IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 44 OF 2010

TANZANIA HAIR INDUSTRY LIMITED.....PLAINTIFF

VERSUS

FARHAT COSMETICS LIMITED.....1ST DEFENDANT

HAITHAM SROUR.....2ND DEFENDANT

Date of hearing: 19th May 2011, 22 December 2011 and 15th October 2012.

Date of closing submissions: 16/10/ 2012

Date of last Order: 16/10/2012

Date of Judgment: 14/12/2012

JUDGMENT

MAKARAMBA, J.:

On the 4th June 2010 the Plaintiff filed in this Court a suit claiming against the Defendant for the following orders:

(i) Immediate payment of Tanzania Shillings 289,467,231.30

(ii) *In the alternative an Order for transfer of the 2nd Defendant's property described in Paragraph 7 above, into the name of the Plaintiff as a Set Off to the outstanding sum stated in (i) above*

(iii) *Interest on (i) above, at the current Bank rate from the due date, 1st January, 2006, to the date of payment in full, and at the rate of 30% from the date of filling of this suit to the date of Judgment.*

(iv) *Interest on the decretal sum at the Courts rate from the date of Judgment until payment in full.*

(v) *General damages of Tzs. 300,000,000/= as stated in paragraph 7 above, to be assessed by the Honourable Court*

(vi) *Costs of this suit, and*

(vii) *Any other reliefs (s) as the Honourable court shall deem just and equitable to grant.*

Briefly, the background of this suit as could be gathered from the plaint is that, in between 1st January, 2006 and 31st October, 2009 at the behest of the 1st Defendant, the Plaintiff supplied to the 1st Defendant various hair and other sundry cosmetic products as detailed in the relevant invoices, out of which TZS 289,467,231.30 is outstanding and has never been paid.

On the 8th October 2009 the 2nd Defendant in his capacity as a subscriber as well as a Director of the 1st Defendant, undertook and guaranteed to pay the outstanding sum in a written undertaking whereby the 2nd Defendant covenanted to sell his private property situated in Betolay, Lebanon for United States Dollars (USD) 580,000.00 as a Set Off to the above overdue sum, in favour of the settlement of the amount due to the Plaintiff. The above undertaking has been totally dishonored by the 2nd Defendant and thus the above sum remains outstanding. The Plaintiff has made several demands to the Defendants for payment of the overdue sum; the demands have been in vain. The Defendant vehemently disputed the Plaintiff claim hence this judgment.

On the first day of hearing the following issues were framed and recorded for the determination of this suit, namely:

1. *Whether there was a contract between the parties*
2. *If the first issue is in affirmative, whether there was any breach*
3. *Whether the second Defendant was part of the contract between the Plaintiff and the first Defendant*
4. *Whether the second Defendant had offered his property in Lebanon as an alternative to the payment of TZS 289,467,231.30*
5. *What relief(s) the parties are entitled to.*

Mr. Mapinduzi, **Rattansi** and **Kaozya,** learned Counsel represented the Plaintiff and **Mr. Edward Chuwa** assisted by M/s **Lilian,** learned Counsel represented the 1st & 2nd Defendants. At the close of this suit, the

learned Counsels prayed to make their closing submissions orally, the prayer which was duly granted by this Court. However, on the 16th October, 2012 when the matter came for oral closing submission, Mr. Kaozya decided to file his written closing submissions instead of making oral closing submission as per the order of this Court. In considering the circumstances of this case, the Court allowed Mr. Kaozya to read over what has been contained in his written closing submissions.

In support of his case the Plaintiff summoned only one witness, **Mr. Hussein Hamad,** the Director of Tanzania Hair Industry Ltd. who testified as **PW1** and the Defendant summoned **Mr. Haitham Srour**, the Director of Srour Co. Ltd who testified as **DW1** and **Mr. Sameer Suhaihat Mauji**, an employee of Farhat Cosmetics Ltd who testified as **DW2**.

I shall determine the first, second and third issues jointly. The main argument by Mr. Kaozya was that, DW1 having admitted that, the Plaintiff did supply various products to the Defendants, it proves that, there was a contractual relationship between the Plaintiff and the Defendants. According to Mr. Kaozya, the testimony of DW2 shows that, the Plaintiff had entered into a contract either by the 1st Defendant or the 2nd Defendant simply because the 2nd Defendant did enter into a contract on behalf of his employee (the 1st Defendant) without his knowledge. Mr. Kaozya submitted further that, the 2nd Defendant's agreement to sale his property in Lebanon for the purposes of clearing the 1st Defendants debt puts him into liabilities together with the 1st Defendant.

