IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 5 OF 2013

YARA TANZANIA LIMITED ..... PLAINTIFF

VERSUS

CHARLES ALOYCE MSEMWA
t/a MSEMWA JUNIOR AGROVET
KASIMU SHODO MAZAGAZA
BARTON MWAITUKA MWALEMBE
..... DEFENDANTS

13th October 2015 & 18th February, 2016

JUDGMENT

MWAMBEGELE, J.:

This suit filed by the plaintiff on 04.01.2013 is seeking for the following reliefs against the defendants jointly and severally:

i. A declaration that the defendants, jointly and severally, are in breach of the contract of sale between the parties therein;
ii. An order for payment of Tanzania Shillings One Hundred Twenty Million Eight Hundred Thirty Thousand (Tshs. 130,820,000/=) as purchase price/value of the fertilisers;
iii. Interest on (ii) above at the commercial rate of 25% per annum;

iv. Payment of Tanzania Shillings Thirty Million (Tshs. 30,000,000/=) as general damages;
v. Payment of interest on (ii), (iii) and (iv) at court rate from the date of judgment to the date of satisfaction of the decree;
vi. Costs of the suit; and
vii. Any other orders and reliefs this Honourable court deem fit and just to grant.

The suit is based on two agreements of sale for the supply of fertilisers executed by the parties on 30.11.2010 and 23.01.2011. The two agreements; each titled "Supply Cum Loan Agreement" were for the supply of fertilisers by the plaintiff to the first respondent. The second and third defendants acted as guarantors to the agreements. As per the terms of the agreements, the purchase price was to be paid within thirty days from the date of supply.

The plaintiff avers that pursuant to the agreements, it supplied the defendant fertilisers worth Tanzania Shillings One Hundred Twenty Million Eight Hundred Thirty Thousand (Tshs. 120,830,000/=) as purchase price/value of the fertilisers as exhibited in invoices and delivery notes which were tendered and admitted in evidence and marked Exh. P8. The plaintiff avers that this amount has remained unpaid to date.

The defendants, luckily, do not deny the above averments by the plaintiff, save for payment of the purchase price. What the defendants aver is that the plaintiff has been paid in full the purchase value of the fertilisers supplied.

Before the testimony of witnesses; during the final pre-trial conference, to be exact,the following issues were framed:

1. Whether the defendants are in breach of the fertiliser supply contract; and
2. What reliefs are the parties entitled.

The plaintiff fielded only one witness and the defendants fielded three; the defendants themselves. It is in the testimony of Eveline Mungumsaidie who testified for the plaintiff as PW1 that upon the plaintiff and first defendant executing two agreements, which were guaranteed by the second and third defendants, the first defendant was supplied with fertilisers worth Tshs. 350,820,000/= but paid only Tshs. 220,000,000/= and was owing Tshs. 130,820,000/= as at 22.05.2012 when a demand letter was written to him. PW1 went on to testify that the first defendant wrote the plaintiff acknowledging that he was indebted to the plaintiff and that he was ready to pay. This letter was tendered in evidence and marked Exh. P11.

After the demand letter, PW1 went on, the first defendant effected one payment on 17.09.2012 at the tune of Tshs. 10,000,000/= thereby reducing his liability to Tshs. 120,820,000/=. To verify what she testified and to disprove the first defendant who averred in pleadings that he collected fertilisers worth Tshs. 150,000,000/= only, the first defendant's statement of account was tendered and admitted in evidence as Exh. P14.

The first defendant who testified as DW1 does not deny to have executed the two agreements to which the second and third defendants were guarantors

and that one of the terms was that he would take the fertilisers on credit and pay within thirty days. The first defendant states that he collected fertiliser from the plaintiff worth Tshs. 192,420,000/= and that he paid the amount in full but could only retrieve deposit slips worth Tshs. 150,000,000/=. The first defendant testified that he did not locate documents of some of the payments made because, as a managing director of the first defendant, he used to move in several regions for marketing activities. The first defendant urges the plaintiff to check its record and that a proper scrutiny would certainly reveal that he is not indebted to it and that he actually overpaid them by Tshs. 37,000,000/=.

The second and third defendants – Kassimu Shodo Mazagaza and Burton Mwaituka Mwalembe – who testified as DW2 and DW3 respectively, do not deny to have stood as guarantors to the two agreements. The both testified that DW1 had told them he had satisfied the purchase value in full.

