IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CIVIL CASE NO. 7 OF 2018

EXPORT TRADING COMPANY LTD .....PLAINTIFF

VERSUS

TANDAHIMBA NEWALA

COOPERATIVE UNION (TANECU) LIMITED.....1ST DEFENDANT

DAR ES SALAAM NDOGO AUCTION MART LTD .....2ND DEFENDANT

JUDGMENT

12th & 22nd Oct., 2021

DYANSOBERA, J.:

The plaintiff, the Export Trading Co. Ltd, is a private Company established under the laws of Tanzania. The 1st defendant is a Cooperative Union registered under the laws of Tanzania while the 2nd defendant is a Ware House Operator registered under the laws of Tanzania.

In order to fully appreciate what is in issue in this matter a brief history of the plaintiff company and her relationship with the 1st and 2nd defendants need

to be stated. In 2014/2015 cashewnuts season, on various dates, the plaintiff bought from the 1st defendant cashewnuts and kept them under various warehouse operators, the 2nd defendant inclusive. The 2nd defendant as a Warehouse Operator kept some cashewnuts at its own warehouse located at Newala. After paying for the said commodity and having been issued with Warehouse Receipts and Release Warrants from NMB Bank PLC and CRDB Bank PLC, the plaintiff was directed and went to collect the said cashewnuts paid for from the warehouse operated by the 2nd defendant. The plaintiff, however, discovered that the cashewnuts she was collecting was not grade one she had paid for but grade two. She complained but the defendants took no heed. She decided to sue them claiming the following reliefs:-

(i) An order of payment of Tshs. 651, 052, 412/= (say Six Hundred Fifty One Million, Fifty Two Thousand, Four Hundred and Twelve only) being claimed sum resulting from undelivered 414, 529 chashewnuts kilograms by the Defendants

(ii)An order of payment of Tshs. 70,000,000/= (say Tanzanian Shillings Seventy Million only) for loss of business.

(iii) Interest thereof on (i) and (ii) above at bank commercial rate of 21% per annum from June, 2015 to the date of full recovery.

(iv) An order for payme of general damages as may be assessed by the Honourable Court, preferrably, not less than Tshs. 200,000,000/= (say Tanzanian Shillings Two Hundred Million only).

(v)Interest thereof at bank commercial rate fpf 21% per annum from the date of institution to the date of full payment.

(vi) Costs of teh suit, and,

(vii) Any other relief (s) and orders that this Honourable Court maydeem just to grant.

In a bid to prove its case, the plaintiff lead by Mr. Hussein Mtembwa, learned Advocate, called one witness namely, Ahmed Omary Hassan, the Executive Manager of the plaintiff who had been in that capacity from 2005. His duties included supervision of taking cargo from the warehouse. The cargo could be various crops. His brief narration was to the following effect. The company deals with buying and processing the crops and selling them. In 2014/2015 cashew nut season the plaintiff company bought a cargo through the TANECU approximately 18,054,168 kilograms worthy 30,083,150,218/=. Out of 18,054,168 kilograms, the plaintiff kept with the 2nd defendant who is the Warehouse Operator an approximate total of 6, 006, 108 kilograms worthy Tshs 10, 111, 3,321/=.

The 1st defendant offered a tender; the plaintiff successfully bade and won the tender. Upon the 1st defendant's directives, the plaintiff went to the National Microfinance Bank PLC and the CRDB Bank PLC and paid the money. The said banks, in consequence, issued Release Warrants and Warehouse Receipts. These documents were handed over to the 2nd defendant so that the plaintiff collected the bought and paid for cashewnuts. A packing of the cargo commenced but PW 1 was informed that the cargo which was being packed was not Grade I but was Grade II. PW 1 was, therefore, ordered to stop. He then informed the 2nd defendant through the Manager one Yahaya. PW 1 was given unused Release Warrants and Warehouse Receipts which were 414, 529 kilograms worthy Tshs. 551m 052,412. The documents which were on use (*zilizoanza kutumika*) and which were given back to the plaintiff were 327m 182 kilograms. The remaining receipts worthy 87, 347 kilograms which were already used were not returned to PW 1. According to PW 1, the documents bore the names of both the plaintiff as a purchaser and the 2nd defendant as a Warehouse Operator and they were from the two banks. The Warehouse Receipts and the Release Warrants were admitted in court and marked as exhibit P 1, collectively.

