

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

**CIVIL CASE NO. 8 OF 2019**

**TANDAHIMBA NEWALA COOPERATIVE UNION  
(TANECU) LIMITED.....PLAINTIFF**

**VERSUS**

**CHIKUNDI HOLDINGS (T) LIMITED.....DEFENDANT**

**JUDGMENT**

10<sup>th</sup> Febr. & 31<sup>st</sup> March, 2022

**DYANSOBERA, J.:**

The plaintiff herein is a body corporate established under the Cooperative Societies Act, No. 20 of 2003. The defendant is, likewise, a body corporate established under the Companies Act, No. 2 of 2002. On 18<sup>th</sup> day of November, 2019, the plaintiff, by way of a plaint, sued the defendant on a claim of breach of contract craving for payment of Tshs. 451, 640,200/= being the value of the lost raw cashew nuts worthy about 237,705.4 kgs, interests and costs of the suit.

According to the averments in the plaint as amended on 3<sup>rd</sup> December, 2020, the plaintiff operates as cashewnuts buyer and seller agent of affiliated primary cooperative societies and her main function is to represent



various primary cooperative societies based in Tandahimba and Newala Districts in Mtwara Region with its operations of buying and selling cashewnuts by way of public auction. The defendant, among other things, deals with warehouse operation business and is licensed in that business. In her capacity as a warehouse operator, the defendant did, during the cashewnuts season 2017/2018, receive the raw cashewnuts from the plaintiff's affiliates and issued warehouse receipts to the plaintiff. It is also pleaded that some warehouse receipts totaling 17 equivalent to 278, 758 kilograms of raw cashewnuts valued at Tshs. 491, 640,200/= were kept in that warehouse. It then turned out that the said cashewnuts were not sold as the buyers noted that there were no cashewnuts in the warehouse. When the plaintiff demanded payment, the defendant managed to pay Tshs. 40, 000, 000/= only making the unpaid amount to be 451, 640, 200/= which is the subject matter in this suit.

On her part, the defendant in the Written Statement of Defence, vehemently denied the claims and put the plaintiff to the strict proof of thereof. The defendant pleaded under paragraph 2 of the written statement of defence that the alleged loss was caused by the negligence of the plaintiff for failure to sale (sic) the cashewnuts timely which accelerated the shrinkage of the cashewnuts to the tune of the alleged kilograms.


With these pleadings, the court framed and recorded the following issues:



1. Whether there was breach of storage agreement
2. If so, who was in breach of the agreement
3. To what reliefs are the parties entitled.

At the hearing of this suit, Mr. Robert Dadaya, learned Counsel represented the plaintiff while Ms Tekla Kimathi, learned Advocate of Phoenix Advocates, stood for the defendant.

Before delving into the determination of the issues, let me set out the matters not at issue. According to the pleadings and evidence unfurled by PW 1 and DW 1, the defendant is a warehouse operator of Micronix System Ltd situated at Newala Urban. In 2017/2018 cashewnut season, the defendant, after obtaining a license to operate the warehouse he wrote to the plaintiff through a letter dated 11<sup>th</sup> day of November, 2017 (exhibit P 1) introducing herself. Attached to the letter was a license from the Ware House Regulatory Board. An agreement of storage of cashewnuts was entered into the parties whereby the plaintiff ordered the Agricultural and Marketing Cooperatives Societies which are primary cooperative societies to be taking the cashewnuts to the defendant's warehouse at Newala. According to the procedure as explained by PW 1 and DW 1, the defendant would receive the goods, weigh their quantity and quality and then issue Warehouse Receipts to acknowledge receipt of the goods. These receipts would indicate the name of the depositor, both the quality and quantity of the goods, the time of keeping the goods and would also act as a contract agreement between

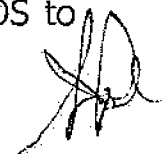


the warehouse operator and the depositor (AMCOS) under the TANECU umbrella. The same receipts would contain the terms and obligations of the warehouse operator.

In summary, the plaintiff's case according to her witness one Mohamed Nassoro Mwinguku (PW 1) is the following. PW 1 is the General Manager of the plaintiff and in that capacity, he is the Chief Executive Officer charged with the duty of supervising daily activities of the cooperative and its members who are Agricultural and Marketing Cooperative Societies (AMCOS) which are the primary cooperative societies. The plaintiff has the duty of supervision and coordination of all sales. Likewise, where there is a dispute, the plaintiff becomes a representative of AMCOS.

