

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

AT ARUSHA

CIVIL CASE NO. 1 OF 2020

SERENGETI BREWERIES LIMITED.....PLAINTIFF/DEFENDANT

VERSUS

MONABAN TRADING & FARMING CO. LIMITED..... DEFENDANT/PLAINTIFF

JUDGMENT

05/11/2021 & 22/3/2022

GWAE, J

On the 24th day of January 2020, the plaintiff / defendant, Serengeti Breweries Limited, a corporate body established under Cereals and other Produce Act. No. 19 of 2009 trading in among others, carrying out and other commercial activities for the development of cereals and other produce industry in Tanzania, instituted this civil suit against the defendant / plaintiff Monaban Trading and Farming Co. Ltd and another entity, the Cereal and Other Produce Board of Tanzania (Board).

The basis of the plaintiff's/defendant's suit is an agreement entered by the parties on the 9th September 2017 whereby it was agreed that the

defendant/ plaintiff was to store the plaintiff's/defendant's cereals including 1, 383 metric tons of white sorghum at the premises located at a Plot No. 1,3,4,7,11 and 11A -Unga limited Area within the Arusha District and City of Arusha. What culminated these proceedings by the plaintiff/defendant is that, in the course of the parties' business, there was a demand of vacant possession of the warehouse by the Board vide her letter dated 3rd October 2019. Due to the said demand letter threatening a forfeiture of the plaintiff's/defendant's stocks or cereals stored in the warehouse. Both parties were then denied an access to the warehouse and thereafter there were seizure and confiscation of all properties in the said ware house. The said seizure was followed by an application for an injunctive order filed by the defendant/plaintiff.

However, on the 20th March 2020, when the Board's representative one Clement Mathias (adv) appeared for the hearing, he notified the court that, the board was not interested in withholding the white sorghum stored in Unga Limited area and therefore they had no defence to make in this suit. The counsel for the plaintiff/defendant namely; Mr. Lubango and Mr. Mushi then discharged the Board. Consequently, the defendant/ plaintiff remained a sole defending party to the suit.

Following the above dispute between the parties and an order of the court discharging the Board, the plaintiff/ defendant through her amended plaint duly filed on the 28th July 2020, prays for the following orders against the defendant/plaintiff;

- a. A declaration that the plaintiff handed over the defendant white sorghum weighing 1, 383 metric tons (1, 383,000 kilograms)
- b. Release of his 1,383 metric tons of white sorghum which alleged to have unlawfully been withheld by the defendant.
- c. Payment of general damages by the for unlawful forfeiture and holding of the 1,383 metric tons of white sorghum
- d. Payment of costs of the suit
- e. Any other relief as the court may just, convenient and equitable to grant

On the other hand, the defendant/plaintiff through her amended written statement of defence duly filed on the 17th August 2020 admitted to have entered into a grains management services agreement but contested that, the plaintiff/defendant did not honour their agreement by not paying him the due storage fees in regard of the stored sorghum, maize and barley despite several demands before institution of this suit and

that the plaintiff/defendant deceitfully entered the warehouse and collected 331,060 kilograms in her absence. He thus prays for the dismissal of the suit.

However, the defendant/plaintiff sets a counter claim against the plaintiff/defendant claiming that she has genuine claims against her for unpaid storage fees for the grain management services rendered by him (defendant/plaintiff) for the year ending 7th October 2016, 7th October 2017, 7th October 2018 and 7th October 2019 despite acknowledgement of the claims; Following his reliance on the claimed and acknowledged outstanding balance, the defendant/plaintiff is praying for the judgment and decree against the plaintiff /defendant as follows;

- a. An order of payment of Tshs. 540, 409,485/=being an outstanding amount for grain management services from 7th October 2016 to 7th October 2019
- b. Costs of the proceedings
- c. Any other relief (s) as the court shall deem proper to grant in the circumstances of the counter claim.

Through his amended written statement of defence to the defendant /plaintiff's counter claim duly filed 24th August 2020, the plaintiff/defendant denied each and every allegation raised thereof.