PW 1 described the functions of those documents. As to how they were collected from the banks, PW 1 told this court that it was after the confirmation that the cargo had been paid for.

As to what the plaintiff did after the discovery of the misdelivery, PW 1 explained that the plaintiff communicated with the 1st defendant who was the vendor of the cashewnuts on the difference of the cargo from which was paid for and the one the plaintiff was collecting from the 2nd defendant. A team was thereby formed though it took not less than four months in dealing with the

matter. The recommendations of the team resulted into the 2nd defendant issuing to the plaintiff the Tanzania Warehouse Licencing Board Form No. 7 (exhibit P 2) which was a confirmation that the 2nd defendant was responsible. The said Form No. 7 was taken to the Warehouse Board which is the supervisor of Warehouses. According to PW 1, the total amount of the missing kilograms were 414, 529 worthy Tshs. 651, 052,412/=. It was PW 1's argument that though the Board received the Form No. 7, it did not pay. As to why the filling in the form was delayed, PW 1 explained that the plaintiff was waiting for the recommendations of the committee team that had been formed to make inquiry. As to why the plaintiff sued both the 1st and 2nd defendants, PW 1 clarified that the 1st defendant was a vendor of the cashewnuts and the 2nd defendant was the keeper and both refused to pay. PW 1 also explained the contents of the catalogue and admitted that it was prepared by the 1st defendant after getting information from the 2nd defendant.

On the damages the plaintiff suffered, PW 1 asserted that there was an order for the supply of the cashewnuts, the matter has taken long and the plaintiff could be taken to have been negligent. He prayed for an order of payment of the money, compensation for the inconvenience and costs of the suit.

When cross examined, PW 1 admitted that they had no document proving that they were following up the payments to the 1st defendant and the Board. PW 1 also stated that the Warehouse Licencing Board was responsible to oversee all laws and regulations. PW 1 also admitted that exhibit P 2 puts obligation to take legal steps against the Warehouse Operator who fails to deliver the cargo.

PW1, in response as to why she did not sue the Warehouse Licencing Board, explained that she paid the purchase money to the 1st defendant. As to whether the Warehouse Licencing Board was to be joined, PW argued that that is a legal issue and none of his business. PW 1 further admitted that the Cashewnuts Board of Tanzania is duty bound to control the quality of cashewnuts. He maintained that they complained to the 1st defendant and not to the CBT. He, likewise, admitted that he was not sure if the issue of the substandard of cashewnuts features in the plaint but was sure that the plaintiff failed to get the cashewnuts for which she had paid for. He also clarified that exhibit P 1 shows the amount the plaintiff missed to get and its value.

On re-direct examination, PW 1 maintained that they could not get exhibit P 1 from the banks unless they had paid for the cargo. He said that exhibit P 2 was filled in on 16.6.2015 and proved that Grade I cargo was not present at the warehouse.

As to how exhibit P 2 came into existence, PW 1 explained that after the plaintiff discovered that the delivered cargo was not genuine, she reported to the 1st defendant and a committee was thereby formed and recommendations issued by experts from CBT and Naliendele. PW 1 insisted that the 2nd defendant conceded and hence exhibit P 2 was authored.

Insisting that the 1st defendant was rightly sued along with the 2nd defendant, PW 1 stated that the plaintiff bought the cashewnuts from the 1st defendant who had issued the catalogue and informed the plaintiff that the cargo she was buying was at the 2nd defendant.

The defence which was led by Mr. Robert Dadaya had three witnesses, namely Mohamed Nassoro Mwinguku (DW 1), Edson Mweyunge (DW 2) and Humphrey Mlagalila (PW 3).

In his testimony, DW 1, a General Manager with the 1st defendant, recalled that between September and October, 2019 a demand letter from the plaintiff was received. It was on claims. The plaintiff was claiming compensation of mis-delivery of cashewnuts that the 1st defendant bade on the auction. They were of 2014/2015. After receipt of the claims the Warehouse Regulatory Receipt Board (*Bodi ya Usimamizi wa Stikabadhi ya Maghala*) was informed for clarification of the claims as it is responsible for supervising and disputes from Warehouses. DW 1 got a reply that the claims were baseless and the plaintiff had no valid claims. He wrote a letter in the capacity as manager of TANECU. The two letters respectively, dated 10.10.2019 and 14.10.2019, were admitted in court and collectively marked exhibit D1.

