**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO.23 OF 2019**

**FUCHS OIL MIDDLE EAST LIMITED.....PLAINTIFF**

**VERSUS**

**PETROLUBE TANZANIA LIMITED.....1st DEFENDANT**

**TOTAL TANZANIA LIMITED.....2nd DEFENDANT**

**JUDGMENT.**

**Date Last Order: 22/02/2022.**

**Date of Judgment: 6/05/2022.**

## Z.A MARUMA J.

The controversy between the plaintiff and the defendants herein originated from contractual relationship which resulted from the two agreements of Production License Agreement (PLA) signed and dated 17th February 2006 (referred herein exhibit P1) and Technical Cooperation Agreement (TCA) (referred herein exhibit P2) dated 1st December 2014. The contractual relationship between them resulted into the plaintiff's claims against the defendants jointly and severally at a tune of USD 1,964,483.00. That the amount of (USD 1,154,349.00) being a royalty fees from mid-2016 to September 2018 pursuant to production licensing

agreement "PLA" and USD 792,134.00 being aggrieved cost of purchase of the plaintiff's base oil, additives, concentrates and raw materials for the blending of concentrates pursuant to a technical cooperation agreement "TCA" between the plaintiff and 1st defendant. The claim against the 2nd defendant (the co-defendant) was in respect to the assets acquired from the 1st defendant which might be entitled to attachment and sell as a Lien by the plaintiff.

The brief background of the dispute is to the effect that on 17th February, 2007 the plaintiff herein FUCHS OIL MIDDLE EAST LIMITED entered into the first agreement of Production License Agreement (PLA) allowed the 1st defendant to use its trademark and knowhow for the purposes of manufacturing, distributing, and selling products described in "PLA" contract (Exhibit P-1). This was followed by the 2nd agreement of Technical Cooperation Agreement (TCA) (Exhibit P2) signed on 1st December 2014 for the plaintiff to provide technical assistance to the 1st defendant to enable manufacture of products at 1st defendant production facility. The relationship between them was never disturbed remained in force until 2018 when the dispute arose after the sale of the production machinery and equipment to the 2nd Defendant in 2018. As a result of controversy between them the plaintiff sued the 1st and 2nd defendants

before this court for the breach of the agreements (PLA and TCA) respectively.

Before this Court the plaintiff is praying for:

1. the payment of the United States dollars one million one hundred and fifty-four thousand three hundred and forty-nine (USD 1,154,349.00) being the outstanding royalty fees from march ,2016 until September ,2018.
2. Payment of the United States dollars seven hundred and ninety-two thousand, one hundred and thirty-four (USD 792,134.00) being outstanding trading invoices accrued from 26.12.2017 to 22.04.2018.
3. An order for the defendant to pay any accrued outstanding fees from date of filling this suit to date of judgement.
4. An order for the defendant to pay an interest on the outstanding amount at a commercial rate of 2.0% above LIBOR per annum as the PLA from the date of filling this suit to the date of judgment.
5. An order for the defendant to pay an interest at court rate from the date of the judgement to the date of full payment on the amount claimed.
6. Costs of the suit.

The hearing of the case took place in the presence of the Plaintiff who was represented by Mr. Jovinson Kagirwa, learned advocate and the defendants were represented by Dr. Alex Thomas Nguluma, learned advocate.

The suit was supported by the pleadings as well as the factual evidence of facts by the two witnesses namely DIDIER VIDAL (hereinafter to be referred to as "PW1") and ALF UNSTERSTELLER (hereinafter to be referred to as "PW2"). Contesting the claim was demonstrated by the witness statement refuting all the facts and evidenced by two witnesses one FEROZ KASSAM (hereinafter to be referred to AS "DW1") and one GETRUDE MPANGILE (hereinafter to be referred as "DW2").

