IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT PAR ES SALAAM.

COMMERCIAL CASE NO. 10 OF 2016

MOGAS TANZANIA LIMITED ..... PLAINTIFF

VERSUS

MEXONS ENERGY LIMITED.....1ST DEFENDANT

ABDALLAH ALLY SELEMANI t/a

OTTAWA ENTERPRISES (1987) LTD.....2ND DEFENDANT

Date of Last Order: 6/04/2022

Date of Judgement: 22/04/2022

JUDGEMENT

MAGOIGA, J.

The plaintiff, **MOGAS TANZANIA LIMITED** by way of amended plaint instituted the instant suit against the above-named defendants jointly and severally praying that, this court be pleased to enter judgement and decree in the following orders, namely:

(a) Payments of the sum of TZS.186,957,366/=by the 1st defendant being unpaid price for petroleum products delivered on credit;

(b) Payment of the sum of TZS.170,035,421.07 by the 1st defendant being opportunity loss on un-purchased volumes of petroleum products that the plaintiff could have earned save for alleged breaches per month from period January 2015 to November, 2015;

(c) Payment of the sum of TZS.32,240,000/= per month by the 1st defendant per month from 1st December, 2015 till judgement for not purchasing products to scheduled D of the dealership agreement;

(d) Payment 1st and 2nd defendants for rent and /or compensation arising from the agreement at monthly sum of TZS.4,000,000/=from January 2015 till judgement.

(e) A declaration that the transfer of the then leased property and assets between the defendants was done in bad faith thus realization of the same.

(f) Interest at 25% commercial rate stated on the sum stated in prayer (a) hereinabove from due date till judgement.

(g) Interest on the decretal amount at prevailing court rate from the date of judgement till full settlement of the amount in prayer (a) hereinabove

(h) General damages as may be assessed by this honourable court.

(i) Exemplary damages as may be assessed by this honourable court

(j) Costs be provided for

(k) Any other order and /or relief(s) as the honourable court may deem just to grant.

Upon being served with the plaint, the 1st defendant filed written statement of defence denying to have breached the terms of the dealership agreement and stated that it is the plaintiff who frustrated the performance of dealership agreement for not repairing of the Petrol station as agreed. On that note, the 1st defendant urged this court to dismiss the suit with costs. On the other hand, the 2nd defendant disputed plaintiff's claims and stated that, he has never dealt or colluded with the 1st defendant in whatever manner and as such urged this court to dismiss the suit with costs.

The brief facts of this suit are imperative to be stated for better understanding the gist of this suit. According to the pleadings, it is averred and not disputed by 1st and 2nd defendant that, on 13th October, 2014 plaintiff and 2nd defendant executed lease agreement wherein Mogas Tanzania limited (plaintiff) rented Makambako Junction Petrol station from the 2nd defendant for primary term of ten years. It was express in said lease agreement that, the rental fee for the demise premise would be payable for an interval of three and half years. Facts go that, when the lease agreement was entered the said premise was already mortgaged in favour of CRDB Bank Plc by 2nd defendant. Subsequently, to that arrangement, on 30th December, 2014 the 1st defendant entered into dealership agreement with Mogas Tanzania Limited for supplier of petroleum product at Makambako Junction Petrol station to be operated by the 1st defendant for a term of two years.

It was a common understanding of the parties that, the 1st defendant was to purchase and exclusively market outlet of petroleum and other related products of plaintiff at minimum number of 151,000 petroleum litres per month in the following volumes;- petroleum motor sprits 50,000 litres, Automotive gas oil 50,000 and Illuminating kerosene 50,000 per month and lubricant 1,000. It further alleged that the 1st defendant did not purchase minimum numbers of volumes of petroleum, the act which constitute breach of dealership agreement under Clause 16. This, among others, triggered the plaintiff to issues the notice of termination dealership agreement on 10th September, 2015. Subsequent to such notice, 1st defendant on 15th October 2015 instituted Civil Case No. 12 of 2015 at Njombe District Court claiming for specific performance.

Further facts were that, before the determination of the said case to its finality, 1st defendant on 19th November, 2016 executed sale agreement with the CRDB Bank after 2nd defendant failure to repay the loan and the same was transferred to ownership of the 1st defendant.This state of affair culminated the institution of this suit by the plaintiff for breach of dealership agreement and lease agreement by defendants claiming the reliefs as contained in the plaint, hence, this judgement.

The plaintiff at all material has been enjoying the legal services of Mr. Deogratius Ringia, Ms. Judith Ulomi and Mr. Mosses Mvungi, learned advocates. On the other adversary part, the 1st defendant at all material time was equally enjoying the legal service Mr. Daniel Welwel, learned advocate and the 2nd defendant equally was enjoying the legal service of Mr. Dickson Ndunguru, learned advocate.

Before hearing started, during final pre trial conference, the following issues were framed, recorded and agreed between the parties for determination of this suit, namely; -

(i) Whether the 1st defendant is in breach of the dealership agreement?

(ii) Whether 1st defendant owes the plaintiff the sum of TZS.186,957,366 on account of credit supplies of petroleum products.

(iii) Whether the defendants colluded and executed sale agreement unlawfully transferring the leased property to the 1st defendant.

(iv) Whether the court, in this suit can deal with matter subject of Civil Case No. 12 of 2015 filed in the District court of Njombe.

(v) Whether the 2nd defendant is in breach of the lease agreement it executed with the plaintiff.

(vi) What are the reliefs parties are entitled to?

