

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT MWANZA**

**COMMERCIAL CASE NO. 2 OF 2020.**

**CNBMI TANZANIA LIMITED.....PLAINTIFF**

**VERSUS**

**BUJIKU INVESTMENTS LIMITED..... DEFENDANT**

**Date of Last order: 30/08/2021**

**Date of Judgement: 02/09/2021**

**JUDGEMENT**

**MAGOIGA, J.**

The plaintiff, CNBMI TANZANIA LIMITED by a plaint instituted the instant suit against the above-named defendant praying for judgement and decree in the following orders: -

- i. Declaration order that the defendant is in breach of the sale agreement;
- ii. The defendant to pay the plaintiff the outstanding principal sum of Tshs. 98,208,000.00 (say Tanzania Shillings Ninety-Eight Million, Two Hundred and Eight Thousand only);
- iii. The defendant pays the plaintiff commercial interest of 10% of the principal sum;



- iv. Damages as shall be assessed by the court but preferably not less than Tshs 10,000,000/= (Ten Million);
- v. The costs of the suit;
- vi. Any further orders and reliefs as this honourable court may deem just, equitable and convenient to grant.

Upon being served with plaint, defendant filed written statement of defence disputing plaintiff's claims and averred that, it was the plaintiff who breached the sale agreement by unilaterally and unfairly terminating the agreement. On the above reason, the defendant urged this court to dismiss the suit with costs.

The brief facts giving rise to this suit are not complicated. It is stated that, on 4<sup>th</sup> July, 2020, the plaintiff (as buyer) and the defendant (as supplier) orally entered into purchasing agreement for supply of 7440 bags of Simba brand cement at a price Tshs.17,600.00 for each bag at tune of Tshs.120,032,000.00. Among others, it was agreed that, the defendant was to supply a special brand of Simba cement known as 32.5N with condition that, same will take effect upon receipt of Tshs. 120,032,000.00 contractual price by the defendant.

Further facts were that, in compliance with the terms of the agreement, the plaintiff on 10<sup>th</sup> July, 2020, transferred to defendant Tshs.



120,032,000.00. Up to the 21<sup>st</sup> July, 2020 the defendant had only been able to supply 1240 bags out of agreed bags of 7440 leaving undelivered balance of 5580 bags worth Tshs. 98,208,000.00.

Consequently, on 21<sup>st</sup> July, 2020 the plaintiff cancelled the order for supply on reasons that the defendant has delayed supply of cement. However, on 7<sup>th</sup> August, 2020, the plaintiff placed another order for 1240 bags of another brand of Simba Bora cement at the price of TZS 22,320,000 out of the former amount not supplied before cancellation of the former order. After the supply of 1240 bags of Simba Bora Cement there was still undelivered balance of bags which was to be supplied. The legal dispute ensued between parties each throwing blames against each other for breach of contract and eventually on 11<sup>th</sup> December, 2020 plaintiff instituted this suit claiming for payment of unpaid balance for unsupplied bags of Simba Cement and other consequential reliefs as contained in the plaint.

While this suit was pending in this court, on 25<sup>th</sup> March, 2021 parties signed partial deed of settlement whereby defendant agreed to pay Tshs.67,544,000.00 being part of an outstanding balance for undelivered bags of cement and wanted a set of Tshs.19,008,000.00 which is a loss occasioned by the plaintiff for unilaterally cancelling the



order. It was against this background, the plaintiff and defendant are claiming against each other for payment Tshs.19,008,000.00 being an outstanding balance of cement not delivered and the defendant wants the same amount be set-off for loss incurred as result of unfairly terminating of the order at her detriment.

The plaintiff at all material has been enjoying the legal services of Mr. Charles Kiteja, learned advocate. On the other adversary part, defendant at all material time has been equally enjoying the legal services Ms. Marina Mashimba, learned advocate.

Before hearing started, the following issues were framed, recorded and agreed between the parties for determination of this suit, namely; -


1. Whether it is the plaintiff or defendant who is in breach of contract?;
2. Whether the defendant is entitled to the amount of TZS 19,008,000 by way of set off a loss accassioned by the plaintiff?
3. To what reliefs parties are entitled.

