IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 66 OF 2020

YARA TANZANIA LTD.....PLAINTIFF

VERSUS

UNYIHA ASSOCIATES LTD.....DEFENDANT

Date of Last Order: 01st March 2022

Date of Judgment: 01st April 2022

EXPARTE JUDGMENT

NANGELA, J.,

This is ex-parte Judgment on a suit for recovery of money. The Plaintiff, a Company incorporated under the laws of Tanzania and licensed to do business of supplying fertilizer and other agro-inputs, is suing the Defendant seeking for the following orders and reliefs:

(a) A declaration that the Defendant is in breach of contract between the parties herein for failure to pay the purchase price as agreed,

(b) An order for payment of Tshs. 446,000,000/= being an outstanding

purchase price for fertilizers supplied to the Defendant,

(c) An order for payment of interest on item(b) above at the commercial rate of 25% per annum from the date when the debt became due to the date of judgment.

(d) Interest on the decretal sum at the rate of 12% per annum from the date of Judgment to the date of full payment.

(e) General Damages for breach of contract.

(f) Cost for this suit, and

(g) Any other reliefs that this honourable court shall deem just and equitable to grant.

The Plaintiff's case was presented for filing on 6th August, 2020. Briefly stated, the facts of this case may be stated as here under. Sometimes in February 2015, the Plaintiff entered into an agreement with the Defendant wherein the Plaintiff was to supply a consignment of fertilizer to the Defendant worth **TZS 466,600,000/-** vide a local purchase order (LPO) issued by the Defendants.

Under the parties' agreement, the Defendant was obliged to pay for the purchase price a month or four from the date of invoice. However, in an effort to have the monies paid, the Plaintiff, through the services of her lawyer, sent a demand letter to the Defendant as the

remainder for the payment. At the end of the day, the matter ended up coming before this Court.

Following the completion of the pleadings, this suit was scheduled, for its first pre-trial conference (PTC) which was to take place on 23rd April 2021. On that particular date, neither the Defendant nor her Advocate attended the first PTC. This Court re-scheduled the first PTC once again and same was to take place on the 7th day of June 2021. Even on that date, the first pre Trial conference could not proceed due the Defendant's absence.

Acting under Rule 31 of the High Court (Commercial Division) Rules of Procedure, GN. No.250 of 2012 as amended by GN.107 of 2019, this Court struck out the Defendant's written statement of defence (WSD) and ordered the matter to proceed *ex-parte* against the Defendant.

On the 8th day of October 2021, the learned counsel for the Defendant appeared in Court and prayed for time to file an application to set aside the ex-parte order. The prayer was granted and the said application was supposed to be filed on or before the 25th day of October 2021 and it was scheduled for hearing on the 8th day of November 2021.

Unfortunately, the Defendant could not comply with the orders of this Court dated the 8th of October 2021. As

such, on the 8th day of November 2021, this Court issued an order of *ex-parte* hearing, hence, this judgment.

In the course of *ex-parte* hearing, this Court framed and recorded the following issues, namely:

(a) Whether there was a valid contract between the Plaintiff and the Defendant

(b) Whether the Defendant breached the fertilizer supplying agreement concluded with the plaintiff.

(c) Whether the Plaintiff is entitled to any relief.

When the Plaintiff's case opened for hearing, the Plaintiff called one witness, Mr. Januari Fabian, who testified as **Pw-1**. In his testimony in chief which was earlier on filed in Court on 18th June, 2021, **Pw-1** stated that, sometimes in February, 2015, the parties entered into fertilizer supply agreement.

Pw-I told this Court that, as a matter of practice in the Plaintiff's business, upon receipt of a local purchase order from customers, the Plaintiff issues a delivery note. He testified that, each delivery note supplied to the Defendant was accompanied by the conditions of sale.

Pw-I told this Court that, the parties agreed mutually that, payment was to be furnished to the Bank account of the Plaintiff, within either one month or four months after delivery and issuance of invoice. He told this

Court that, the payment period of each invoice was/is well stipulated in each of the invoices showing the total amount payable and settlement terms.

