

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 201 OF 2017**

**METMAR TRADING (PTY) LIMITED .....PLAINTIFF**

**VRS**

**K&K CARGO LOGISTICS (T) LIMITED.....1<sup>ST</sup> DEFENDANT**

**ALFRED H. KNIGHT TANZANIA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**B.K.PHILLIP,J**

This case arises from sale agreements of metals prescribed as “**Tantalite**” entered between the plaintiff and the 1<sup>st</sup> defendant, and a third party who is not a party in this case known as Nova Nutria. It is the plaintiff’s case that in 2008, the plaintiff entered into two contracts with the 1<sup>st</sup> defendant for purchasing tantalite. The particulars of the contracts are the stated hereunder.

1<sup>st</sup> Contract: TA7918 K & K; Net weight: 11679.5; Paid US\$. 198,434.14; Paid on 6<sup>th</sup> August, 2008; Cont: MSKU414300.5; Seal: ML-TZ0101198; AHK cert: TAN071-08; Stuffing cert AHK cert: TAN 118-08; Total costs per ledger: US\$.53, 901.72; **Total excl interest: US\$.252, 335.85.**

2<sup>nd</sup> Contract: TA7966 K & K; Net weight: 24783.0; Paid: US\$ 595,402.06; Paid on 9<sup>th</sup> September, 2008; Cont: MEAU77929653; Seal: ML-TZ0092030; AHK cert: TAN104-08; Stuffing cert AHK cert: TAN 118 – 08. Total costs per ledger: US\$.191, 618.25; **Total excl interest: US\$787,020.31.**

The particulars of the contracts between the plaintiff and Nova Nutria are as stated here under;

1<sup>st</sup> Contract: TA7974 Nova Nutria; Net Weight: 19505; Paid US\$.416.756.95: Paid on 9<sup>th</sup> September, 2008: Cont: TTNU3642337; Seal 282399; AHK cert: TAN128-08; Stuffing cert AHK cert: TAN 128-08; Total costs per ledger US\$. 313,964.91; **Total excl interest: USS\$730,721.86.**

2<sup>nd</sup> Contract: TA7974 Nova Nutria; Net weight: 20275.5; Paid: US\$447,194.81; Paid on 9<sup>th</sup> September, 2008; Cont: MSKU3121763; Seal:282397; AHK cert: TAN 128-08; Stuffing cert AHK cert: TAN 128-08; Total Costs per ledger; **Total excl interest: US\$.447,194.8.**

The plaint reveals that the plaintiff had engaged the 2<sup>nd</sup> defendant to carry out the analysis, to weigh and then stuff the materials indicated herein above in each contract. The plaintiff alleged that it paid all the agreed purchase price and in May 2008 the second defendant undertook to weigh ,sample, analyse and stuff the material described as "tantalite" which the plaintiff was interested in, and issued certificate No. AHK TAN REF: TAN 071-08 , with the following particulars ;

***Material: Tantalite; Place Mukuba, Dar es Salaam; Gross Weight :12.135.50 kgs; Net Weight 11,705.00 Kgs; Container No. ECMU155097-1; Seal No. AHK0018020; No of Drums 23. Drums all sealed and seal numbers referenced.***

The plaintiff further alleged that the 2<sup>nd</sup> defendant also issued certificate of analysis of the materials they had undertaken to analyze and stuff for the plaintiff which corresponded to the above analysis and sampling, and issued certificate of analysis with the same number having the following particulars;

*"Moisture (H2O): 0.20%, Tantalum Pentoxide (Ta2O5): 24.32%; Niobium Pentoxide (Nb 2O5): 12.36%; Tin Oxide (SnO2): 6.55%; Thorium Oxide: 0.031%; Uranium Oxide: 0.019%...."*

Furthermore, the plaint reveals that on the 15<sup>th</sup> of July, 2018, the 2<sup>nd</sup> Defendant affected the weighing and stuffing of the material referred to in the Certificate AHK TAN REF: TAN 071 -08 and after effecting the weighing/ stuff of the material issued a weighing/stuff certificated with the following particulars;

*"Client: Metmar Trading; material: Tantalite; Place: Mukuba, Dar es Salaam; Gross Weight: 12,110.00 Kgs; Container No: MSKU4143005; Seal No. AHK282790/00153; No of Drums 23 Drums all seal and seal number referenced"*

As regards the tantalite bought from Nova Nutria, between July and August, 2008, the 2<sup>nd</sup> Defendant issued a certificate with the following particulars;

*"Parked Gross Weight: 12,110.00 kgs; Tare: 430.50 Kgs; Net Material Weight: 11,679.50 Kgs; Ta 2O5 (%): 24.32%; Nb2O5 (%): 12.36%; Container No. MSKU 4143005; Seal Nos. 000153/282790/ML -TZ 0101198"*