In proof of the suit, the plaintiff called two witnesses. The first witness was Mr.**BOMA SHAABAN BOMA** (to be referred herein in these proceedings as '**PW1**') Under affirmation and through his witness statement adopted in these proceedings as his testimony in chief, PW1 told the court that he is Finance Manager of the plaintifff with roles, among others, to produce financial report, direct investment activities, develop strategies and plan for long term financial goals of their organization hence, conversant with the facts of the suit.

PW1 went telling the court that, on 13th October, 2014 plaintiff entered into long term lease agreement for ten years with 2nd defendant and soon, after the execution of lease agreement, the 1st defendant was appointed as a dealer on probation of six months. The 1st defendant entered into dealership agreement with the plaintiff on demised premise (Makambako junction Petrol station) for the period of two years.

PW1 went on telling the court that, 1st defendant breached dealership agreement in the following manner; **one,** 1st defendant abstained from purchasing plaintiff's product exclusively from July, 2015, but 1st defendant received 107,914 litres of diesel and 48,894 litres of PMS, out of which only 61,000 litres of diesel oil and 17,500 of MPS were purchased from the plaintiff depots. The additional of 78,308 litres of fuel sold by the 1st defendant station were not purchased from plaintiff depots, the act which demonstrate that plaintiff brought them from other source.

According PW1, the minimum volume dropped while business in station was being going on a usual, which is a clear indication that 1st defendant was purchasing products to other sources contrary to dealership agreement, the act which constitute

dumping oil business. **Two**, the 1st defendant has failed to make payment on products delivered on credit to the tune of Tshs.186,957,366/= as a such plaintiff instituted suit, among others, claiming for unpaid balance of goods delivered on credit.

PW1 went on testifying that, despite the clear terms of the agreement, but the 1st defendant opted not to purchase plaintiff products from January 2015 to November 2015 as a such plaintiff suffered loss of TZS.170,035,421.07 being opportunity loss for non-purchase of contractual volumes of petroleum product; Tshs.32,240,000/= against the 1st defendant per month from 1st December, 2015 till judgement for not purchasing products under schedule D of the dealership agreement; Tshs.4,000,000/= being monthly rent from January 2015 against all defendants; declaration that the transfer of leased property and assets between defendants was done in bad faith thus realization of the same; interest at the rate of 25% on all sums claimed and costs of the suit.

On the basis of the above testimony, PW1 prayed that this court be pleased to enter judgement and decree against all defendants as prayed in the plaint.

In proof of the plaintiff's suit, PW1 tendered in evidence the following exhibits, namely:

a. Account statement and affidavit as to accuracy and authenticity **as exhibit P1a-b;**

b. Tax invoice dated 30/9/2015, delivery note, marketing order, loading order, purchase order, entity pass, meta reading **as exhibit P2a-f;**

c. Tax invoice dated 30/9/2015, delivery note, marking purchase order, loading order and entry pass**as exhibit P3a-e;**

d. Tax invoice dated 7/9/2015, delivery note, marking purchase order, loading order and entry pass marketing order and meter reading as **exhibit P4a-f.**

Under cross- examination by Mr. Welwel, PWI told the court that, he started working with Mogas as chief accountant in 2012 and up to 2015. PW1 when pressed with questions on the relationship of the parties, PW1 was quick to point out that, the relationship of the parties was based on contract whereby 1st defendant was a dealer, the 2nd defendant was petrol station owner who leased it to plaintiff and plaintiff was supplier of petroleum products to 1st defendant.

PW1 when shown exhibit P1b told the court that it is customer statement, which was prepared by him 2015 at the capacity as Chief Accountant and Assistant Manager of the plaintiff. PW1 when questioned further told the court that, there was an agreement to make delivery of petroleum on credit, but 1st defendant did not repay as a such the outstanding balance is TZS.186,957,366/=. PW1 when pressed with more questions told the court that, before institution of this suit they claimed the amount and to date they are still claiming for the payment of the amount, however, no demand notice has been issued against the 1st defendant.

PW1 when shown exhibit P2 in particular exhibit P2c recognized it as marketing order which was prepared by customer service office but it was not signed by anyone. According to PW1, non-signing of marketing order is normal practice because it is an internal document and it is on standard form document. PW1 asked to read exhibit P2c read it and told the court that, initials in it were signed by Business Manager approved by national Sales Manager but it was not necessary for them to sign.

PW1 when shown exhibit P2b and asked to show proof of delivery, PW1 told the court that, there was the signature of Jonas Massawe who was a driver of the 1st defendant and the loading people are the one who gave the document to driver who signed it, to acknowledge receipt of the goods. However, PW1 admitted not knowing to whom it was signed before. PW1 when show exhibit P3 recognized as Delivery note it was signed by Clarence Kidimba before loading people. PW1 when further pressed with questions told the court that he does not know Clarence personally but through document.

PW1 when shown exhibit P4b he recognized it and insisted that it was signed by Clarence Kidimba in the presence of loading people. PW1 when pressed with more questions told the court that, the basis of their claim is the profits which were to get if 1st defendant would have bought petroleum from plaintiff. PW1 went on insisting that its profit loss was for failure of the plaintiff to buy plaintiff products and the projected sales of 7000 litres and its profit TZS.220 per litre. PW1 when asked further questions told the court that, the claim of TZS.32,240 000/= is a profit per month if defendant was to buy what was agreed.

PW1 when asked on the claim of TZS.4,000,000/=told the court that it is the rent which was to be paid by Mexon Energy Limited. According to PW1, the claim of 4 Million is for both defendants.