The plaintiff's case was to the effect that, PW1 adopting contents of his witness statement stated that he entered into contract of production license agreement PLA and plaintiff granted the first defendant permission to use trademark and know-how for the purpose of manufacturing, distributing, and selling products described in "PLA" contract with the defendant herein and he referred this court as "Exhibit P-1" which is license agreement referred to clause 4.1 and 4.6 of that contract i.e. PLA that, the minimum production volumes in metric tons have been agreed to be paid as royalty fees to be charged by the plaintiff on quarterly basis he testified that on 2013 total royalty outstanding

towards the plaintiff was USD 805,247.00. He further submitted that to move forward plaintiff accepted a one of settlement of USD 400,000 an amount which was paid by the managing director of the first defendant Feroz Kassam, thus outstanding balance for up early 2014 as the balance USD 405,247.00 was written off.

PW1 also testified that on December 1st December, 2014 plaintiff and the defendant entered into a Technical Cooperation Agreement (TCA) and the plaintiff would provide technical assistance to the 1st defendant to enable manufacture of products at 1st defendant production facility that TCA (Exhibit P2). That according to Article 4 of the TCA to include South Sudan, Uganda Kenya and Rwanda as extra territories as per TCA, the plaintiff was supposed to charge USD 25,000 to USD 50,000 on quarterly basis. That the 1st defendant was charged USD 500,000 for the years 2015, 2016 and 2017 (USD 100,000 + USD 25,000) per quarter and PW testified that charges for the year 2015 was paid in full by the 1st defendant.

He further testified that on 2016 only USD 220k has been received by the plaintiff following that event the 1st defendant through its MD Feroz Kasam told the plaintiff that it was having – some sort of contacts with Fuchs competitors Total (T) limited. PW testified that for the year 2017 nothing was paid to plaintiff also in the year 2018 plaintiff charged for

only 3 quarterly at USD 100k + USD 25K per quarter PWI provide the summary for the claim of the year 2016,2017 and 2018 the total ROYALTY outstanding to be USD 1,154,349.00.

Furthermore, on the issue additive account from 2010 to 2018 PW1 adduced evidence that the 1st defendant was supposed to follow the plaintiff's formulations which the plaintiff had issued that is lubricants mainly consist of the base oils and additives. That for the base oils which represents the bigger part of the product in volume. The 1st defendant had to purchase them directly from the different refineries which were approved by Fuchs. PWI continued to states that for the additives which the 1st defendant had to purchase from the plaintiff the process was quite straight forward and applicable for each purchase in the following mode:

1. That the 1st defendant had to issue the purchase order to the plaintiff in which in turn the plaintiff issued a proforma invoice to the 1st defendant.
2. That after the 1st defendant signed approval of the proforma invoice, plaintiff arranged for the shipment of the additives directly from the manufacturer like Lubrizol Afton and any other to Dar es salaam port.

3. Documents to enable the clearance from the Tanzania port were directly addressed to 1st defendant (Petrol lube Tanzania limited).
4. That the 1st defendant after clearing the consignment would arrange payment of the invoice to the plaintiff.

PW1 further adduced the evidence that, from the above mode of purchasing additives from the year 2010 to 2017 all plaintiff invoices have been settled by the 1st defendant that from December 2017 and the 1st defendant stopped making payments of the additives they received through the plaintiff as it was shown in the plaint there are signed proforma invoices and proof of receipt from 1st defendant in summary shown the additives outstanding of USD 792,134.00 and the plaintiff referred this Court to Exhibit P-3.

Apart from that on the issue of SET-OFF CLAIM raised by the 1st defendant in WSD , PW1 testified to this Court that the debit note dated 30th December 2017 which is part of exhibit of petrol lube 1 was issued by the plaintiff as an adjustment of the optional fees of USD 25,000.00 to USD 50,000.00 per quarter as the plaintiff had been charging only USD 25,000.00 for 1st defendant transaction of supplying the referred products to Kenya ,Uganda ,Rwanda and South Sudan taking into consideration the magnitude of supply PW1 referred this Court to "exhibit P-4".