The plaintiff to proof of her case called one witness, Ms. AGATHA MTEI (to be referred in these proceedings as '**PW1**'). PW1 through her witness statement adopted as constituting her testimony in chief, told



the court that, she is a Human Resources Manager of CNBMI Tanzania Limited and therefore conversant with the fact of this case. It was the testimony of PW1 that, on 4<sup>th</sup> July, 2020 plaintiff and defendant entered into purchasing agreement for supply of 7740 bags of cement at the price of Tshs.17,600.00 per bags to the tune of Tshs. 120,032,000.00.

PW1 went on to testify that, on 10<sup>th</sup> July, 2020 plaintiff transferred to defendant's account contractual price of Tshs.120,032,000.00. According to PW1, despite being paid the whole contractual sum, the defendant did not timely supply the agreed cement soon after payments. Following the delay to deliver the cement, on 21<sup>st</sup> July, 2020 the plaintiff cancelled the order. PW1 further testified that defendant was only able to supply 1240 bags out of agreed bags of 7440 leaving undelivered balance of 5580 bags worth TZS 98,208,000. As the result plaintiff instituted the instant suit claiming for payment of Tshs.98,208,000.00 as unpaid balance for undelivered bags of cement.

PW1 went on to tell the court that, while this suit was pending, parties partly settled the matter and the defendant agreed to pay Tshs. 67,544,000.00 being part of the amount of Tshs.98,208,000.00 being value of undelivered cements. 

However, PW1 told the court that defendant's claim for set off of Tshs 19,008,000.00 is unfounded for the plaintiff performed fully the terms of the agreement. Eventually, PW1 prayed that, this suit be allowed and all reliefs claimed in the plaint be granted with costs.

In proof of the case, the plaintiff tendered in evidence the following exhibits, namely;

- a. Transfer to CRDB Account of the defendant as **Exhibit P1;**
- b. Email and Letter of cancellation of the order collectively admitted as **exhibit P2 a-b;**
- c. Emails, Demand notices and reply collectively admitted as **exhibit P3 a-d.**

Under cross examination by Ms. Mashimba, learned advocate, PW1 told the court that, she started working with the plaintiff since 1<sup>st</sup> November, 2020. PW1 pressed with questions admitted that, when parties entered into agreement, was not an employee of the plaintiff and what she was testifying was what was told by his boss one Jake. PW1 when asked in regard of the order of 10<sup>th</sup> July, 2020 she replied that the order was for 6820 and not 7440.

Further under cross examination, PW1 told the court that, the agreement was orally made and among the terms of the contract, was



for the defendant to make a supply of cement within one week after payments done. Pressed further if the said term was pleaded and is within her witness statement, PW1 admitted that, the term that supply was to be in one week was not pleaded and was not within her witness statement.

On the delay, PW1 admitted she was wrong when she stated in her witness statement that, the plaintiff cancelled the order after the lapse of 14 days but the truth is that the plaintiff cancelled the order after 11 days and not 14 days. PW1 when shown Exhibit P2 a-b said the letter was written on 21<sup>st</sup> July, 2020 which is after 11 day from the date of the deposits of money.

PW1 when further pressed into question admitted that she knew defendants are not producers of the cement, and she knew where it is produced in Tanga and she knew that cement was to be delivered at Simiyu region. PW1 when further cross examined in regard to settlement deed, she told the court that, she was present when a settlement entered and defendant was claiming for Tshs 26, Million for transport and costs, however, the amount was reduced to Tshs 19.008.000/= and further told the court that the breach was in the 1<sup>st</sup> contract.



Under re-examination by Mr. Kiteja learned advocate, PWI told the court that, the letter to cancel the order was not part of agreement and that the only dispute is on the set off Tshs.19.008.000/= on the 1<sup>st</sup> order which the defendant was only able to deliver 1240.

This marked the end of the plaintiff's case and the same was marked closed.

In defence, the defendant called one witness, Mr Benjamin Fredrick Bujiku, (to be referred in these proceedings as '**DW1**'). DW1 through his witness statement which was dully adopted as his testimony in chief told the court that, he is a Managing Director of the defendant business entity dealing with business of buying and selling building materials hence, aware of the fact of the case.