Under cross- examination by Mr. Ndunguru, PW1 told the court that, no need of being cross examined basing on long term lease because he did not tender it though he referred it in his witness statement. PW1 when pressed with questions told the court that TZS. 4,000,000/=was for both 1st defendant and 2nd defendant.

Under re-examination by Ms. Ulomi, PW1 told the court that, the basis of plaintiff claim is on the contract although he did not tender it. PW1 when show **exhibit P2c** identified it as marketing order approved by customer service office. PW1 when pressed with the questions told the court that the information is first shared with client and later are entered into system for approve and the Financial Manager is the custodian of all documents. PW1 when further questioned told the court that, there are two types of profit the first one is that of EWURA and that of Petro station which is Tshs. 154 per litre and 57 per litre.

PW1 when further questioned told the court that, the marketing order was signed by Mariam Mdoe the Customer Service Manager. PW1 when shown exhibit P2, told the court it was signed by Jonas Massawe who is a representative of the buyer, however, he does not know Jonas personally.

The next witness was **MICHAEL NDUHUCHILE** (to be referred herein in these proceedings as '**PW2'**). PW2 under oath and through her witness statement adopted in these proceedings as his testimony in chief told the court that, he is Managing Director of the plaintiff and successor of the former Managing Director Idris M. Mtamke who, by then, executed dealership and lease agreement between plaintiff and defendants. PW1 went on to tell the court that, his roles, among others, is but not limited to entering contracts or arrangements, creating and reporting on business plans and managing on behalf of plaintiff.

PW1 went further telling the court that, on 13th October, 2014 plaintiff entered into long term (10 years) lease agreement on plot No 276 & 277 Block (FF) with 2nd defendant whereby the 1st defendant was appointed and entered into dealership

agreement with the plaintiff who had long term lease in (Makambako junction Petro station) owned by the 2nd defendant. It was a testimony of PW1 that, it was the fundamental term of the dealership agreement that, 1stdefendant to provide exclusively market outlet for petroleum and other related products of the plaintiff as per clause 1 a, b and clause 9 of dealership agreement. It was further agreed that, 1st defendant to purchase plaintiff products at minimum number of 151,000 petroleum litres per month as per clause 16 a, c, in the following minimum numbers of sales petroleum motor sprits 5,000 litres, Automotive gas oil 5,000 and Illuminating kerosene 5,000 per month and 1000 lubricant motor oil as agreed under schedule (D)

PW2 went on testifying that, contrary to what was agreed, the 1st defendant failed to meet its minimum number of targets as a such on January 2015, 1st defendant was able purchase 147,104 litres of fuel, in May 100,450 litres of fuel, on July 80,000. However, the 1st defendant did not purchase any amount in February, March, May, June, July, August, and September 2015. In January and April 2015 only decimal amount of IK was purchased contrary to dealership agreement.

PW1 further testified that, the 1st defendant abstained from purchasing petroleum product exclusively from the plaintiff and in July 2015 Makambako junction Petrol station received 107,914 litres of diesel and 48,894 litres of PMS, out of which only 61,000 litres of diesel oil and 17,500 of MPS were purchased from the plaintiff depots. The additional of 78,308 litres of fuel sold by the 1st defendant station were not purchased from plaintiff depots which is a clear indication that, plaintiff brought them from other sources. According to PW1, the presences of additional litres of fuel which were not purchased from plaintiff constitute dumping in oil business.

PW1 went on telling the court that, apart from the above breach, 1st defendant continued to breach fundamental terms of the dealership agreement in the following manner; **one,** 1st defendant was required to maintain a minimum stock for four (4) days of station sale volume but he did not comply most of the time stock was out leading to customer disappointment. **Two,** the 1st defendant has failed to employ a minimum agreed number of staffs to ensure high standard customer service. **Three,** 1st defendant had failed to make payment on products delivered on credit as a such plaintiff claims the payments of TZS.186,957,366 as of December. **Four,** for first three month of the contract, 1st defendant had not secured and proper insurance in respect of the product 1st defendant ought to have produced such insurance policies despite several meetings. The 1st defendant refused to produce the said document. According to PW1, all these constitute breach of the agreement.

PW2 further testimony was that, despite of several correspondences and the team travelling to Njombe and Makambako to discuss the said breach with the 1st defendant did not show up despite of having the notice of the meeting. On that note, plaintiff was left with no option rather than issuing termination letter.The rest of PW2 testimony is a replica of PW1 which I need not repeat here.

In proof of the plaintiff's suit, PW2 tendered in evidence the following exhibits, namely:-

a. Lease agreement dated 25/9/2014 **as exhibit P5;**
b. Dealership agreement dated 30/12/2014 **as exhibit p6;**
c. Letter dated 16/7/2015 **as exhibit P7;**
d. Letter of termination dated 10/9/2015 **as exhibit P8;**

e. Court order dated 6/10 2015 **as exhibit P9**

Under cross- examination by Mr. Welwel, PW2 shown exhibit P2 and told the court the duration of the contract was for 24 months which was to commence on 30/12/2014 and the expire date was on 30/12/2016. PW2 admitted that the said contract was not renewed to his recollection. PW2 when pressed with questions told the court that, the agreed minimum sales were petroleum fuel 5000 litres, Diesel fuel 50,000 litres, kerosene 5,000 litres and Lubricant oil 1000 litres per months. PW2 when pressed with more questions told the court that, the term sales targets are the volumes expected to be bought by the dealer as per contract which can change from time to time depending on circumstance. PW2 when asked on the clause for non-meeting the target PW2 was quick to point out that no clause in the contract which states the consequences.

