

**IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)  
AT MWANZA**

**HC CIVIL CASE NO. 40 OF 2017**

**SULTANALI JAVER**

**T/A MWALONI FILING STATION ..... PLAINTIFF**

**VERSUS**

**NSK OIL & GAS LIMITED ..... DEFENDANT**

**JUDGMENT**

*Date of the last Order: 16<sup>th</sup> April, 2020*

*Date of Judgment : 30<sup>th</sup> April, 2020*

**A.Z. MGEYEKWA, J**

On 21<sup>st</sup> November, 2017, the Plaintiff herein, SULTANALI JAVER T/A MWALONI FILING STATION instituted a suit at hand against the Defendants herein NSK OIL & GAS LIMITED claiming payment of total sum Tshs. 292,073,489/= being outstanding substantive

amount as purchase price that the defendant failed to refund the plaintiff after a deliberate breach of fuel supply agreement.

In their Complaint, the Plaintiff prays for Judgment and Decree against the defendant as follows:-

- i. That payment of a substantive sum of Tshs. 292,073,489/= (Two Hundred Ninety Two Million Seventy-Three Hundred Thousand Four Hundred and Eighty-Nine as per paragraph 3 of the complaint).*
- ii. The Payment of 12 % interests on the decretal sum from the date of judgment until payment in full.*
- iii. That payment of 24 % interest on the decretal sum from the date of default till satisfaction of the decree.*
- iv. General damages for loss of business and disturbances.*
- v. Costs of suit.*
- vi. Any other reliefs(s) at this Court may deem just to grant.*

On the other hand, the Defendant, in response to the Plaintiff's claims, has filed an Amended Written Statement of Defence and Counter Claim disputing the claims and prays the Plaintiff's claims be dismissed with costs.

A brief background of the suit as obtained from the record of the case is that for a long time ago the plaintiff and the defendant had entered into an oral contractual agreement of supplying of variety of fuel. As a consideration to the terms and conditions in the said agreement, the Plaintiff was supposed to advance some funds to the defendant's bank account being advance payment of purchase price for the supply of variety of fuel. The plaintiff for several times deposited the amount as advance to purchase price for the supply of fuel amounting Tshs. 551,2000,000/= copies of various cash deposit slips are herewith attached and marked as Annexure K1, K2, K3, K4, and K5. The defendant upon receiving the said money was supposed to supply the plaintiff the said variety of fuel depending on the advanced amount which the plaintiff deposited in the defendant's bank account and the defendant complied without any problem. In 2016, the defendant breached the contractual terms and failed to perform its obligations of supplying such fuel to the plaintiff despite the fact that he received the advanced purchase price from the plaintiff.

The plaintiff communicated with the defendant and both reached into an amicable resolution that the defendant will refund the plaintiff the advanced purchase price within a short time but instead the defendant supplied the plaintiff with another variety of fuel valued at Tshs. 259,126,511 and the remaining total balance of Tshs. 292,073,489/= have remained unpaid and the defendant ended promising to effect the outstanding payment. Then the defendant issued a cheque dated 10<sup>th</sup> August, 2016 which was not honoured. The defendant wrote a letter of reminder; dated 25<sup>th</sup> August, 2016 to the defendant to effect the outstanding payment, the defendant promised to settle the debt. On 1<sup>st</sup> November, 2017 the plaintiff issued a 14 days notice of intention to sue the defendant but the defendant neglected thus the plaintiff opted to lodge a suit before this court.

At all the material time, the Plaintiff was represented by Mr. Katemi, the learned Advocate, while the Defendant was represented by Mr. Gwakisa Sambo, the learned Advocate.

