

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DISTRICT REGISTRY OF MOSHI**

**AT MOSHI**

**CIVIL CASE NO. 3 OF 2021**

**MASUKI GENERAL STORE LTD. ----- PLAINTIFF**

**VERSUS**

**MACMILLAN JOHANSON ELINGAYA ----- 1<sup>ST</sup> DEFENDANT**

**MACHAME BUSINESS TANZANIA LTD ----- 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

*17/11/2022 & 25/11/2022*

**L.M. MLACHA, J**

The plaintiff, MASUKI GENERAL STORE LTD filed a suit against the defendants, MACMILLAN JOHANSON ELINGAYA and MACHAME BUSINESS TANZANIA LTD (hereinafter referred to as the first and second defendants respectively) claiming immediate and unconditional payment of Tshs. 305,333,688/= being money illegally held by the defendants, general damages, interest and costs. It was stated in the plaint that, on 1/10/2019 through their principal officer, the plaintiff company gave the first defendant who is a principal officer of the second defendant an order to

supply various goods, to wit, beverages of different quantity for sale during the December, 2019 end of the year festivals. The plaintiff initially paid a sum of Tshs. 50,000,000/= through CRDB Bank Plc. That the parties agreed that the defendants could purchase the goods from South Africa at their own costs and deliver them at Moshi. That on the understanding between the parties, the plaintiff deposited Tshs. 50,000,000/= on 3/1/2019, Tshs. 70,000,000/= on 12/11/2019 and Tshs. 10,000,000/= on 19/11/2019. A further payment of Tshs 3,000,000/= was made on 26/11/2019 making a total of Tshs. 183,000,000/=.

It was stated that on 23/11/2019 the defendants delivered at Moshi goods which were not ordered and which had not been paid custom duty. TRA officials invaded the plaintiffs godowns soon thereafter demanding their taxes and penalties total Tshs. 122,333,688/=. The defendants had no money and asked the plaintiff to settle this amount which they did making the total outstanding amount of Tshs. 305,333,688/=.

The defendants filed a joint written statement of defence and denied liability. They said that they never signed acceptance of the order and cannot take responsibility over it. They proceeded to state that they agree

receiving the amount of money indicated in the plaint but claimed that they were in respect of previous supplies. They added that the TRA money was in respect of the supply of Savana Dry 2047 cartons which are different from goods indicated in the order. They put the plaintiff to strict proof.

Mr. Martin Kilasara appeared for the plaintiff while the defendants were represented by Mr. David Shilatu. With the assistance of the counsel the court framed the following issues:

1. Whether the plaintiff agreed with the defendants to supply various beverages/liquors and paid for them.
2. Whether the defendants breached the said supply agreements.
3. Whether the plaintiffs suffered damages as a result of the said breach
4. To what reliefs are the parties entitled to.

Mr. Martin called two witnesses. Mr. David had one witness only who is the first defendant. PW1 Evance Masuke (54) told the court that he is the director of the plaintiff company. He deals with soft and hard drinks. He has a trade licence, TIN number and VAT number. He tendered a certified

copy of his trade licences which were received as exhibit P1 collectively. He said that he has done the business for 20 years. He knows the first defendant who supply drinks from South Africa and who has godowns in Dar es Salaam. He went on to say that he used to press orders and pay through the bank to the defendants who could in turn send the goods to his godown at Majengo Moshi near MSD godowns. He used to deposit money at their CRDB account.

PW1 went on to tell the court that first defendant came to his shop in 2019 and said that there was an increase of prices of wine in South Africa making it important to press an order for wine early because it was near Christmas. As it was in October, PW1 agreed. He prepared his order and gave it to him, exhibit P2. The first defendant demanded to be paid in advance. He had no enough money to satisfy the order. They agreed that PW1 should deposit the money to the defendant's account at CRDB bank by installments. They could make the calculations later. He started with Tshs. 50,000,000/=. He then deposited Tshs. 70,000,000/=, Tshs. 50,000,000/= and Tshs. 10,000,000/=. He tendered the bank pay in slips which were received as exhibits P3 and P4 (collectively). They agreed that he could bring the drinks straight to Moshi. He made a further payment of

Tshs. 3,000,000/= through his M-Pesa account to allow Mr. Macmillan to put fuel to the trucks. They agreed that the process could take one month. He expected to receive the goods by 15<sup>th</sup> November, 2019 but things were not that way. He received some goods at the end of November, but it was not wine. It was uncustomed goods, cartons of savanna dry.