As to why he was in court, PW 1 explained that he was testifying on the case between the plaintiff and defendant on the loss of the raw cashewnuts occasioned by the defendant in the 2017/2018 cashewnut season.

Explaining on the historical background of the matter, PW 1 told this court that the defendant was a warehouse operator of Micronix System Ltd situated at Newala Urban. In 2017/2018 season the defendant did, on 11<sup>th</sup> day of November, 2017 after securing a license, to operate a warehouse, write to the office of the plaintiff introducing herself and attached the letter with a licence from the Warehouse Receipt Regulatory Board (exhibit P 1) together with other documents. The plaintiff then ordered the AMCOS to



take the cashewnuts to the defendant at Newala. These cashewnuts were being collected from the farmers who were taking them to AMCOS.

Regarding the procedure, PW 1 and DW 1 were at one as indicated in my judgment on matters not at issue.

The defence of the defendant which was given through the testimony of Ally Mnyukwa Kakongya (DW 1), the company coordinator was to the following effect. The plaintiff is a cooperative union with members from Tandahimba and Newala who are AMCOS. On 4<sup>th</sup> day of August, 2018 the defendant applied for a job through a tender to serve as keepers of cashewnuts in the warehouse.

DW1 Informed the court on two occasions where shrinkage can occur. He asserted that to avoid shrinkage, the principle of FIFO is employed and that when the buyer is awarded the tender he is given 7 days to pay and 14 days to collect the cargo as to give a room when the cashewnuts should be kept.

DW1 explained the procedure followed on issuing warehouse receipts. According to him, after to confirming the weight and number of sacks received, in the warehouse, the defendant issues the warehouse receipts to the plaintiff who then advertises for the purchase and when the goods are purchased, the buyer takes them to the defendant's warehouse. The plaintiff



would then issue Release Warrants so that the defendant hands over the goods to the buyer.

It was the argument on part of the defendant that she, the defendant was issuing the goods according to how the auctions were being conducted. PW 1 asserted that on 16. 12. 2017 the plaintiff's leadership stopped conducting auctions without prior notices to the defendant. The said auctions resumed on 12.1.2018. The company which was awarded the tender for goods which were in the defendant's was Joflo and Company Limited- about 1012 tons. By the time, there were 4000 to 5000 tons in the warehouse. The defendant received collections of more than 14 million tons. The cargo of Joflo and Company Ltd remained in the warehouse. Upon inquiry, the plaintiff asked the defendant not to worry telling her that the same Joflo and Company Limited had also 50 tons in the Agrophocus warehouse operated by Scalabo. The defendant was also told that the buyer had deposited 60m/- and that he would pay for the cargo. The defendant, relying on that information waited up to March, 2018. The cargo belonging to Joflo was not collected and he was required to pay for 1012 tons equivalent to 12, 680 sacks but did not pay for them.

The Warehouse Regulatory Board, upon, receiving report, issued guidelines on what had to be done between the parties. In June, 2018 the defendant was informed that a buyer had been secured one Alfa Namata



and an agreement had been reached with the plaintiff. A further problem arose. The issue was how the defendant could release the cashewnuts which are biological seeds subject to shrinkage as it naturally contain water and oil. Six months were elapsing before the cargo was collected. A conflict on the rate of shrinkage arose before the cargo was released. Alpha Namata discovered that the goods had too much shrinkage and the payments issued showed that there was shortage or loss. The witness then demonstrated how shrinkage occurred. He contended that Alpha Namata paid for 753,084 sacks and was handed over with 12, 680 sacks and that the difference was on weight. DW 1 informed this court that there were efforts to negotiate and settle the matter.

Admitting that the defendant paid Tshs. 40,000,000/=, DW 1 argued that he and James Cuthbert Twanje and Basil Gaspel Mapunda were arrested and detained and were not allowed to be out on bail until they paid the claimed amount. The defendant managed to pay Tshs. 40,000,000/= only and thereafter, they were released on bail.

