

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MOSHI DISTRICT REGISTRY)**

**AT MOSHI**

**CIVIL CASE NO. 06 OF 2018**

**ELIA JOHNSON KIWIA**

**(TRADING AS KIWIA AGROVET) ..... PLAINTIFF**

***VERSUS***

**KAFOI ESTATE (T) LTD .....DEFENDANT**

**JUDGMENT**

**MUTUNGI .J.**

The Plaintiff herein has sued the Defendant and prays for Judgment and Decree against the same as hereunder: -

- (1) The Defendant to be ordered to pay the Plaintiff the principal sum due plus 5% interest monthly to the tune of Tshs. 444,970,512.78/=. The calculation made after breach of the contract on 31<sup>st</sup> March 2013 to date arising out of the principal sum and interest thereof.
- (2) The Defendant be ordered to pay 5% interest per month of the money due from the day of Judgment until the whole debt has been settled down as per 8<sup>th</sup> February, 2013 agreement.

- (3) That, the Defendant to pay the Plaintiff the general damages of Tshs. 50,000,000/= for the loss of business, breach of trust and mental stress resulting from the above debt.
- (4) Costs of this suit be provided for by the Defendant.
- (5) Any other relief(s) this honourable deems fit.

The Plaintiff who is also referred to as PW1 testified in court that he is a sole proprietor and trading as Kiwia Agroveter. He further informed the court that he owns a shop located at Sanya Juu selling among other things livestock inputs and Agro inputs of which some of the Agro inputs are supplied to him on credit by many companies but the major one known as Balton (T) Ltd. The Plaintiff had met one Anna Felix Mosha who had introduced herself as the Director of the Defendant. She had requested to be supplied with Agro inputs since her company owns a farm at Siha. The Plaintiff was to supply the Defendant the same during the period of April and June 2012. As a result they entered into an oral agreement and she promised that, she would pay cash but in the event her husband (Felix Gamael Mosha) referred in this matter as DW1 faced deficits he would supply then on credit basis.

PW1 further elaborated that, in the beginning all went well and the said Anna Felix Mosha honored her promise. He was at first paid Tshs. 150,000,000/= and later they took goods on credit and by June 2012, the Defendant had an outstanding debt amounting to Tshs. 41,081,000/=. They promised they would pay the debt within two weeks but all in vain. It was now obvious that the two sides had fallen in a crisis in respect of the payment of the debt. PW1 took initiatives to phone the said Anna Mosha but she kept giving him empty endless promises and at times alleged the Co-director (the husband) was away and could not authorize payments. The said Anna Mosha went on with her stories and PW1 kept waiting in anticipation that he would be paid the outstanding amount. In February 2013 the said Anna Felix Mosha came up with a different story that, her husband (DW1) had agreed to pay the Plaintiff but they should draw up an agreement which the Plaintiff was required to sign. The same was to be executed before the Defendant Directors' longtime friend, a Lawyer based in Arusha known as Advocate Colman Ngalo.

The Plaintiff having conceded to the said request, Anna Felix Mosha informed him that her husband (DW1) had arranged and instructed one of their employees (Hussein) to take him

to Advocate Ngalo's office located at Sanawari – Arusha. After he received Hussein's phone number, the Plaintiff contacted him and they agreed to meet on 8/2/2013 at the Advocate's office at 4:00 p.m. and find a way to settle the debt. At the Advocate's office, the Plaintiff managed to meet DW1, Advocate Ngalo in presence of the said Hussein. DW1 instructed Advocate Ngalo to prepare an agreement of how to settle the debt after both parties consenting.

It was agreed that the same should be payable in two instalments. The terms were such that, the Defendant shall pay the Plaintiff a sum of Tshs. 20,540,500/= on or before 28<sup>th</sup> February, 2013 and the balance 20,540,500/= on or before 30<sup>th</sup> March 2013. In the event the Defendant defaults payment as stated in the agreement, there will be an interest at the rate of 5% per month on the outstanding amount until such time the whole debt had been cleared. The agreement was signed by Hussein Omari (the Defendant's Farm Accountant) on behalf of the Defendant (the same was admitted in evidence as Exhibit "P2") and the Plaintiff on behalf of his shop. While still in the meeting DW1 had admitted the said Hussein Omari had the authority to sign on

behalf of the company and in the end Colman Ngalo signed and stamped the agreement.