DW1 went on to tell the court that, the plaintiff on 10<sup>th</sup> July 2020 ordered from Bujiku Investment Limited 6820 bags of cement known as Simba Cement Barabara brand 32.5N at the price of Tshs.17,600.00 per each bag. DW1 further told the court that, the whole ordered consignment was valued at Tshs 120,032,000.00, which money was transferred to Bujiku Investment Limited account on 10<sup>th</sup> July, 2020. DW1 further told the court that the nature of Simba Cement 32.5N cannot be kept in stock but have to be supplied only after the order to





the manufacturer and the claim that same was to be delivered immediately is impossible and was not the term of the agreement. DW1 told the court that after being paid the money ordered the cement but when the ordered consignment was on transit to Simiyu, the defendant received a letter cancelling the order and requested for refund back the money which had already been paid.

DW1 went on to say that it could not be said that there was a delay on delivering the ordered consignment because it was only 11 days passed after the deposit of the money, which money was cleared after three days and as such the order was unilaterally and arbitrarily cancelled after 6 days which was not a delay in the circumstances. According to DW1, it was common knowledge to both parties that, Simba Cement was to be out sourced from Tanga and be transferred to Simiyu and as such cancellation within six days of ordered consignment was clear breach of contract on the part of the plaintiff. DW1 insisted that, there was no agreed specific date for delivery of consignment and that even after the cancellation of the 1<sup>st</sup> order the plaintiff placed another order of 1240 bags on 7<sup>th</sup> August, 2020 which the same was delivered to defendant.



DW1 further told the court that, when the plaintiff cancelled the ordered consignment, the defendant had already spent 26,136,000 as a transportation cost. DW1 as such prayed that, prayed that the court be pleased to compel the plaintiff to shoulder such costs and interest from the date of judgment to the date of payment in full. In disprove of the case for plaintiff, DW1 tendered some documents to be part of his testimony.

- a. orders for cement No 152,153,154 and 156 admitted in evidence as **exhibit D1 a-d;**
- b. deposits slip dated 9/7/2020,15/7/2020,17/7/2020 and 18/7/2020 are collectively admitted in evidence as **Exhibit D2 a-d;**
- c. Proforma invoice dated 7/8/2020 admitted in evidence as **exhibit D3;**
- d. Delivery note dated 9.8.2020 admitted in evidence as **exhibit D4;**
- e. Deposits dated 15/7/ 2020 and 3/7/2020 are collectively admitted in evidence as **exhibit D5 a-b;**

Under cross examination by Mr. Kiteja, learned advocate DW1 told the court that, on 10<sup>th</sup> July,2020 plaintiff place an order for special Simba Cement 32.5 valued at Tshs. 120,032,000.00. DW1 when shown exhibit D2a admitted that, it is true the deposit was made before he had



business with plaintiff. DW1 when pressed with questions told the court that on 21<sup>st</sup> July, 2020 the ordered consignment was cancelled and changed to another order of 42.5 for the same money. DW1 when further pressed with questions told the court that, transportation costed her Tshs. 120,000 per ton and most vehicles had 32 to 35.

DW1 when shown exhibit D1a-d he was quick to say those are orders sent to Tanga Cement and he paid Tshs 2,376,000/=for each motor vehicle and the whole cost stood at Tshs.26,136,000/=and that dispute is on 32.5 and not 42.5 cement. DW1 further told the court that, he changed the order because he wanted to supply CNBMI and his prayer is for the costs incurred in the contract with plaintiff.

Under re-examination by Ms. Mashimba, learned advocate DW1 told the court that, by July 2020 it was an order for 32.5N which was changed to 42.5 and that the cancelling disturbed his way of doing business.

This marked the end of hearing of this suit.

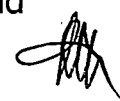
Now the notable duty of this court is to determine the merits or demerits of this suit by determining each issue as agreed and recorded before hearing started. However, before I embark on raised issues, I noted some facts not in dispute and which I wish to point them out and narrow down non contentious issues. **One**, it is not disputed by the



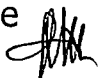
parties herein that they orally entered into purchasing agreement for supply of Simba Cement 32.5N. **Two** it is not disputed that the plaintiff transferred Tshs 120,032,000/= to the account of the defendant maintained at CRDB and immediately was able to supply 1240 bags out of agreed 6820 bags of cements as agreed. **Three**, it is not disputed that parties on 25<sup>th</sup> March, 2021 partly settled the matter and the defendant was to pay plaintiff Tshs. 67,544,000.

