

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 5 OF 2019**

**HAMED NASSIR MASOUD .....PLAINTIFF**

**VERSUS**

**SWALEH JUMA KISONGO.....DEFENDANT**

**JUDGMENT**

**B.K. PHILLIP,J**

This case arises from a sale agreement of two Motor Vehicles, to wit; Scania Truck No 263 BNT and Mitsubishi Pajero-station Wagon, No. T541 BLB ( henceforth "the Vehicles"). It is the plaintiff's case that in March 2014, the plaintiff sold the aforementioned two Vehicles to the defendant at a price of Tshs. 54,000,000/= ( say Fifty Four Million only). That plaintiff further alleges that it was agreed that the purchase price would be paid at the convenience of the defendant and that in September 2014, the defendant drew three cheques worth Tshs. 10,000,000/= each for payment of the purchase price, but, upon being presented to the Bank all were dishonored due to lack of fund in the drawer's bank account. The plaint reveals that in November 2015, the defendant made a commitment in writing to pay the outstanding purchase price which by date was Tshs 49,000,000/= as he had paid Tshs. 5,000,000/= only out of the purchase price aforesaid of Tshs. 54,000,000/=. Furthermore, the plaintiff alleges

that despite the aforesaid commitment made by the defendant, he paid Tshs. 5,600,000/= only, leaving an outstanding balance of Tshs. 43,400,000/= to date and that since the defendant took possession of vehicles he has been using them for his benefits. Thus denied the plaintiff the revenue that would have been earned by using the vehicles. The plaintiff prays for judgment and decree against the defendant as follows;

- i. For orders that the defendant is in breach of his duties and obligations to pay the sale price for two motor vehicles Scania Truck, No. T263 BNT and Mitsubishi Pajero, Station Wagon No. T541 BLB, both sold to him by the Plaintiff and which he took physical possession since then.
- ii. For orders compelling the defendant to pay all outstanding sale price due, in the sums of 43,400,000/= (say Tanzania Shillings Forty Three Million and Four Hundred Thousand only) he owes the Plaintiff.
- iii. For orders compelling the defendant to pay specific losses suffered by the Plaintiff for non-use of the vehicles in the extent of a net profit of Tshs. 9,000,000/= annually, (say Nine Million Only) since November, 2015 and whose total sum to date is Tshs. 27,000,000/= (say Twenty Seven Million only).
- iv. For orders that the defendant be ordered to pay general damages in the extent to be assessed by this Hon. Court.
- v. For payment of interests at the mercantile rate of 18% on items (ii) and (iii) herein, counting from 27<sup>th</sup> November, 2015 when the

Defendant last made a formal undertaking to pay until the date of judgment.

- vi. For payment of interest at the courts rate of 12% on items (ii), (iii) and (iv) above, counting from the date of delivery of judgment until date of full settlement.
- vii. For payment of the costs of the case.
- viii. Any other reliefs the court shall deem just and fit to grant.

The defendant filed his written statement of defence , however the same was struck out under the provisions of rule 31(1) (b) of the High Court (Commercial Division) Procedure Rules 2012 and the case proceeded ex-parte against the defendant. I ordered the plaintiff to prove his case by witness statement. The plaintiff filed two witness statements.

From the foregoing the issues for determination by the court in this case are;

- i) Whether there was a sale agreement between the plaintiff and defendant in respect of Motor Vehicles with registration Numbers T.263 BNT and T.541 BLB.
- ii) If the first issue is answered in the affirmative, Whether or not there was breach the sale agreement of the aforesaid Motor Vehicles between plaintiff and the defendant?
- iii) What relief(s) is the plaintiff entitled to.

At the ex -parte hearing of the case, the learned advocate Elisa Abel Msuya, appeared for the plaintiff. Let me go straight to the determination of issues, starting with the first issue, that is **Whether there was a sale agreement between the plaintiff and the defendant in respect of Motor Vehicles with registration Numbers T.263 BNT and T.541 BLB** , PW1, Hamed Nassir Masoud, (the plaintiff) testified that he is a businessman dealing with transportation business. That sometimes in March 2014, he was in need of capital for his business, thus he decided to sell to the defendant two Motor Vehicles to with Scania truck No. T 263 BNT and Mitsubish Pajero-Station Wagon No. T 541 BLB for Tshs. 54,000,000/= . PW1 further testified that due to close relationship and long friendship with the defendant he accepted to handover the two Motor Vehicles to the defendant, on agreement that the purchase price would be paid at the convenience of the defendant, but at any rate within reasonable time and without undue delay. Furthermore, PW1 testified as follows; That the defendant did not fulfill what was agreed. By November 2015 he had paid Tshs. 5,000,000/= only. On 27<sup>th</sup> November 2015, the defendant committed himself in writing to pay the outstanding amount of Tshs. 49,000,000/= by paying a monthly installment of Tshs. 5,000,000/=, starting from December 2015 without fail. PW 1 testified further that the defendant did not honour his promise, up to the date of filing this case, he had paid Tshs. 5,600,000/= leaving an outstanding balance of Tshs. 43,400,000/=. He tendered in court a document titled "*Makubaliano*" dated 1<sup>st</sup> August 2014 which was admitted as Exhibit P1.