The plaintiff further alleged that all materials described as "tantalite" bought from the 1<sup>st</sup> defendant and Nova Nutria (the other vendor) were moved from the 1<sup>st</sup> defendant's warehouse to Mukuba Depot in Dar Es Salaam Port and the defendant were aware that the said material (tantalite) were to be shipped to China where the plaintiff had secured a client for buying the same. Thus the said tantalite was shipped to China to the plaintiff's client in Juijiang, Jiangxi China. Upon arrival of the said materials (tantalite), the plaintiff's client demanded the materials ( tantalite) to be re-sampled and analyzed by Alfred H. Knight (China). Furthermore, the Plaintiff alleged that the process of analyzing and sampling the materials ( tantalite) was done as requested, in the presence

of the plaintiff's representative, in an independent warehouse. The results from the analysis done in China showed that the material contained no tantalite and that mostly contained Iron ore or illuminate ( a base metal).Thus, the result did not match with the description of the materials in the certificates of analysis issued by the second defendant. The plaintiff's client in China, rejected the delivered consignments of the materials as they did not contain "tantalite" as described in the certificate issued by the 2<sup>nd</sup> defendant. In addition to the above, the plaintiff alleged that it had appointed Alex Stewart (China) to act as its independent observer. It is the plaintiff's case that the 1<sup>st</sup> defendant failed to deliver the materials (tantalite) agreed in the sale agreement and that it colluded with 2<sup>nd</sup> defendant to make fraudulent representation on which the plaintiff relied upon to purchase the materials from the 1<sup>st</sup> defendant and Nova Nutria. Thus, in this case the plaintiff prays for judgment and decree against the defendants as follows;

- a) That the Honourable Court may be pleased to order the Defendants jointly and severally to refund the Plaintiff US Dollars One Million Thirty Nine Thousand Three Hundred Fifty Six and Sixteen Cents (US \$ 1,039,356.16) that the Plaintiff and had paid for the purchase of the tantalite from NOVA NUTRIA but which was never delivered to the Plaintiff.
- b) That the Honourable Court may be pleased to order the Defendants jointly and severally to refund the Plaintiff US Dollars One Million One Hundred Seventy Thousand Nine Hundred Sixteen and Sixty Seven Cents (US \$ 1,177,916.67) that the Plaintiff had paid for the purchase of the tantalite from NOVA NUTRIA but which was never delivered to the Plaintiff.
- c) That the Honourable Court may be pleased to order the Defendant to refund the Plaintiff all the costs incurred in shipping of the two (2) containers No. MS KU 312176/3 and TTNU 36233/7 to China.

- d) Interest thereon at the commercial rate on the principal amount from the date of the cause of action to the date of judgment and thereafter at the court rate to the date of final payment.
- e) That the Honourable Court be pleased to order the Defendants to pay the Plaintiff general damages of the amount to be fixed by the Court for breach of contract and the loss of earnings on the frustrated contract (between the Plaintiff and its Chinese client) and for loss of business reputation and credibility.
- f) That the costs of the suit be borne by the Defendants.
- g) Any other further remedies that the Honourable Court may be deem just fair and equitable.

In its defence the 1<sup>st</sup> defendant conceded that it entered into contract with the plaintiff for sale of materials described as "tantalite". The 1<sup>st</sup> defendant stated that it was not responsible in any way for the contract of sale of the tantalite that was entered between the plaintiff and Nova Nutria. Furthermore, the 1<sup>st</sup> defendant alleged that it did not breach its contract for sale of the materials ( tantalite) it had entered into with the plaintiff and that the materials (tantalite) sold to the plaintiff were sold ex warehouse, verified and sealed by the 2<sup>nd</sup> defendant who was employed by the plaintiff to do inspection, verification and sealing of the said materials (tantalite). The 1<sup>st</sup> defendant refuted all the allegations of collusion and misrepresentation leveled against it by the plaintiff. Also, the 1<sup>st</sup> defendant disputed the plaintiff's assertion that the materials bought from Nova Nutria were also taken from the first defendant's warehouse and delivered at Mukuba depot Dar es salaam by the 1<sup>st</sup> . Moreover, the 1<sup>st</sup> defendant stated that at Mukuba Depot, Dar es Salaam, the materials (tantalite) were not under its exclusive control as alleged by the plaintiff,

since Mukuba Depot is an Inland Container Depot "ICD" not the 1<sup>st</sup> defendant's warehouse.

In addition to the above, the 1<sup>st</sup> defendant disputed the plaintiff's allegation that the container seals and drum seals reached in China intact and that the materials therein upon being analyzed in China were found to have 0% of tantalite.

This case proceeded ex-parte against the 2<sup>nd</sup> defendant following its failure to appear in court despite being aware of the existence of the case filed against it. At the hearing of this case the plaintiff was represented by the learned Advocate Hamida Sheikh, while the learned advocate Dominic Daniel appeared for the 1<sup>st</sup> defendant.

The following issues were framed for determination by the court;

- i) Did the plaintiff buy the tantalite from the 1<sup>st</sup> defendant and Nova Nutria?
- ii) Whether the 1<sup>st</sup> defendant is liable for the acts, omissions or breach done by Nova Nutria, if any, under the contract of sale executed between the plaintiff and Nova Nutria.
- iii) Who employed the 2<sup>nd</sup> defendant.
- iv) Whether the tantalite (the subject matter in this case) was analyzed and stuffed at Mukuba Depot.
- v) Who had the charge over the tantalite purchased from the 1<sup>st</sup> defendant and Nova Nutria from the time the plaintiff effected payment of the tantalite to the time it was packed into the containers and eventually delivered to the ship?