However, what is in disputed is who breached the contract and whether the defendant is entitled to amount of Tshs. 19,008,000.00. In this suit, plaintiff is claiming for payment of outstanding balance of TZS 19,008,000/=being a balance of undelivered amount and that it was the defendant who breached the contract. On the other hand, defendant is disputing the existence of the debt and that he is entitled to set off amount to Tshs. 19,008,000.00 being a transportation cost incurred on the cancelled ordered consignment.

With the above contention, therefore, it is imperative to determine issues against the evidence on record. The first issue was thus coached 'whether it is the plaintiff or defendant is in breach of contract? The plaintiff stated that, it was defendant who breach the contract for the delay of supply of cement while defendant has denied the delay and



argued that it was plaintiff cancelled the ordered without reasonable ground and hence, he is the one breach the contract. Having gone through and considered both sides' pleadings, testimony and exhibits tendered, I am satisfied beyond doubt that in the circumstances of this suit, it was plaintiff who was breached the terms of the contract. I am taking the above stance on the following reasons; **one**, time for delivery of cement was not stipulated and therefore cannot be taken as a ground for cancellation of the of the ordered consignment. Section 55(2) of the Law of Contract, [Cap 345 R.E.2019] is loud and clears that, if the parties failed to specify the time, then, that should not be of essence of the contract and do not become voidable by failure to do such thing. Not only that but the plaintiff did not plead the issue of time of delivery and worse enough even the long time state in the letter did specify how long the defendant has delayed the consignment. Therefore, since there was no time stipulated for delivering the consignment time cannot be used as the reasons for breach of contract on the part of defendant. **Two**, it was a common understanding of the parties that, defendant was not a manufacturer or the producer of the ordered cement but just a supplier who depended on production of the manufacturer who is at Tanga because Simba Cement Barabara (32.5N) is exclusively manufactured in Tanga and unless miracles happens which is not the case to supply the



same from Tanga within six days. **Three**, I am convinced with the explanation of the defendant that even the amount of 1240 bags supplied were supplied out of stock that was destined to another client but reasonably that it cannot be kept on the stock so it is produced for specific order, so defendant was not in any delay. **Four**, the defendant had the knowledge that the cement was to be out sourced from Tanga and be delivered to Bariadi by road transport. The journey from Tanga to Baridi-Simiyu by road I have no doubt can take more than a week, so the cancellation of an order by plaintiff after the lapse 6 days from the date the money was dully credited into the defendant's account, cannot be considered any delay. I have no flicker of doubt, the plaintiff, in the circumstances, acted unreasonably and unfair at the detriment of the defendant. No notice was sent of intention to terminate the contract was send to the defendant but jus cancellation. This is not fair to commercial transaction of this bulk. In the totality of the above, makes me conclude that, the defendant, indeed, without mincing words disturbed the business operations of the defendant. The mere argument by the plaintiff that six days was delay in the circumstances, is far from convincing this court otherwise and same must be and is hereby rejected to be of no merit at all.



That said and done, this court finds that the first issue must be and is hereby answered in the affirmative that the plaintiff was in breach of the contract by unreasonably and unfair cancelling the contract in the circumstances.

This takes me to second issue which was couched that **'whether the defendant is entitled to the amount of TZS 19,008,000 by way of set off as a loss accessioned by the plaintiff?'** This issue will not detain this court much. Much as this court has found negative in issue number one on the part of the plaintiff on the above reasons and more positively that, the plaintiff cancelled the ordered consignment unreasonably and unfairly as per P2a-b and the defendant has vide exhibits D1a-d, D2a-d, D4, D5a-b proved that he had incurred cost for transportation and other related costs, then this court finds that, the defendant as matter of fact is entitled for payment of TZS 19,008,000 by way of set off in the circumstances of this case.

This trickles down to the last issue that what relief's parties are entitled. Based on my findings in issues Nos. 1 and 2 above, this suit must be and is hereby dismissed with costs to the defendant.

Just by way of passing, this suit, reasonably, was to end up in mediation stage and avoid unnecessary costs to parties if parties' were well



advised. I strongly urge parties' learned advocates to use, encourage and exploit fully mediation process with more commercial science than litigation science alone.

It is so ordered

Dated at Mwanza this 2<sup>nd</sup> day of September, 2021.



A handwritten signature in black ink, appearing to read "S.M. Magoiga". The signature is fluid and cursive, with a long horizontal stroke at the end.

**S.M. MAGOIGA**

**JUDGE**

**02/09/2021**