Coming on the 2nd issue of the set off claim PW1 testified that the allegations of loss of market raised in the WSD and set-off claim was the mere fabrications as the 1st defendant failed to clear additives sent to them by the plaintiff in June 2008 (Lubrizol Titan Truck Plus) as result the plaintiff re-direct the Lubrizol shipment to Egypt. following that event, the 1st defendant used the additives from the 2nd defendant to manufacture titan truck plus, in the process of which 1st defendant changed and violated the plaintiffs formular and breached Article 3.5 of the TCA Agreement.

On the 3rd issue of set-off claim PW1 testified that the 1st defendant stopped the production since June 2018 notwithstanding with agreement in TCA they declined or refused to pay the plaintiffs in conformity with the TCA, followed by sale to the 2nd defendant of the 1st defendant plant facility which were tied to the TCA agreement and as the result the contractual and legal foundations binding the parties between the plaintiff and the defendant collapsed and to support his argument the plaintiff referred this court to document admitted by this court as (Exhibit "P5").

In regard to the 4th issue of the sett-off claim PW1 testified that the amounts of USD 240,185.00 allegedly paid as cash in advance in the favor of the plaintiff for the importation of the two blow mould 4 liters jerry can and 1 blow mould 4 liter jerry can relates to a transaction

for which 1st defendant dully instructed the plaintiff to delay the requisite shipment and subsequently instructed the plaintiff to the use of USD 240,185.00 to clear outstanding and amounts due to the plaintiff as per the TCA PW1 referred this court to "Exhibit P-6 and P-7" respectively consequently reducing the outstanding payment to USD 1,154,349.00.

On the 5th issue of the sett-off claim PW1 testified that the alleged loss of USD 619,819.00 which the defendant raised in paragraph 14 of the WSD has no legal foundation or contractual transaction that the 1st defendant has unilaterally breached the contract of PLA and TCA prior to the formal termination of the contractual engagement or contractual foundation to support his argument PW1 referred this Court to "exhibit P8 and P9" in order to show the fact that at the moment the 1st defendant sold its lubricant blending facility by July 17th 2018 and confirmed at 11th September 2019 while the termination of the PLA and TCA happened on 28/11/2018 PWI testified that following that event the alleged loss of USD 619,819.00 has no legal or contractual foundation.

On the 6th issue of the sett-off claim PW1 adduced the evidence that the allegations raised by the defendant in paragraph 15 of the WSD on the issue of MARKETS PW1 testified that the plaintiff had no any responsibility of providing any markets of the produced products and

further the plaintiff never issued any direction to the 1st defendant to make any supplies to the alleged plaintiff in Uganda as described by the 1st defendant as Messrs Fontana Auto parts (U) LTD of which a total amount of USD 679,995.54 is alleged outstanding.PW1 testified that to the best of his knowledge the 1st defendant never produced any instruction of supplies to the plaintiff. That it is not ascertained if the supplies were made no payment by the alleged importer. PW1 furthermore submitted that the 1st defendant allegation is not supported by any document to verify the said supplies neither to show the nexus/connection between the plaintiff and alleged customer and the refusal of the alleged customer to pay e.g. demand note or reminder to pay. Therefore, PW1 concludes his submission in chief by stating that the alleged sett-off claim amount has no legal or contractual basis.

PW2 namely ALF UNSTERSTELLER adduce the evidence to the effect that the 1st defendant come into contact with the plaintiff also shows the duties, functions and responsibilities which the defendant was having to the plaintiff as per the contracts of PLA and TCA. He testified that he has been employed by the plaintiff herein FUCHS PETROLUBE (FUCHS) since 1994 a cooperation manager that is specialized in providing the lubricant technology and related services worldwide head office in (Mannheim Germany).