Upon completion of all preliminaries, the Final – Pre Trial Conference was conducted and the following issues were framed by this Court:-

- 1) *Whether the Plaintiff's claims against the defendant is a substantive amount of Tshs. 292,073,489/=.*
- 2) *Whether the defendant's claims against the Plaintiff's outstanding balance of Tshs. 429,012,100/=*
- 3) *What reliefs if any parties are entitled to?*

To prove the above issues the Plaintiff's side summoned one witness, *Aldof Wilfred Kinyanguli* who testified as **PW1**. The defendant side also summoned one witness, *Kamaljeet Aggarwal*, who testified as **DW1**. The Plaintiff tendered a total of *four (4) documentary Exhibits, to wit* **Exhibit P1** Bank receipts; **Exhibit P2** a cheque; **Exhibit P3** a letter dated 25<sup>th</sup> August, 2016; **Exhibit P4** a letter dated 1<sup>st</sup> November, 2017.

It is imperative at the outset to point out that, this matter has been also gone through the hands of my brothers Hon. Maige, J, and Hon. Rumanyika J who conducted the 1<sup>st</sup> Pre-Trial Conference and

Mediation respectively. I thank my predecessors for keeping the records well and on track. I now have to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

To prove the existing contractual relationship between the parties, PW1, Adolf Wilfred Kinyanguli, testified that he is working with Mwaloni Filling Station Oil Company and the Company deals with buying and selling petroleum. PW1 stated that the company was established in 2011 as Mwaloni Filling Station with the registration number 121635. PW1 testified that Mwaloni Company comprises two shareholders namely; Zulfikas Ismail Nachi and Sultan Karim Java.

PW1 further testified that he was working with the Company as a filling station supervisor since it was established and he was handling and supervising all activities in relation to petroleum.

PW1 continued to testify that he knew NSK Oil & Gas Limited and the NSK Oil & Gas Company, are the same Companies with two names, as they used to buy oil from them and have dealt with them for a long time since they started the company. PW1 added that they

had no written contract but trusted each other to deposit a certain amount of money in their account for which they were supplied with fuel based on terms which they agreed upon.

PW1 continued to testify that the dispute started in 2016 when they agreed to begin the supply of both petroleum and diesel whereas the plaintiff was supposed to deposit Tshs. 551,200,000/=. PW1 added that they demanded 3 Lorries of 12300 liters each of petrol and one lorry of 3700 liters of diesel to meet the requirement of the total value of Tshs. 551,200,000. PW1 went on testifying that they deposited the money in the CRDB, NMB and Bank M. To substantiate this fact, PW1 tendered bank slips which were collectively admitted and marked as **Exhibit P1**. PW1 continued to submit that the first bank slip dated 4<sup>th</sup> April, 2016 amounted to Tshs 61,910,000 payment was deposited to Bank M, the second bank slip dated 6<sup>th</sup> April, 2016 amounted to Tshs. 100,000,000 was deposited to NMB Bank and the third bank slip dated 6<sup>th</sup> April, 2016 amounted to Tshs 85,730,000 was deposited to NMB Bank and the fourth bank slip dated 9<sup>th</sup> April, 2016 amounted to Tshs. 213,280,000 was

deposited to CRDB Bank and on 13<sup>th</sup> April, 2016 the plaintiff deposited Tshs. 90,280,000 to NMB Bank.

It was further testimony of PW1 that to date the defendant had failed to deliver 12300 liters of petrol and 3700 liters of diesel while they assured the plaintiff that they will supply the said fuel by writing a cheque which was dishonored by the bank. To substantiate his fact, PW1 tendered a cheque which was admitted and marked as **Exhibit P2**. PW1 went on testifying that the cheque dated 10<sup>th</sup> August, 2016 was issued by NSK to Mwaloni Filling Station and it was for part payment of Tshs. 80,000,000/=. PW1 tendered a demand letter dated 25<sup>th</sup> August, 2016 which was admitted and marked as **Exhibit P3**. PW1 went on to testify that they decided to hire an Advocate to remind the defendant to effect the outstanding balance. To fortify the facts PW1 tendered a reminder letter demanding Tshs. 292,073,489; the same was admitted and marked as **Exhibit P4**.