Pw-1 tendered the said local purchase orders, delivery notes and invoices as exhibits, and these were admitted as **Exh.P-1, Exh.P-2** and **Exh.P-3** (collectively). **Pw-1** further testified that, during the period from February 2015, the Defendant issued various Local purchase order (LPO), LPO No. 377, 382 and 384. He testified that, in response, the Plaintiff supplied the Defendant with fertilizers worth **TZS 466,600,000/=** as per **Exh. P-1, Exh.P-2** and **Exh.P3** as mentioned earlier above.

Pw-I further testified that, out of the different Invoices which amounted to **TZS 466,000,000**/- in value, the Defendant failed to pay the Plaintiff for the fertilizers supplied to her without justification. Despite the Plaintiff's remainder to the Defendant to pay the outstanding amount, the Defendant failed to settle the amount.

Pw-1 tendered in Court the demand letter and the Defendant's response to the demand letter and these were admitted as **Exh. P-4.** So far, that was the Plaintiff's case, and, on 24th February 2022, the Plaintiff's learned counsel filed closing submissions which I will also take into account in this judgment.

It is a cardinal principle of the law of evidence that, he who alleges must prove. Sections 110(1), 111 and 112 of the Evidence Act, 1967, Cap.6 R.E 2019, provides as here below:

> **110.-(1)** Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> **111.** The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> **112.** The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.

It is also a cardinal principle of law that, in civil cases, parties are to prove their cases on the balance of probability. See the case of **Silayo vs. CRDB (1996) Ltd** [2002] 1 EA 288 (CAT) and **Catherine Merema vs. Wathigo Chacha,** Civ. Appeal No.319 of 2017 (unreported). In view of the above, the Plaintiff was made to prove its case.

As I stated earlier, herein above, three issues were framed and recorded for determination by this Court in

respect of this suit at hand. To start with, the first issue is *whether there was a valid contract between the Plaintiff and the Defendant*. In this case, **Pw-1** tendered various documents in Court, one of these being local purchase orders (LPOs) and their accompanying Invoices and delivery notes. These were received in Court as **Exh.P-1 Exh.P-2** and **Exh.P-3** (collectively).

In the case of **Isaka Commercial Agency Ltd vs. Pangea Minerals Ltd,** Commercial Case No.125 of 2019 (unreported), this Court defined a purchase order as:

> "a document sent from a buyer to a seller of products with a request to order a particular product."

One of the questions which this Court asked itself was whether an LPO can qualify as a contract? In the **Isaka Commercial Agency Ltd's case (supra)** this Court had the following to say:

> "The answer is YES, it can, depending on the circumstances of each case. In essence, a purchase order only qualifies as a legally binding contract when accepted by the seller by way of product transaction between the two. So, the circumstances pertaining to each case will

> determine whether it constitutes a contract or not. This was stated in the case of *Sangijo Rice Millers Co. Ltd v SM Holdings Limited* [2006] TLR 89, where this Court held that, a purchase order, together with the conduct of the parties may constitute a contract."

I have taken the liberty of examining **Exh.P.1, Exh. P.2** and **Exh.P.3** and their accompanying invoices and delivery notes and, they all exhibit that, indeed, on diverse dates of February 2015, the parties entered into arrangements whereby the Defendant ordered and the Plaintiff supplied consignments of fertilizer.

In essence, looking at **Exh.P.1, Exh.P.2** and **Exh.P.3** in the instant case, I have no flicker of doubt that these documents establish that there was an offer accepted by the Plaintiff and acted upon, thus creating a binding supply agreement between the Plaintiff and the Defendant.

According to section 3(2) of the Sale of Goods Act, Cap.214, R.E 2019, the law states as follows:

> "Where in a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where

> the transfer of the property in goods is to take place at a future date or subject to some conditions to be fulfilled after the transfer, the contract is called an agreement to sell."

In this case, the available documentary evidence tendered before this Court provide a sufficient proof that the parties herein had a business relationship constituting a contract of supply. The Exhibits indicate that, the orders were placed, invoices were raised and delivery notices were received indicating that the Defendant received the supplies. In view of such undisputed evidence the first issue in the affirmative. That is to say there was a valid agreement between the parties.

The second issue was:

> Whether the Defendant breached the fertilizer supplying agreement concluded with the plaintiff.

In law, each party to a contract is expected to fulfill his or her obligations under that contract. **In Simon Kichele Chacha vs. Aveline M. Kilawe,** Civil Appeal No.160 of 2018 (unreported), the Court of Appeal of Tanzania was of the view that:

> "It is settled law that parties are bound by the agreements they freely entered into and this is the

> cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in *Abualy Alibhai Azizi v. Bhatia Brothers Ltd* [2000] T.L.R 288 at page 289 thus: - 'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."