For the purpose of composing this judgment, the plaintiff/ defendant and defendant/ plaintiff as named above shall be referred as plaintiff and defendant respectively. The plaintiff and defendant, during trial, had secured their own advocates namely; Mr. Lubango assisted by Mr. John Mushi who appeared representing the plaintiff whereas Mr. Kapimpiti Mgalula assisted by Mr. Stolla represented the defendant. Having consulted the parties' advocates who appeared on the 27th May 2021, the following issues were framed by the court for determination;

1. Whether the plaintiff is or was entitled to be handed over 1,383 metric tons (1,383,000 kilograms) of white sorghum.
2. Whether the defendant is responsible for the loss of 331.06 Metric tons
3. Whether the plaintiff is indebted to the tune of Tshs 540,409,489/= as pleaded in the counter claim.
4. To what extent of reliefs are the parties entitled

In proving his suit and disproving the defendant's counter claim the plaintiff summoned her two (2) witnesses, to wit; Lucia Minde, the plaintiff's legal Director (PW1) and Musa Ally Keyla, the plaintiff's stores and quality supervisor (PW2). The plaintiff was also able to produce the following thirteen (13) exhibits which were received by the court for evidential value;

1. Parties contract dated 9th September 2017 (PE1)
2. The plaintiff's reply letter issued on the 10th November 2019 responding the Board's letter (PE2)
3. An application registered as No. 61 of 2019 for injunctive order filed in the court by the defendant against the Board (PE3)
4. The plaintiff's letter dated 20th August 2019 on verification made in the presence of the representatives of the plaintiff and that of the Board whilst in the absence of the defendant informing him of the discovered shortfall of 353,530 kilograms after verification in the absence of the defendant's representative (PE4)
5. The Board's letter dated 3rd October 2019 discarding stock verification as per PE4 on the ground that, stock verification made on 6th June 2019 was made in the plaintiff's absence (PE5)

6. This court's ruling dated 24th March 2020 vide Misc. Civil Application No. 6 of 2020 allowing the plaintiff to enter into the warehouse and collect her white sorghum weighing 1,383 metric tons within 45 days from the date of the order and directing her to deposit hard cash Tshs, 350,000,000/= or bank bond guarantee worth Tshs.470,000,000/= (PE6)
7. Financial guarantee deposited to the court by the plaintiff in compliance with the order of the court (PE7)
8. The parties of Deed of settlement duly received by the court the 27th May 2020 however on the 14th July 2020 this court was informed that the parties had failed to mutually settle out of the court (PE8)
9. Sorghum verification at CPB (PE9) from 9th July 2020 to 13th July 2020 making a stock verified at the rate 511,040 kilograms
10. E-mail communication between the parties
11. The plaintiff's letter dated 18th June 2019 addressed to the defendant signifying that actual verification was not done (PE11)
12. Police report reported by PW2, Mussa Ally Keyla who does not remember its loss (PE12)
13. Stock verification of 22nd June 2019 and 25th June 2019 (PE13).

Together with the documentary evidence, the plaintiff's witnesses, in essence, testified that the defendant was rendering the storage facilities in

their behalf for the agreed sum of Tshs. 74,070/= per metric ton. That, they have been using requisition forms and delivery notices when the plaintiff required certain grains and whenever she received the same from the defendants. Admittedly, that the defendants had reminded the plaintiff of the outstanding amount (More than 200 million in 2018) but there were no necessary documents to support such claims that were sent to the plaintiff for payment by the defendant.

Moreover, the plaintiff through PW2 testified that, they handed over 1, 383 metric tons in the year 2017 and 2018 and that after the court order vide PE6, the plaintiff and defendant were able to collect from the warehouse a total of 360,880 and 180,020 kilograms respectively, thus making a total of 540,900 kilograms and that thereafter such collection of white sorghum, there was an order expunging the mutual agreement from the court's record, the plaintiff was also able to collect a total of 511,040 kilograms making a total of 1,051, 940 kilograms collected by the plaintiff from the warehouse making a difference of 331,060 kilogram which is the basis for the plaintiff's claim against the defendant.

However, PW2 when cross examined by the counsel for the plaintiff if release of the goods or grains received and stored by the defendant would

be done without their awareness, he replied to the negative. PW2 also told the court that the plaintiff was indebted at the tune of more than Tshs. 260 million according to parties' e-mail communications (PE10) but he cannot tell with certainty of the indebtedness' amount.