- vi) Whether the 1<sup>st</sup> defendant had any further obligation or, responsibility after the goods were loaded on the ship.
- vii) Whether the container seals reached China while intact.
- viii) Whether the materials when re- analyzed in China was found to be different materials apart from tantalite.
- ix) Did the 2<sup>nd</sup> defendant make false, negligence and /or fraudulent representations to the plaintiff and did the plaintiff believe or rely on the 2<sup>nd</sup> defendant's representations on professional expertise, experience and certificate issued by the 2<sup>nd</sup> defendant.
- x) Did the 2<sup>nd</sup> defendant collude with the 1<sup>st</sup> defendant and or others to make fraudulent and /or negligent misrepresentation on which the plaintiff relied upon to purchase the goods from the 1<sup>st</sup> defendant and Nova Nutria, If so,
- xi) Did the plaintiff incur financial loss and damages as claimed in the plaint because of relying on the negligence and/or fraudulent representation of the 1<sup>st</sup> defendant.
- xii) To what reliefs are the parties entitled to?

Both the plaintiff and the defendant brought in court one witness each. The plaintiff's witness was Mr. Louis Francois Daffarn (PW1) and the defendant's witness was Mr. Robert Simba Ufoo Mushi (DW1).

Now, let me embark on the determination of the issues, starting with the first issue that is, **Did the plaintiff buy the tantalite from the 1<sup>st</sup> defendant and Nova Nutria?**, the testimonies of both PW 1 and DW1 show that the plaintiff did buy the tantalite from the 1<sup>st</sup> defendant and Nova Nutria (a third party who is not a party in this case). Both learned Advocates in their closing submissions invited this court to answer this issue in the affirmative. Therefore this issue is answered in the affirmative, since the evidence adduced proves that the plaintiff did buy the tantalite from the 1<sup>st</sup> defendant and Nova Nutria.

Coming to the second issue that is, **Whether the 1<sup>st</sup> defendant is liable for the acts, omissions or breach done by Nova Nutria , if any , under the contract of sale executed between the plaintiff and Nova Nutria**, PW1 testified that, the plaintiff entered into two contracts with Nova Nutria to purchase 19,000.00Kgs and 20,000.00Kgs of Tantalite Ore from Nova Nutria. Other two contracts were for the 1<sup>st</sup> defendant, the first one was for purchase of 11,700.00Kgs of Tantalite ore and the second one was for purchase of 24,783 Kgs of Tantalite Ore. It was PW1's testimony that all material (tantalite) in respect of the above mentioned contracts were stored in sealed containers at the facilities controlled by and in the sole custody of the 1<sup>st</sup> defendant during all the period relating to the transaction. PW1 further testified that the materials ("tantalite") bought from both the 1<sup>st</sup> defendant and Nova Nutria at all material time for the period from the time that the goods were offered for sale to the up to the time when the certificates (Exhibit P3 and P4) on the analysis and contents of the materials were issued by the 2<sup>nd</sup> defendant and finally delivered to the ship were under the 1<sup>st</sup> defendant's custody. Moreover, PW1 testified that the materials (tantalite) were weighed and re-stuffed into drums and packed into containers by the 2<sup>nd</sup> defendant at Mukuba Depot, in Dar es Salaam under the supervision of the 1<sup>st</sup> defendant. When answering questions, from his advocate during re – examination, PW1 told this court that the 1<sup>st</sup> defendant acted as a clearing

and forwarding agent for the materials (tantalite) sold to the plaintiff by Nova Nutria.

On the other hand the DW1's testimony was to the effect that , the 1<sup>st</sup> defendant was not party to the contract between Nova Nutria and the plaintiff, thus cannot liable for those contracts in anyway. DW1 further testified that the material ( tantalite) bought from Nova Nutria were analyzed, weighed and stuffed into three containers by the 2<sup>nd</sup> defendant under the instructions of the plaintiff. DW1 admitted that payments for containers No MAEU7792653 which had the material (tantalite) bought from Nova Nutria were affected through the 1<sup>st</sup> defendant under the instructions from Nova Nutria, but alleged, that did not make the 1<sup>st</sup> defendant a part to the contract between Nova Nutria and the plaintiff. It was DW1's testimony that the first defendant was a clearing and forwarding agent for the goods bought from Nova Nutria and that the 1<sup>st</sup> defendant had no control of Mukuba Depot since it is an Inland Container Depot ("ICD"), an extended port under the Tanzania Port Authority ("TPA") and customs controlled area. Furthermore, DW1 testified that, Mukuba Depot, Dar es Salaam is owned by Mofed as agent for both Tanzania Revenue Authority ("TRA") and TPA, thus, for the entire period when the materials (tantalite) were at Mukuba Depot were under the custody of the owner of the ICD and customs authority.