In conclusion, PW1 prays for this court to restore the said amount along with interest to account for loss and disturbance incurred during the said period.



Testifying for the defendant's case, DW1 stated that he is working with NSK Company since 2006 and in 2007 he was appointed as the CEO of NSK Company. DW1 testified that his daily duties entailed running the company's day-to-day activities. PW1 went on stating that prior to 2009, the Company was known as NSK Oil Company Limited and in 2009 the name was changed to NSK Oil and Gas Limited. To substantiate this fact, PW1 tendered a Change of Name document which was issued by BRELA, the document was admitted and marked as **Exhibit D1**.

DW1 went on testifying that the business between the two parties started in 2010 and it entailed buying and selling petroleum products based on trust and oral agreement and they supplied petrol and oil on the basis of credit. DW1 informed the court that the plaintiff's business is based in Mwanza and the defendant's DEPO is located in Dar es Salaam and Headquarters are in Arusha. DW1 stated that Mwaloni Filling Station used to send their Trucks Total Tanzania DEPO to collect fuel where fuel was imported and stored at TOTAL DEPO for sale.

DW1 continued to testify that TOTAL was instructed to fill Mwaloni's trucks with fuel and a delivery note was written bearing the plaintiff's name, the truck driver's name, and the truck number. He went on testifying that the driver took the said document along with the invoice to the final destination, which is the Mwaloni Filling Station Office and the original delivery note was kept by the client. To substantiate this fact, DW1 tendered copies of delivery note and tax invoice which were collectively admitted and marked as **Exhibit D2**.

DW1 further told the court that **Exhibit D2** is a tax invoice and it shows that NSK and Gas Company Limited issued fuel to Mwaloni Filling Station and was received by the driver who was identified by his name and the truck bears a motor vehicle number plate T992 DAF. He added that **Exhibit D2** covers the entire period of a transaction from 2010 to 2016. DW1 further testified that the defendant issued a "*Movement Summary*" which contains periodic summary showing type, quantity, and value of fuel sold to the plaintiff. To support his fact, he tendered a document titled Movement Summary which was admitted and marked as **Exhibit D3**.

It was DW1 further testimony that Exhibit D3 covers a period from the conception of the business on 13<sup>th</sup> May, 2010 to the last day of the business 26<sup>th</sup> July, 2016 and the total price for the said business was Tshs. 16,906,385,500. He then added that the value of Tshs. 16,477,373,300 was paid, the defendant was claiming a balance of Tshs. 129,012,100 from the plaintiff and the same is not effected to-date. DW1 went on testifying that the payments were all made through Bank M, DTB Bank, CRDB Bank, and NMB Bank. To substantiate this fact, DW1 tendered bank statements, which were collectively admitted and marked as **Exhibit D4**.

DW1 resumed testifying that in total the plaintiff has deposited Tshs. 16, 447,373,400 while they supplied diesel amounting to diesel 3,291,000 liters; kerosene 600,026 liters and petrol 5,912,400 liters making a total value of Tshs. 16,906,385,500. DW1 continued to tell the court that they have a printout showing truck number, trailer number, and driver's names. He tendered documents showing truck details which were collectively admitted and marked as **Exhibit D5**. DW1 added that the defendant hired Mr. Gwajisa an Advocate to

claim the debt. To support his facts, DW1 tendered a Special Resolution document, which was admitted and marked as **Exhibit D6**. DW1 continued to testify that the plaintiff deposited Tshs. 5,051,200 for purchasing fuel to be sold to them on the mode of credit. He tendered a letter dated 2<sup>nd</sup> November, 2017, which was admitted and marked as **Exhibit D7**. DW1 went on stating that Mwaloni was indebted therefore they filed a suit before the court to pursue the debt, he referred this court to Exhibit P2. DW1 acknowledges that they effected a cheque of Tshs. 80, 000,000/= because they were dealing on the basis of trust and since the transaction was in Dar es Salaam it was not easy to know the balance. DW1 added that the said cheque was then put on hold as they discovered they sold more fuel than the payment which was made by the plaintiff thus the plaintiff has breached the oral agreement.