PW1 told this Court that, the details of the products supplied can be traced in the tax invoices issued from 2006 to 2009. PW1 stated further

that, since no any sale agreement was executed by the parties, the tax invoices issued by the seller should be taken as a binding contract. While being cross examined by Mr. Chuwa, PW1 stated that, the contract under **Exhibit P1** is a mere an agreement for the settling the outstanding debt and that such agreement was made after the dispute having been arisen.

On the Defendants' side, Mr. Chuwa argued that, a contract can only be made by an offer and acceptance in terms of section 2(1) (a) (b) of the Law of Contract Act, Cap.345 R.E. 2002. An Offer must be certain and clear for it to be accepted by the other party. In this suit, there is no any indication that there is an offer or terms which are clear and certain. The Plaintiff told this Court that, the contract was made through invoices; according to Mr. Chuwa, an invoice is just a document produced by a seller to the buyer with list of prices for the buyer to make payment, therefore cannot be taken as a contract. However, Mr. Chuwa surmised that, such invoices were neither produced nor admitted in this Court as evidence.

Mr. Chuwa submitted further that, the contract of sale is governed by the Sale of Goods Act, Cap.214 R.E 2002. Section 6(1) of the Sale of Goods Act provides to the effect that, a contract for the sale of any goods of the value of two hundred shillings or more shall not be enforceable by action unless it is reduced in writing. Mr. Chuwa pointed out that, the word "note" as used in section 6(1) of the Sale of Goods Act referrers to the "delivery note." However, according to Mr. Chuwa, none of the delivery notes if any was submitted in this Court as evidence. Mr. Chuwa is of the opinion that, in this suit there is no any contract for the sale of goods between the

parties in terms of section 5(1) of the Sale of Goods Act and the Law of Contract Act.

Mr. Chuwa submitted further that, the Plaintiff had a constructive notice under the Memorandum and Articles of the company that the 2nd Defendant is not the director of the 1st Defendant and that he does not have capacity to enter into the purported Contract with the Plaintiff. According to Mr. Chuwa, the provisions of section 11(2) of the Law of Contract Act provide to the effect that, *the contract made by a person who has no capacity is void*. Mr. Chuwa preferred this Court to the case of **DUNLOP PNEUMATIC TYRE CO. LTD VERSUS SELFRIDGE & CO. Ltd [1915] AC 847**, in which it was held that:

> *"Only parties to the contract may take the benefit and liabilities of the contract, a stranger to the contract can never incur liability or can never have the benefit of that contract."*

Mr. Chuwa submitted further that, **Exhibit P1** shows that **Mr. Haitham** owns a company by the name of **Farhat Cosmetics Ltd,** the first Defendant in this case. However, according to Mr. Chuwa, Mr. Haitham cannot own the company. This is due to the fact that, the company as a separate legal entity is different from its members, and therefore, even if the 2nd Defendant is a director, he cannot own the company. Mr. Chuwa referred this Court to the case of **SALOMON VERSUS SALOMON & CO. LTD [1897] AC 22** which states that a

company is a separate legal entity. Therefore, according to Mr. Chuwa **Exhibit P1** is not worth anything.

Mr. Chuwa submitted further that**, Exhibit P1** was made under mistake therefore makes it to be void in terms of section 20 of the Law of Contract Act. This because, **Exhibit P1** presupposes the contract to have been concluded between the Plaintiff as one party and the 2nd Defendant as the other party while the 2nd Defendant was a stranger to the contract. Therefore, since the 2nd Defendant did not have capacity to enter into the contract with the Plaintiff the contract under **Exhibit P1** is void.

Mr. Chuwa further submitted that, in commercial transaction the intention to create a contract is presumed by the parties to a contract, however, such intention can be waived by the parties themselves. According to Mr. Chuwa, the footnote to **Exhibit P1** waives the intention to have legal actions. That footnote states that:

> *"In case the sale of the property does not materialize, we regret for a change of agreement."*

Under such circumstances, Mr. Chuwa amplified further that **Exhibit P1** was not intended for any legal actions rather alternatively for the parties to enter into another transaction. The statement in the footnote relieves the parties to any liability and that the Plaintiff is precluded from referring this matter to litigation, Mr. Chuwa suggested. Mr. Chuwa submitted further that, section 29 of the Sales of Goods Act, imposes a duty on a seller to

deliver goods to the buyer. However, in this suit no any delivery was proved to be made to the Defendant by the Plaintiff.

Mr. Chuwa submitted further that, since there are no terms and conditions of the contract, even if there is any liability, such liability cannot be due, which means that no any breach of the contract can be claimed to be committed by the Defendant. Also, DW2 told this Court that, the 1st Defendant has never received any product on loan basis; the payments for the goods supplied were made by cash on the same day.