PW2 also testified that the plaintiff normally appoints 1 Distributor per country in its geographical foot print to represent Fuchs products sales. That in 2006 the 1st defendant entered into the contract of PLA with the plaintiff and that he was present in the signing ceremony and officially the defendant became the officially Fuchs license partner for Tanzania in manufacturing and distribution of Futch products. That initially from the year 1999 at the initial stages of the plant in Tanzania the plaintiff assists several millions USD to the 1st defendant in developing the Tanzanian plant outside the payments terms that the plaintiff supported the MD FEROZ KASSAM with the vision of developing the businesses of 1st defendant. The plaintiff was doing that because of the trust and personal relationship to the said Mr. Feroz Kassam with a hope that he would always honor its commitments. But PW2 testified that the 1st defendant submitted to the plaintiff multiple repayment plans which kept failing as a result the plaintiff told his shareholders to maintain the patience and let the 1st defendant to continue with the business.

PW2 further more testified that following the 1st defendant delay in repayment as a matter of GOODWILL and to clean up history for a new chapter the plaintiff FOMEL accepted in the year 2013 a one set off settlement proposal from the said defendant MD Feroz Kassam and credited USD 405k out of USD 805k owed conditional to immediate

payment of the remaining USD 400k. Apart from that on the contractual situation PW2 submitted that the original contract of PLA was their first 5 years contract was expired on 2011.There was no formally extended in writing due to unrelated FOMEL shareholders dispute at that time .However, it was agreed orally with the 1st defendant MD to continue with the original terms of the 2006 PLA /COA by conduct and based on mutual trust. PW2 testified that this is evident from the factual operations of the business relationship e.g. the production of the Futch branded products and know-how by the 1st defendant respective invoices balance confirmations and payments.

PW2 further testified that the plaintiff installed the agreement in form of technical cooperation agreement TCA the main subject of the TCA was to easier charging of royalties which included various several flat fees rather than the royalties staggering on actual volumes produced or contractual minimum volumes if production was lower than minimum which had been the basis is applied per the PLA. That the TCA come into existence with to replace the PLA but the royalty claims and TCA are distinct that the royalty payment obligations there has been the products supplies which are the other part of the claim. PW2 testified that the supplies are based on separate orders and are neither subject to the 2006 PLA /COA nor the Technical cooperation agreement entered into

2014 (TCA). PW2 referred this court to exhibit P-10 to show the ample documents exchanged between the parties in respect of that effect.

Furthermore, on the last part of the PW2's witness statement he gave the testimony to show how the 2nd defendant total Tanzania was sued by the plaintiff, PW2 testified that the second defendant was sued by the plaintiff for the reason that it acquired an asset which the plaintiff may be entitled to attach and sell as a lien. That the FUCHS and the plaintiff eventually learnt from the ordinary press that the 1st defendant disregarded all personal ,contractual and other legal obligations and sold the plant to the 2nd defendant and PW2 referred this court to exhibit P11 to show that efffect.PW2 testified that after that incidence on 15th October 2018 a letter to the management of the 2nd defendant informing them about the 1st defendant owing FOMEL approx. USD 1.9 million and that the plaintiff would take legal steps against the 1st defendant which may also affect the 2nd defendant that the 2nd defendant reply to that letter and told the plaintiff that they took notice but they hope it would not affect their planned transaction.PW2 referred this court to exhibit P-12. PW2 testified that it was the plaintiff concern that the 1st defendant facility represented against the money it owed to plaintiff which has now changed hands to the 2nd defendant that following the change

of the plaintiff plant facility to the 2nd defendant hence the claim against the 2nd defendant.