In addition to the above PW1 testified that in September 2014 he left for Oman for a business trip and appointed his brother PW2 to collect the outstanding amount from the defendant. During his absence the defendant drew three cheques worth Tshs. 10,000,000/=, in favour of his brother, PW2, purporting to pay the outstanding amount but all were dishonoured by the bank for lack of fund in the defendant's Bank account. He reiterated the prayers made in the plaint.

Also, he tendered the following exhibits; Three pictures of a motor Vehicles–Scania, T 263 BHI and one picture of a male –Exhibit P2 collectively.

PW2 was Sulemain Mohamed Salum. He testifies as follows; That, he is a brother of Hamed Nassir Masoud (the plaintiff). He knows Swalehe Juma Kisongo as a shareholder of KRB Freight Company Limited. That in September 2014, the plaintiff informed him that he had sold two motor vehicles to the defendant to wit; Scania Truck No. T263 BNT and Mitsubishi Pajero–station Wagon No. T541 BLB. The defendant paid Tshs. 5,000,000/= only leaving an outstanding balance of Tshs. 54,000,000/=. It was PW2's testimony that in September 2015, when the plaintiff went to Oman for a business trip, he appointed him to be his agent for collecting the outstanding purchase price from the defendant and introduced him to the defendant. There was a time the defendant drew three cheques worth Tshs. 10,000,000/= each for payment of the outstanding amount, but all of the cheques when presented to the bank were dishonoured. Furthermore, PW2 testified that he witnessed the

undertaking between the plaintiff and the defendant, and signed as a witness for the plaintiff, in which the defendant committed himself to pay the plaintiff the outstanding amount of Tshs. 49,000,000/= in installment of Tshs. 5,000,000/=, starting from December 2015.

In addition to the above PW2 testified that in January 2019, he was informed by the plaintiff that the defendant so far had paid a sum of Tshs. 5,600,000/= only leaving an outstanding balance of Tshs. 43,400,000/= only. PW2 tendered in court three cheques of KRB Freight Company Limited, in favour of Suleiman Mohamed Salum, dated 12<sup>th</sup> September 2014, worth Tshs. 10,000,000/= each which were admitted as Exhibit P3 collectively.

The Exhibits tendered in court to prove that there was a contract between the plaintiff and the defendant for the sale of the aforesaid Vehicles are Exhibits P1, P2 and P3. However, when I was going through the contents of the said exhibits, I noted that the pleadings, the testimonies of PW1 and PW2 are contradictory to the exhibits tendered in court. For resistance, the pleadings and the witness statements of PW1 and PW2 show that the motor vehicles that were sold to the defendant were two, to wit, Scania T263 BNT and Mitsubish Pajero, station wagon No T 541 BLB, but exhibit P1, which is a document signed by the parties in acknowledgement of the debt and commitment to pay the same, shows that the vehicles which were sold to the defendant were Scania 124 and Pajero Diesel, 2001. In short the registration Numbers are not properly indicated. Moreover, the same exhibit, indicates that the sale agreement was between Suleiman

Mohamed Salum, ( PW2), Vendor and Swalehe Juma Kisongo ( defendant ) , buyer. Mr. Hamad Nassir and Abdul Muasi signed as witnesses for the vendor and buyer respectively. This is quite different from the averment made by PW2 in his witness statement, in which he said that the undertaking to pay the outstanding amount made by defendant was signed by the plaintiff as the vendor and defendant as the buyer, and that he signed the document as witness for the plaintiff. In his testimony PW1 testified that there was no specific dates for the payment of the purchase price and the same was supposed to be paid as soon as it was convenient to the defendant to pay the same , but the payments were supposed to be done within reasonable time without undue delay. Exhibit P1 indicates that Payments were agreed to be done in two installments, the first one was for a sum of Tshs. 30,000,000/= payable on 10<sup>th</sup> August 2014 and the second one was for a sum of Tshs. 24,000,000/= payable 10<sup>th</sup> September 2014. In short there are so many fatal contradictions in the plaintiff's evidence to extent that the existence of the sale agreement between the plaintiff and the defendant for the two motor vehicles becomes seriously questionable. To appreciate the contradictions that I have pointed out herein above let me reproduce the contents of Exhibit P1 hereunder;

From the foregoing and in view of the contradictions pointed out herein above, it is the finding of this court that no sufficient evidence has been adduced to prove the existence of the sale agreement between the plaintiff and the defendant for the Motor Vehicles with registration No.T263 BNT and T541 BLB. Therefore, the first issue is answered in the negative. Since

the first issue has not been answered in the affirmative, the remaining issues are redundant as they were dependent on the existence of the sale agreement, thus I do not see any plausible reasons for making determination on the same.

Having made the above findings, I hereby dismiss this case in its entirety. Since the case proceeded ex-parte, I give no order as to costs.

Dated at Dar es Salaam this 9<sup>th</sup> day of September 2019



**B.K.PHILLIP**

**JUDGE.**