DW 1 said that he was not a person responsible to resolve the dispute as the 1st defendant was a mere depositor and not a custodian and the problem was mis delivery on the cashewnuts deposited to the 2nd defendant, the Warehouse Operator, Dar es Salaam Ndogo who accepts the cashew nut after looking at the moisture content, weight, shells out turn and nut count (the number of cashew nuts in a kilo. If satisfied with those things, she accepts the cashew nuts and he issues Warehouse receipts to the AMCOS (depositors). DW 1 told this court that the Warehouse Receipt Regulatory Board issues licence to Warehouse Operators and issues guidelines with respect to the season. DW 1 explained the bidding and purchase processes. He told this court that the plaintiff did not bring her concern to them before she instituted the suit in court. He

recalled only to have received the letter. He argued that the authority responsible for the quality of cashew nuts is the CBT who is the regulator and argued that if there is an issue of sub – standards after the buyer has successfully bidden at the auction and paid for the cashew nuts they are at liberty to satisfy themselves of the quality have to complain to the CBT though the Regulatory Board, has to be informed. The 1st defendant, through DW 1, disowned responsibility in this matter.

When cross examined by learned Counsel for the plaintiff, DW 1 explained the procedures on issuing Warehouse Receipts, the bidding and the conduct of an auction and ultimate payments. He told this court that for him it was difficult to affirm whether or not the cashew nuts were paid for but upon being shown the exhibit P 1, he admitted that they are evidence of payment.

With regard to the mode of resolving the dispute between the buyer and the Board through the Guidelines, DW 1 asserted that those are administrative not court procedures. DW 1 admitted that being late to take the cargo is not mis-delivery and to him, it can also mean over delivery. He denied to have come across Form No. 7 and insisted that it is the Board who investigates and submits the report.

In re-examination, DW 1 said that the Bank has authority to say about Release Warrants and House ware Receipts. Further that the Warehouse operator and the Board can answer whether or not the plaintiff paid for the cashew nuts. As to why they are not involved in the dispute, DW 1 asserted that AMCOS has no claims against TANECU. As to where should the claims be submitted, DW 1 maintained that the Guideline provides and answer.

The next witness to testify for the 1st defendant was DW 2, a government employee working with the Warehouse Receipt Regulatory Board as a Corporate Secretary charged with supervising various activities of the Board making sure the meetings of Director are convened according to the calendar. His duties also include giving legal advices and other duties assigned by to him by his superiors. He told this court in his evidence that the Board was established under the law, Cap 339 R.E 2019 Warehouse Receipt Act. DW 2 detailed the functions of the Board including issuance of licences to Warehouse supervisors and Warehouse Operations *(leseni ya shughuli za ghala)*. According to him, the powers include dealing with disputes arising from Warehouse receipt Operations. He also detailed on how Form No. 7 is issued and the purposes of the Guidelines in respect of Warehouse Receipts. It was his argument that the Guideline has to be discussed by all the stakeholders and agreed upon. He explained that the Board supervises deals with mis-delivery if there is a problem of substandard on quality, a commission is founded and includes the CBT, the Board and the Researchers such as TARI – Naliendele warehouse operator and a representative buyer. He also explained how the inquiry is conducted and reported.

With respect to 2014/2015 season, DW 2 explained that there was a commission which was formed to inquire into the quality of cashew nuts between the plaintiff and 2nd defendant but there were complaints between the plaintiff and the goods kept in TANECU warehouses. He asserted that no commission was founded because the claim were time barred and the plaintiff was so informed. Further that no complaint was raised and that the plaintiff was in the

involvement of "*mchezo mchafu*" in that she took more cashew nuts than she had paid for. He argued that there was collusion with warehouse operator and that is why both did not complain.

To buttress his evidence, DW 1 tendered in court *Mwongozo Na 1 wa mfumo wa stakabadhi za Ghala, sekta Ndogo ya korosho Ref. No. BA 32/292/01 "F"/7* dated 19 September 2014 which was admitted and marked as exhibit D2. He informed the court that the plaintiff's claims against the 1st were dealt with and the plaintiff was accordingly informed and notified.

On cross examination, DW 1 contended that the claims by the plaintiff were directed against the 1st defendant who then wrote to them and got an answer that they had already received the claims but had dismissed them on the ground that they were time barred and the plaintiff was responsible for the collusion. DW 2 explained how the plaintiff's complaint was dealt with. He clarified on how the Board found the plaintiff's claims barred.

