

**IN THE HIGH COURT OF THE UNITED REUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 127 OF 2020**

**EA TRADE & MARKETIN;G  
SOLUTIONS LTD .....PLAINTIFF  
VERSUS  
SAYONA DRINKS LIMITED.....DEFENDANT**

Last order: 03<sup>rd</sup> March, 2022  
Judgment: 11<sup>th</sup> March, 2022

**JUDGEMENT**

**NANGELA, J.**

The Plaintiff herein sues the Defendant and prays  
for judgment and decree as follows:

1. The Defendant pay the Plaintiff  
TZS 200,940,000/= following  
Breach of the parties' Sales and  
Distribution Agreement.
2. Interest of 10%on the claimed  
amount in (1) above at the  
prevailing commercial rate from  
July 30<sup>th</sup>, 2020 to the date of  
judgment.
3. Interest on the decretal amount  
at the Court's rate of 30% from

the date of judgment till final settlement.

4. Cost of this suit.
5. Any other relief this Honourable Court May deem fit and just to grant.

The facts of this case are briefly that, on the 21<sup>st</sup> January 2020, the Plaintiff and Defendant concluded a Sale and Distribution Agreement, whereby the Plaintiff was appointed a distributor of the Defendant's products. It is alleged that, the Defendant breached the terms of the agreement by appointing another distributor to operate within the same territory where the Plaintiff was operating with an exclusivity status, hence, causing loss to the Plaintiff.

On the 29<sup>th</sup> September 2021, a final pre-trial conference was convened and the parties settled for the following issues to be resolved by this Court:

1. Whether there was a contract between the Plaintiff and the Defendant for the Sale and Distribution of the Defendant's products.
2. If so, whether there was breach of that contract;
3. If the second issue is in the affirmative, whether the defendant suffered damages and to what extent.

4. To what reliefs are the parties entitled.

At the commencement of the hearing of this case, the Plaintiff enjoyed the services of Mr Denis Mwesiga, learned advocate, while Mr Jerome Msemwa, Advocate represented the Defendant. The Plaintiff called two witnesses, namely: Mr Kennedy Kajuna who testified as Pw-1 and Mr Raymond Ferdinand Mutungi who testified as Pw-2. Furthermore, the Plaintiff tendered in Court, three (3) documents to prove its case and these were admitted as Exh.P.1, P.2 and P.3. In summary, both Pw-1 and Pw-2 supported the claims made by the Plaintiff.

As for the defense case, the Defendant called one witness, namely, Mr. Musa Rashidi Lilombo, who testified as the defense witness (Dw-1). At the closure of the defense case, the learned advocates prayed to file closing submissions on or before 25<sup>th</sup> February 2022 and, on the 7<sup>th</sup> February 2022, I set a date for the delivery of judgment of this suit. As proceed hereunder I will consider their closing submissions as well.

However, before I proceed to tackle the agreed issues which I earlier pointed out here above, as a matter of law, the basic principle relating to proof is that he who alleges must prove and, such proof, must meet the requisite standards. See the case of **Abdul-Karim Haji vs. Raymond Nchimbi Alois and Another**, Civil

Appeal No.99 of 2004 (unreported). In civil cases, however, 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).

The first issue which needs to be established, therefore, is:

Whether there was a contract between the Plaintiff and the Defendant for the Sale and Distribution of the Defendant's products.

As it was once pointed out in the case of **Louis Dreyfuss Commodities Tanzania Ltd vs. Roko Investment Tanzania Ltd**, Civil Appeal No.4 of 2013 (CAT) (unreported), the general principle about contract is that, it arises because one party makes an offer or proposal and the other party accepts it to procure what in law is referred to as *consensus ad idem*.

The above holding by the Court of Appeal is indeed the essence of section 10 of the Law of Contract Act, Cap.345 R.E, 2019 which provides that, all agreements are contracts if they are made by free consent of the parties who are competent to contract, for a lawful consideration and with a lawful object and are not on the verge of being declared void.