In conclusion, DWI urged this court to disregard the plaintiff's claim and find that the defendant is the one who deserves to be paid the outstanding balance. He prays this court to restore the balance with interests and costs which in totality is Tshs. 429,012,100.

And with that, the parties closed their cases and the learned counsels opted not to make their final submission thus this court continued to determine the case.

Before I embark to address the issues raised by both parties let me first put it clear that both learned counsels have not disputed that since 2010 the plaintiff and the defendant had entered into an oral contractual agreement of supplying of variety of fuel to supply and receive fuel and their business was based on trust.

As I pointed out at the beginning of this judgment, three issues were framed for trial.

To start with the first issue as to *whether the Plaintiff claims against the defendant is a substantive amount of Tshs. 292,073,489/=*. I wish to refer to paragraphs 3 of the Plaint where the Plaintiff has indicated this fact, that the Plaintiff claims against the defendant payment of the total sum of Tshs. 292,073,489/= being an outstanding substantive amount. During the hearing of this case, both parties have not disputed the fact that their business was based on trust and they entered into an oral agreement to supply

and receive fuel and that the mode of business was for the plaintiff to deposit money in the defendant's account.

Under our law, particularly section 10 of the Law of Contract Act Cap.345 [R.E 2019], all agreements are contracts if they are made by the free consent of the parties who are competent to contract, for a lawful consideration and with a lawful object and are not on the verge of being declared void. Additionally, under section 13 of the same Act, the contract is legally enforceable if both parties were willing to agree and if they were not forced in any way. Furthermore, a contract is valid if none of the parties was induced to enter into the contractual agreement, and if both parties were on sound mind thus automatically the contract abide both parties. I have perused the evidence on record and found that all the ingredients of a valid contract were fulfilled.

Now, let me find out whether the plaintiff's claims against the defendant is a substantive amount of Tshs. 292,073,489/=. PW1 testified the dispute arose in 2016 when the plaintiff from 3<sup>rd</sup> to 14<sup>th</sup> June, 2016 deposited a sum of Tshs. 500,200,000/= to the defendant's bank accounts and the defendant being obliged to supply

2,426 liters of petrol and 1,448 liters of diesel. According to PW1 testimony, the plaintiff deposited in NMB Bank, CRDB Bank, and Bank M a total sum of Tshs.551,200,000/= (Exhibit P1). From the evidence adduced, the plaintiffs alleged to claim from the defendant the outstanding balance of 1,2300 liters of petrol and 31,000 liters of diesel which amounts to Tshs.292,073,489/=. The plaintiff tendered documentary evidence such as bank slips (Exh.P1), a cheque issued by the defendant (Exh.P2), and a letter from the defendant titled Internal Audit on Affairs and Operations of the NSK Tanzania Limited (Exh.P3) and a Final demand Note (Exh.P4). All exhibits intended to substantiate that money was deposited in the defendant's accounts, however, they did not authenticate the actual amount of fuel the defendant supplied to the plaintiff from the date when the business started. I am saying so because the parties' business was done on the basis of trust since 2010. It is my firm view that the plaintiff was required to show cogent evidence to prove the quantity of fuel supplied to them if at all was tarring with the amount of money alleged to have been deposited into the accounts of the defendant.

In my view, where the business transaction is based on trust and claim arises between two parties, assessment of it has to be based on the corresponding accounting documents. That is to say, one has to make a comparison between the documents in the hands of the supplier and those in the possession of the receiver of goods. Thus, since the business between the plaintiff and the defendant started way back in 2010, under trust, cogent evidence such as a goods delivery note and respective invoices were required to be availed before the court to show the total quantities of fuel supplied by the defendant to the plaintiff.