In his defense and proof in the plaintiff's suit and his counter claim respectively, the defendant summoned one Nathanael Philimon Mollel who appeared as DW1. DW1 denied the plaintiff's assertion that, the defendant was handed over white sorghum totaling 1,383,000 kilograms. He added that, there were clear procedure in receipt of grains for storage facilities by the defendant and during release of the same whenever required by the plaintiff.

Similarly, the defendant's witness testified that, they are not responsible for the alleged loss of 331,060 kilograms of white sorghum since the defendant handed 1,418,390 kilograms to the Board. Admittedly, DW1 testified that, after the court order (PE8) they (defendant) collected 180,020 kilograms of the white sorghum from the warehouse in order to set off the defendant's claims.

After close of the parties' case, the advocates for the parties sought and obtained leave to file their closing submissions which I shall consider in the course of determination of each issue demonstrated herein above.

Having briefly summarized the parties' evidence, it is now for the determination of the issues herein above, starting with the first issue which reads, **Whether the plaintiff is entitled to be handed over 1,383 metric tons (1,383,000 kilograms) of white sorghum.**

Examining the evidence adduced by the parties especially documents so tendered and received by the court, there is no direct evidence which can justify this court to certainly hold that the defendant was handed over 1,383 metric tons in a specific period. However, through PE10 it is clearly established that there were communications between the parties regarding the withholding or retaining of white sorghum by the defendant till the assessment of the defendant's initial claimed amount (Tshs. 286, 693, 749. 2). I have further looked at the PE13, stock verification and testimony of the DW2, it is even confusing since the parties' balance is different (Stock balance as per SBL was 1,386,448 whilst as per Monaban was 1, 418,390 kilograms). Worse still, physical verification allegedly done on the 20th August 2019 was in the defendant's absence.

It is also my finding that, the plaintiff would not be entitled to be handed over 1,383,000 kilograms of white sorghum since he had already collected, 360,880 kilograms tons for the first time and 511,040 kilograms for the second time following the order of the court dated 28th July 2020 plus 180,020 kilograms which were collected by the defendant as way of setting off the debts. The above parties' collections of white sorghum made a total of 1,071,940 kilograms. It follows therefore, the plaintiff's claim on release of 1,383, 000 kilograms (see prayer (ii) in the plaintiff's plaint) as per amended plaint filed on 6th August 2020 is unsubstantiated.

In the 2nd issue, **whether the defendant is responsible for the loss of 331, 060 kilograms of white sorghum.**

According to section 110 of Tanzania Evidence Act, Cap 6 Revised Edition, 2002 provides for an obligation on a party who alleges existence of certain facts to prove existence of such facts, for the sake of clarity the same is hereby quoted:

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

In the light of the above cited provision of the law, the plaintiff was supposed to prove in balance of probabilities that it was the defendant who is responsible for the loss of 331,060 kilograms of the white sorghum. Carefully examining the evidence adduced by the plaintiff, it is quite uncertain if the defendant caused the loss of the said 331,060 kilograms since it is undisputed fact that, the warehouse owned by the defendant came to be in possession of the Board since 6th June 2019 (see PE3, PE4 & PE5) and that the actual stock verification took place was made by the plaintiff in the absence of the defendant as indicated in the plaintiff's letter dated 20th August 2019.

According to the parties' evidence, I have to asked myself, if the physical verification was conducted on the 27th June 2019 and actual or physical balance of white sorghum was found to be 1,064,860 kilograms as opposed to stock balance as per the plaintiff that is 1,386,448 kilograms while stock balance as per the defendant was 1,418, 390 kilograms as indicated in the PE13. If the stock balance as per the defendant is said to be 1,418, 390 kilograms, the question that follows is, how was it obtained since he was not present during physical verification nor was there any documentary evidence establishing that the defendant's stock balance as

per the alleged handover sheet was 1, 418, 390 kilograms? A lot is left to be desired.

Even assuming that the balance of the stock as per the defendant was 1,418,390 kilograms as testified by DW1 and stock balance as per the plaintiff being 1,386,448 kilograms, again, the question that follows is, who between the defendant and the Board was more responsible taking into account that the defendant was denied access to the warehouse by the Board? The answer here is the Board.

More so, the evidence adduced by the PW2 particularly when cross examined by the defendant's counsel, does not render the defendant to be held responsible for the loss, if any, since he patently told the court that there was no possibility for the plaintiff's grains stored by the defendant to be released without his awareness as the plaintiff's staff had fully control of grains received through good received note (GRN) and those released through well-known system, delivery notes (DN).