As agreed the Defendant deposited with CRDB (Kiwia Agrovet Account) on 28/2/2013 at Dar es Salaam (Holland House Branch) Tshs. 20,000,000/= No. 0150234660400 and the Plaintiff tendered a Bank Statement to this effect (Exhibit "P3"). Thereafter the Defendant did not deposit the remaining amount as agreed. The Plaintiff gave them some allowance of time and kept on contacting Anna Felix Mosha who kept on giving empty promises and excuses. The Plaintiff had no alternative but to write Advocate Colman Ngalo a letter (10<sup>th</sup> October, 2014 – Exhibit "P4") to assist him in following up the balance. The Plaintiff did receive a response on 11/12/2014 vide a cheque of Tshs. 10,000,000/= signed by DW1 which he deposited in the NMB Account (Kiwia Agrovet) on 12/12/2014 Account No. 401066000054 hence DW1 tendered a Bank Statement (Exhibit "P5") to that effect.

Thereafter the Plaintiff received no further payments despite several serious follow ups with Anna Felix Mosha. In the end she told him to contact her husband as she no longer had any liability in the said issue. The Plaintiff did not give up but



still made several attempts to talk to DW1 but in vain. He was later discouraged by DW1's reply that, he had no right to talk to him before talking to one Hussein. Now that the Plaintiff was getting tired, he decided to write a demand note to the Defendant through his Advocate towards the end of 2016 (on 10<sup>th</sup> November, 2016) claiming for Tshs. 169,997,969/= (Exhibit "P6"). As usual there was no payment made by the Defendant despite receiving, signing and stamping the same. To his dismay he received a phone call from DW1 complaining that he had acted unreasonably and had humiliated the Defendant to write the demand letter, on the reason that he had disclosed the debt to an Advocate who was a third party.

The Plaintiff further elaborated that, the actual amount not paid is 5% interest of Tshs. 11,081,000/= each month from 30/3/2013 to the institution of the case plus and a further 5% is charged monthly on the principal sum to the institution of the case the total in that case adds up to Tshs. 444,970,512.79/=. This amount is to be paid by the Defendant's Directors as per the Certificate of incorporation (Exhibit "P1") and signatories appearing in a Board Resolution (Exhibit "P7"). Further that his business

tremendously dropped since his creditors had stopped supplying him goods (various inputs). He has also lost customers due to insufficiency of stocks. His family has greatly suffered due to financial constraints, emotional and mental stress. In that regard the Plaintiff prayed for Tshs. 50,000,000/= general damages and 5% interest per month of the money due from the date of Judgment until the whole debt is settled as per the 8<sup>th</sup> February, 2013 agreement.

On the other side of the coin, DW1 (Felix Gamael Mosha) explained to the court that, he is the principal shareholder and Director of the Defendant. He has a Co-Director who apparently is his wife (Anna Felix Mosha). That there was a time he met the Plaintiff in Advocate Colman Ngalo's office due to claims brought up against their company (the Defendant). The claims had mushroomed from a business venture the Plaintiff had with DW1's wife and they wanted the claim sorted out. They had taken agricultural inputs from the Plaintiff on credit amounting to Tshs. 41,081,000/=, DW1 was satisfied that this was the actual debt and promised to re-pay the money in instalments. DW1 first sent the Plaintiff Tshs. 20,000,000/= (March 2013) then Tshs. 10,000,000/= in December, 2014 with a remaining balance of Tshs.

11,081,000/= unfortunately the Defendant underwent a management change and DW1 believed the debt would be cleared by the new management. Unfortunately to his surprise he learnt through the Plaintiff's Advocate that, the outstanding amount had not been cleared. On a further scrutiny he noted that, the outstanding claim had gone up to over Tshs. 168,000,000/= on the allegation that there was an agreement attracting a 5% interest monthly on the principal amount. Out of good will, DW1 phoned the Plaintiff in order they do meet to discuss on the new claims but the Plaintiff turned hostile. He could not proceed to make any further payments since they had not verified the new claim or consented to pay the same. What was needed, was the plaintiff to send a statement of accounts to the defendant. As far as one Omari Hussein was concerned, DW1 stated that he had no authority to sign the said Agreement without the approval of the Board, a member of the Board or the Farm Manager. The said Omari Hussein has long left the company. Be as it may, DW1 testified that his company did not realize any harvests from the Plaintiff's agricultural inputs since the barley they had planted did not flourish, in fact it failed completely. The meeting they held in Advocate Ngalo's



office was to verify the debt and not to enter into a further Agreement. DW1 informed the court that he admits the balance of the unpaid debt of Tshs. 11,081,000/= without interest as alleged and this would have been settled in 2016 had the Plaintiff accepted to meet with DW1 through the telephone conversation. The Agreement allegedly signed by Omari Hussein was without the knowledge and authority of the Defendant. The amount now claimed is out of fraudulent and fictitious calculations. Even if it is accepted that there was an interest component, then 5% on the balance would be slightly above Tshs. 6,000,000/= and for six years would be about 36,000,000/= in total the debt would be slightly above Tshs. 50,000,000/=.

