

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 134 OF 2014**

**NASSOR MOHAMED NASSOR .....PLAINTIFF**

***VERSUS***

**DANIEL MADUHU MASUNGA.....DEFENDANT**

**JUDGMENT**

**Mansoor, J:**

**Date of JUDGMENT: 11 SEPTEMBER 2015**

The suit against the defendant is for payment of THz 148,000,000 being the value of goods supplied by the Plaintiff to the Defendant at different dates as from 2011 to 2013, interests, general damages and cost of the suit.



It is the plaintiff's case that he is a businessman carrying out the business of importation of clothing from Thailand, and sell them to different customers in Tanzania. He said he was trading as a sole trader and he did not have a partner or business associate. He said, sometimes he was using the names of his children for importation of the clothing, for easy of identification. He said, the defendant is his customer and he used to take the clothing on credit. He said, once the defendant took the clothing, they used to write the value/price of the clothing taken in a counter book, and both of them used to sign the book. He said, the outstanding amount as at 25<sup>th</sup> February 2013 was THz 192,000,000. He said, out of this amount, the defendant paid THz 50,000,000 on 22 July 2013, thus the balance was THz 142,000,000. He also claimed that the Defendant took some clothing worth THz 6,000,000 from one Said Ally Hemed, and he is yet to settle this amount, thus making the total claim to be THz 148,000,000. The counter book was admitted in Court as Exh P1, and at the last written page Daniel Maduhu Masunga wrote as follows:



*“Mimi Daniel Maduhu Masunga mpaka leo tarehe 25-2-2013 jumla ya pesa ninayodaiwa na Nassor Nassor Mohamed (maswabirina) ni jumla ya shilingi milioni mia moja na tisini na mbili tu. 192,000,000.”*

In this page two signature appears immediately after the above words, and according to the plaintiff, the handwriting of the above words is of the defendant.

At the bottom of this page of the counter book, it is written as follows:

*-50,000,000 (MZA)*

*22-7-2013*

*“Balance ya pesa ya Maswabilina ninayodaiwa ni shs 142,000,000.”*

There is also two signatures immediately below the above words.

A handwritten signature in dark ink, appearing to be a stylized 'D' or 'M' followed by a flourish.

To support his case, the plaintiff brought Badru Othman Soud, the supervisor of the plaintiff's shops, and Said Ally Hemed, the shop attendant and the supervisor of the plaintiff's business as his witnesses. They both testified that they know the defendant, and that he used to take goods on credit from the plaintiff, and that he defaulted paying the balance of THz 142,000,000 as written in the counter book. Said Ally Hemed testified further that he also supplied clothing to the defendant worth THz 6,000,000, and the defendant admitted this. Said Ally Hemed however did not produce any evidence to prove these allegations apart from his words given at the witness dock.

To the above claims, the defendant entered appearance and filed a written statement of defence. In his defence he partly admitted the claims. He admitted that they were trading with the plaintiff in the business of importation of clothing from Thailand, but he denied to have been the plaintiff's customer. He said, the plaintiff was his business partner, and they trading as partners under a business partnership. He said all



the importation of clothing were in the name of the defendant. He said the packing list would always bear the names of the plaintiff and the defendant or the plaintiff's children. He also admitted that the plaintiff used to import the clothes in the names of different people such as Iptisam Hilal, Thania Mohamed, Nassor Mohamed Nassor, Salha, Ziyana El Hashim, and Maswabirina. All these names except Maswabirina was the names of the plaintiff's children. He alleged in his defence that initially, him and the plaintiff had contributed equally to the revolving financial capital of their business.

The defendant pleaded in paragraph 4 (e) of his defence that as partners, him and the plaintiff, would, from time to time reconcile their accounts whereby they would determine and indicate the extent balance of the defendant's debit, and similarly, the plaintiff credit. The defendant basically acknowledged the existence of the counter book, i.e. Exh P1, and said in paragraph 4 (d) of his defence that he was always on debit because he used the partnership money amounting THz 109,000,000 to purchase a house on Plot no. 107 Block R

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Mission Street, Mwanza, and he was refunding the money slowly. He said, he used the money through mutual agreement with the plaintiff as his partner.

He pleaded in his written statement of defence that in July 2012, the plaintiff decided to abruptly pull out from the partnership while there was a pending huge stock. The stock was received, kept and marketed and sold by the defendant, that is what he has pleaded in paragraph 4 ( e) and (f) of his written statement of defence.