PW2 when further cross examined on the test of dumping told the court that, the evidence of dumping is that 1st defendant did not exclusively bought products from plaintiff, but he acknowledged that, he has no evidence to prove dumping but he has the letter to prove dumping. PW2 shown exhibit P7 and asked to show if it was delivered to 1st defendant, PW2 was quick to point out that, it does not show if it was delivered and don't have the email before this court. Nevertheless, PW2 insisted it was delivered by relational Manager one Kassim Mselele by hand. PW2 when further asked to read paragraph 1 of exhibit P7 read it and told the court that, 1st defendant did not respond but he came to plaintiff office for discussion.

PW2 when pressed into more questions told the court that, the condition for supply on credit were limited 150 Million and a bank guarantee of TZS.150 Million was issued.

PW2 when asked on the renewal of the dealership agreement told the court, there was a renewal but he does not remember when it was done.PW2 pressed into further cross examination told the court that, normally, the purchaser issues purchase order to plaintiff, but no purchase orders were brought before the court. PW2 when asked on the claim of 186 Million told the court that he does not know how it happened but the products were delivered and when pressed with question on the amount of TZS. 176 Million PW2 told the court that, they computed the profit which was to be realized if 1st defendant would have purchased the product and the said profit are internal arrangements and that's why it is not covered under exhibit P7 and there is no any document for that expectation.

PW2 when asked on the different between claim of 170 Million and 32Million, PW2 told the court that, the former is the opportunity loss in terms of agreement as wholesale while a 32 million is claim on loss as a result for not purchasing the volume as agreed in retail margin. PW2 went on to tell the court that, the contract was not terminated because there was court order to maintain status quo until determination of the case. PW1 when shown exhibit P9 identified it and told the court that, it reads District court of Njombe, and, according to PW2, the order did gave health to contract to date. PW2 told the court in Njombe case they filed defence, but he does not recall the outcome of the case.

PW2 when asked on the claim of 4,000,000 per month told the court that, the said claim was rent paid by the company to 2nd defendant and they need it be paid back although it is 6 years now since the conflict.

Under cross- examination by Mr. Ndunguru, PW1 told the court that, on the claim against the 2nd defendant is based on court order of maintaining status quo but we have no written evidence of informing 2nd defendant. PW2 when pressed with questions told the court that, it is true that, the subject matter has been sold to 1st defendant. PW2 when asked on when the leased property was sold told the court that he can't tell when the subject matter was sold because he is not privy to that contract. PW1 when pressed with more questions told the court that, the amount claimed in the plaint are against all defendants because there was collusion save for TZS.186 Million is against the 1st defendant alone. PW2 further cross examined told the court that, what was agreed on clause 1 (a) and (b) of exhibit P5 was paid to the tune of TZS. 336,000,000/=for three and half years. PW2 admitted that plaintiff had knowledge on mortgage but he was not aware of default but later 2nd defendant informed plaintiff on default and that he has no any agreement of sale.

Under re-examination by Mr. Mvungi, PW1 when pressed with questions told the court that, clause 16(3) of the dealership agreement states the consequences is to revoke license and claim damages. PW2 when pressed with the questions told the court that, the plaintiff gave different securities in order to help the dealer to reach the targets.

Under re-examination by Ms. Ulomi, PW1 told the court that, in case of breach plaintiff had recourse under clause 3(3). PW2 when pressed with the questions told the court that, two year has not lapsed.

PW2 asked to clarify if he knows the meaning of maintain status quo and clarify to court, that the terms and conditions in the agreement shall continue is what he meant by maintaining status quo.

This marked the end of hearing of plaintiff case and same was marked closed.

In defence, the 1st defendant was defended by **Mr. MEXON JEFTA SANGA** (to be referred in these proceedings as '**DW1**'). DW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the Managing Director of the 1st defendant hence conversant with the suit. DW1 admitted to know the plaintiff and that he had business relationship with her. DW1 went on to tell the court that, on 30th December, 2014 the plaintiff and defendant entered into dealership agreement for period of two years. It was DW1 testimony that, it was agreed, among others, that, the 1st defendant to operate the plaintiff service station known as Mogas Makambako Junction Petro station by displaying, selling and advertising plaintiff petroleum products on exclusive basis. It was further agreed that, the monthly purchase target was be 50,000 litres of premium motor sprits and 50,000 litres of automotive gas oil, illuminating kerosene 5,000 per month and 1000 lubricant motor oil as agreed under schedule (D).

According to DW1, it was an impliedly term that, before 1st defendant takes over the station, the plaintiff was to have serviced station operational and compliant with licensing requirements including working pumps, repaired structure, branding, painting and general appearance of the station but plaintiff did not meet those conditions as a such defendant carried out requisite repair works to improve the image of the service station so as to make the service station fully operation and to meet agreed targets which were contractually plaintiff obligations.

DW1 went on telling the court that, apart from that, 1st defendant took necessary steps by employing sufficient pump attendance, caretakers, security guards and the

management team at his costs, the act which were acknowledged and appreciated by the plaintiff by awarding 1st defendant best dealer achievement award on 1st January, 2015. DW1 further testimony were that, the allegation of dumping by plaintiff is untrue because plaintiff did not procure product from other source and that no particulars of dumping have been set by the plaintiff save for contradictory information on the record.