PW1 went on to say that soon after the trucks had entered his yard TRA officials and the police came in. He was away in Tanga. He instructed his manager to go and see what was going on. TRA officials ordered the trucks to go to the police station. The drivers complied. They then sent the drivers and his store man to the lock up. On receipt of the information, he contacted the first defendant who said that there was no problem. He came to Moshi on the next day and met the trucks at the police station. The police advised him to go to TRA. TRA returned the trucks to his yard later in the day for inspection which was done. It was discovered they had savanna dry cartons whose duties were yet to be paid. The first defendant passed at the border without paying custom duties. They had a tax liability of Tshs. 122,000,000/=. The first defendant came and left promising to appeal to higher authorities. TRA pressed for payment. The first defendant advised him to pay the taxes for him so that he can sell the goods to raise

funds to get money to go to South Africa to bring the wine. He deposited the money Tshs. 122,333,688/= to the account of the first defendant to offset the tax liability. The money was transferred to TRA. He tendered the pay in slips which were received as exhibits P5 collectively (4 documents). PW1 went on to say that in total the first defendant received Tshs. 305,333,688/=.

PW1 proceeded to tell the court that the first defendant picked the cartons of savana dry and sold them to some other people. He waited for his wine but there was no delivery. The first defendant promised to bring the order but could not do so. He tried to convince him through people without success. He gave him a demand notice written by his advocate without success. He complained to the police who moved to Dar es Salaam to arrest him. He came and they met at the office of the OC-CID. He told the police that the first defendant was the one who received his money. The defendant denied. The defendant asked the police to release him so that he could talk privately to PW1. He was given the chance. He agreed to receive the money. He apologized and said that he had no money. He demanded to be given more money. That he could repay back with profits. PW1 agreed but demanded the agreement to be done before the police.

He could not agree. The police told them that the matter was both criminal and civil. PW1 opted for a civil case. He tendered the demand notice and the Board Resolution which were received as exhibits P6 and P7 respectively.

PW1 went on to say that he has suffered loss because the money was meant to be circulating in the business but that is not the case here. It could generate profits if it were in his hands but there are such profits. He expected the drinks to be consumed in Christmas where there were a lot of people but he could not succeed. He has tried to call him several times to discuss the matter but he is not available. He argued the court to grant the prayers as per the plaint.

PW2 Richard Mnaya Kindori works with the plaintiff company as its stores manager. He has been there from 2013 to date. He works at the Majengo stores. He said that the company deals with wines and spirits. He knows the defendants very well. He had been dealing with them. He said that the first defendant were given the order exhibit P2 to bring wines from South Africa but could not bring them. He could identify the order in court. He could show his signature in the order. It was an order for various wines,

4,140 cartons, he said. He went on to say that the agreement to supply wines was done in the office. He added that they gave the order to Mr. Macmillan.

PW2 went on to say that in November, 2019 he received a call from his director (PW1) who required him to go at the stores to attend some trucks which had company goods. He went to the godowns but to his surprise he was put under arrest by the police. The police were with TRA officials. He realized later that the trucks had savana dry, not wines as ordered. The wines were never supplied, he said.

DW1 Macmillan Johanson Elingaya (52) told the court that he has been dealing with the plaintiff company for a long time. He had business relations with the company for five years. He knows PW1, the director of the company very well. He used to supply wines from South Africa to the plaintiff company. He denied to receive the wines order (Exhibit P2). He said that he was shown the order but he told PW1 that the items were not existing in South Africa. They have savana drinks instead. He denied to demand and receive money from PW1 but later said that he received Tshs. 50,000,000/= on 1/10/2019, Tsh. 10,000,000/= on 11/11/2019, and Tshs.

70,000,000/= on 12/11/2019 all through his CRDB Account. He said that this was money for drinks already supplied. He agreed that he made a supply for savanna dry to the plaintiff company on 15/11/2019. He agreed that TRA officials attached the trucks because they had a tax liability of Tshs. 122,000,000/=. He agreed that PW1 gave him Tshs. 122,333,688/= to pay the tax but said that this money was agreed to be payment of the supply of savanna dry which he supplied. He identified exhibit P5 which is evidence of payment of the tax. It was for savanna dry, he said. He went on to say that the goods were received by the plaintiff company. He denied the debt of Tshs. 305,333,688/=. He said that he has already supplied the drinks. He ended by saying that he has done no more business with the plaintiff company since 2019. He could not say why. He asked the court to dismiss the case with costs.