The defendant pleaded in paragraph 4 (g) of his defence that the plaintiff opened two shops in the premises where the shop of the defendant/partnership was located, and he was selling similar goods at a cheap prices, and as a result the sale of the goods at a partnership shop could not be sold, resulting in a huge stock kept in the partnership shop. The defendant pleaded that the plaintiff disowned the stock and claimed that he had sold the stock to the defendant and demanded the payment of THz 148,000, 000 from the defendant. In his

witness statement, the defendant repeated what is pleaded in the written statement of defence. The defendant produced in court the shipping documents of the goods from Thailand including the Release Orders, Payment Notices, Custom Declarations, Deposit Slips, Invoices, which were received by Court as evidence and marked as Exh D1 collective. The Custom documents showed that the name of the tax payer was Masunga Daniel Maduhu, the defendant herein. Some of the Bill of Ladings shows the name of the consignee to be Masunga Daniel Maduhu. The document titled job no. 5733 dated 4 November 2011 which is a packing list shows the following particulars, that there was a container coming from Bangkok to Zanzibar covered in a Bill of Lading No. 752578784 MSKU 4117264 (part of Exh D1) the name of the Consignee in that document is shown to be Daniel Masunga, the defendant therein, but the document bears the name of different people occupying a certain volume/cbm in the container of which the consignee was the defendant herein. These people in this document are as follows:



<b>Name</b>	<b>pkgs</b>	<b>Volume/cbm</b>
Iptisam Hilal-----	50	9.92
Thania Mohamed	17	3.34
SS Salum	9	1.98
K S M	1	0.14
Mohamed Sulaiman	8	2.70
Saidi Kombo	19	2.42
Thabit	15	1.28
Omar Abdulla Omar	5	0.65
Happy Paul	1	0.47
P Shirima	1	0.47
Joseph AK	2	0.56
EmRasso	1	0.54
Kevin EM	1	0.54
MMasi	1	0.46
Kizaro	1	0.27
P Tarimo	2	0.70
Mary Masawe	5	1.44
Mamories of Zanzibar	13	1.42
Nadir Mohd Iddy	2	0.56

*[Handwritten signature]*



Mbarouk Talib	2	0.44
Salim Khamisi	1	0.49

Apart of the names, Iptisam and Thania, which names are alleged by the defendant to be the names of the plaintiff's children, the rests of the names in that list, are strangers, unknown to the plaintiff. Thus the above container carried a total of 157 packages, and occupying a total space of 30.42 cbm. The cargo/goods in this container belonged to almost 21 different people, but the consignee on this container was only one, the defendant, and that is why in all the rest of the documents for clearing these goods including payment of revenue/ custom charges carried the name of the defendant. These appears to be the arrangements between the defendant and several other people who were importing goods from Bangkok in small quantities. The defendant does not claim to be in partnership with those other people mentioned in the list, but he claims to be in partnership with the plaintiff only.

*[Handwritten signature]*

The defendant also produced in Court a Lease Agreement between Mohamed Nasor Songoro and Thaniya Nassor Mohamed, Lessor and Lessee, respectively, for leasing a space at Plot No 6 Block No. 17, Nyamwezi Street, Kariakoo, and this was admitted as Exh D2. I shall not consider at all this agreement as neither Mohamed Nasor Songoro nor Thaniya Nassor Mohamed is a party to this suit, thus I shall not determine an issue of unfair trading between the parties to this suit.

Now, the Court in consultancy with the parties' Counsels framed and recorded the following issues during the Final Pre Trial Conference:

1. Whether the relationship between the plaintiff and the defendant is of a Seller/Purchase or of partners;
2. Who between the parties breached the Agreement;
3. To what reliefs are the parties entitled.

**1. Whether the relationship between the plaintiff and the defendant is of a Seller/Purchase or of partners;**

He who allege must prove, that is a cardinal principle of law of evidence.

What the Court have to determine is whether in law there was constituted a partnership between these two persons. The plaintiff and the defendant are both small scale business people dealing with the same line of business, i.e. importation and sell of clothing basically from Bangkok. They used to import and ship the goods in one container together with other several people as shown in a list produced herein above, for easy of reference. There is no proof as alleged by the defendant that the plaintiff and the defendant had agreed to admit into partnership. There is also no proof adduced by the defendant, who alleges that there is existed a partnership, reduced in writing the terms and conditions of their arrangement in an agreement or a deed duly executed by both of them: that deed or agreement would have stated the date of commencement of the partnership, the kind of business the partnership was doing jointly, the name and the style of the partnership, the

obligations and duties of each partner and how each partner was supposed to keep and maintain the records and the books of accounts showing the expenses and revenue earned by each of them separately or jointly, for the benefit of the partnership. The partnership deed would also have shown how each partner would have recovered the bills in respect of work done for the partnership business. There is no any account showing that the partners opened the account and were operating it jointly. There is nothing that was shown by the defendant in his pleadings showing that the shop /warehouse expenses including the shop/warehouse rent, establishment and other charges and expenses including travelling and motor expenses that were incurred by the partnership and the proportion of the gross recoveries of each partner and the balance that was or would have been divided between the partners in the proportion of their contribution, as profits. There was only an allegation pleaded by the defendant in his written statement of defense that he used the money from the partnership business to purchase a house in Mwanza. This also was not proved.