The first issue for considerations is whether the defendants are in breach of the fertiliser supply contract they executed. Luckily, in this suit the defendants do not dispute that they indeed executed the two contracts. They also admit the terms and conditions therein. The only dispute between the parties arises when it comes to the fertilisers supplied and the amount paid and owed.

As seen in the summary of evidence above, the plaintiff testifies that the defendants, jointly and severally, owe it Tshs. 130,820,000/= as amount outstanding for the fertilisers supplied. On the other hand, the first defendant

testifies that he does not owe the plaintiff anything as he paid the purchase value in full and in excess.

Having subjected the oral as well as documentary evidence to serious scrutiny, I have reached a conclusion that the evidence so far show on a preponderance of probabilities that the defendants owe the plaintiff the amount stated. I have been fortified by this conclusion by the evidence of PW1 as well as the documentary evidence tendered. I shall demonstrate.

The first defendant's statement of account was tendered and admitted in evidence as Exh. P14. This statement shows the listing of the first defendant's account. It shows the deposits and credit sales and the balance which the first defendant owes the plaintiff. The deposits are shown to be Tshs. 230,000,000/= deposited in six instalments; Tshs. 40,000,000/=, Tshs. 50,000,000/=, Tshs. 50,000,000/=, Tshs. 30,000,000/=, Tshs. 50,000,000/= and Tshs. 10,000,000/=. The balance is shown to be Tshs. 120, 820,000/=.

The first defendant produced four pay-in slips showing that he paid the plaintiff Tshs. 10,000,000/= on 19.01.2011, Tshs. 50,000,000/= on 12.02.2011, Tshs. 50,000,000/= on 22.02.2011 and Tshs. 10,000,000/= on 17.09.2012. These four payments also feature in Exh. P14. He could not produce other pay-in slips under the pretext that he did not locate documents of some of the payments made because as a managing director of the first defendant he used to move in several regions for marketing activities. With unfeigned respect, I find this contention by DW1 too cheap to buy. The fact that he (DW1) used to move in several regions for marketing activities of the

first defendant cannot be an excuse for not producing relevant documents to prove a certain fact. Failure to do so is but to the defendants' own peril.

In the same token, I am not convinced by DW1's allegation that he actually overpaid the plaintiff by Tshs. 37,580,000/=. I say so because DW1 did not plead so in the joint written statement of defence. The assertion just surfaced in the witness statement; that is in the examination-in-chief as the witness statement was admitted in lieu of examination in chief as dictated by the provisions of rule 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. It is a cardinal principle of law of civil procedure founded upon prudence that parties are bound by their pleadings. On this point, I find it irresistible to associate myself with the decision of the Supreme Court of Nigeria in ***Mojeed Suara Yusuf Vs Madam Idiatu Adegoke*** SC.15/2002 (sourced through http://www.nigeria-law.org/Mojeed%20Suara%20Yusuf%20v%20Madam%20Idiatu%20Adegoke%20&%20Anr.htm) in which, speaking through Pius Olayiwola Aderemi, JSC, it stated:

> "... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the court".

If I may be required to add another persuasive authority from Nigeria, I would add ***Adetoun Oladeji (Nig) Ltd Vs Nigeria Breweries Plc*** (2007) LPELR-SC.91/2002 (sourced through http://nigeria-law.org/Adetoun%20Oladeji%20%28Nig%29%20Ltd%20v%20Nigerian%20Breweries%20Plc.htm); also cited as ***Adetoun Oladeji (Nig.) Ltd. Vs N.B. Plc*** (2007) 5 NWLR (Pt.1027) 415] in which it was also categorically stated that it is settled law that parties are bound by their pleadings and that no party is allowed to present a case contrary to its pleadings.

That is the position of the law in Nigeria as well as in this jurisdiction - see ***Peter Karanti and 48 others Vs Attorney General and 3 others,*** Civil Appeal of No. 3 of 1988 (Arusha unreported) and ***James Funke Ngwagilo Vs Attorney General*** [2004] TLR 161 the decisions of the court of appeal and ***Mohamed R. Shomari Vs Principal Secretary, Ministry of Defence And National Service & 2 Ors***, Civil Case No 37 of 2009 (unreported); the decisions of this court.