Moreover, the plaintiff was required to authenticate the claimed amount possibly by tendering cogent evidence such as Goods received notes to show the total quantities of fuel received that matches the payments made by the plaintiff to the defendant. In the record, the plaintiff tendered Exhibit P4, a demand notice to the defendant with regard to the outstanding balance of Tshs.292,073,489/=. The Exhibit P3 tendered by the plaintiff reveals that the defendant claimed a statement of accounts to be availed by the plaintiff in respect of the claim of Tshs. 292,073,489/= but the



same was not availed. I am asking myself how could the defendant ascertain the claims without any document taking into account the nature of the business they were working on was based on trust and several times the plaintiff deposited money in the defendant's account knowing that the balance will be fixed.

Now when the dispute arose the plaintiff was supposed to come to court with cogent evidence to prove his claims but none of the documents proves the claim on the balance of probability as provided under section 110 (1) of the Evidence Act, Cap. 6 [R.E 2019] that:-

"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."

The above provision was well elaborated and in that of **Lamshore Limited and Another v Bizanje K. U. D. K**, [1999] TLR 330 and in the case of **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 at 677, where it was stated that;

*" He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. "*

Based on the above authority it is vivid that the plaintiff in the present suit has failed to bring sufficient evidence to prove his claims. For the aforesaid reasons and findings, the first issue cannot be answered in affirmative.

Answering the second issue on *whether the defendant's claims against the Plaintiff outstanding balance of Tshs. 429,012,100/=*. It is on record that DW1 tendered delivery notices and tax invoices as (Exh.D2) indicating that fuel was delivered to Mwaloni Filling Station (plaintiff) and payment of the same as claimed in 2016. In my view, the documents reveal how the plaintiff effected the payment but the same does not show the outstanding claims of Tshs. 429,012,100/=.

I had to analyze the documents which were tendered before this court to find out if the defendant's claims are valid. To start with the movement summary document (Exhibit D3), the Trucks detail document (Exhibit D5) and A notice for special resolution meeting dated 5<sup>th</sup> March, 2018 (Exh.D6). In my view these documents cannot support the claims of outstanding balance before this court. The way I see the said documents, they do not prove the actual supply as

they do not speak for themselves to show that the truck and truck drivers were the plaintiff's employees. The defendants also tendered bank statement documents that were collectively received and marked as (Exh.D4). The defendant tendered the document with intended to substantiate payments received from the plaintiff between the years 2016 and 2019; however, this evidence does not in any way prove the unpaid claims by Mwaloni.

Moreover, the defendant's reply letter to the plaintiff dated 21<sup>st</sup> November, 2017 among others he reminded the plaintiff to supply them with a statement of account before instituting the case. The plaintiff did not furnish the defendant with the said copy. I am wondering the plaintiff decided to lodge a case without even reconcile the matter by furnishing the said statement of account which could have assisted this court in finding out if the said claims were genuine. The second issue is answered in negative.

In relation to the third issue, to *what reliefs if any are the parties entitled to*, guided by the observations and analysis of all two issues, I have found that the plaintiff and defendant are not entitled to any relief as they have failed to prove their claims. As I have

pointed earlier that the principle governing civil cases is stipulated under section 110 of the Evidence Act, Cap.6 [R.E 2019] that who alleges must prove failure to that the same must be dismissed. The same was held in the case of **Barelia Karangirangi v Asteria Nyalwambwa** Civil Appeal No. 237. In the circumstance, both the plaintiff's claims and the defendant's counter claims are to be dismissed. Therefore, I proceed to dismiss the entire suit and the counter claim without costs.

Order accordingly.

DATED at Mwanza this 30<sup>th</sup> April, 2020.

  
A.Z.MGEYEKWA

**JUDGE**

30.04.2020

Judgment delivered on 30<sup>th</sup> April, 2020 via teleconference, Mr. Katemi, learned Advocate who was remotely present.



  
A.Z.MGEYEKWA

**JUDGE**

30.04.2020

Right to appeal full explained.