construction of Ubungo Interchange and the previous owner Mr. Claus Aloys Kilongamtwa was compensated...

Therefore, based on the above, Certificate of Title should be surrendered to TANROADS and then to Ministry of Land, Housing and Human Settlement for transfer/cancellation as per Land Registration Act..."

I am aware that PW1 stated on oath to have communicated with TANROADS on the issue of certificate of title and that the latter informed him that she was not responsible with the issue of certificate of title. However, PW1 did not produce evidence to prove that fact.

On account of the foregoing, the defendant was not under an obligation of handing over the certificate of title of the mortgaged property to the plaintiff. That said, I am of the considered view that the plaintiff is duly discharged from liability of the loan as per Exhibit P1. This renders the first issue answered not in the affirmative.

The next issue is whether the plaintiff entered into an Agency Agreement with Greener Homes & Car Hi-Tech Limited of 2nd Floor, Overseas, Trading Mall,

No. 2 Tang XI, BAO Hal Line, Street, Guangzhou, China, for sale of car accessories. PW1 testified to have entered into an agency agreement with Greener Homes of China. The said agreement was tendered and admitted in evidence as Exhibit P6. On the other hand, the defendant alleged that Greener Homes & Cars Hi-Tech Limited was registered with BRELA as reflected in Exhibit D2. The defendant went on contending that the signature on behalf of Greener Homes & Car Hi-Tech Limited on Exhibits P6 and D3 is the same. On that account, Mr. Msuya held the view that Greener Homes & Car Hi-Tech Limited is a ghost company.

It common knowledge that a company with similar name may be registered in the different countries. Therefore, I agree with Mr. Muganyizi that the fact that Greener Homes & Cars Hi-Tech Limited is registered in Tanzania does not imply that Greener Homes & Cars Hi-Tech Limited of Guangzhou China is a ghost company. Otherwise, the defendant ought to have produced evidence from China to support her contention.

I have further considered the defendant's argument that the signature on behalf of Greener Homes & Car Hi-Tech Limited on Exhibits P6 and D3 were signed by one and the same person. Such argument suggests that the agency agreement was forged. Since the agency agreement was appended to the plaint, the defendant was expected to take the necessary action and report the relevant matter to the police for investigation. I hold so basing on the decision

of the Court of Appeal in the case of **Eupharacie Mathew Rimisho T/A Emari Provision Store and Another vs Tema Enterprises Limited** and Another, Civil Appeal No. Civil Appeal No. 270 OF 2018 (unreported), where it was held:

"...even if the signatures were forged as alleged, it was incumbent on the appellants to act promptly, invoke other remedies by reporting the matter to the Police because all along, and before filing the joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was annexed to the plaint. In the circumstances, the appellants' inaction to invoke remedies under criminal justice leaves a lot to be desired as correctly found by the learned trial Judge."

Since the defendant did not report the matter to the police for examination of the handwritten expert, this Court has no cogent reasons to hold that the agency agreement and Exhibit D3 were signed by one and same person. Such fact was not proved on the balance of probabilities. To this end, the second issue is answered in the affirmative.

Next for consideration is the additional issue, whether the Greener Homes and Cars Hi-Tech Limited terminated the agency agreement after learning that the plaintiff was indebted to the defendant. PW1 stated on oath that the agency agreement was terminated by Greener Home and Cars Hi-Tech on 9th November, 2018. It was further testified by PW1 and PW3 that Greener Homes and Cars Hi-Tech Limited terminated the agency agreement after learning that

the plaintiff had pending liability with the defendant, thereby contravening article 3.7 of the said agreement. Pursuant to paragraph 16 of the plaint, the fact that the plaintiff was indebted to the defendant was unveiled on 5th October, 2018, when Greener Homes and Cars Hi-Tech Limited through Trill & Associates Advocates conducted due diligence on the plaintiff. In her written statement of defence, the defendant denied the allegation. She stated that the search was not made bonafide.

Now, the plaintiff called PW2 from Trill and Associates. PW2 stated on oath that he was engaged by one, Wang to conduct search in relation to Plot No. 252 Block C, Sinza. It is not known as to how the search was conducted in relation to the property and not the plaintiff who entered in the agency agreement with Greener Homes and Cars Hi-Tech. Further to this, the search report in respect of due diligence conducted on 5th October, 2018 was not tendered in evidence. PW1 tendered the official search report made by Trill & Associates on 15th February, 2019 (part of Exhibit P8). It is not known as to why the official search report dated 5th October, 2018 was not produced while the same was appended to the plaint as Annex P6. Also, PW3 who was alleged to have been instructed to testify on behalf of Greener Homes and Cars Hi-Tech did not tender the search report which prompted termination of the agency agreement.