The last witness for the defence was DW 3, working with Cashewnut Board of Tanzania, stationed at Mtwara, Head Quarters. He is Senior Agricultural Officer. He explained the functions of the CBT including the regulator of cashew nut activities in the country, advising the Government on policies for cashew nut

progress and is the main supervisor of the Cashewnuts Act of 2009 and its Regulations. Further it supervises the quality of cashewnuts from the fields to the buyer and coordinates pesticides and fungicides, the dispersion of the seedlings and issuing licences to the buyers. According to him in 2014/2015, the official records do not show any complaint on the quality of cashew nuts by the plaintiff and that there is no record of any Commission being formed.

He supported the fact that the 1st defendant prepares the sales catalogue after getting report from the Warehouse operator and that the CBT does intervene when there is an unsolved dispute between the buyer and seller but only after the complainant informs them in writing and that misdelivery can involve the CBT when it is invited only and maintained that they are not concerned with the issue. With respect to 2014/2015 season DW 3 denied the CBT to have received complaint on quality insisting that the records do not show any other complaint by the plaintiff.

After the closure of the defence case, parties were accorded opportunity to file their final written submissions.

With respect to the plaintiff, it was submitted on the 1st issue that exhibit P 1 is evidence that the claimed cashewnuts were paid for as testified by PW 1 and

DW 1. The latter detailed on the procedures. It was further submitted for the plaintiff that the presence of exhibit P 2 collectively is evidence that the plaintiff never collected a total of 414, 527 kilograms of cashewnuts worthy Tshs. 651,052,412/= and this means that the plaintiff is entitled to her claims.

On the second issue, the plaintiff insisted that the 1st defendant cannot escape the liability otherwise; it will frustrate the whole system. It was argued on part of the plaintiff that the 1st defendant is liable to compensate for any loss. Respecting the principles of the contract, it was contended that the 1st defendant, by issuing the sales catalogue, she was making an invitation to treat. That the plaintiff offered to buy by bidding, the 1st defendant accepted the offer by issuing sales invoices. The deal was done by the plaintiff when she deposited into the 1st defendant's bank accounts the purchase price as evidenced by exhibit P 1. The plaintiff supported her argument by citing the case of **River Valley Food (T) Ltd v. TANECU,** Commercial Case No. 6 of 2009.

It was her further argument that the 1st defendant was a party to the contract and cannot escape liability. The plaintiff argued that the so called procedure under the Warehouse Receipt system of adjudication cannot out the jurisdiction of this court. The case of **Ilulu SACCOS Ltd v. Abdallah Nassoro Mtime**, Civil Appeal No. 1 of 2009 was referred to as supporting the argument.

On principles relating to damages, the plaintiff submitted that an injured party may recover those damages reasonably considered to arise naturally from the breach of contract, or those remedies within the reasonable contemplation of both parties at the time of contracting. The plaintiff cited the case **of Hadley v. Baxandale** (1854) 9 Exch 341 in which the principle relating to damages was laid down. The fact that general damages need not be specifically pleaded and may be awarded even if not pleaded was also analysed with various case law authorities in support thereof. It was submitted that the amount of Tshs. 200, 000, 000/= is reasonable.

Responding to this submission, the 1st defendant argued that the plaintiff lodged this suit in contravention of the law for want of capacity to institute the purported suit. She clarified that in law, as a body corporate, she cannot institute a suit without directors" board of resolution authorising the institution of such a suit. No resolution was attached to the pleadings, the 1st defendant strenuously argued. She prayed to strike out the suit with costs.

In the alternative, the 1st defendant argued that the plaintiff had failed to prove her claims on the required standard, i.e., on balance of probabilities in that neither pay in slip nor bank statement was produced to support the claim that she purchased from the 1st defendant 414, 529 kilograms of cashewnuts worthy

Tshs. 651, 052,412/=. It was further argued that the purported Warehouse Receipts and Release Warrants were not conclusive and prima facie proof that the alleged payment was made in favour of the 1st defendant.

An argument was also advanced that no official from the respective banks was called to identify the said warehouse receipts and release warrants suggesting that the documents might have been forged or obtained in unofficial purposes.