Testifying further DW1 told the court that, it was plaintiff who made the implementation of the dealership agreement difficult and more costly to 1st defendant for failure to comply with the agreement as a such defendant institute Civil Case No. 12 of 2015 contending various breaches of dealership agreement. However, the case was not decided on the merits because the subject matter which was service station was sold before its determination. According to DW1, the claim of TZS.170,035,421,.07 is unfounded and non-contractual because 1st defendant does not owes plaintiff any single coin of money as he was procuring stock from the plaintiff on advance payments basis even the security tenant set on the dealership agreement there is no likely hood that 1st defendant owes plaintiff TZS.186,957,366 and there is no evidence supporting that allegation because no purchase order constituting the said amount neither invoice and credit agreement setting out the terms of the credit supplies.

PW1 went telling the court that, parties agreed that for 1st defendant to procure the product on credit, there should be a bank guarantee of TZS.150 Million, in which the parent company of Mexon Investment Limited had bank guarantee from CRDB which was valid up to 15th October, 2015 and on 13th October,2015 plaintiff called on bank guarantee and all credit supplies were liquidated and there was no subsequent supplies to this date. In that regards, the allegation by the plaintiff is unsubstantiated.

DW1 went telling the court that, the allegation that 1st defendant and 2nd defendant colluded to execute sale agreement to defeat plaintiff interest are incorrect because 1st defendant bought the property from CRDB Bank under its power of sale under mortgage deed and that, plaintiff is lien to that contract then plaintiff cannot sue 1st defendant without pleading CRDB. It was further testimony of the plaintiff that, no plaintiff assets were included in sale all asset of plaintiff which were not part of purchased property by 1st defendant were returned to plaintiff. DW1 went further to testify that, TZS.32,240,000/= is unfounded because the property was sold by CRDB a dealership agreement along with lease agreement was taken by event and has no justification to claim for perpetual benefit for the property it no longer had. DW1 went on to tell the court that even the claim of 4,000,000/=is unfounded because 1st defendant is not privy to lease agreement. On the foregoing reasons, DW1 prayed and urged this court to dismiss the instant suit with costs.

In proof of what has been testified above, DW1 tendered the following exhibits in evidence namely; -

(a) Plaint and written statement of defence in Civil case No 12/2015 between Mexon Energy Ltd vs Mogas Tanzania Limited **as exhibit D1a-b;**

(b) Bank guarantee in favour of plaintiff from CRDB Bank **as exhibit D2;**

(c) Handing over note between Mexon and Mogas Dated 11/5/2017 **as exhibit D3;**

(d) Transfer under power of sale dated 19/9/2016 **as exhibit P4;**

Under cross- examination by Mr. Ringia, DWI told the court that, he is a standard seven leaver and does not know english though his witness statement is in english.

DW1 when pressed with questions told the court that, he only paid TZS.750,000,000/= to CRDB and has never paid any single coin to Ottawa. DW1 insisted that neither Ottawa did not took him to CRDB, but it's the bank itself that advertised the Petrol station and the bank sold to 1st defendant. DW1 when shown the witness statement of Ottawa and the letter dated 6/9/2016 told the court that, the letter was from CRDB to Ottawa and it's true that exhibit P4 has the amount of TZS.750,000,000/=. DW1 when pressed with more questions told the court that, he cannot recall how much was selling per day.

DW1 when asked on the Njombe case told the court that, the case was instituted in Njombe after the notice of termination before the expire of the contract with plaintiff he wanted to protect its interest because plaintiff wanted to terminate contract before its expire. DW1 when shown exhibit P4 identified it and insisted that he bought the property for TZS.750,000,000/. DW1 when further shown exhibit P1a told the court that, the business was not good at all but he does not recall how much he was selling. DW1 when pressed with questions admitted that before institution of the Njombe case plaintiff was his supplier but after the institution of case no business was going on and the station was not working on until when 1st defendant bought the Petrol station.

DW1 on further cross examination told the court that, the award has nothing to do with the quality of the Petrol station. DW1 went on telling the court that, EWURA do inspect all petrol stations but he does not recall if it was inspected or receive the notice from Mogas. DW3 shown exhibit D3 told the court that it was handing note which was done on 11/5/2017. DW1 when shown exhibit P1a told the court that, it was given on 6/10/2015 it came to his knowledge when he bought the petrol station is when the

bank told him that, power generator, pump and ked oil are plaintiff's property and he handed over to plaintiff.

DW1 shown exhibit D2 and told the court that, her duty in dealership agreement was to pay for products supplied and told the court that bank guarantee was releases by Mogas and when he handed it to Mogas they refused. DW1 when pressed with more questions told the court that, the offer was TZS.1,350 Billion

Under cross -examination by Mr. Ndunguru Advocate, DW1 told the court that, the he bought it from the bank and the price paid is the price agreed with the bank. DW1 had no knowledge of the Ottawa offer and for the first time he came to know Ottawa during handing of plaintiff assets. Therefore, no fraudulent was committed between me and Ottawa because Ottawa defaulted in payment of the loan and the bank sold the leased property.

Under re-examination by Mr. Welwel DW1 told the court that, the letter dated 18/8/2016 was from Ottawa to Mogas, letter dated 6/9/2016 was from CRDB to Ottawa which has nothing to do with 1st defendant. DW1 when pressed with questions told the court that, Ottawa was not party to exhibit D4 and for the first time he heard the price of 1.5 Million before this court. DW1 pressed with more questions told the court that, the petrol station was not being maintained to meet business expectations. DW1 when pressed into more questions told the court that, in Njombe case there was no argument of jurisdiction. DW1 when shown exhibit D2 told the court that exhibit D2 was recalled and it was for 400 Million but the money plaintiff recalled was 200 Million.