PW2 testified that as per the PLA and TCA, consequently Upon the production transactions undertaken by the 1st defendant, the outstanding amounts in respect of royalty fees due and payable to the plaintiff by the 1st defendant from march 2016 until September 2018 is USD one million one hundred and fifty-four thousand three hundred and forty-nine (USD 1,154,349.00) .to support his arguments he referred this court to exhibit "P-13"

Also, PW2 testified that on 28th November 2018 he sent the demand notice to the 1st defendant as required by law reminding him to pay that USD (1,154,349.00) being the total outstanding of royalty fees failure of which he will be sued. To support his argument the PW2 referred this court to exhibit "P-14". PW2 further testified that another demand notice to notify the defendant to immediate payment of USD (792,134.00) being the total outstanding amount of the additives fuchs base oil concentrates and raw materials specifications in which PW2 testified that the defendant never responded also to that demand notice and to support his argument PW2 referred this court to exhibit "P-16"

PW2 further testified to this court that pursuant to PLA and TCA the plaintiff supplied the 1st defendant with the defendant with additives on

trading or sale and purchase basis. That the plaintiff issued the 1st defendant confirmed to be correct and in line with respective invoice which the 1st defendant confirmed to be correct and in line with the supplied lubricating oil additives. That the total value of the referred invoices, which the 1st defendant confirmed to be correct and which to date remain unpaid amounts to USD 792,134.00. to support his arguments, he referred this court to "exhibit P15"**.**

PW2 continued to testify that the 2nd defendant is joined as a party to the suit on the basis that it purchased the assets of the 1st defendant which to the knowledge of the plaintiff is the whole or substantially the whole of the property of the 1st defendant in trading and manufacturing business, which the plaintiff was advised by his advocate that it will be entitled to attach and sell the as lien under the law of contract act cap 345 of Tanzania equally as per the transfer of business (Protection of creditors) Act cap 398 of Tanzania to realize the amounts due to it from the 1st defendant as described and the PW2 referred this court to "exhibit P11" the fair competition commission notification.PW2 concludes his testimony by submitting that the 1st and 2nd defendant jointly and severally amount due and payable to the plaintiff by the defendants the total claim as reflected to the plaint is USD 1,946,487. Up to that point the plaintiff case marked closed.

In cross examination the PW2 stated that the 2nd defendant was included because he purchases the first defendant plant which the plaintiff advised by his advocate that the plant will be later on entitled to be attached as a lien. In reexamination PW2 testified that he followed the advise of his lawyer to sue the 2nd defendant.

On the other hand, DW1 (Feroz Amir Kassam) adopting his witness statement testified that, he as the managing director of Petrol Lube (T) limited and total Tanzania limited that personally negotiated the PLA agreement with one Mr. Asif Rashid who was representing the plaintiff herein. DW1 further testified to this Court that the 1st defendant dully performed its obligations under the PLA and full paid the royalties and charges or costs until when the agreement lapsed on 2011 and parties did not renew the agreement. He said that there is no any penny or outstanding balance or any sum due and owing to the plaintiff under PLA and in any case the plaintiff alleged that if there is any sum payable the same is barred by time limit applicable in Tanzania for recovery of any sum under the PLA agreement.

DW1 further testified that on 3rd October 2011, after the expiration of the PLA he wrote an email to the plaintiff Mr. Misaoui requesting on the status of the agreement which will govern the parties after the expiration of original agreement and after the parties engaged into one deal of

transaction arrangement. DWI testified that there was no positive response from the plaintiff on whether the agreement will be renewed or NOT OR what fees shall be applied to the production .to support his argument DW1 referred this court to (exhibit D1).

DW1 further testified that the plaintiff is estopped from claiming the alleged sum due to the time limitation applicable to the PLA which expired on February 2011. That after the expiration of the PLA all issues pertaining to the trademarks and know how between the plaintiff and the 1st defendant were regulated by the TCA as this issue is not disputed as the plaintiff through its letter issued by its lawyer ENS Africa dated 28th November 2018 referenced ENS/PTL/534/2018 clearly confirmed that TCA was signed on 1st December 2014 for the purpose of enabling the 1st defendants to receive technical assistance and know how to support his argument he referred this court to exhibit D2.

DW1 testified that the PLA agreement expired on 2011 and there were no invoices issued or services provided under the PLA after expiration period that the 1st defendant and the plaintiff relationship was regulated by the PLA.