In the case at hand, Pw-1 who also doubles as the Managing Director of the Plaintiff, told this Court that,

sometime on the 21<sup>st</sup> January 2020 the Plaintiff inked a Sale and Distributorship Agreement with the Defendant, and its duration was for a year.

To prove such a fact, Pw-1 tendered in Court the original contract which, after some deliberations and directives, I admitted it as **Exh.P.1**. Looking at **Exh.P.1** which was duly signed by the two parties, I have no doubt that it created binding obligations between the parties and signify their intention to that effect. Its existence before this Court as an Exhibit, therefore, suffices to dispose of the first issue affirmatively.

The second issue was predicated on the first issue being responded to affirmatively. In particular, the second issue was that:

If the first issue is in the affirmative, whether there was breach of that contract.

As it was once stated by this Court in the case of **Kibogate Tanzania Ltd vs. Grandtech (T) Ltd**, Comm. Case No.32 of 2021 (unreported), in law, a breach of contract is a material non-compliance with the terms of a legally binding contract which occurs when one of the parties fails to perform his/her obligations to the detriment of the other party.

In this case at hand, it was the testimony of Pw-1 before this Court, that, according to Paragraph 1 (a) of

**Exh.P.1** and **Exh.P.2(c)** the Plaintiff was an exclusive distributor of the branded products of the Defendants which were listed in **Exh.P2 (b)** and these were for exclusive distribution by the Plaintiff in the following geographical supply areas: the City Centre, Kariakoo, Upanga, Kurasini and part of Kigogo and Ilala, Chang'ombe Police, Ferry Area and Keko Gerezani and Keko-Makochi.

However, Pw-1 testified that a new distributor in the name of **T-STORES** was introduced by the Defendant in the same territorial area earlier assigned exclusively to the Plaintiff without notification to the Plaintiff. Looking at the testimony of Pw-1 in respect of that fact, I find myself coming up with two basic questions which need to be examined further, namely: Was there such introduction of a new distributor? If yes, did such an act constitute a breach of the terms of their agreement (**Exh.P-1**)?

In his testimony, Pw-1 had testified that on the 20<sup>th</sup> July 2020 the Plaintiff was e-mailed by the Defendant to the effect that the assigned territorial area needed more man power and thereafter assigned the territory to a second distributor.

The said e-mail, however, was not tendered in Court as evidence. Nonetheless, the testimony of Pw-2, who was engaged by the named **T-STORES** distributor from June 2020 and, that, he worked for that distributor

till October 2020, has evidential information that tends to corroborate the testimony of Pw-1.

In his testimony, Pw-2 told this Court that, he had previously worked for the Defendant as a Sales and Distribution Officer for four years until when he faced retrenchment from his job sometimes in 2019.

Pw-2 told this Court that, afterwards in June 2020 he was engaged by **T-STORES DISTIBÜTORS** to distribute SAYONA branded products, including Tunda 600mls, Twist 400mls, SAYONA water, SAYONA Snacks and Apple Bubble, to mention , but a few.

According to Pw-2, the **T-STORES'** Managing Director, one Asher Kalpesh, had instructed him to distribute and provide sales' service of these products in the following areas: City Center, Upanga, Kurasini, Kariakoo, Msimbazi, Illala, Chang'ombe Police, Ferry Area and Keko Gerezani/Makochi. He also testified that, in the course of performing his duty, he met Pw-1 who was also doing the same business in the same territory.

In my view, much as it is true that Pw-2 had earlier worked for the Defendant before, I find that, his testimony is still a reliable account of what he is conversant with and I see no reasons why I should doubt him.

Besides, the Defendant raised nothing to the attention of the Court to indicate that Pw-2 is not

independent witness but a witness with interest to serve other than that of speaking the truth.