This marked the end of hearing 1st defendant case and the same was marked closed.

The next witness was **ABDALLAH ALLY SELEMAN t/a OTTAWA ENTERPRISES (1989)** (to be referred herein in these proceedings as '**DW2**'). DW2 under affirmation and through his witness statement adopted in these proceedings as his testimony in chief, told the court that on 25th September, 2014, the 2nd defendant entered into long term lease agreement for ten (10) years of one of his petrol station at Makambako Plot No 1 Block H with Mogas Tanzania Limited. DW2 went on to tell the court that it was common understanding that, the leased property has been mortgage in favour of CRDB. DW2 went further telling the court that, it was agreed, among others, that in case of default and the mortgage property sold no one will be liable and plaintiff will vacated the premise immediately. Unfortunately, due to economic hardship 2nddefendant defaulted to pay the loan and the CRDB sought to recover his money by selling some of 2nd defendant properties, Makambako petrol station, inclusive. Following the intention of CRDB to sale the leased property, the 2nd defendant through the letter dated 21st March, 2016 informed and offered plaintiff to buy the said station. However, Plaintiff through letter dated 31st March, 2016 responded that at time time was not with enough money. On 17th August, 2016 plaintiff responded that, they cannot do anything about the station because they were ordered to maintain status quo.

DW2 further testimony were that, CRDB Bank announced the sale of the property and the 2nd defendant was informed on the announcement of the sale of the property through letter dated 6th September,2016 in which the same 2nd defendant informed plaintiff. DW1 went on telling the court that, after advertisement the Bank met Mexon Energy Limited and they executed sale agreement thereafter the 1st defendant informed 2nd defendant through letter dated 17th January,2017. Subsequent to letter of

Mexon on the same date 2nd defendant wrote the letter to plaintiff informing him on the intention of the new owner taking immediate possession .According to DW2, the allegation of the collusion between 1st defendant and 2nd defendant are not true.

On that note and for the reasons given above, DW2 argued the court to dismiss the case with costs.

In disproof of the plaintiff's suit, DW2 tendered in evidence the following exhibits, namely:

(a) Letter dated 21/3/2016**as exhibit P5**

(b) Letter dated 31/3/2016 **as exhibit P6a-b**

(c) Two letters dated 17/1/2017 **as exhibit p7a-b**

Under cross- examination by Ms. Ulomi, DW2 told the court that, CRDB loan was for TZS. 1.3 Billion and by time the station was sold the outstanding amount was TZS.750,000,000/= and the said petrol station was sold to Mexon for TZS. 750,000,000. DW2 when pressed with questions told the court that, he was not given the money by Mexon because before this case, he has never met Mexon personally. DW2 when asked on the price of the petrol station was quick to point out that, at first, he said the price of 1.5 Billion but client never showed up. DW2 when pressed with questions told the court that, he was not involved on the sale and he does not know the means they used to sale the property but Mogas failed to buy the petrol station.

Under cross examination by Welwel, DW2 told the court that, he was the owner of the petrol station and Mogas was a tenant and that's why he was given the first offer. DW2 when questioned more questions told the court that, plaintiff and 2nd defendant had contract in which 1st defendant was not part to it. DW2 when further questioned

told the court that, he did not know Mexon before and no other payment was given relating the selling of the petrol station.

Under re-examination by Mr. Ndunguru, DW2 told the court that, Mexon gave nothing on that sale of petrol station. It's the bank who sold the property because he had the loan with CRDB Bank, insisted DW2.

This marked the end of defence case and same was marked closed.

The learned advocates for parties prayed under Rule 66(1) to file closing submissions, which prayer I granted. I have had time to go through the rivaling submissions, and I commend them for their industrious input on the suit. I will not produce them in verbatim but I will consider them along while answering the issues framed and where necessary will refer to them and where I will not it suffices to say same are accorded the weight they deserve.

Having summarized the evidence by both parties and having read the final submissions by the rivaling learned advocates for parties, the noble task of this court now is to determine the merits or otherwise of the suit. However, it should be noted that in this suit there are some facts which are not in dispute between parties which in a way will assist this court to do justice. These are; **One**, there is no dispute that 2nd defendant and plaintiff entered into long term lease agreement for ten years in which enabled the plaintiff to enter into dealership agreement with the 1st defendant for two years. **Two,** there is no dispute as well that, the leased property was mortgage in favour of CRDB Bank. **Three,** it is not disputed that 1st defendant instituted Civil Case No. 12 of 2015 at Njombe District court seeking specific performance. **Four**, there is no dispute as well that the 2nd defendant defaulted in its obligations under the facilities with CRDB

Bank. However, in the circumstances, what is in serious dispute between the parties here is the breach of dealership agreement and lease agreement.That being in mind, is high time to answer the issues now.

The first issue was couched that "**whether the 1st defendant is in breach of dealership agreement"?** The learned counsel for plaintiff has submitted that, 1st defendant has breached the dealership agreement on the following manner; **first,** 1st defendant failed to purchase minimum volumes of products as agreed contrary to clause 16 of the dealership agreement. **Second,** the 1st defendant did not exclusively purchase plaintiff product as agreed contrary to clause 2(d) of the agreement the act which constitute dumping. **Third,** the 1st defendant stopped purchasing plaintiff's products after the court order.