As to why they signed on exhibit P. 6, DW 1 explained that they were forced to sign believing that the whole matter would ultimately land to the justice. He told this court that in September, 2019 they were charged in the District Court. In proof of this argument, DW 1 tendered in court the charge

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sheet (exhibit D 1). On 30<sup>th</sup> day of November, 2021, DW 1 and his fellows were released on nolle prosequi.

Finally, DW 1 tendered in court a letter from the Warehouse Regulatory Board dated 8<sup>th</sup> day of March, 2018 which was admitted as exhibit D 2.

Mr. Robert Dadaya submitted in support of the plaintiff's case. In his written submission filed on 13<sup>th</sup> day of December, 2021, learned Advocate reviewed the evidence of the witness and in the end, sought to persuade this court that the defendant was liable for the loss as she admitted the loss, accounted for it by paying Tshs. 40, 000, 000/= and committed herself to pay the rest amount but failed to honour her commitment.

Further, it was submitted on part of the plaintiff that the argument of shrinkage of the cashewnuts advanced by the defendant cannot absolve her of the liability as it lacked supportive evidence. He maintained that the defendant failed to call material witnesses from Naliendele government research institution and the Cashewnut Board of Tanzania on the formation of a committee and the existence of the investigation report. Unfortunately, I did not lay hands on the final submission made and filed on part of the defendant. I take it that no submission was filed by the defendant.

With the above summary, I now embark on discussing and resolving the framed issues.





Regarding the 1<sup>st</sup> issue that is whether there was a breach of storage agreement, the plaintiff through Mohamed Nassoro Mwinguku (PW 1) who was testifying on the loss of the raw cashewnuts allegedly caused by the defendant, the warehouse operator, told this court that the plaintiff through AMCOS bought the cashewnuts and kept them in the Micronics Warehouse operated by the defendants. It turned out that there were no cashewnuts in the warehouse. The plaintiff remained with 17 receipts (exhibit P 2) bearing the names of AMCOS as owner of the goods (depositor) and the defendant (warehouse operator) who issued them. Exhibit P 2 showed the goods weighing 258, 758 kilograms worthy Tshs. 491,640, 200/=. The plaintiff informed the defendant that she had failed to sell the goods as they were not in the warehouse and the defendant admitted the loss.

Denying causing the loss, Ally Mnukwa Kakongya admitted the shortage of 259,528 kilograms but explained that the shortage resulted from cashewnuts remaining in the warehouse for a long time without being disposed of.

This means that the evidence sufficiently proves that there was shortage or rather loss of 258, 758 kilograms worthy Tshs. 491,640, 200/=. Did this amount to breach of storage agreement? The plaintiff wants the court to answer this issue in the positive. According to PW 1, the warehouse receipt bore details on how the defendant could be obligated in case of



breach. He was supported in this by exhibit P. 2. On the other hand, the defendant argued that there was shrinkage which occurred due to the passage of time.

I have closely considered the testimonies of PW 1 and DW 1 and the documentary exhibit. I am convinced that exhibit P 2 speaks itself. Under item 3 of exhibit P 2, the warehouse operator undertook to store the commodity in quality and quantity as above mentioned until 30 June, 2018 with allowances of deterioration of 2 of quality and weight loss 2. The defendant committed herself, according to exhibit P 2 which is a binding contract to store the commodity in quality and quantity as stipulated in the contents of exhibit P. 2. The defendant admits the loss. Although he is attributing the loss to the delay by the plaintiff from making the collection of the commodity with dispatch, there is no clause in exhibit P 2 that exempts her from being liable particularly where the loss occurred during the time of storage. There is a question of shrinkage but the evidence is silent if that occurrence could not be foreseen by the defendant when entering into the contract of storage with the plaintiff. Since there is ample evidence of the loss occasioned in the warehouse which was being operated by the defendant and the defendant admits the loss, the first issue is answered in the positive that there was breach of storage agreement.