In her closing submissions the learned Advocate Sheikh invited this court to answer this issue in the affirmative. She submitted that the evidence adduced by PW1 shows clearly that the 1<sup>st</sup> defendant was not only the clearing and forwarding agent for the materials (tantalite) sold by Nova Nutria but also received the payments for those goods as admitted by DW1. Ms Sheikh also contended that according to PW1's testimony, all the goods bought from the 1<sup>st</sup> defendant and Nova Nutria were stored and were under the control of the 1<sup>st</sup> defendant until when they were delivered to Mukuba Depot Dar es Salaam. On the other hand, in his closing submission Mr. Dominic invited this court to answer this issue in the

negative, on the ground that the plaintiff's allegations that all materials (tantalite) were under the control of the 1<sup>st</sup> defendant is not true. He contended that, the evidence tendered in court ( Exhibit P8, P9 paragraphs 5 and 6 of PW1's witness statement ) show that some of the materials ( tantalite) bought by the plaintiff from Nova Nutria were stored, weighed analyzed and stuffed at JB Depot. Moreover, Mr. Dominic contended that the plaintiff failed to indicate the containers for the materials stuffed at JB Depot and the ones stuffed at Mukuba Depot. Furthermore, Mr. Dominic submitted that Mukuba Depot is not owned by the 1<sup>st</sup> defendant. It is an Inland Container depot ("ICD") owned by Mofed, an agent for TPA and TRA, and it is a customs controlled area. Mr. Dominic maintained that is not true that the materials (tantalite) when were at Mukuba Depot were under the exclusive and sole control of the 1<sup>st</sup> defendant.

Since this issue refers direct to matters pertaining to "contracts", I think it is worth stating here that , the general rule on matters pertaining to the responsibilities of the parties in any contract is that, it is only a party who is privy to the contract can be bound by the same. A party who is not privy to the contract can be held liable for the same under exceptional circumstances in which it has to be established with concrete evidence that such party had a responsibility in the contract at issue. In the instant case, it is not in dispute that the 1<sup>st</sup> defendant was not a party to the contract between the plaintiff and Nova Nutria. However the plaintiff's arguments is that the 1<sup>st</sup> defendant prayed a vital role in handling the materials (tantalite) sold to the plaintiff which are the subject of this case on the ground that the materials (tantalite) were weighed, analyzed and stuffed under the exclusive and sole control of the 1<sup>st</sup> defendant.

Having perused the court's record and the closing submissions made by the learned advocates as well as analyzed the evidence adduced by witnesses, I have noted that the evidence tendered in court (Exhibit P3 contract for sale of tantalite between the plaintiff and Nova Nutria) shows

clearly that the 1<sup>st</sup> defendant is not a party to that contract and there is nothing in the contract indicating that the 1<sup>st</sup> defendant is involved in the contract in anyway. According to Exhibit P8 (Weighing/sampling /stuffing certificate dated 15<sup>th</sup> July 2008) and Exhibit P9 (Weighing /sampling /stuffing certificate dated 22<sup>nd</sup> July 2008) some of the materials (tantalite) sold to the plaintiff by Nova Nutria were weighed, analyzed and stuffed at JB Depot, Dar Es Salaam, thus I am inclined to agree with Mr. Dominic that the plaintiff's assertion that all materials (tantalite) sold to the plaintiff were weighed, analyzed and stuffed at Mukuba Depot under the exclusive control of the 1<sup>st</sup> defendant is not correct. Under the circumstances, plaintiff's endeavour to connect the 1<sup>st</sup> defendant to the contract between the plaintiff and Nova Nutria on the ground that it had exclusive control and supervisions during the weighing, analysis and stuffing of the all the material (tantalite) sold by Nova Nutria has failed. The fact that Nova Nutria has not being joined in this case leaves a lot to be desired. The plaintiff has not offered any explanations on why Nova Nutria has not being joined in this case. I have also noted that the 1<sup>st</sup> defendant acted as clearing and forwarding agent for all materials (tantalite) bought by the plaintiff and that payment for some of the materials (tantalite) sold to the plaintiff by Nova Nutria were effected through the 1<sup>st</sup> Defendant. In my considered opinion the aforesaid facts cannot make the 1<sup>st</sup> defendant liable for any omissions/mistakes committed by Nova Nutria in the contract because the execution of the terms of the contract remains to be the responsibility of the parties to the contract. For the reasons stated herein above, this issue is answered in the negative.

As regards the third issue that is, **Who employed the 2<sup>nd</sup> defendant**, Ms Sheikh in her closing submission contended that according to Exhibit P1,P2 and P3 (the sale agreements) the 2<sup>nd</sup> defendant was employed by the 1<sup>st</sup> defendant and that DW1 in his witness statement admitted that the 2<sup>nd</sup> defendant was employed by the 1<sup>st</sup> defendant. On the other hand, Mr. Dominic submitted that the pleadings as well as PW1's witness statement show explicitly that the 2<sup>nd</sup> defendant was employed by the plaintiff. I have

read the witness statement of both PW1 and DW1. With due respect to the learned Advocate Sheikh, in his witness statement DW1 testified that the 2<sup>nd</sup> defendant was employed by the plaintiff. This assertion is supported by what is pleaded in paragraph 5 (i) and (ii) in the plaint. For easy of understanding, the same is reproduced hereunder;

