

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

CIVIL CASE NO. 81 OF 2021

TANZANIA PORTS AUTHORITY..... PLAINTIFF

VERSUS

M/S REZA COMPANY LIMITED..... DEFENDANT

JUDGMENT

Date of last order: 08/03/2024

Date of Judgment: 15/04/2024

A.A. MBAGWA, J.

The plaintiff, a statutory public body instituted this suit against the defendant claiming for a total of TZS 515, 438, 491.31 say Tanzania shillings Five Hundred Fifteen Million Four Hundred Thirty-Eight Thousand Four Hundred Ninety-One and Thirty-Two Cents being the costs allegedly incurred by the plaintiff in the refloatation and removal to a safe location of the defendant's vessel known as MV Mytham. The plaintiff prays for the judgment and decree against the defendant in the following orders;

- (a) Payment by the defendant to the plaintiff of a sum of Tanzania shillings Five Hundred Fifteen Million Four Hundred Thirty-Eight Thousand Four Hundred Ninety Thousand (TZS 515,438,490.00).



- (b) Interest at 31% on the sum in (a) and (h) from the 4th March 1999 till the date of judgment.
- (c) Interest on the decretal amount at the court rate from the date of judgment till the date of payment in full.
- (d) Defendant be condemned to pay costs of this suit.

The plaintiff's claim arises from the alleged sinking and capsizing of the defendant's vessel which was loading cargo at the plaintiff's premises to wit, Dar es Salaam Port at Berth No.11.

In brief, the plaintiff's case as deciphered from the pleading and witness statement of Abdullah Yusuph Mwingamno (PW1) may be recounted as follows; On the 4th day of March 1999, the defendant's vessel namely, M.V. MYTHAM was loading cargo at Dar es Salaam Port at Berth No. 11. In the process, the vessel capsized and sunk thereby impeding the plaintiff's operations. In addition, the third parties' properties were either lost or damaged as consequence of sinking. The plaintiff laments that the sinking of the vessel was caused by the negligence of the defendant's employees to wit, the master and chief officer. At paragraph 4 of the witness statement and paragraph 6 of the plaint, the plaintiff particularised the alleged defendant's negligence on the following aspects;



- (a) The chief officer of the vessel did not follow the rolling practice in loading the containers hence the shifting of the containers in a bid to create a space.
- (b) The chief officer of the vessel was negligent as there were no container shoes on deck, nor was the cargo lashed upon loading thereby causing the cargo to slide to the starboard side.
- (c) The chief officer of the vessel namely, Godfrey Chatta, and the master captain M.J. Mwakibete improperly and negligently loaded the vessel by stacking containers with a total weight of 72.25 tonnes on the starboard side against 41.5 tonnes of cargo of the port side thus causing the ship to be listed to the starboard side.
- (d) The containers already loaded on the ship were unsecured and untied contrary to the established shipping procedures and principles as such, all the containers shifted to the starboard side thereby facilitating the fast sinking of the ship.
- (e) The ship did not have stability information on board hence the officer could not guarantee the ship's stability at any particular time during the process of loading cargo.



- (f) The vessel was unseaworthy because it lay docked at the port on account of a labour dispute between its former owner and employees as such it developed defects that the government surveyor required to be rectified on or before the 16th day of January 1999 but the same were not remedied. Moreover, the ship was incapable of correcting her stability by means of water ballast because she had an unspecified amount of solid ballast in her double bottom tanks in form of steel in the tank and coupled with the fact that the hull of the ship was corroded with numerous holes and perforations.
- (g) The ship's officers manifested gross incompetence, recklessness and lack of knowledge as regards the handling of containers to wit, the officers totally failed to take reasonable and necessary precautions prior to and during the loading of containers in that they were oblivious of the carrying capacity of their ship as a consequence they accepted cargo over the ship's capacity.
- (h) When re-registering the ship, the owner substantially altered the information which the manufacturers had originally specified about



the cargo and passenger capacity of the ship and indicated a higher capacity.

Following the sinking of the vessel, the plaintiff's operations at Berth No. 10 and 11 were blocked. The plaintiff further states that the vessel had on board various lubricants namely, 1400 litres of diesel, 200 litres of lubrication oil, 100 litres of hydraulic, and 130 litres of gearbox oil. As such, upon capsizing, the said lubricants spread into water and seriously polluted the environment. Besides, third parties' properties were either lost or damaged. The plaintiff mentioned Messrs Alawy who claims compensation of TZS 280,236,000.00

Hardly had the incident occurred than the plaintiff notified the defendant of the event and the associated consequences. Consequently, the defendant was required to take immediate action to refloat and remove the ship to prevent blockage of entry to the port. Nonetheless, the defendant neglected the plaintiff's call.

To salvage the situation, the plaintiff had no option but to engage a company by the name of Divecon International of Mombasa Kenya to refloat and remove the defendant's ship from the port premises. As a result, the plaintiff incurred costs to the tune of TZS 515, 438, 491.31 say Tanzania shillings



Five Hundred Fifteen Million Four Hundred Thirty-Eight Thousand Four Hundred Ninety-One and Thirty-Two Cents.