On the other hand, the learned counsel for 1stdefendant strongly submitted that it is the plaintiff who frustrated the performance of dealership agreement on the following manner; **one**, plaintiff failed to undertake necessary repair for full utilization of the petrol station consequently 1st defendant failed to meet agreed targets as a such on 6th October,2015 instituted Civil Case No. 12 of2015 seeking specific performance of dealership agreement. **Two,** no documents which have been tendered before this court to prove the allegation of dumping, in support of his arguments the learned advocate cited the case of GODWIN RWEGARULILA BUBERWA V. DOMINICESTACE RUTAIWA, CIVIL APPEAL No 34 of 2020, in which the court held that, for a document to be acted upon by the court that document must first be tendered and then admitted as exhibit. **Three** the sale targets are projection which depend on parties conduct and market condition as such 1st defendant cannot be hold in breach of dealership agreement.

It is settled legal position that breach of contract occurs when one party in a binding agreement fails to perform its obligations and conditions according to the terms and conditions of the contract. The provision of section 37 the Law of Contract Act [Cap 345 R.E. 2019] underscore the point. For easy reference I produce it hereunder:

> **Section 37(1) the parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this Act or of any other laws.**

Guided by the above legal stance, the next question I asked myself is; was there any such failure on the part of the 1st defendant or plaintiff? Having gone through the pleadings, the respective testimonies of the parties and final closing submissions and traversed the exhibits tendered for and against, I am satisfied beyond doubt that in the circumstances of this suit, it was plaintiff who was in breached of the terms of the contract. I am taking the above stance on the following reasons; **One**, the plaintiff does not both in pleadings and evidence demonstrate any preparation taken to repair or to demonstrated that he serviced and repaired the petrol station to the required standard and worse enough DW1 was not cross examined by the learned advocate for the plaintiff on the point and as a matter of principle, a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said.

Then, if that is the position, failure of learned counsel for plaintiff to cross examine DW1 on that fact, should be taken to be an admission or acceptance that plaintiff

did not repair the station to the required standards. This legal position was stated by the Court of Appeal in the case of SHADRACK BALINAGO vs. FIKIRI MOHAMED @ HAMZA & 2 OTHERS, CIVIL APPEAL NO. 223 OF 2017 (CAT) MWANZA (UNREPORTED) in which it was held that: -

> **"as rightly observed by the learned trial judge in her judgement, the appellant did no cross examined the 1st respondent on the above piece of evidence. We would, therefore, agree with the learned judges' inferences that the appellant's failure to cross examined the 1st respondent amounted to acceptance of the truthfulness of the appellant's account."**

It is on that account that, I agree with the 1st defendant that, plaintiff did not observe and perform the covenants and conditions contained **in exhibit P6** under clause 32, of dealership agreement. On that note, plaintiff cannot put a blame to 1st defendant for not meeting the sale targets and use it as the reasons for breach of contract on the part of defendant while at the 1st place did not perform its obligation.

Two, one of the reasons given by plaintiff that 1st defendant breached dealership agreement was dumping, plaintiff alleged that, he discovered that 1st defendant was not exclusively purchasing plaintiff product after review of sales report, email communications exchange and physical check /audit. However, nothing was tendered to substantiate the allegations nor was any witness called to support the allegations that the 1st defendant was purchasing petroleum product from other

sources. In absence of such evidence, there is no way it can be conclusively be determined that, the defendant in any way purchased products from other sources. It is trite law that, the court cannot make a finding basing on the document which was neither tendered nor admitted before it as exhibit. This legal position was stated by the Court of Appeal in the case of **SHEMSA AND TWO OTHERS VS SELEMAN HAMED ABDALLAH, CIVIL APPEAL NO 82 OF 2012(UNEPPORTED).**

In the circumstance, it cannot justifiably be said that, 1st defendant did not exclusively purchase plaintiff product basing on the letter **exhibit P7** alone which was requesting 1st defendant to explain why he does not buy MOGAS products without the support of the records stated in the letter to have shown so. One would expect the plaintiff to bring forth the record of purchases from other sources to justify that actually there were other non Mogas products. Failure to tender those records was fatal to the plaintiff's case because were very material evidence in proving breach of contract and dumping. It is a common knowledge that, once a fact is disputed, then, the part has duty to prove it and since plaintiff in this case opted not to call any witness or to tender the record that were supporting exhibit P7 which was seriously disputed even on its service to the 1st defendant leave the case for breach and dumping hanging on their part of the plaintiff. Section 110 of the Tanzania Evidence Act, [Cap 6 R.E. 2019] underscore the point that whoever wants the court to decide in his favour has legal burden to prove what he alleges in civil cases on balance of probability. Unfortunately, this was not done in this case.

Three, the plaintiff allegation of breach of contract was based also on failure of 1st defendant to meet sales targets. It is my considered view that, minimum sales

targets are subjective to other factors.I am convinced with the explanation of the 1st defendant that meeting of targets is not solely depend on the conducts of the parties to the dealership agreement but also extraneous factors in the market forces. Therefore, it will be unfair holding 1st defendant liable for breach of dealership agreement without taking into consideration of other factors which are out of his control .The 1st defendant has explained to court that, one of the reasons why he did not meet the target was plaintiff failure to repair the petrol station to the standard required. This fact was not disputed by the plaintiff, and careful perusal **Exhibit D1a** it shows that 1st defendant from beginning was requesting plaintiff to perform his obligation.

In the totality of the above, reasons I conclude that, plaintiff frustrated the performance of dealership agreement. The mere argument by the plaintiff on minimum sales target and dumping are far from convincing this court otherwise and this makes this court to answer issue number one in the negative.