#### Particulars of Facts

*"5(i) that in 2008, the Plaintiff a trader in metals was offered some goods described as **"Tantalite"** by the 1<sup>st</sup> Defendant and another Vendor called **NOVA NUTRIA**. Before the Plaintiff **purchased** the material described as Tantalite which is the subject matter of this suit, the Plaintiff and employed the services of the 2<sup>nd</sup> Defendant to carry out the analysis, to weigh and then to stuff the material offered for sale by each of the Vendors".*

*(ii) That the Plaintiff had employed the services of the 2<sup>nd</sup> Defendant, because they are an internationally established firm of assessors/analyses and surveyors and so the Plaintiff had relied on their reputation as first class independent surveyors/assessors, to assist it, to protect the integrity of the business and to ensure, to verify and to confirm that the right metal, that is tantalite, of the right quality and quantity was indeed sold, packed and delivered to the Plaintiff and then to its clients in China....".*

In addition to the above PW1 in paragraph 3 of his witness statement testified as follows;

*"3. That in 2008, the Metmar Trading (Pty) Limited (the Plaintiff) a trader in metals, was offered some goods described as "Tantalite" by the K & K Cargo Logistic (T) Limited (1<sup>st</sup> Defendant) and another Vendor called NOVA NUTRIA. Before the Plaintiff purchased the material described as Tantalite which is the subject matter of this*

*suit, the Plaintiff has relied on the services of the 2<sup>nd</sup> Defendant (Alfred H. Knight Tanzania Limited) to carry out the analysis, to weigh and then to stuff the material offered for sale by the 1<sup>st</sup> Defendant and NOVA NUTRIA”.*

On the strength of the evidence adduced as pointed out herein above I am of a settled legal opinion that the 2<sup>nd</sup> defendant was employed by the plaintiff.

Coming to the 4<sup>th</sup> issue , that is, **Whether the tantalite (the subject matter in this case) was analyzed and stuffed at Mukuba Depot**, PW1 testified to the effect that all material (tantalite) were weighed, analyzed and stuffed in drums and sealed at Mukuba Depot. DW1 in his witness statement testified that four containers with the tantalite in respect of weighing, sampling and stuffing certificates dated 23/7/2008 and 25/8/2008 were weighed, sampled/ stuffed at Mukuba Depot. In his closing submission Mr. Dominic submitted that not all (materials) tantalite were weighed, analyzed and stuffed at Mukuba Depot since the evidences tendered in court show that some of the tantalite bought by the plaintiff were weighed at JB Depot, while Ms. Sheikh invited this court to answer this issue in the affirmative, since according to her, the evidence adduced is quite clear that all materials (tantalite) were weighed, analyzed and stuffed at Mukuba Depot as testified by PW1. She also contended that even DW1 in his witness statement admitted that the material (tantalite) were weighed and stuffed at Mukuba Depot.

As I have pointed out earlier in issued No. 2, that some of the weighing /sampling/stuffing certificates indicate that the weighing, analysis and stuffing of some of the materials (tantalite) was done at JB Depot, in particular the ones bought from Nova Nutria. For example, weighing/sampling/stuffing certificate with reference No.TAN-128-08 dated 22/7/2008 and certificate No. with reference No. TAN 104-08 dated 15/7/2008 (Exhibits P8 and P9) for the materials (tantalite) sold by Nova

Nutria indicate that weighing/analysis and stuffing the materials (tantalite) was done at JB Depot. I have also noted that the admission made by DW1 in his witness statement that the materials (tantalite) was weighed, analyzed and stuffed and Mukuba Depot is specifically in respect of the materials (tantalite) indicated in certificates dated 23/7/2008 and 25/8/2008 not all materials (tantalite) that are subject of this case. The pleadings show that the materials (tantalite) subject of this case includes the tantalite bought from Nova Nutria, in respect of weighing and stuffing certificates of with reference No.128-08 dated 22/7/2008 (Exhibit P9) which shows that weighing and stuffing of those materials (tantalite) was done at JB Depot. From the foregoing I am inclined to agree with Mr. Dominic that not all materials (tantalite) subject of this case were analyzed and stuffed at Mukuba Depot, Dar es Salaam.

As regards the 5<sup>th</sup> issue that is, **Who had the charge over the tantalite purchased from the 1<sup>st</sup> defendant and Nova Nutria from the time the plaintiff effected payment of the tantalite to the time it was packed into the containers and eventually delivered to the ship?**, PW1 testimony is to the effect that at all material times for the period from the time that the materials (tantalite) ( including those purchased from Nova Nutria)were offered for sale and sold to the plaintiff up to the time the certificates ( Exhibit P8,P9 and P10 ) were issued and materials (tantalite) delivered to the ship, the materials (tantalite) were under the 1<sup>st</sup> defendant's custody and exclusive control. Furthermore PW 1 testified that at Mukuba Depot, the said materials (tantalite), including the ones bought form Nova Nutria were weighed, re-stuffed into drums and packed into containers by the 2<sup>nd</sup> defendant under the supervision of the 1<sup>st</sup> defendant. When responding to questions during cross examination, PW1 admitted that he had stated in his witness statement that some of the materials (tantalite) were analyzed at JB Depot.