On the liability of the 1st defendant, Mr. Dadaya reiterated the whole paragraph 9 of the 1st defendant's amended written statement of defence to the amended plaint and submitted that the 1st defendant is not in any way responsible for the for the alleged misdelivery of 414, 529 kilograms of cashewnuts. Counsel for the 1st defendant reasoned that the 1st defendant was neither Warehouse operator nor Warehouse Regulatory Board which has powers to inter alia supervise the whole warehouse system process. He argued that the Warehouse operator keeps, security deposited by the warehouse operator for reimbursing the purchase in case of misdelivery. Reference was made to the Warehouse Receipt Act No. 10 of 2005 read together with *Mwongozo Na. 1 wa Mfumo wa Stakabadhi za Ghala Sekta Ndodo ya Korosho, Toleo Na. 5 wa mwaka 2014* (exhibit D 2) made under section 6 (1) of the Warehouse Receipt Act. It

was further submitted that in case the court finds that the plaintiff incurred loss, the same should be borne by the 2nd defendant it being argued that she is licenced to keep cashewnuts, the subject of the suit. Counsel for the defendant supported this argument by citing sections 50, 51 (1) and (2) of the Warehouse Receipt Act No. 10 of 2005. It was stressed on part of the 1st defendant that if the Warehouse Receipt Act and the Guidelines are carefully read as a whole, it will be seen that the 1st defendant is not in any way liable good of the purported claims of the plaintiff.

On the third ground, Mr. Dadaya submitted that the claims are not genuine as the plaintiff has no basis to institute the suit and herself has to blame for failure to timely utilise local remedy put by the law. It was contended for the 1st defendant that PW 1 testified that the purported purchase was done on 9th January, 2015 but Form No. 7 was filled in and submitted to the Tanzania Warehouse Licencing Board on 16.6.2015. This, according to Mr. Dadaya, contravened the Guidelines that is Regulations 2.17 and 2.18.

At the commencement of hearing of this suit, the court framed the following issue:-

1. Whether the plaintiff is entitled to the claim
2. If, so, who is liable between the 1st defendant and 2nd defendant.

3. To what reliefs are the parties entitled.

Respecting the first issue, it was amply proved that the plaintiff in the material season did not only buy the cashewnuts from the 1st defendant and pay for it but also was issued with the Warehouse Receipts and Release Warrants by the National Microfinance Bank PLC and the CRDB Bank PLC. These documents were admitted in evidence as exhibit P 1 collectively. As rightly submitted by PW 1 and not controverted by DW 1, DW 2 and DW 3 in their evidence, the Warehouse Receipts are issued by the Warehouse operator to prove that the cargo belongs to the holder and the Release Warrants is proof by the bank that the bearer of the receipts is the valid or genuine purchaser from the respective cooperative society. It was also proved to the satisfaction of this court that there was misdelivery on part of the 2nd defendant. This explains why the 2nd defendant issued exhibit P 2.

The arguments by Mr. Dadaya, Counsel for the 1st defendant, that the plaintiff had failed to prove her claims in that neither pay in slip nor bank statement was produced to support the claim that she purchased from the 1st defendant 414, 529 kilograms of cashewnuts worthy Tshs. 651, 052,412/=, that the purported Warehouse Receipts and Release Warrants were not conclusive and prima facie proof that the alleged payment was made in favour of the 1st defendant and that no official from the respective banks was called to identify the said warehouse receipts and release warrants suggesting that the documents

might have been forged or obtained in unofficial purposes, has no legal basis in view of cogent evidence by PW 1 which was not materially controverted by the 1st defendant through DW1, DW 2 and DW 3. Exhibit P 1 was conclusive proof of both the purchase of the goods and payment for the goods made by the plaintiff to the 1st defendant. This is partly because, these are documents kept and issued by a public office. The 1st defendant has not doubted the genuineness of these documents. In deed she supports the fact that she sold the cashewnuts to the plaintiff in that material season and the purchase price was deposited into the NMB Bank PLC and CRDB Bank PLC as evidenced by exhibit P 1. In the circumstances, this court is entitled to infer that the documents were issued regularly, a presumption permissible under s. 122 of the Evidence Act. If there is need for an authority, I would draw support from the observations of Newbold J.A. in **The Commissioner of Income Tax v. C.W Armstrong** [1963] E.A. 505 at p. 513; that:

> "That section authorizes the presumption that an official act, which is proved to have been performed, has been performed regularly and this is a presumption which is not lightly overridden."