This is as well evident from section 37 (1) of the Law of Contract Act, Cap.345 R.E 2019 which provides that:

> "The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."

As it may be observed here above, each party is entitled to perfect performance of the terms agreed which terms, as in this case, include full payment for what was supplied by the Plaintiff to the Defendant. Failure on the Defendant to pay for what was supplied timely or as agreed will definitely constitute an outright breach of the contract.

In this suit at hand, **Pw-1** did indicate that, upon receipt of local purchase order from the customer, the

Plaintiff issued delivery notes upon delivery of the ordered products ex-factory and each delivery note had a condition of sale under leaf outlining the terms and conditions of sale.

According to item 3:2 of the condition of sale, it was provided that payment of price and VAT shall be in accordance with the terms agreed upon by the parties. In this case the parties were in a mutual agreement that payments were to be paid into the Bank Accounts of the Plaintiff within either one month or four months after the delivery and issuance of invoice.

Apparently, from the evidence adduced by the Plaintiff, it was made clear that the Plaintiff did discharge its obligations by supplying fertilizers to the Defendant upon orders and raised corresponding invoices. The Defendant, therefore, was supposed to reciprocate by way of effecting payments as agreed but did not pay for the products supplied despite there being evidence of such supply in the form of the delivery notes attached to **Exhibits P.1, P.2** and **P.3**.

It was also the evidence of Pw-1, received as Exh.P4 (Demand letter) that, despite such demand for payment and Defendant's promise to settle the outstanding amounts, the Defendant did not discharge its obligation of paying for all the consignment of fertilizers supplied. All

these prove that, there was breach of the contract of supply and, the second issue, is therefore responded to in the affirmative.

The last issue was in respect of the kind of reliefs the parties are entitled to. As regard that issue, the Plaintiff is claiming for a specific relief in form of payment of **TZS 446,000,000/=** being the outstanding amount for the fertilizers supplied to the Defendant. These specific claims were fully pleaded and proved by the Plaintiff as demonstrated herein above. The Plaintiff is, therefore, entitled.

There is, as well, a claim for interests at commercial rate of 25% running from the due date of judgment and interest on the decretal sum running from the date of judgment to the date of full settlement of the debt. The Plaintiff is also asking for payment of general damages and costs as well as any other relief which this Court may be pleased to grant.

In law general damages need to be only pleaded but there is no need for proof thereof unlike a claim for specific damages. If the Plaintiff merely avers that he suffered general damages that averment will suffices. See the cases of **Cooper Motor Corporation Ltd vs. Moshi/Arusha Occupation Health Services** [1990] TLR 96 and **Fredrick Wanjara, M/S Akamba Public Road Service**

Limited A.K.A Akamba Bus Service vs. Zawadi Juma Mruma, Civil Appeal No. 80 of 2009 CAT (Unreported). However, assessment of the quantum to be paid as general damages is left to the discretion of the Court.

Based on the facts adduced and the evidence availed to the Court by the Plaintiff, it is clear that the Plaintiff has managed to prove its case to the required standards, i.e., on the balance of probability and, in view of that, judgment is entered in favour of the Plaintiff as follows, that:

1. The Defendant breached the contract between the Defendant and the Plaintiff due to failure on the part of the Defendant to pay the agreed purchase price of the fertilizer consignment supplied by the Plaintiff;
2. The Defendant is hereby ordered to pay **Tshs. 446,000,000/=** being the sum for outstanding purchase price of the fertilizer consignment supplied by the Plaintiff as per invoices raised by the Plaintiff.
3. The Defendant shall pay interest at a commercial rate of 14% on the outstanding

amount stated in (no. 2) above, from the date of filing this suit to the date of judgement.

4. The Defendant shall pay interest at the rate of 7% on the decretal amount from the date of judgement to the date of full satisfaction.
5. The defendant shall pay general damages amounting to **TZS 10,000,000**.
6. Cost of this suit follows the event.

It is so ordered

DATED at DAR-ES-SALAAM, THIS 1st DAY OF APRIL 2022

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HON. DEO JOHN NANGELA
JUDGE