As this Court stated in the case of **Nadds Bureau de Change and Another vs. Y2K Bureau de Change Limited**, Commercial Application No.8 of 2021 (unreported), (citing the Indian case of **State of Kerala vs. Narayanan Bhaskaran and Others**, 1992CrimLJ 238):

"Expressions like '*independent witness*' and '*interested witness*' must be understood in a reasonable perspective. What is a witness expected to be independent of? He must be independent of bias, for or against the prosecution or the accused. He should be free of personal interest in the outcome of the trial..... Whether a witness is independent or interested, is a matter of ascertainment from circumstances, by a process of evaluation, based on broad probabilities and sound forensic sense."

This Court did cite another Indian case of **Raju v. State of T.N**, reported in (2012) 12 SCC 701, where the Supreme Court of India was of the view and held that:-



"A witness may be called '*interested*' only when he or she derives some benefit from the result of litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one ... in the circumstances of a case cannot be said to be '*interested*.'"

As I stated, here above regarding the status of Pw-2, I am convinced that he is an independent witness as he has nothing to derive from the case at hand. For that reason, I find him and his testimony to be credible and reliable. Since he has testified to have once worked with **T-STORES** and, that, the distribution of his supplies of SAYONA products was in the same territory of supply which was exclusively assigned to the Plaintiff, I find that, this testimony corroborates the testimony of Pw-1.

As I stated, Pw-1's testimony was to the effect that, the Defendant had assigned to another distributor (**T-Stores**) the territorial areas which were exclusively reserved for the Plaintiff.

On the other hand, and, even with such a finding regarding the reliability of the evidence of Pw-2, can this Court safely make a conclusive finding to the effect that such testimony was a sufficient proof of breach of the distribution agreement, **Exh.P.1**?

To respond to that question, one has to look at the **Exh.P.1**, particularly looking at the exclusivity nature of the appointment of the Plaintiff as a distributor. Essentially, Clause 4 of **Exh.P1** reads as hereunder:

"Supplier's appointment of Distributor in section 1 of this agreement is an exclusive appointment to distribute the Products in the territory. Supplier can independently advertise, solicit and make sales of Supplier Products, support supplier's products **or appoint additional distributors for the Supplier Products in the Territory except in case Supplier found satisfactory Distributor's performance based on Supplier's parameters**

(Emphasis added).

As it may be observed from the above clause, the agreement did not rule out the possibility of the Defendant to appoint another additional distributor in the same territorial area. However, that could only be done upon establishing that there was unsatisfactory distribution performance on the part of the Plaintiff.

On the contrary, it was clear in the testimony of Pw-1, that, from February 2020 to 30<sup>th</sup> July, 2020, the

Plaintiff had already generated income in favour of the Defendant amounting to **TZS 303,084,210.00** being the invoice of stock supplied to the Plaintiff.

Pw-1 did avail to this Court a copy of the General Ledger sent by the Defendant to the Plaintiff and this was part of **Exh.P2** and stated that, the monthly turnover amount generated in favour of the Defendant by average was **TZS 50,504,035/=** while the average profits generated as a result of Sales and distribution of all products on behalf of the Defendant was **TZS 0.89/=** which is equivalent to **TZS 5,546,543.85** /per month.

The above testimony of Pw-1 was not controverted in any way by the Defendant. The testimony of the sole witness to the Defendant's case was not of any assistance either since, it called for strict proof, some of the averments in the Plaint as if it was a written statement of defense, instead of providing an opposing view regarding what the Plaintiff had alleged.

In my view, one would have expected to receive a contrary evidence of underperformance on the part of the Plaintiff which would have justified the introduction of a second distributor in line with Clause 4 of the Agreement (**Exh.P1**).

Undoubtedly, since the Defendant failed to establish that the Plaintiff was underperforming, there was no justification on the Defendant's part to introduce a new

distributor to the same territory as evidenced by Pw-2's testimony, while the Plaintiff was enjoying exclusivity status in that territory.

It is my finding, therefore, that, the assignment of distribution and sales functions to another distributor (M/s T-STORES) in the same geographical area which was earlier overseen by the Plaintiff (as substantiated by the testimony of Pw-2), and, without concrete justifications, violated the sense of exclusivity envisaged in Clause 4 of the agreement (**Exh.P1**) and amounted to a breach thereof. The second issue is, hence, responded to affirmatively.