I will now move to examine the extent to which the evidence have proved the issues or failed to do so. I will make a general discussion covering all the issues. I start by examining the contractual relations between the parties. It is obvious that there was no written contract. But that does not mean that there was no contract. In **Simon Kichele Chacha vs. Aveline**

**M. Kilawe**, Civil Appeal No. 160 of 2018 (CAT) at Mwanza it was said

thus:-

*"Parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be sanctity of the contract. That is, there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus: - 'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"*

Speaking of Oral contracts, Lord Denning had this to say in **Combe vs**

**Combe** [1951] 1 All E.R. 767 page 770:-

*"The principle, as I understand it, is that **where one party has, by his words or conduct**, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken at him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he*

*himself had so introduced, **even though it is not supported in point of law by any consideration, but only his word.***"  
(Emphasis added)

Speaking of sale of land and oral agreements, the Court of Appeal had this to say in **Catherine Merena v. Wathaigo Chacha**, Civil Appeal No. 319 of 2017 (CAT) at page 14:-

*It should be underscored that an agreement for sale of land is **essentially as good as any other contract, and therefore whether it is oral or written provided that the conditions of a valid contract fall within the ambit of section 10 of the Law of Contract Act, Cap 345 Revised Edition 2002** (The Contract Act), it is a contract. Section 10 of the Contract Act ..."*

The court went on to say the following:-

*In essence, **vital elements include free consent of the parties competent to contract, for a lawful consideration and with lawful object.** In case of an oral contract, to be enforceable, it is expected to be in the presence of witnesses. Therefore, **for an oral contract to stand, there must be a proper scrutiny of the witnesses and their credibility and of the overall evidence.** Indisputable, what should also be borne in mind is that oral contracts are extremely tricky to prove*

*because to prove their existence, there must be several pieces of evidence that point to a particular direction. (Emphasis added)*

The pleadings and the evidence show that there were oral communications between the parties based on mutual trust which were the basis of the agreement between the parties. The order was merely a list of what was to be supplied and not the contract itself. The agreement between the parties was oral. I try to show.

PW1 said that he had a long business relationship with the first defendant who has godowns in Dar es Salaam and who supplied him with wines from South Africa. DW1 agrees that he has godowns in Dar es Salaam, he deals with the business of importation of wines from South Africa. He added that he had five years business relationship with the plaintiff. PW1 said that he used to press an order for wines by phone to DW1 who could send goods to his godown at Majengo Moshi. He could then pay through their CRDB account. That was their modus operandi. The DW1 agrees that he used to supply wine to him and get paid through the bank.

The evidence from the plaintiff show that in October 2019 DW1 came to his godowns in Majengo Moshi and told PW1 that there was a likelihood of

price increase of wine in South Africa. PW2 saw DW1 entering the offices. They had a discussion which was also attended by PW2. PW1 prepared his order (through his store man PW2) and gave it to DW1. It was a big order. DW1 said that he had no money to make the supply. They agreed that PW1 should deposit money by installments to the account of DW1 to enable him to raise funds to purchase the goods. They could make the calculations later. He deposited of Tshs. 183,000,000/=. As they were closely related, PW1 did not worry and expected him to make the supply. DW1 said that PW1 showed him the order but he told him that the wines were not existing in South Africa. They had savana dry drinks instead. He then changed his words and said that he never saw the document, everything was done over the phones. He said that he saw the document first in court. He denied to demand to be paid in advance. He said that the money which he received was money for stocks already supplied. He accepted to receive the money for paying taxes but said that it was the purchase price for the savanna dry cartons which he left at the plaintiff's godowns. He denied to collect the goods and sell them to other people.

Oral agreements are agreements and binding, if proved to exist. Proof of an oral agreement lies on credibility of witnesses. It also lies on an

examination of the evidence in totality. We look at the credibility of witnesses and the flow of the evidence to establish what happened.