DW1 further testified that there was the difference in the invoice in which the plaintiff annexed to the plaint and the one which the plaintiff issued in this Court as follows;

1. Invoice no. TNZ001/2016 dated 31st March 2016 was issued to the defendant with USD 100,000/= and the 1st defendant paid the invoiced sum on 22nd March 2016. DWI testified that this is totally different to what is annexed to the plaint with USD 125, 000.00 DW1 testified that the plaintiff has decided to print his own invoice for his ill motive and unfair advantage in business relationship.
2. Invoice no. TNZ002/2016 was dated 1ST APRIL 2016 and not 31ST MARCH 2016 as averred and was issued to the defendant with USD 100,000.00 and the 1st defendant paid the invoiced sum on 5th may 2016 that this is contrary to what is annexed to the plaint with USD 125,000.00. DWI testified that the plaintiff prints his own invoices for his ill motive and unfair advantage in business relationship.
3. Invoice no. TNZ003/2016 dated 1st September 2016 was issued to the defendant with USD 100,000.00 and the 1st defendant paid the invoiced sum on 24th October 2016.that this is contrary to what is annexed to the plaint with USD 125,000.00.
4. Invoice no. TNZ0004/2016 dated 1st October 2016 was issued to the defendant with USD 100,000.00 and the 1st defendant paid the invoiced sum on 24th October 2016 that this is contrary to what is annexed to the plaint with USD 125,000.00 that the plaintiff has

decided to print his own invoice for his ill motive and unfair advantage in business relationship.

DW1 further testified that for the year 2017 only one invoice covering four the 1st 2nd 3rd and 4th quarter was issued by the plaintiff to the 1st defendant which was dated 30th December 2017 with USD 160,000.00 that all monies were paid and there were no any outstanding balances /monies payable as technical fees by the 1st defendant

He went further more to testify that there was no invoice issued by the plaintiff to the 1st defendant for the year 2018 all the invoices annexed to the plaint seems to be prepared and printed by the plaintiff solely for the purpose of this suit. To support his argument he referred this court to "exhibit D3".

DW1 testified that under TCA there was no transaction which was done on credit as the all proforma invoices were issued by the plaintiff to the 1st defendant. The order remained blocked until the payment is received either through bank transfer or by cash payment which was mostly preferable by the plaintiff in DUBAI to support his argument DW1 referred this court to "exhibit D4".

DW1 further testified that it is the plaintiff who breached the contract and initiated the false claim against the first defendant in order to justify its ill motive for terminating the agreement without any

reasonable cause. DW1 also testified that following that event DW1 sustained a fundamental loss such that all made products could not be placed in the market for want of license and trademark restrictions to support its arguments DW1 referred this court to "exhibit D4".

In cross examination DW1 testified that the contracts were two namely PLA and TCA and he full filed all his obligations. DW1 testified that it was the plaintiff who terminated the TCA contract.

DW2 (GETRUDE MPANGILE) did not appear in court his evidence and his advocate prayed that his witness statement to be given lesser weight under rule 56(3) of the High court commercial division rules. In his statement he only referred this court to the correspondences between the plaintiff and the 2nd defendant dated 15th October 2018 and 12th November 2018 which shows the 2nd defendant acquisition of assets and not a purchase of title.

In determining the case, the Court framed four issues as follows:

(1) Whether there was a contractual relationship between the plaintiff and the defendants?

(2) Whether the production license agreement and the technical cooperation agreement co-existed if any?

(3) Whether there was a breach of the two agreements?

(4) To what relief are the parties entitled?