At paragraph 11 of the plaint, the plaintiff provided a breakdown of the claimed amount as follows;

- (i) TZS 29, 763,901.44 being costs for tugs, welding, and compressors;
- (ii) TZS 1, 440,782.05 being costs for pollution, removal, and control of pollution;
- (iii) TZS 7,667,020.15 being costs for equipment and labour used at the plaintiff's central workshop;
- (iv) TZS 1,696,682.40 being costs for labour and material at the dockyard;
- (v) TZS 94,634,105.28 being the costs for hiring, engaging experts, and equipment for refloatation and removal of the vessel.
- (vi) TZS 100,000,000.00 being damages for loss of revenue on account of closure of the harbor, disturbance and inconvenience;
- (vii) TZS 280,236,000.00 being compensation for loss of properties belonging to the third parties;
- (viii) Costs of the suit;



- (ix) Any other and further reliefs which this Honourable Court may deem fit to grant.

The plaintiff contends that all the endeavours to settle the matter amicably and consensually proved futile hence the institution of this suit.

It is worthwhile to note that initially, this case was registered as Civil Case No. 374 of 1999. However, on the 5th day of May 2021, it was withdrawn before Hon. E.E. Kakolaki J with leave to refile it. Consequently, on the 27th day of May 2021, it was refiled and registered as Civil Case No. 81 of 2021.

It is on the court record that the defendant was being represented by Bendera & Co. Advocates. However, through its letter dated 13th July, 2023 prayed to withdraw its services. Thus, on 17/07/2023 this Court (Hon. M.K. Pomo J) granted the prayer. In addition, the Court ordered the counsel to notify the defendant of the subsequent mention date. The record is silent on whether the counsel heeded the court order.

Thus, when the matter was placed before me, I ordered the plaintiff, in the interest of justice, to serve the defendant through publication. Despite the service through Habarileo Newspaper dated 29th November 2023, the



defendant did not appear to defend her case nor did she file the written statement of defence.

Consequently, on the 20th day of February 2024, upon application by the plaintiff's counsel, this Court ordered an *ex parte* hearing of the matter. Besides, the hearing was conducted by filing witness statements in terms of Order XVIII Rule 2 of the Civil Procedure Code.

At the hearing, the plaintiff was represented by Mr. Erigh Rumisha assisted by Ms. Mwantumu Selle, learned State Attorneys.

In a bid to establish the claims, the plaintiff paraded one witness namely, Abdallah Yusuph Mwingamuno whose statement was adopted and admitted to form part of his testimony in chief. In addition, he tendered a couple of documentary exhibits to wit, claims for the golden bell batteries and car batteries (**exhibit P1 collectively**), a letter dated 5th March 1999 from Tanzania Harbours Authority to the Managing Director, Reza Company LTD (**exhibit P2**), and a letter from Divecon International Limited to Tanzania Harbours Authority dated 10/03/1999, Quotation from Divecon to Tanzania Harbours Authority dated 15/03/1999, a letter dated 18/03/1999 from Tanzania Harbours Authority to Reza Company Limited and its attachment

titled 'salvage and removal of MV Maytham at Berth No. 11 equipment and labour costing' (**exhibit P3**).

Having gone through the pleadings and the plaintiff's evidence, the germane issue for determination is whether the plaintiff has established its claims on a balance of probabilities. As hinted above, the plaintiff is claiming a sum of TZS 515, 438, 491.31 say Tanzania shillings Five Hundred Fifteen Million Four Hundred Thirty-Eight Thousand Four Hundred Ninety-One and Thirty-Two Cents being the costs allegedly incurred by the plaintiff in the refloatation and removal of the defendant's vessel to a safe location. In support of these claims, the plaintiff through PW1 tendered various documents as hereinabove-mentioned.

Exhibit P1 is a demand notice by Mr. Salum Alawy for compensation for batteries with a total value of \$350,285.71. Further, exhibit P2 is a note of protest by the plaintiff dated 5th March 1999 informing the defendant that she was liable for the costs of the removal of the ship and consequential damages though no exact amount is indicated therein. However, exhibit P3, the letter dated 18/03/1999 from Tanzania Harbours Authority to Reza Company Limited is accompanied by a breakdown of the total costs allegedly incurred by the plaintiff in remedying the situation. According to the said



breakdown titled 'salvage and removal of MV Maytham at Berth No. 11 equipment and labour costing' the total cost is Tanzania shillings 134,367,279.80. Further, letters from Divecon International Limited to Tanzania Harbours Authority dated 10/03/1999 and 15/03/1999 are quotations from Divecon to Tanzania Harbours Authority.

Indeed, in all of the documents that were tendered by the plaintiff, there is no proof of payment. All documentary exhibits are just correspondence and or invoices between the plaintiff, defendant, and third party namely, Messrs Alawy.