In the case at hand, the first defendant, through DW1, did not plead that he paid in excess of what he was supposed to pay. The statement arose in the course of giving evidence. It is most unlikely that the said money was overpaid, otherwise DW1 could have stated so in the pleadings. And to clinch it all, no counter-claim has been raised to that effect. As a business person, it is most unlikely that he would have overpaid the plaintiff and yet not claim the same. It is not stated either why did he overpay. Form the look of things and evidence, he seems to tell the court that he was very poor in keeping the records because he used to travel here and there in search for markets of the

first defendant. This is not humanly possible. I am not ready to accept this assertion as I find it wanting in plausibility.

In view of the foregoing, I am satisfied that the defendants did not pay the purchase value of the fertilisers supplied to them. That was in breach of the agreement executed between them and the plaintiff. This answers the first issue that the defendants, jointly and severally, are in breach of the fertiliser supply contract.

The second issue is ancillary; it is about reliefs. This will be clear shortly in the final part of this judgment. Let me, at this stage, tackle the question of general damages pleaded by the plaintiff. The plaintiff has pleaded general damages and quantified at the tune of Tshs. 30,000,000/=. It should be stated at this juncture that general damages are never quantified; they are paid at the discretion of the court and, on that score, it is the court which decides which amount to award – see ***Tanzania - China Friendship Textile Co. Ltd.*** **Vs** ***Our Lady of the Usambara Sisters*** [2006] TLR 70 and ***Admiralty Commissioners Vs Susqueh-Hanna*** [1926] AC 655. In the ***Admiralty*** case it was stated:

> "If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question [in our jurisdiction the court]".

[Quoted in ***Kibwana and Another Vs Jumbe*** [1990-1994] 1 EA 223].

In the ***Our Lady of the Usambara Sisters*** case (supra) it was held:

> "They [the Plaintiffs] were also claiming for general damages which they quantified to the tune of TZS. 15000000. **But since general damages are awarded at the discretion of the Court, it is the Court which decides which amount to award**. In that respect, normally **claims of general damages are not quantified**".
> [Emphasis supplied].

It was therefore improper for the plaintiff to quantify general damages. The question which comes to the fore at this juncture is whether the plaintiff suffered damages as to be entitles to the award of general damages. According to **Black's Law Dictionary** (Abridged 7th Edition) by Bryan A. Garner; Editor in Chief, the term "damages" is defined at page 320 as:

> "Money claimed by, or ordered to be paid to. A person as compensation for loss or injury".

And the term "general damages" is defined by the same legal work at page 321 as:

> "Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

This position is reiterated by the court in the ***Kibwana*** case [supra] in which it was held that:

> "The court, in granting damages will determine an amount which will give the injured party reparation for the wrongful act and for all the direct and unnatural consequences of the wrongful".

In the instant case, the plaintiff being a business legal person, it is certain that it has suffered damages as a result of the defendants' wrongful act of breaching the contract. For that reason, is must be entitled to general damages. Given the circumstances of this case, I assess the general damages at Tshs. 10,000,000/=. As for interest at commercial rate claimed by the plaintiff at the rate of 25% per annum, I am afraid, the plaintiff is not entitled to this type of interest because interest is a matter of substantive law and must be specifically pleaded – see ***National Insurance Corporation (T) Ltd & another Vs China Engineering Construction Corporation***, civil appeal No. 119 of 2004 and ***Nestory Omar Diwani t/a Diwani Cargo and Motor Vehicles Delivery Services Vs Bollore Africa Logistics Tanzania Ltd***, Commercial Case No. 99 of 2014; unreported decisions to the Court of Appeal and this court (Khamis, J.) respectively. In the case at hand, the plaintiff pleaded but did not lead any evidence to show that he is entitled to interest prior to filing of the suit.

In sum total, I enter judgment in favour of the plaintiff against the defendants jointly and severally and proceed to declare and decree as follows:

1. The defendants, jointly and severally, are in breach of the contract of sale executed between them and the plaintiff;
2. The defendants, jointly and severally, should pay the plaintiff Tanzania Shillings One Hundred Twenty Million Eight Hundred Thirty Thousand (Tshs. 130,820,000/=) as the amount outstanding out of the purchase value of the fertilisers supplied;
3. The defendants, jointly and severally, should pay the plaintiff Tanzania Shillings Ten Million (Tshs. 10,000,000/=) as general damages;
4. The defendants, jointly and severally, should pay the plaintiff interest on the decretal sum at court rate of 7% per annum from the date of judgment to the date of full satisfaction;
5. The defendants, jointly and severally, should pay the plaintiff costs of the suit.

Order accordingly.

DATED at DAR ES SALAAM this 18th day of February, 2016.

J. C. M. MWAMBEGELE
JUDGE