DW1's testimony was to the effect that the four containers with weighing and stuffing certificates dated 23/7/2008 and 25/8/2008 were analyzed, weighed, sampled and stuffed into containers at Mukuba Depot. Moreover, DW1 testified that Mukuba Depot is an Inland Container Depot (ICD) owned by Mofed. For the entire period when the Materials ( tantalite) were at Mukuba Depot, until when they were eventually delivered to the ship, they were under the custody of the owner of the ICD and customs authorities. When answering questions during cross examination DW1 told this court that the 1<sup>st</sup> defendant does not have a warehouse, all materials (tantalite) were received at Mukuba Depot, Dar es Salaam and does not know where the materials (tantalite) were stored before being brought to Mukuba Depot. He said further that they received Nova Nutria materials (tantalite) from JB traders.

The evidence adduced shows that the materials (tantalite) bought from Nova Nutria were received by the 1<sup>st</sup> defendant at Mukuba Depot and the 1<sup>st</sup> defendant together with the 2<sup>nd</sup> defendant had charge over the materials (tantalite) since the 2<sup>nd</sup> defendant did the stuffing of the materials (tantalite) while the 1<sup>st</sup> defendant was forwarding and clearing agent for the same. I am in agreement with Mr. Dominic that Mukuba depot is an ICD owned by Mofed as testified by DW1, however, as far as the control and charge over the materials (tantalite) at Mukuba Depot is concerned, I am inclined to agree with Ms. Sheikh that the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant were the ones responsible and had the charge and control over those materials (tantalite) at Mukuba Depot. It is not in dispute that the materials (tantalite) were kept at Mukuba Depot where the packing of the materials (tantalite) in the drums was done and thereafter the materials (tantalite) were shipped to China.

The next issue is **Whether the 1<sup>st</sup> defendant had any further obligation or responsibility after the goods were loaded on the ship.** In his final submission Ms. Sheikh contended that this issue is irrelevant since according to her opinion the evidence adduced shows that

the containers reached China intact. On the other hand Mr. Dominic submitted that, the contract signed by the parties was on free on board (F.O.B) terms, thus the 1<sup>st</sup> defendant's obligations under the contract were extinguished after the goods were loaded on the ship and what transpired in China was of no concern to the 1<sup>st</sup> defendant. In fact the evidences adduced do not suggest that the 1<sup>st</sup> defendant had any obligations or responsibility after the goods were loaded on the ship. I am inclined to agree with Mr. Dominic that the terms of the contract itself being F.O.B it means that the 1<sup>st</sup> defendant (seller) had no any further obligation after loading the goods on the ship. The buyer took the ownership of the goods when the seller shipped them.

As regards the 7<sup>th</sup> issue that is, **whether the containers reached in China intact?**, PW 1 testified that the containers reached in china intact while DW1 testified that there is no any evidence tendered in court to prove that the containers reached in China intact and that there is no evidence tendered to prove that goods could not be tempered with while in China. In her closing submission Ms. Sheikh submitted that the containers reached China intact. She referred this court to the testimony of PW1 in which he testified that all the container seals, drum seals /numbers /colours reached China intact and matched the particulars of the certificates issued by the 2<sup>nd</sup> defendant. On his part, Mr. Dominic submitted that no evidence was tendered to prove that the containers reached China intact and there are possibilities that the containers could have been tempered with on the way to China or while in China. Moreover, Mr. Dominic contended that the PacMarine Preliminary Survey Report (Exhibit P. 15) which is relied upon by the plaintiff to show that the containers reached in China intact its contents does not prove the alleged position on the following grounds, first PacMarine officer were working on information just provided to them which are equal to a hearsay, secondly, when, PacMarine officers arrived at the scene on 14/11/2008, they found devanning and sampling of container No MSKU 4143005 had already being carried out on 24/10/2008 and devanning and sampling of containers Nos.

TTNU362337 and MSKU3121763 had started from 12/11/2008. Thirdly, on 14 /11/2008 PacMarine officers found the material (tantalite) in container No. MSKU 4143005 had been completely off loaded and packed in another container (SNBU2176472). Moreover Mr. Dominic contended that PacMarine officers did not witness the opening of the containers.

I have read the Preliminary Survey report ( Exhibit P15) that was prepared by PacMarine Services, an international Marine Consultants & Surveyors hired by the plaintiff to investigate on the Containers of the ( materials) tantalite subject of this case that were delivered in China. The report is the only documentary evidence that is relevant in the determination on this issue that is, whether the containers reached in China intact. The report indicates that the assignment to do the survey was made by email dated 13<sup>th</sup> November 2008 and when PacMarine officers started doing their assignment they found some of the containers had been opened. The report indicates that the materials (tantalite) which were in container number MSKU 4143005 were loaded to another container, the sampling operation for container No. TTNU3642337 was in progress and the sampling operation for container No. MAEU7792653 had been finished. With this kind of information, I am inclined to agree with Mr. Dominic that there is no satisfactory evidence to prove that the containers reached in China intact. I am inclined to agree with Mr. Dominic that even PacMarine officers who were engaged by the plaintiff did not witness the opening the containers since the report shows that they found some of the materials (tantalite) loaded in other containers. In addition to the above, it has to be noted that PW1's testimony that the containers reached China intact actually is not direct evidence because he was not in China when the containers arrived in China. PW1 relies on the information on the Preliminary survey report (Exhibit P15).