In addressing on the first issue on whether there was a contractual relationship between the plaintiff and the defendants. It is an undisputed fact based on the evidence provided by the plaintiff PW1(the plaintiff) that he entered into contract of production license agreement PLA with the 1st defendant with a permission to use trademark and know-how for the purpose of manufacturing, distributing, and selling products described in "PLA" contract (Exhibit P1) as indicated in clause 4.1 and 4.6 of that contract. Also, it is not in dispute that the Plaintiff further entered into another agreement with the 1st defendant of Technical Cooperation Agreement (TCA) (exhibit P2) signed on 1st December 2014 for the plaintiff to provide technical assistance to the 1st defendant to enable manufacture of products at 1st defendant production facility. These facts were agreed by the 1st defendant in his written statement of defence under paragraph 3.1 as well as in his closing submission that there were two contracts between them as mentioned above. Therefore, the issue is answered in the affirmative that there was a contractual relationship arising from "PLA" contract (Exhibit P1) and (TCA) (exhibit P2).

I now coming to the second issue on the issue whether the production license agreement and the technical cooperation agreement co-existed. This is the disputed fact based on the submissions made by

the parties in their pleadings and during the cross-examination of the witnesses. PW1 testified that the original "PLA" contract (Exhibit P1) was signed on 2006 for the period of five years ended in the year 2011 and admitted that it was not formally extended in writing due to un related plaintiff's holding company shareholders dispute at that time. He said the contractual relationship under the PLA was continued based on the mutual trust under "Implied in act contract". This fact was disputed by the 1st defendant in para 3.2 of the WSD and paragraphs 10 and 11 in his witness statement that the PLA expired on 2011 and the parties proceeded to deal with a single transaction until 2014 when they entered into TCA agreement whose purpose was to regulate the relationship of the parties as there was no written contract since 2011.

The urged issue by the plaintiff is that the PLA continued to apply based on the conduct of the parties continued to transact on the basis of the expired PLA until 2018 when the 1st defendant sold the business assets to the 2nd defendant. I am of the view that is not a sufficient ground to conclude that there was a co -existing PLA contract after the expired contract period on 2011.

The plaintiff's position relied on **British America Tobacco Kenya Limited case,** Civil Appeal No. 209 of 2019 cannot apply to the present

case. This finding is made in view of the different circumstances of these two matters. At page 16 of the cited decision, the Court observed that;

" *…Back to our civil case and considering the entire evidence, did the conduct of the parties create an implied contract between them? The learned trial judges considered as relevant, the correspondences, joint meetings and the fact that the one of the officers of the appellant was accommodated in the respondent's premises…".*

Considering the circumstances of the position in the above cited case and the circumstances in the case at hand, it is fair to say that this case is distinguishable. This is said so based on the established facts that, there is evidence that the PLA contractual relationship was ended in 2011. The plaintiff through the witness statement of PW2 under paragraph 10 admitted that the PLA signed in 2006 expired in 2011 and there was no formal extension in writing due to the dispute among the stakeholders. Though PW2 testified that the business relationship under the original terms of PLA based on mutual trust. This is also countered by the 1st defendant as provided under paragraph 3.3 of the WSD that the parties were executed TCA contract under Article 4 which has different terms from that PLA. Under the TCA agreement the royalty fees charged at the flat rate of USD 400,000.00 per year different with the term under the PLA where the loyalty's fees paid under Article 4 were charged depending

the net production of the licensed products. Also, the TCA agreement was not an extension of PLA. This was supported by the email dated 3rd October 2011 (Exhibit D1) that established that there was no agreement after the expiry of PLA agreement in 2011. Moreover, looking at the two agreements "PLA" contract (Exhibit P1) and (TCA) (exhibit P2), I failed to see the "implied in act contract" as claimed by the plaintiff as the fact that the TCA purpose was on the provision of use of the trade marks, know how transfer technology-formulation and technical support, almost the same as what have been executed in the expired "PLA" contract (Exhibit P1) save for the aspects of royalty in dispute which have different terms. This proved that the PLA was not in co-exist with the TCA. The latter came into force in 2014 to cover the gap of the relationship between the Plaintiff and the 1st Defendant due to un-renewable PLA which expired in 2011. Therefore, the answer to the second issue is answered in the negative.