Looking at the prayers, the claim of TZS 515, 438, 491.31 say Tanzania shillings Five Hundred Fifteen Million Four Hundred Thirty-Eight Thousand Four Hundred Ninety-One and Thirty-Two Cents has been presented as specific damage because the plaintiff is alleging it to be the costs she incurred in purifying the environment, compensating Messrs Alawy, refloating and removing the ship to a safe location and loss of business. As such, the plaintiff was duty bound to specifically plead it, and strictly prove it, a duty which, in my view, she failed to discharge. On this, I am fortified by the decision of the Court of Appeal in **Reliance Insurance Company (T) LTD & 2 others vs Festo Mgomapayo**, Civil Appeal No. 23 of 2019,

CAT at Dodoma. While deliberating on the proof of specific damages, the Court of Appeal at page 19 had the following to say;

'The law in specific damages is settled, the said damages must be specifically pleaded and strictly proved, but this is not the case in the current appeal. Much as we appreciate that, the respondent's vehicle was damaged during the said accident as expounded above, the evidence on record falls short of materials to form the basis of awarding specific damages. In this respect therefore, it is our finding that the High Court judge misdirected himself when relied on contents of job card and proforma invoice (Exhibits P9 and P10 respectively) and the evidence of Rogath Kauganila (PW2) as strictly proving the amount he awarded as specific damages. That being the case, the first issue is answered in the negative;'

In addition, it is a settled position of law that correspondences, demand notices, invoices, and the like are not proof of payment. In the case of **Ami**



Tanzania Limited vs Prosper Joseph Msele, Civil Appeal No. 159 of 2020, CAT at Dar es Salaam, the Court observed thus at page 16-17;

'We are of the similar view that, in the absence of receipts, bank transfers of money or letters of credits by the respondent to the supplier of the cargo, the invoice cannot be taken to be the proof of payment as it was a mere advice of the amount to be paid, it was a mere bill'.

Admittedly, what was tendered by the plaintiff was a communication of claims between the parties and not proof of payment or costs. The plaintiff therefore was expected to produce proof of payment such as payment vouchers or bank statements to prove that she, in actual fact, incurred the claimed costs say by paying Divecon International Company, Messr Alawy etc. Further, under item (vi) of the prayers, the plaintiff claims a sum of TZS 100,000,000.00 being damages for loss of revenue on account of the closure of the harbor and inconveniences. The law is now settled that expected profit or loss of business falls under the category of specific damages which should be strictly proved. See **Puma Energy Tanzania Limited vs Ruby Roadways (T) LTD**, Civil Appeal No. 287 of 2020, CAT at Dodoma and **Professional Paint Centre Limited vs Azania Bank Limited**,

Commercial Case No. 53 of 2021, HC Commercial Division at Dar es Salaam.

It was thus incumbent upon the plaintiff to specifically and strictly establish how she arrived at that figure instead of evasive claim.

In his written submission, Mr. Erigh Rumisha had it that the plaintiff tendered payment vouchers and invoices and for that reason implored the court to take them into account and grant the prayers. With due respect to Mr. Rumisha, I think he misconceived his own evidence. There was no payment voucher or any proof of payment in the evidence which was tendered by the plaintiff. His argument therefore is not backed by evidence.

Since the plaintiff did not produce any single document to prove the payment of the claimed costs or actual loss of business, it is my considered findings that she has failed to establish the specific damage on a balance of probabilities.

Notwithstanding the foregoing, at paragraph 11(i), the plaintiff prayed for any reliefs which this Court may deem fit to grant. Having assessed the evidence as a whole, it goes without saying that by refloating and removing the defendant's ship, the plaintiff incurred some costs and inconveniences though she was not able to strictly prove it. It is also a common cause that



by blocking the entry access to Berth 10 and 11, the plaintiff's business was disturbed and for that reason, the plaintiff either experienced inconveniences or lost income in one way or another. It is the law that general damages need not be specifically pleaded and strictly proved rather it can be granted even based on mere averment. See the case of **Peter Joseph Kalibika and Another vs Patrice Aloyce Mlingi**, Civil Appeal No. 37 of 2009, CAT at Tabora. In the case of **Reliance Insurance Company (T) LTD** (supra) at page 20, the Court had this to say;

'The position of the law in regard to an award of general damages is settled. There is a number of authorities stating that general damages are normally awarded at the courts discretion and need not to be specifically proved, as Mr. Rutabingwa would wish it to be done in this particular matter. We agree with the line of argument taken by Mr. Kalonga in support of the above position of the law and the authorities he cited; including, the case of Cooper Motors Ltd (supra)'

Alive to the settled position of law as indicated hereinabove and having considered the plaintiff's evidence holistically, I am inclined to award the



plaintiff general damages to the tune of Tanzania Shillings One Hundred Million (TZS 100,000,000) only.

In the final analysis, I enter judgment and decree in favour of the plaintiff and order as follows;

1. The defendant is hereby ordered to pay the plaintiff Tanzania Shillings One Hundred Million (TZS 100,000,000) only being general damages.
2. The defendant should pay court interest of 7% on the decretal sum under (1) above from the date of this judgment to the date of full payment.
3. Costs of this suit be borne by the defendant.

It is so ordered.

The right of appeal is explained.

DATED at DAR ES SALAAM this 15th day of April, 2024.




A.A. Mbagwa

JUDGE

15/04/2024