The next issue is **Whether the materials when re- analyzed in China was found to be different materials apart from tantalite,** PW1 testified that the materials were sent to china and upon being re-analyzed

were found to be different material as they had 0% content of tantalite, thus were different materials apart from tantalite. The letter from the 2<sup>nd</sup> defendant dated 24<sup>th</sup> November 2008 (Exhibit P17) supports PW1's testimony stated herein above. DW1 in his testimony denied the plaintiff's allegations that the materials when re-analyzed in China had 0% of tantalite. In his closing submission, Mr. Dominic contended that the plaintiff failed to tender any report from Alfred H. Knight (China), Alfred H. Knight International (UK) and Alex Stewart (China) despite the allegation made that it hired those institutions to re-analyze the materials (tantalite) in China, instead the plaintiff tendered the analysis report issued by Alex Stewart (SA) on 12/11/2008 (Exhibit P16) whose results are the same to the certificate issued by the 2<sup>nd</sup> defendant in Exhibit P8, P9 and P14.

In her closing submission, Ms. Sheikh submitted that the testimonies of PW1 show that the materials when re-analyzed in China were found to be other materials apart from tantalite. She contended that PW1's testimony is supported by Essayers Certificate of analysis by Alfred H. Knight (Britain), weight certificates, Alfred H. Knight Essayers Certificate (China) and the letter dated 24/11/2018 from A.H. Knight (Exhibit P17) as well as email correspondences between the plaintiff's representatives and defendant's officers (Exhibit P18 and P19).

With due respect to Ms Sheikh, there is no Essayers Certificate of analysis by Alex Stewart (China), Certificate of Analysis by Alfred H. Knight (Britain) and Alfred H. Knight Essayers Certificate (China) which were tendered in court as Exhibits. The analysis report tendered in court, as correctly submitted by Mr. Dominic was one issued by Alex Stewart (SA) (Exhibit P16) and the weighing/sampling /stuffing certificates which were issued before the materials (tantalite) were shipped to China. However, looking at Exhibit P18 and P19, and the preliminary Survey Report by Pac Marine Services (Exhibit P15) I am inclined to agree with Ms Sheikh that when the

materials were re-analyzed in China were found to be other material apart from tantalite. Therefore this issue is answered in the affirmative.

Now, having answered the above issue in the affirmative the next issue is **Did the 2<sup>nd</sup> defendant make false, negligence and /or fraudulent representations to the plaintiff and did the plaintiff believe or rely on the 2<sup>nd</sup> defendant's representations on professional expertise , experience and certificate issued by the 2<sup>nd</sup> defendant,**

In his closing submission Ms Sheikh submitted that this issue has to be answered in the affirmative. She further submitted that weighing and stuffing certificates issued by the 2<sup>nd</sup> defendant, (Exhibits P7, P8, and P9) proves that the 2<sup>nd</sup> defendant had deliberately made false, negligent or fraudulent representation to the plaintiff. Ms Sheikh contended that the very fact that the materials that were re-analyzed in China were found to be different from the prescription indicated in the certificates issued by the 2<sup>nd</sup> defendant demonstrates that the 2<sup>nd</sup> defendant made false and negligent representation to the plaintiff. Ms. Sheikh contended that by the results which were revealed after the re –analyzing the materials (tantalite) in China, it is obvious that the material that were sampled and stuffed at Mukuba had not tantalite, but yet the 2<sup>nd</sup> defendant indicated that the material had tantalite, contrary to the truth. She also referred this court to the witness statement of PW1 to support her position on this issue. Furthermore, Ms Sheikh submitted that the plaintiff relied on the 2<sup>nd</sup> defendant's representation and expertise that is why it paid for the materials (tantalite) and took all the trouble of shipping the same to China in belief that they are proper ones, fit to be sold to plaintiff's client in China.

On the other hand Mr. Dominic did not submitted anything on this issue since to him this issue is redundant due to the fact that he was of the view that the plaintiff failed to prove that when the materials (tantalite) were re- analyzed in China were found to be different materials apart from tantalite.