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The second issue is who breached the agreement. The evidence in its totality points a finger to the defendant. This is not only from the testimony of PW 1 but he is also supported in this by exhibit P 3 which is a letter on *Malipo ya Korosho* dated 21<sup>st</sup> day of June, 2018 which acted as a demand letter and exhibit P 4 on *Korosho zilizobaki ghalani* in which the defendant promised to pay for it in the following words:

*"tofauti ya mzigo uliosalia, yaani kilo 259, 518 ambao kwa kiasi kikubwa umesababishwa na mzigo huo kubaki ghala kwa muda mrefu wa zaidi ya miezi mitano huku ukiendelea kunyauka, sisi watunza ghala tutaulipia kuanzia jumatatu tarehe 25 June, 2018".*

On 26<sup>th</sup> September, 2018, the defendant managed to pay Tshs. 40,000,000 only as evidenced by exhibit P. 5 which is the personal current account statement. There is also *Hati ya Mapatano* between the defendant and the plaintiff dated 12<sup>th</sup> June, 2019 (exhibit P. 6). On exhibit P 6, three important things are clear. First, the defendant admitted to have paid 40m/- and admitted that the remaining amount that was Tshs. 451, 640, 200/=.

Second, the parties agreed on payment schedule and that in case the defendant failed to pay in accordance with the set payment schedule, the plaintiff would be entitled to take legal actions against her. There is no dispute that by 18<sup>th</sup> day of November, 2019 when the suit was instituted in court, the defendant had not paid even a single cent. Third, the exhibit P 6 was executed not between PW 1 and DW 1 in person as DW 1 wanted the



court to believe but between James Cusbert Twanje on behalf of Chikundi Holdings (T) Ltd which is the defendant and, Mohamed N. Mwinguku (PW 1) on behalf of the plaintiff. The said exhibit P 6 was witnessed by Ally Kakongya Mnu kwa DW 1 on part of the defendant and Shaibu H. Sadiki on part of the plaintiff. The argument by DW 1 that they were forced to sign the said exhibit cannot be swallowed without a pinch of salt because, none could force legal entities like the parties to sign exhibit P 6.

Besides, the exhibit D 1 which is a charge sheet in Economic Case No. 2 of 2019 is indicative that there was something fishy with the defendant.

Finally, there is no evidence that the defendant complied with the directions issued by the Warehouse Receipt Registration Board(exhibit D 2) in which *'kwa kuzingatia Kanuni ya 70 (1) ya Kanuni za Stakabadhi za Ghala, 2016 Mwendesha ghala anaagizwa kujaza ilani namba 2 inayopatikana katika jedwali C (Kiambatanisho) na kumpatia Mweka mali muda wa siku 7 kuhakikisha korosho hizi zimeuzwa na ziwe zimetoka ghalani* and that in case the depositor failed she would lose her rights detailed under paragraphs a and b.

It was in the evidence of PW 1 that where the warehouse operator loses the cargo, she becomes a buyer and has to pay and the last set price was Tshs. 1, 900/= per kilogram. This evidence was not controverted.

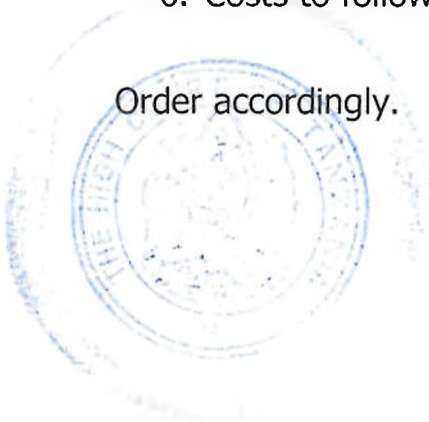
As correctly submitted by Mr. Dadaya, there was breach of the storage agreement and the defendant is liable for the breach as she failed to perform her obligation.



In the view of the foregoing, I find the plaintiff having proved her case on balance of probabilities and enter judgment and decree as follows: -

1. I declare that the defendant breached the storage agreement by occasioning loss of 258,758 kilograms of raw cashewnuts valued at Tshs. 491,640,200/=.
2. The defendant is ordered to pay the plaintiff the remaining amount of Tshs. 451,640,200/= out of Tshs. 491,640,200/=.
3. . Payment of interest at the commercial bank rate of 21% per annum from December, 2017 to the date of judgment.
4. Interest at court's rate of 7% from the date of judgment to the date of full recovery.
5. The claims on general damages is disallowed for lack of proof.
6. Costs to follow the event.

Order accordingly.



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**W.P. Dyansobera**

**Judge**

**31.3.2022**

**Court:** Judgment to be delivered by the Deputy Registrar, High Court of Tanzania, Mtwara in the presence of the parties who should be summoned.



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**W. P. Dyansobera**

**Judge**

**31.03.2022**

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