On the evidence on record, it is clearly stated under paragraph 4 of the plaint that, the Plaintiff is claiming against the Defendants jointly and severally for the payment of TZS 289,467,231.30 being a principal sum outstanding arising from **various goods supplied and sold to the Defendants between the 1st January, 2006 and 31st October, 2009**. The goods supplied are mentioned under paragraph 5 of the Plaintiff including various hair and sundry cosmetic products. PW1 told this Court that, the details of all goods mentioned by the Plaintiff in the plaint are provided for in various tax invoices issued by the seller from 2006 to 2009. However, the 1st Defendant under paragraph 3 of the Written Statement of Defence vehemently disputed that it had never entered into any contract with the Plaintiff for the supply of sundry cosmetics or at all.

PW1 told this Court that, there is no any Sale Agreement between the parties and that the agreement was not reduced in writing. PW1 stated that in the alternative, the tax invoices issued by the seller should be taken as a binding contract between the parties.

The tax invoices as alleged by PW1 were not tendered in this Court as evidence. That being the case, I deliberately decided to go back to the Agreement for Settlement of the Outstanding Debt which was tendered and marked as **Exhibit P1,** which the Plaintiff also treated as a binding contract between the Plaintiff and the Defendants. The agreement shows that, Mr. Haitham Srour being the owner of Farhat Cosmetics Ltd agreed to pay the overdue amount of USD 213,000 owed to Tanzania Hair Industry Ltd on behalf of Farhat Cosmetics Limited. However, Mr. Haitham Srour (DW1) denied being the owner of Farhat Cosmetics Ltd. and that he neither was the director nor had any relationship with Farhat Cosmetic Ltd. I am alive to the search letter which was admitted in this Court during the trial and marked as **Exhibit D1,** which shows that, Mr. Haitham Srour is neither the director nor shareholder of Farhat Cosmetic Ltd. The search letter dated 5th January, 2011 which is from the Business Registration and Licensing Agency (BRELA), **Exhibit D1** discloses that, the directors and shareholders of Farhat Cosmetics Ltd are **Sibtain Abbas Moledina, Ali Farhat Ibrahim** and **Housam Assad Srour**. No any other evidence was produced in this Court to prove as to whether Mr. Haitham Srour was among the Directors and/or shareholders of Farhat Cosmetic Ltd. Not only that but also, Mr. Haitham disputed the handwriting as it appears in **Exhibit P1** to have been made by him. However, the Plaintiff did not bother to bring any evidence to prove whether the handwriting in Exhibit P1 which DW1 denied as not belonging to DW1 was that of DW1 or not.

This Court therefore finds and holds that since the products referred to under **Exhibit P1** purported to be supplied by the Plaintiff were found to

be uncertain, and that DW1 has denied having any relationship with Farhat Cosmetics Ltd., and that the handwriting in **Exhibit P1** was not made by him, then the agreement for settlement of outstanding debt which was admitted and marked as **Exhibit P1** does not have any weight in this case.

In any event, the Plaintiff having failed to produce tax invoices, which the Plaintiff treated as a binding contract between the Plaintiff and the Defendants, and the Plaintiff having failed to establish that the Agreement for Settlement of Outstanding Debt, Exhibit P1, is valid and enforceable between the parties, this Court finds and holds that that the Plaintiff has failed to establish the existence of any Sale Agreement between the parties to this suit, as mandatorily required under section 6(1) of the Sales of Goods Act, Cap.214 R.E 2002. Further, the Plaintiff has also failed to establish the existence of any contract between the Plaintiff and the Defendants in terms of section 10 of the Law of Contract Act Cap.345 R.E 2002.

It is a cardinal principle of law as was expounded in the case of **THE MANAGER, NBC, TARIME VERSUS ENOCK M. CHACHA [1993] T.L.R. 228 (HC)** that:

> *"In civil cases there must be proof on the balance of the probabilities. However, 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****. (the emphasis is of this Court).*

On the evidence on record, the Plaintiff has failed to establish on a balance of probabilities that there was a contract between the parties. The first issue must therefore be resolved in the negative. That being the case, I do not find it useful to determine whether there was breach of contract by the Defendant, which must also fail as well as the rest of the issues framed for the determination of the suit as they lack any leg on which to stand.

In fine and for the foregoing reasons the Plaintiff's case fails. It is hereby dismissed with costs. Order accordingly.

R.V. MAKARAMBA

JUDGE

14/12/2012

Judgment delivered this 14th day of December, 2012 in the presence of Mr. Kaozya Advocate for the Plaintiff, Mr. E. Chuwa Advocate for the 1st Defendant and Mr. E. Chuwa Advocate for the 2nd Defendant

R.V. MAKARAMBA

JUDGE

14/12/2012