Further to above, the plaintiff did not plead to have instructed PW2 or Trill & Associates to conduct any search. Apart from the search alleged to have been conducted by Trill & Associates Advocates on 5th October, 2018, the search pleaded in the plaint were stated to have been made by the plaintiff and Access Bank. Had the plaintiff instructed PW2 he would have pleaded that fact. Since parties are bound by their own pleadings, I will not consider the evidence in respect of the search conducted by PW2 in 2019.

In the absence of the official report made on 5th October, 2018 or before 9th November, 2018, I find no evidence to support the claim that the Greener Homes terminated the agency agreement after learning that the plaintiff was indebted to the defendant. Thus, the additional issue is answered in the negative.

Another issue for my determination is whether the Plaintiff suffered loss of anticipated earnings or income to the extent of USD 375,000.00 arising from termination of the Agency Agreement entered by the Plaintiff and Greener Company. It is worth noting here that the said amount of USD 375,000.00 was pleaded in the plaint as special damages. As rightly submitted by Mr. Msuya, it is the law in this jurisdiction that, apart from being pleaded, special damages must be strictly proved. See for instance, the case of **Stanbic Bank Tanzania Limited vs Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 (unreported), in which the Court of Appeal held:

*"Although not as comprehensively expressed, this Court in one of its decisions - **Zuberi Augustino v Anicet Mugabe**, [1992] TLR 137, at page 139 said: - It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

Similar position was stated in the case of **Vidoba Freight Co. Ltd vs Emirates Shipping Agencies (T) Limited and Another**, Civil Appeal No. 12 of 2019 where it was underscored that:

*"It is a trite principle of law that specific damages must be specifically pleaded and strictly proved. In the case of **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited** (supra) cited by Mr. Mang'ena, the Court quoted Lord Macnaghten in **Bolag v. Hutchison** [1950] A.C. 515 at page 525 who had this to say regarding special damages:-*

"... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly."

Basing on evidence of PW1 and Exhibit P6, Mr. Muganyizi submitted that the plaintiff was denied income of USD 375,000.00, which is calculated on minimum sales. His argument was based on the contention that the magnitude of business was based on sales that Mr. Wang managed to do so. On the other

hand, Mr. Msuya urged the Court to disallow this claim for want of specific proof.

In his evidence, PW1 testified that USD 375,000.00 constituted 30% of the commission which would have been paid to the plaintiff in respect of minimum sales of the product for five years from October 2018 to September 2023. However, article 4.1 of Exhibit P6 uses the word "may" thereby suggesting that it was not mandatory for the plaintiff to receive the commission of 30 % of the minimum sales. This is when it is considered that, the same article provides that "separate commission agreement may be made between the parties stating the commission amount on a case by case basis." Furthermore, the commission was not of sales amount as pleaded in the plaint and adduced by PW1. Article 4.1 of Exhibit P6 makes it clear that the commission 30% was in respect of net cash received, whereby the term "net cash received" is defined to mean "net amount of payment received by the Company from the customer for the product, less charges, if any, taxes, duties, freight and insurance etc."

It is further depicted from paragraph 4.2 of the agency agreement (Exhibit P6) that the commission of net cash received was limited to;

- (a) *sale of products by the Company, where the Product are delivered by the Company to a location within the Territory pursuant to an order or enquiry received form a customer whose address, from such order or enquiry received, is*

located in the territory, irrespective of whether such order or inquiry was received directly by the Company or through the Agent, and

(b) Any sale of Products by the Company, other than a sale described in preceding subparagraph (a), made pursuant to any order or enquiry first forwarded by the Agent to the company, where such product are to be delivered by the Company to a location within the Territory, and/or the customer's address, from which such order or enquiry was received, is located in the territory.

As it can be glanced from the above excerpt of the agreement, the commission was limited to sale of products by Greener Homes in respect of an order or inquiry from a customer within the territory of the plaintiff or an order or enquiry forwarded by the plaintiff. In that regard, the plaintiff was expected to give evidence on the volume of orders or enquires which would have enabled him to earn commission of USD 375,000.00. This was not done. For instance, although PW1 stated to have spent two weeks looking for customers in different regions, he did not give evidence on whether he had obtained customers for the products from Greener Homes and Hi-Tech Limited. As if that was not enough, evidence regarding volume of trade Greener Homes and Hi-Tech Limited was not given. On the foregoing reasons, I hold the view that it was not proved that the Plaintiff suffered loss of anticipated earnings to the extent of USD 375,000.00/= arising from termination of the agency agreement. Hence, the fourth issue is answered in the negative.

There comes the last issue on what reliefs to which the parties are entitled to. As the preceding issues are answered not in affirmative, I hold that the plaintiff is not entitled to any of the claims prayed in the plaint.

In the final analysis, the Court settles for the order that the plaintiff's case is hereby dismissed for want of merits. The plaintiff shall pay costs of the case to the defendant.

DATED at DAR ES SALAAM this 5th day of April, 2023.



S.E. Kisanya
JUDGE
05/04/2022