And partly because, the transaction between the plaintiff and the banks required no corroboration as the learned Counsel for the 1st defendant wished the court to believe. Exhibit P 1 was, in my view, self-proof that the payments were duly made and received and the exhibit P 1 was a genuine document. As said above, the defendants did not dispute the genuineness of these documents in exhibit P 1. It was amply proved that there was mis-delivery on part of the 2nd defendant with respect to 414, 529 kilograms of cashewnuts worthy Tshs. 651, 052, 412/=.

With the available evidence, I am satisfied that the contract between the plaintiff and the two defendants was complete. The **Halsbury's Laws of England**, 4th Edition, paragraph 203 stipulates the cardinal elements which a valid contract must contain. These elements are; one, there must be two or more separate and definite parties to the contract. Two, those parties must be in agreement, that is there must be a consensus ad idem. Three, those parties must intend to create a legal relationship in the sense that the promises of each side are enforceable simply because they are contractual promise and four, there must be consideration, or some other factor which the law considers sufficient to support the promise by each party. These four elements of the contract were proved by the plaintiff to the satisfaction of this court.

The burden of proof and standard of proof in civil cases are settled. The burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. The court makes its decision on the "balance of probabilities", and this is the standard of proof required in civil cases. The Court of Appeal in the case of **Mr. Mathias Erasto Manga v. M/s Simon Group (T) Ltd**, Civil Appeal No. 2013 citing the case of **RE MINOR**

(1966) AC 563 at 586 held:-

> "The balance of probability standard means a court is satisfied an event occurred if the court considers that, on the evidence the occurrence of the event was more likely than not".

With respect, that is the legal position. In the case under consideration, I am in no doubt that the plaintiff has proved on the balance of preponderance of probability that the plaintiff is entitled to the claims. The first issue is answered in the affirmative.

As far as the second issue is concerned on who is liable between the 1st and 2nd defendants, the answer can be found in both the pleadings and the available evidence.

With regard to pleadings, paragraphs 12, 13, 14, 15 and 21 of the plaintiff's amended plaint filed on 19th September, 2019 are clear and self-explanatory as follows:-

> '12. That, initially, the 2nd defendant had committed herself and agreed to have the custody of the said cashewnuts kilograms by signing and stamping into the said Warehouse Receipts.
>
> 13. That the 2nd defendant, although initially confirmed and agreed to have custody of the said cashewnuts so auctioned and sold by the 1st defendant, in the end, was unable to deliver to the plaintiff a total of 414, 529 cashewnuts kilograms, equal to Tshs. 651, 052,412/= (say Six

Hundred Fifty One Million, Fifty Two Thousand, Four Hundred and Twelve only).

14. The 2nd defendant also, confirm to such failure by returning to the plaintiff the release warrants and warehouse receipts in respect to undelivered or uncollected cashewnuts kilograms.

15. That the 2nd defendant accepted, confirmed and agreed further to have failed to deliver to the plaintiff the stated cashewnuts kilograms by signing two Mis-delivery Claim Forms (Forms No. 7) both dated 16th June, 2015 for a total of 414, 529 cashewnuts kilograms, equal to Tshs. 651, 052,412/= (say Six Hundred Fifty One Million, Fifty Two Thousand, Four Hundred and Twelve only).

21. That the said mis-delivered cashewnuts are worthy Tshs. 651, 052, 412/= (say Six Hundred Fifty One Million, Fifty Two Thousand, Four Hundred and Twelve only) and the value of loss of business is Tshs. 70,000,000/= (Say Tanzanian Shillings Seventy Million only). The cause of action occurred in Newala District of Mtwara Region where mis-delivery forms also were signed hence within the jurisdiction of this Honourable Court.

The above paragraphs clearly indicate that it is the 2nd defendant who is liable for misdelivery, the cause of action in this case. Furthermore, it is in evidence that the plaintiff bought the cashewnuts from the 1st defendant and paid the money. This was on the understanding that the cashewnuts the 1st defendant was selling to the plaintiff and which the latter paid for was Grade I and not Grade II. The evidence of PW 1 is clear that the 1st defendant in issuing the Sales Catalogue relied on the information she had received from the 2nd

defendant. It is, therefore, the 2nd defendant who knew the Grade of the cashewnuts she was keeping in her warehouse. This explains why she issued exhibit P 2 after the recommendations from the expert. PW 1, during cross examination, admitted that exhibit P 2 puts obligation on the plaintiff to take legal steps against the 2nd defendant for misdelivery. This is what the plaintiff did when she sued the 2nd defendant.