At the close of the case each side did submit final written submissions which were geared at providing the court with the summary of the case and the rival arguments. The court did also frame issues as hereunder: -

- (1) Whether the Agreement between the parties dated 8/2/2013 was valid.
- (2) What are the reliefs parties entitled to.

Starting with the first issue, it is imperative to state the undisputed facts as per the evidence found on record. It is not disputed that the Plaintiff once met with DW1 in Advocate Colman Ngalo's office. It is further not disputed that those in attendance were apart from Mr. Ngalo, DW1 and the Plaintiff, there was one Hussein apparently the Defendant's accountant. It is further not indispute that the burning issue that brought the four together was the Plaintiff's outstanding balance after he had supplied the Defendant with Agro-inputs and had failed to honour the payments.

It does not a matter whether it was to verify the debt or to find a way to re-pay the same but what is of importance is what came out of the meeting of the four in attendance. This is what forms the core of the dispute in this matter. The center of concentration is Exhibit "P2" dated 8<sup>th</sup> February 2013 entered between Kiwia Agrovat (the Plaintiff's trading name and Kafoi Estate Limited). In the said Agreement it was acknowledged that the Plaintiff had in the months of April to June 2012 supplied Agro inputs valued at Tshs. 41, 081,000/= to the Defendant, the same was still outstanding. The same was signed by Elia Johnson Kiwia (Plaintiff) on one side and Hussein Omari on behalf of Kafoi Estate Limited on the other.

The same was witnessed by Colman Maro Ngalo learned Advocate. As if not enough the agreement was affixed with the Defendant's rubber stamp.

What then is the bone of contention as regards Exhibit "P2". DW1 disputes that the same was not valid because it was signed by an unauthorized person without either an extract from the Directors' resolution or power of Attorney to enter into such agreement with the Plaintiff and set a modality of re-payment of the debt. However DW1 does not dispute to have met with the Plaintiff at Advocate Ngalo's office in the company of Mr. Hussein Omari on the date the Agreement was signed. It is thus not convincing that the purpose of the meeting was simply to verify the debt and leave it at that. The question in the mind of the court is, if at all DW1 was present when Mr. Omari signed the agreement then why didn't he stop him from doing so. Given such a scenario for any sane person or for any stretch of imagination one could not doubt Mr. Hussein Omari's participation and this is what happened to the Plaintiff who believed the presence and authority of DW1 had in the matter given authority for Hussein Omari to sign the Agreement. The Plaintiff in this case was neither the Director nor Board member capable of knowing the internal

affairs of the company. Section 38 (b) of the Companies Act, Cap 12 R.E. 2019 provides thus: -

*"38: A contract may be made: -*

*(a) .....*

*(b) On behalf of the company, by any person acting under its authority, express or implied, and any formalities required by law in the case of contract made by an individual also apply....."*(Emphasis mine)

In view of the above provision of law, a company can authorize any person to sign the contract on its behalf and that authority could be expressly or impliedly according to the formalities required by law made by individual persons and this is what Mr. Hussein did. It is baffling to think that Mr. Hussein Omari would just sign an agreement without the approval of DW1 who actually was physically present and considering he had no personal interest in the same. To add salt to the wound DW1 acknowledges that Mr. Hussein was their Accountant yet he had never questioned him on the meeting they held in Mr. Ngalo's office nor the claims after the demand notice issued by the Plaintiff.

There is yet a glancing feature in this matter that, how could it be possible for the Defendant to presume or dream and proceed to deposit the amount of Tshs. 20,000,000/= as agreed in Exhibit "P2" at D'SM on 28/2/2013 a date agreed upon in the agreement, if at all he was not aware of the existence of the said agreement signed by a person he alleged had no authority. Further, "Exhibit P4" a letter sent to Advocate Ngalo by the Plaintiff which was not objected to indicating the terms found in Exhibit "P2" on 10/10/2014 asking for the Advocate's assistance and immediately thereto DW1 paid the Plaintiff Tshs. 10,000,000/=. DW1 could not give any explanation as to why he paid the said amount to the Plaintiff if at all there was nothing binding the two.