The third is now comes to the scrutiny. This was couched as follows:

If the second issue is in the affirmative, whether the defendant suffered damages and to what extent.

Perhaps I should tackle the third issue by referring to what the Court of Appeal of Tanzania stated in the case of **Simon Kichele Chacha vs. Aveline M. Kilawe**, Civil Appeal No.160 of 2018 (unreported), concerning the sanctity of a contractual relationship. The Court of Appeal of Tanzania had the following to say, 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."

From the above holding, it is clear that, in any contractual relationship, each party is expected to honor her or his contractual obligations. Put otherwise round, each party is entitled to perfect performance of the terms agreed in a contractual undertaking, failure of that being tantamount to breach of that contract.

It is clear, likewise, that, each party to a contractual relationship expects to obtain the benefit of the agreed deal reciprocally. Contrary to that will mean that, an innocent party who does not receive the reciprocal benefit of the contract, by reason of the other party's

breach, has a legal right to recover compensation for the damages suffered.

It is a matter of legal requirement, however, that, a claim for specific damages or losses, must be strictly pleaded and proved. The case of **Zuberi Augustino Mugabe vs. Anicet Mugabe** [1992] T.L.R. 137 and **Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited**, Civil Appeal No.21 of 2001 (CAT) (unreported), laid emphasis on that fact.

In the case at hand, the Plaintiff has specifically claimed for, among other things, specific payment of **TZS 200,940,000** as loss arising out of the Defendant breach of the **Exh.P1**. This specific loss is not only pleaded in the Plaintiff but also particularized therein (see **paragraphs 7.0 of the Plaintiff**) and proved by Pw-1.

Specially, Pw-1 testified that, prior to the introduction of a new distributor the average profits generated by the Plaintiff were **TZS 33,279,263/=** in six (6) months time. He also tendered in Court as **Exh.P-3** the target per period per area which the Defendant had assigned to the Plaintiff to be met by the latter.

Pw-1 also stated, as well, that, the expected turnover by the Plaintiff as from August to December 2020 which are high season months, was **TZS 2,511,750,000/=**.

Further according to Pw-1, the monthly turnover amount generated in favour of the Defendant by average was **TZS 50,504,035/=** while the average profits generated as a result of Sales and distribution of all products on behalf of the Defendant was **TZS 0.89/=** which is equivalent to **TZS 5,546,543.85 /** per month. All these were not controverted by the Defendant.

In view of the above and, since there was no evidence to indicate that the targets set under **Exh.P3** were not met by the Plaintiff, and, in view of the fact that there was no notice or complaint regarding underperformance on the part of the Plaintiff, it follows, that, the third issue is in the affirmative as the Plaintiff has established the basis for his claim of **TZS 200,940,000/=**.

The last issue is in respect of the reliefs which the parties are entitled to. In my view, the Plaintiff has fully discharged its burden of proving its case and deserves to be granted the reliefs it has sought. In view of that, this Court proceeds to grant the following reliefs sought in the Plaintiff, that:

1. The Defendant is hereby ordered to pay the Plaintiff **TZS 200,940,000/=** following Defendant's Breach of the Sales and Distribution Agreement dated 21<sup>st</sup> January 2020.

2. The Defendant is hereby ordered to pay the Plaintiff Interest of 10% on the claimed amount in (1) above at the prevailing commercial rate from July 30<sup>th</sup>, 2020 to the date of judgment.
3. The Defendant is hereby ordered to pay the Plaintiff Interest on the decretal amount at the Court's rate of 7% from the date of judgment till final settlement.
4. The Defendant is hereby ordered to pay the Plaintiff cost of this suit.

**It is so ordered.**

DATED AT DAR-ES-SALAAM ON THIS 11<sup>th</sup> DAY OF  
MARCH, 2022



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**DEO JOHN NANGELA**  
**JUDGE,**  
Right of Appeal Explained.