The pleading and the evidence points a finger to the 2nd defendant as the party responsible for misdelivery and therefore responsible for the loss incurred by the plaintiff on the whole transaction. Although it is true that it is the 1st defendant who sold the cashewnuts and received the money, I am in no doubt that both the plaintiff and the 1st defendant were ad idem on the quality of the cashewnuts the plaintiff was purchasing from the 1st defendant, the problem arose at the time of delivery from the warehouse and the person responsible as the keeper was the 2nd respondent. This liability has not been denied by the 2nd defendant who neither filed any defence nor appeared in court to contest the claims against her.

The last issue is the reliefs. As amply demonstrated, the plaintiff bought the cashewnuts and paid for it but there was misdelivery. There is no dispute that the presence of exhibit P 2 collectively is evidence that the plaintiff never collected a total of 414, 527 kilograms of cashewnuts worthy Tshs. 651, 052, 527/=. This entitles the plaintiff to recover the said sum from the party responsible for misdelivery. It is the principle relating to damages in contracts that an injured party is entitled to recover those damages reasonably considered to arise naturally from breach of contract or those remedies within the

reasonable contemplation of both parties at the time of contracting. This is the gist of the decision in the cases of **Hadley v. Baxandale** (1854) 9 Exch 341.

In the testimony and in the submission, the 1st defendant dwelt much on the plaintiff's failure to abide by the *Mwongozo Na. 1 wa Mfumo wa Stakabadhi za Ghala Sekta Ndodo ya Korosho, Toleo Na. 5 wa mwaka 2014* which is exhibit D 2. There was no evidence to prove that the said Guidelines were among the terms and conditions of the contract entered into between the plaintiff and the defendants and that the plaintiff was bound by those Guidelines. Indeed, PW 1 was clear in his evidence that during the advertisement of the tender, no guidelines were issued only a Sales Catalogue. The 1st defendant admitted that the instrument is for administrative purposes only.

Mr. Robert Dadaya submitted that the plaintiff lodged this suit in contravention of the law for want of capacity to institute the purported suit. He explained that in law, as a body corporate, the plaintiff could not institute a suit without directors' board resolution authorising the institution of such a suit and that no board resolution was attached to the pleadings.

With respect, this argument is misconceived and untenable at the moment. First, it was not pleaded but has just been raised from the bar by way of submission. It is generally known that submissions are not evidence. Second, the argument was brought rather too late in a day. It is, therefore, an afterthought. Third, it is true that a company must authorise by resolution the commencement of legal proceedings in its name. The resolution is mandatory. However, the existence or otherwise, is a question of fact to be proved or disproved in evidence. In the case under consideration, their existence or

otherwise was neither pleaded nor made an issue for determination. I think Counsel for the 1st defendant now sees his mistake.

For the stated reasons, judgment and decree is entered for the plaintiff against the 2nd defendant as follows:-

(i) An order of payment of Tshs. 651, 052, 412/= (**say Six Hundred Fifty One Million, Fifty Two Thousand, Four Hundred and Twelve only**) being claimed sum resulting from undelivered 414, 529 chashewnuts kilograms by the 2nd Defendant.

(ii) An order of payment of Tshs. 70,000,000/= (**say Tanzanian Shillings Seventy Million only**) for loss of business.

(iii) Interest thereof on (i) and (ii) above at bank commercial rate of 21% per annum from June, 2015 to the date of full recovery.

(iv) An order for payment of general damages to the tune of Tshs. 200,000,000/= (**say Tanzanian Shillings Two Hundred Million only).**

(v) Interest thereof at bank commercial rate fpf 21% per annum from the date of institution to the date of full payment.

(vi) Costs of teh suit.

W. P. Dyansobera

Judge

22.10.2021

This judgment is delivered under my hand and the seal of this Court on this 22nd day of October, 2021 in the presence of Mr. Hussein Mtembwa, learned Advocate for the plaintiff and Mr. Robert Dadaya, learned Counsel for the 1st defendant but in the absence of the 2nd defendant.

W.P. Dyansobera

Judge