On the third issue on whether there was a breach of the two agreements I have to say. The claim on the breach of contract is indicated under paragraphs 5.3 and 5.4 of the plaints which contain the terms of obligations between the parties under PLA and paragraph 5.5 in respect to the TCA agreement. However, it was affirmed above there were no co-existing contracts as the PLA agreement was ceased its existence in the year 2011 and the TCA started from 2014 to 2018 as per exhibit "P2". The

position on the issue of breach is assessed as follows. Since the PLA in the eyes of law ceased to exist since 2011 and there is nowhere or no article or clause in the TCA agreement which shows that the TCA agreement will be regarded as the PLA agreement. Taking into consideration that the period since the PLA ceased to operate on the legal eye it has no leg to stand on as it is already time barred under the meaning of **Section 3 (1) of the Law of Limitation Act Cap 89 R.E 2019 paragraph 7 part one 1 of the 1st schedule)** read together with item 7 of part 1 of the schedule of the act which states that,

" *the time limitation for claiming under the disputes arising out of contract according to the law of limitation is 6 years."*

This is also discussed by the Court of Appeal in the case of **Director General NSSF Versus Consolata Mwakisu, Civil Appeal No.329/01/2017** (unreported). The Court decided that, claims under the issues arise out of contracts to be instituted within 6 years from the date when the dispute arose or at the time when the contract came to an end.

The fact that the plaintiff instituted this suit after 9 years without any justifiable reason shows that the claim is time barred. Moreover, it is also established in the 1st defendant's WSD at paragraph 3.5 that the

terms under PLA expired in 2011 and there was no pending payments in regard to PLA agreement.

In regard to TCA agreement, the breach is based on un paid loyalties from 2016 to 2018 as per agreement by the 1st defendant evidenced by the unpaid invoices (Exhibit P-9). However, the said invoices were not in line with the TCA agreement terms. Moreover, whatever entitled to the plaintiff in terms of TCA agreement article 4 should be paid where the 1st defendant trade in Kenya or Uganda, the evidence never proved by the plaintiff. In addition to this, the facts show that the plaintiff was the one who breached the TCA contract by issuing one month's notice through his letter dated 28th November 2018 (Exhibit D2) contrary to Article 2 of the TCA which requires six months' notice assumed to terminate the TCA agreement by using the former PLA terms in which by operation of the law it had already lapsed since 2011. The issue is therefore affirmed that there was no breach of any agreement by the 1st defendant as alleged by the plaintiff.

I now come to the last issue on reliefs. As affirmed above, there was no breach of contract by the defendant to the plaintiff. It goes without saying that the plaintiff's claims have automatically vanished and the defendant has nothing in law to offer to the plaintiff. Instead, the 1st

defendant is entitled to be refunded USD 240,185.00 paid for delivery of additives which are yet to be received by the 1st defendant.

In view of the above observations and findings, I find nothing legally binding against the 2nd defendant in respect of the two main contracts which do not bind him anywhere. I think the plaintiff overlooked this and he sued the 2nd defendant prematurely in this suit. Perhaps, by the act of the 2nd defendant to purchase the property from the 1st defendant it will be proper to include 2nd defendant in execution stage as it will be the proper forum to include him by attaching that property and state those allegations against the 2nd defendant. Having said so the relief of the 2nd defendant is to be cleared of any liability, as I hereby do, he is not bound by anything in this case.

In the event, based on the findings in respect of the four issues framed to determine the suit, this Court finds that the plaintiff did not prove its case on the balance of probabilities required by law as the same is accordingly dismissed with costs. The plaintiff is also ordered to refund to the 1st defendant USD 240,185.00 paid for undelivered additives. It is so ordered accordingly.

**Dated** at **Dar es Salaam** this 6th day of May, 2022.

**Z.A.MARUMA,**

**JUDGE.**

**06/05/2022**