Speaking of credibility of witnesses, the Court of Appeal had this to say in **Goodluck Kyando vs. Republic**, (CAT), [2006] TLR 363 where it was said thus:

*"It is trite law that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

The court went further to say the following in **Shabani Daudi vs. Republic**, Criminal Appeal No. 28 of 2001 (unreported) page 8 where it was said thus:-

*"The credibility of a witness can also be determined in other two ways that is, **one**, by assessing the coherence of the testimony of the witness, and **two**, when the testimony of the witness is considered in relation to the evidence of other witnesses including that of the accused person."*

See also **Hamis Shabani @ Hamis (Ustadhi) vs The Republic**. (CAT) Criminal Appeal No. 259 of 2010 and **Abbdalla Teje @ Nalima Nabula Vs Republic**, Criminal Appeal No. 195 of 2005

I will now try to examine the evidence on record in the light of the above principles. I had ample time to examine the three witnesses who appeared before the court closely. PW1 appeared cool and composed. His words were straight. His evidence had a logical flow. He appeared to be a gentleman. See the following examples to prove that he is a gentleman. i) When the goods were seized by TRA he decided to pay for DW1. DW1 agree that he paid. Some other guy could not do this. ii) He was ready to settle the matter at the police station. He opted for a civil suit. Some other people could opt for a criminal case. He proceeded to show that he was a gentleman even before me. He was quoted at page 21 saying the following:-

*"We tried to call him to come sit and talk but he could not be available. I pray the court to order them to pay the money, profit and the cost of the case. **If he can bring the drinks, it is fine.**" (Emphasis added)*

He spoke the underscored words when he was asked the question whether he had anything more to tell the court. He had a similar response during cross examination at page 22. He said thus:-

*"He requested me to pay saying he could bring goods worth the money (Tshs.122,000,000/=). **If he can bring the goods we can still talk because I am a businessman.**" (Emphasis added)*

PW1 appeared to be a witness of credit. I could not doubt his words. PW2 was simple looking, straight forward. He corroborated the evidence of PW2. I could not doubt his credibility. To the contrary, the evidence of DW1 left much to be desired. He could not stand and speak straight, he appeared as having something to hide. His face was shaky. He denied the claims with a lot of difficulties! His words were contradictory, they lacked the logical flow. He appeared to be a person fighting to get out of it, a liar.

I will give three examples to show that the testimony of DW1 fell short of credit. i) He said that he was shown the order at the godown at Majengo but changed later and said that he never happened to see the order. This is reflected in page 24 of the proceedings where he is quoted saying as follows:-

***"He showed me this orders (exhibit P2) but I told him that the items were not existing in South Africa. They***

*have savanna drinks. **This is the first time I see the document.** He told me over the phone that the drinks were out of stock in South Africa.” (Emphasis added)*

ii) He said that the wines in exhibit P2 which were not available in South Africa. The order included ordinary wines like Robertson, St. Raphael, St. Anna, Drostdy, Overmeer and Namaqua. I wonder if all the wines can ever be out of stock in South Africa at one time. iii) He said that he left the savanna dry cartons with PW1 after payment of taxes. He added that, the money he received and which was paid to TRA as tax was agreed to be the purchase price of savanna dry. He could not say why the taxes happened to fall squarely to price of the goods. Further, he could not say why he did not do any more business after receiving the money. This shows that the whole story of leaving the savanna dry to PW1 in consideration for the tax paid to TRA was a fabricated story.

In all DW1 did not appear to say the truth at all. He was merely fumbling around to try to run away from the liability. The truth appears to be what was said by PW1 and PW2.

That said, it is settled in my mind that, based on an oral agreements between the parties, the defendants received an order for supply of wines from South Africa and cash Tshs. 305,333,688/= but could not supply. The defendants were therefore in breach of the agreement and must be held liable to pay the said sum and damages. I agree that the plaintiff's money have been held from November 2019 to date. The money was meant to be in business circulation from 2019 to date but it is outside the circulation. It could generate profits but no profits have been obtained out of it. Further, the plaintiff's company has suffered hardships of operating below their working capital calling for an award for general damages. I will in the end order as follows:

1. Payment of Tshs. 305,333,688/= being the principal sum.
2. Payment of interest at the rate of 20% annually, on the principal sum, from 1/12/2019 to date.
3. Tshs. 20,000,000/= general damages.
4. The plaintiff shall have the costs.



  
**L.M. MLACHA**

**JUDGE**

**25/11/2022**

**Court:** Judgment delivered. Right of appeal explained.



  
**L.M. MLACHA**

**JUDGE**

**25/11/2022**

ORIGINAL