One is further left in a dilemma as to why after DW1 had received the demand notice in 2016 he did not respond, denying having the knowledge of the said agreement nor reporting the said Mr. Hussein to any appropriate authority. Silence in this case would mean acceptance of the knowledge of the disputed agreement. Conclusively, taking into consideration the signature of Mr. Hussein the Defendant's employee and the company's affixed rubber stamp, the court finds there was deemed to have been an



internal authorization mechanism which gave power to Mr. Hussein to sign the impugned agreement. The court is alive with the provision of Section 110 of the Evidence Act, Cap 6 R.E. 2019 and for the sake of reference the same states: -

***“110 (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”***

In this case DW1 had a duty to justify through evidence that Mr. Omari Hussein had fraudulently without justifiable reasons signed Exhibit “P2” after the Plaintiff had led evidence that the same was signed by Mr. Omari Hussein in the presence of DW1 and that of Advocate Ngalo. Failure to do so, it is the settled finding of the court that, the Agreement between the parties dated 8/2/2013 was valid and the same answers the first issue.

Trickling down to the second issue, the court finds that having established that the Agreement entered into between parties in this dispute dated 8/2/2013 was valid, the same was accordingly binding on the parties. The same is envisaged by

Section 10 of the law of Contract Cap 345 R.E. 2019 and for the purpose of clarity, the same is quoted as hereunder: -

***“10: All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not here by expressly declared to be valid.”***

What then were the terms of the Agreement. It is depicted from the disputed Agreement that the parties had agreed as follows: -

- (1) The second party shall pay to the first party the sum of Tshs. 20,540,500/= on or before the 28/2/2013.*
- (2) The second party shall pay the remaining balance of Tshs. 20,540,000/= to the first party on or before 30<sup>th</sup> March, 2013.*
- (3) Upon receipt of the money from the second party the first party shall immediately pay Balton (T) Limited.*
- (4) In the event the second party fails to pay the first party as stated herein, the second party will be liable to pay interest at the rate of 5% per month on the outstanding amount until the whole debt has been cleared.*

Gathering from the evidence it is not disputed by the rival sides that, what remained outstanding was Tshs. 11,081,000/= hence reading through the Agreement specifically clause 4 then it should be calculated 5% of 11,081,000/= times the number of months in default thereto. The amount should then be added to the outstanding amount of Tshs. 11,081,000/= (from 30/3/2013 to 13/11/2018 when the present suit was instituted). This is unlike the formula the Plaintiff was trying to impress upon the court that the principal sum due plus 5% interest monthly and the amount reached be subjected to 5% monthly till payment as of 13.11.2018 adding up to Tshs. 444,970,512.78/=. The Agreement speaks out loud for itself.

The court further finds that, the parties having reached an amicable agreement (Exhibit "P2") by the Defendant not honouring the same was in breach of the Agreement, Section 73 (1) of the Law of Contract Act (Cap 245 R.E. 2019), requires a party that has breached the contract to compensate for any loss or damage caused to the other party which naturally arises in the usual cause of things from such breach or which the parties knew when they made the contract to be likely to result from the breach thereto. The Plaintiff told the court that he had suffered insufficiency of

stocks for business, loss of customers, loss of trust from the major creditors and financial institution, drop of business, loss of income for himself and his family which has resulted to hard life, mental torture and poor mode of living and prayed for Tshs. 50,000,000/=. In the case of **Anthony Ngoo and Another vs. Kitinda Kimaro, Civil Appeal No. 25 of 2014 (unreported), the court held: -**

*"The law is settled that general damages are awarded by the trial Judge after consideration and deliberation on the evidence able to justify the award. The Judge has discretion in the award of general damages, however, the Judge must assign a reason."*

It follows then the court was to have been availed hard facts in the course of the hearing. In the Plaintiff's entire testimony, he never tendered any factual basis to justify his prayer for general damages. For example he did not adduce evidence on the debts he had with his suppliers, of interest was Balton (T) Ltd. He claimed mental and psychological tortures on himself and his family. These too are not backed with hard facts. He claimed loss of income, the same was left with no facts. It would seem the Plaintiff wanted the general

damages as a matter of course. I have further considered the interest imposed monthly on the outstanding amount would mostly offset whatever economic loss or inflation the Plaintiff was exposed to. In the premises I find no justification in the claimed general damages. The court in the circumstances proceeds to order 5% interest per annum on the decretal amount from the date of Judgment to payment in full. In the final analysis I find the Plaintiff's claim granted to the extent explained in the Judgment with costs.



  
**B. R. MUTUNGI**

**JUDGE**

**28/8/2020**

Judgment read this day of 28/8/2020 in presence of Plaintiff and Mr. Mkama Msalama (S.A) holding brief for Mr. John Mushi representing the Defendant.

  
**B. R. MUTUNGI**

**JUDGE**

**28/8/2020**

RIGHT OF APPEAL EXPLAINED.