I have further examined the police report dated 7th June 2021 (PE12) and observed that, the plaintiff's representative, Mr. Musa Ally Kelya merely and generally reported the loss of white sorghum stock without mentioning quantity of the said loss and worse still he did not know who was

responsible for reported loss (“Sikumbuki upoteaji wake”). In **Manager, NBC, Tarime vs. Enock m. Chacha** (1993) TLR 228, it was judicially demonstrated that;

“It is a cardinal principal of law that in civil cases there must be proof on the balance of the probabilities. In this case, it cannot be said that the scanty evidence adduced in this Court proves in any way what is alleged in the plaint. There must be proof of the case on the standard by law which is on the balance of the probabilities even when a case proceeds ex-parte like in this case. . . .”

In our instant case, the plaintiff’s evidence does not warrant this court to hold that the defendant is liable for the alleged loss of 331,060 kilogram of the sorghum, the evidence remains nothing but a mere assertion against the defendant. The best option in my view was to proceed with the Board as a party to these proceedings as it suddenly and forcibly assumed possession of the warehouse together with the stocks therein since 6th June 2019 (PE5).

As to the third issue; **whether the plaintiff is indebted to the tune of Tshs. 540,409,489/= as pleaded in the counter claim.**

According to the parties’ communications through e-mails (PE10) and deed of settlement (PE8), there is an admission of indebtedness by the

plaintiff. More so, in the deed of settlement which came to be expunged from the court's record, the plaintiff admitted to be indebted at the tune of Tshs. **330,404,698/=** which is equal to 472,001 kilograms @ Tshs.700 for the purpose of setting off the outstanding claims. Nevertheless, the plaintiff's claim at the tune of Tshs. 286,693,449.20 was subject to physical stock verification by both parties with proper documentation.

In substantiating the defendant's claim of Tshs. 540,409,489/=, the defendant through her sole witness tendered the so -called reviewed claim against the plaintiff (DE1). Considering the nature of DEI and considering the fact that, the plaintiff's evidence has partly admitted the defendant's claim, and when I objectively assess the defendant's evidence via her witnesses (PW1 & PW2) in its totality, I unhesitatingly find that, the defendant's counter claim is more probable than to its being improbable. I am however aware that mere mentioning of the figure does not in law justify the court to award what was figured in the Plaint except proof of the same in the required standard (See **Bamprass Star Service Station vs. Fatuma Mwale** (2000) TLR 390).

That being the case, the amount claimed by the defendant cannot be wholly granted since I am alive of the requirement for awarding special

damages that is, it should not be on reasonableness of expense allegedly incurred or services allegedly rendered as the case here but subject to strict proof thereof by one seeking such redress by adducing satisfactory evidence in support of his or her claim on special damages as was rightly demonstrated by the Court of Appeal of Tanzania in the case of **NBC Holding Corporation v. Mrecha** [2000] 1 EA 174 and **Zuberi Augustino vs. Anicet Mugabe** (1992) TLR at Page 139

In this particular case, it is my considered opinion that both parties owe a duty of producing necessary documents for reconciliation such as GRN and DN if at all there was clear system regarding goods received and goods released as adduced by PW2. And taking into account that the defendant initially was claiming more than 280 million and the plaintiff's admission of her liability (see e-mail dated 4th March 2019 in PE10 and testimonies) considering the fact that since January 2019 when the parties were communicating in relation to the defendant's claim, the storage fees payable in favour of the defendant were also increasing to when the Board came into possession (June 2019). I am therefore of the considered view that, the defendant is entitled to Tshs. 380, 000, 000/ and not 540,409,


489/= minus white sorghum collected by him (180,020 kilograms x Tshs.700)-126,014,000/ =253,986,000/=.

On the last **issue on reliefs**, the plaintiff's claims against the defendant whereas the defendant's counter claim succeeds to the above extent being storage fees.


Consequently, the plaintiff's claims against the defendant are dismissed and the defendant's counter claim succeeds. The defendant / plaintiff to the counter claim is entitled to a Total of Tshs. 253,986,000/=.

Costs of these proceedings shall be borne by the defendant.

It is so ordered.


M. R. GWAE
JUDGE
22/03/2022

Court: Right of Appeal fully explained


M. R. GWAE
JUDGE
22/03/2022