Nothing of this sort was shown or produced by the defendant, apart from the unproved allegations that they existed a partnership, and they used to import goods in their joint names. On the contrary there is proof produced by the defendant himself that his name was used as a consignee to ship goods on behalf of himself, the plaintiff and several other people, and this does not form a partnership as between the plaintiff and the defendant or between the defendant and other people mentioned in the document reproduced herein above.

Now, partnership is not a matter of intention. It is a well-settled law - and the provisions of the Contract Ordinance give recognition to that law - that to constitute a partnership in law, there must be three elements: (i) there must be an agreement entered into by all the persons concerned; (ii) the agreement must be to share the profits of a business; and (iii) the business must be carried on by all or any of the persons concerned acting for all. All these three elements must be present before a group of persons or two people can be held to be partners.



In determining whether a person is or is not a partner in a firm, the Court must have regard to the real relation between the parties. From the facts and evidence of this case and not merely from the expressed intention of the defendant, and in the absence of a written agreement expressly stating that the parties herein are partners, this Court cannot hold that the plaintiff and the defendants are or were partners;

Now therefore, having held that there existed no partnership between the parties, the other question to be determined by the Court is whether there is a relationship of a buyer and a seller between the parties? This can be gathered from Exh P1, in which the defendant agreed to be indebted to the plaintiff, and as at 22 July 2013, the defendant acknowledges in his own handwriting and signature in this book, as well as in his pleadings that he is indebted to the plaintiff to the tune of THz 142,000,000. He also acknowledged to be in possession of a huge stock, which he claims to belong to the partnership. Since I have held that there existed no partnership between the parties, this therefore is in fact an acknowledgement that

the defendant is the purchaser, and there is an outstanding unpaid purchase price of THz 142,000,000 as at 22 July 2013. The stock does not belong to a partnership business, since as I have stated hereinabove, the defendant failed to prove that there existed any sort or form of partnership between the plaintiff and the defendant.

Therefore in answer to issue no 1, yes there existed a relationship of a purchaser and a seller between the defendant and the plaintiff, respectively, and there was no any relationship whatsoever of partnership between them.

## **2. Who between the parties breached the Agreement;**

There was a habitual agreement of a seller and a purchaser, which was not reduced in writing, but the records shows that the defendant used to take goods on credit from the plaintiff, and he defaulted paying the outstanding purchase price. Thus it was the defendant who breached the purchase agreement, and he is indebted to the plaintiff to a total sum of THz 142,000,000 as at 22<sup>nd</sup> July 2013.



The debt of THz 6,000,000 alleged to have been taken from Said Ally Hemed by the defendant was not proved. Neither Said nor the plaintiff was able to prove that actually the defendant took the goods worth THz 6,000,000, and they were also not able to prove that the defendant actually acknowledged this debt. This amount is also not reflected in Exh P1.

The defendant is therefore found liable to a breach of purchase and sale agreement/arrangements between him and the plaintiff and he is liable to pay the plaintiff for the outstanding unpaid purchase price of THz 142,000,000 only.

### **3. To what reliefs are the parties entitled:**

I note that there is a claim for general damages in the reliefs sought by the plaintiff in his plaint. However, I shall not grant the relief of general damage, as the plaintiff failed to prove any damage. Damages are awarded for the actual loss suffered, and not for the loss which is contemplated. The plaintiff was



duty bound to establish in evidence the loss suffered to enable this court to award him damages for breach of the contract.

I shall, however grant the following reliefs, in favor of the Plaintiff against the Defendant:

- a) The defendant shall pay the plaintiff the outstanding balance of THz 142,000,000;
- b) The defendant shall pay the plaintiff the interest in the amount in (a) above at the rate of 24% p.a from the due date i.e. 22 July 2013 to the date of Judgment;
- c) The defendant shall pay the plaintiff interest on the decretal sum at the rate of 12% p.a as from the date of Judgment to the date of full payment;
- d) The defendant shall pay the plaintiff the costs of this suit.

DATED at DAR ES SALAAM this 11<sup>th</sup> day of SEPTEMBER, 2015

  
**MANSOOR**  
**JUDGE**  
**11<sup>TH</sup> SEPT 2015**