As submitted by Ms Sheikh, PW1's testimony is to the effect that the 2<sup>nd</sup> defendant made a false, negligent and fraudulent representation to the plaintiff which the plaintiff believed and relied on the 2<sup>nd</sup> defendant's expertise and shipped the materials to China. I have already made a finding that the evidence adduced has proved that when the materials were analyzed in china were found to be different materials from tantalite. However, this issue has a direct connection with issue number seven, *that is whether the containers seals reached China while intact?* for obvious reason that in order to hold the 2<sup>nd</sup> defendant liable for false, negligent and fraudulent misrepresentation it has to be established that the material that were sampled, analyzed and stuffed at Mukuba Depot reached China intact as they were stuffed and remained so until they reached the place where they were re-analyzed. In my considered opinion, as I have said earlier when I was making a determination of issue number seven, the evidence adduced by the plaintiff is not sufficient to prove that the containers seals reached in China intact. Therefore, under the circumstances it is not correct to hold the 2<sup>nd</sup> defendant liable for making false, negligent and fraudulent misrepresentation, though it is true that the plaintiff believed and relied on the 2<sup>nd</sup> defendant's certificates and professional expertise to the extent that it shipped the materials to China. My opinions on this issue are fortified by the contents of Preliminary Survey Report prepared by PacMarine Services (Exhibit P15 collectively) which at the last page it states as follows;

*"In our opinion it mostly like that the cargo was substituted during the period between after taking samples to being packed into the iron drums. For further making conclusions of the cargoes, in our opinion, the following information should be obtained from shipper or their surveyor at loading port;*

*i. Where and when the cargo was taken sample.*

- ii. *Where and when the cargo was packed into iron drums. How long time did it take to pack the cargo into iron drums for each container.*
- iii. *Any proactive measure had been taken before and during the cargo packed into drums and containers, especially, during period of between after taking sample to packing into iron drums and stuffed into containers.*
- iv. *Provide a set of color photos at a loading port, including cargo condition, sampling operation, packing into drums, and stowage condition before closing containers, seals of container.*
- v. *A.H. Knight Survey Report/Certificate in loading port.*

*Any development of the matter will be updated in due course....”*

From what is quoted herein above, in my understanding this report (Exhibit P15) which the plaintiff relies on to prove that the containers reached in china intact is not a final report but a preliminary report as it is titled. The makers of the report stated clearly that they needed more information so as to conclude the report. At the end of day there are number of questions that need to be answered before one concludes that the materials that were analyzed and stuffed by the 2<sup>nd</sup> defendant are the ones that were shipped to China and thereafter re- analyzed in China. The maker of the report (Exhibit P15) had formed an opinion that it is most likely that the cargo was substituted during the period between after taking sample to being packed into iron drum. So, it means the maker of the report did not believe that the materials that was re- analyzed in China are the ones which were analyzed by the 2<sup>nd</sup> defendant in Dar es Salaam. I wish to point out here that the questions which arises from the report ( Exhibit

P15) are very crucial in the circumstances of this case, since some of the materials (tantaiite) were analyzed and stuffed at JB Depot. The fact that some of the materials were weighed, Sampled and stuffed at JB Depot is reflected in the report (Exhibit P15) at page three of the report, where it contains the following information;

*No. 2 Lot consignment, comprising of 46 iron drums (24,783 kgs in nett) of "Tantalite" Ore' was stuffed into 1 X 20 dry container (Container No. MAEU7792653) in FCL status. The Consignment was shipped under B/L No. 526369260 issued by MAERSK LINE. From Weighing/Sampling/Stuffing Certificate issued by Alfred H Knight, the inspection was carried out on 11.12 July 2008 at JB Depot, Dar es Salaam...."*

From the foregoing, the answer to this issue is that there is no proof that the 2<sup>nd</sup> defendant made a false, negligent and fraudulent representation to the plaintiff, but it is true that the plaintiff relied on the representations made by the 2<sup>nd</sup> defendant.

The 10<sup>th</sup> issue that is **Did the 2<sup>nd</sup> defendant collude with the 1<sup>st</sup> defendant and or others to make fraudulent and/or negligent misrepresentation on which the plaintiff relied upon to purchase the goods from the 1<sup>st</sup> defendant and Nova Nutria**, becomes redundant since I have already made a finding that there is no sufficient evidence to prove the alleged fraudulent and/or negligent misrepresentation.

As regards the 11<sup>th</sup> issue that is, did **the plaintiff incur financial loss and damages as claimed in the plaint because of relying on the negligence and/or fraudulent representation of the 1<sup>st</sup> defendant**, I entirely agree with Ms Sheikh that the plaintiff incurred losses since the evidence adduced (Exhibits P. 5 and P. 6) is sufficient to prove that the plaintiff incurred losses. However, as I have stated herein above, there is no sufficient evidence to prove that there was negligent and/or fraudulent

representation that was made by the 1<sup>st</sup> defendant and/or the 2<sup>nd</sup> defendant. Since I have already explained the basis of the findings of this court on whether there was a false and negligent and/or fraudulent representation on part of the 2<sup>nd</sup> defendant when I was dealing with issue number nine, I do not need to repeat the same here. Hence, the financial loss incurred by the plaintiff cannot be held to have been caused by false, negligent and fraudulent representation of the 1<sup>st</sup> defendant this is due to the facts and reasons I have explained in the determination of issue number nine.

From the foregoing it is the finding of this court that the plaintiff has failed to prove its claims against the defendants. This case is hereby dismissed with costs.

Dated at Dar es Salaam this 18<sup>th</sup> day of February, 2020.



A handwritten signature in black ink, appearing to read "B.K. Phillip", with a horizontal line extending to the right.

**B.K. PHILLIP**

**JUDGE**