The next issue was couched thus, **whether 1st defendant owes the plaintiff sum of TZS.186,957,366/= on account of credit supplies of petroleum products**. The 1st defendant strongly disputed the payment of TZS. 186,957,366/=in number of ways namely; one, that the so tendered exhibit P2, exhibit P3 and Exhibit P 4 does not reflect the claim of TZS. 186,957,366/=. Two, exhibit P6 provides the limit on credit supply to be TZS. 150,000,000/=, no purchase order has been tendered to substantiate the claim of TZS. 186,957,366/=.

On the other hand, the learned counsel for plaintiff strongly submitted that, 1st defendant was supplied with the product as evidenced by exhibit P2 tax invoice 18,000

litres amounting to TZS.31,626,000/=, exhibit P3a Tax invoice No 41500 amounting to TZS. 77,587,500/=, exhibit P4-f Tax invoice 41500 amounting to TZS. 79,335,500/= and exhibit P1b which show that, as 31st December, 2015 the outstanding debt was TZS. 186,957,366/=.

Having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, I am inclined to answer this issue in the in negative. My reasons are not far-fetched. **One**,as correctly argued by Mr. Welwel, and right so in my opinion, the whole transaction traces its genesis from **exhibit P6** in which provided that, I beg to quote in verbatim:

> **Clause 9b.** Maximum credit limit allowed shall be Tanzania Shillings One Hundred Fifty million only as per the issued Banking Guarantee (150,000,000)

Going by the above wording of **exhibit P6** on the condition for supply goods on credit, it is impossible for the 1st defendant to owe the plaintiff the sum of TZS. 186,957,366. Because the parties agreed the limit to be TZS. 150,000,000/=. How came the plaintiff supplied the product on credit above the limit is not explained by the plaintiff. More so the immediate question is, was there an amendment to clause 9 b of **exhibit P6? T**he answer is No! Because no evidence has been tendered to show that this clause was amended and in absence of such evidence, there is no way it can be concussively be determined that plaintiff supplied 1st defendant products on credit exceeding the agreed limit. As a matter of principle, the obligation to honour what was agreed by the parties to a contract is fundamental. This legal position was stated by the Court of

Appeal in the case of SIMON KICHELE CHACHA Vs. AVELINE M. KILAWE CIVIL APPEAL NO 160/2018 (unreported) in which it was held that: -

> *"parties are bound by the agreement they have freely entered into, and this is a cardinal principle of the law of contract that there should be a sanctity of the contract.*

With that in mind and back to this suit, and having gone through and considered both sides' pleadings, testimony of the PW1 and exhibits tendered, I am in considered view that, the allegations that plaintiff supplied product on credit to the tune of TZS.186,957,366/= is devoid of merits because plaintiff was to supply goods on credit according to agreed limit of TZS.150,000,000/ Million .

Two, the proof of payments of TZS.186,957,366/= were based on exhibit P2, exhibit P3, exhibit P 4 and exhibit P1b but careful perusal of the exhibits on proof of the claim on payments of TZS.186,957,366/=. I have noted that, there are discrepancies on the amount claimed by the plaintiff, **exhibit P1b** show that the outstanding balance as per 31st December, 2015 was TZS. 186,957,366/= while **exhibitP2, exhibit P3 and exhibit P4** indicate that the unpaid supplied products on credit is TZS.188,549,000/= this discrepancies has never been encounter by the plaintiff and worse enough the **exhibitP2b, exhibit P3b and Exhibit P 4b** show that the destination point of the product claimed to be transferred to 1st defendant petrol station was not delivered at Makambako Junction petrol station but rather it was at delivered at Kinondoni Dar es salaam. Therefore, it is my considered opinion that the said products were not delivered to 1st defendant Petrol station but were rather delivered to Kinondoni. None of the plaintiff's witnesses explained to court why these exhibits shows the products

were delivered Kinondoni Dar es Salaam and not Makambako Junction petrol station. Much as these were meant to prove the claim of Tshs.186,957,366/=, then, in the absence of other documents to prove otherwise, this claim was not at all strictly proved.

In totality of the above reasons, the second issue must be and is hereby answered in negative that, in no way plaintiff supplied 1st defendant on credit and that amount up to date not paid as no explanation was given for delivery to be done in Dar es Salaam.

The third issue was thus couched that, **whether the defendants colludes and executed sale agreement unlawfully transferring the leased property to the 1st defendant?** The learned advocate for plaintiff had it that the defendants colluded to defeat plaintiff interest by facilitating the sale of the mortgaged property which was subject to both dealership agreement and lease agreement. On the other hand, 1st defendant has submitted that he bought the leased property lawfully from CRDB Bank, while the learned counsel for 2nd defendant had it that the 2nd defendant has not colluded with 1st defendant in whatever way he was in default and his property was to be sold

Having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, I am inclined to answer this issue in the negative. My reasons are not far-fetched. **One,** plaintiff doesn't dispute that the leased property was mortgaged to CRDB Bank nor that the 2nd defendant defaulted in repayment of the loan. Therefore, it is unimaginable to say that 1st defendant and 2nddefendant colluded to defeat plaintiff interest because plaintiff had prior knowledge of the mortgage and debt. More so,

the content of **exhibit D4** are loud and clear that 1st defendant executed sale agreement with the CRDB Bank on 19th November,2016 and the same it come to the knowledge of 2nd defendant through the letter dated 17th January,2017 **exhibit D7b**. Up to this juncture, there was no collusion as rightly submitted by learned advocated of defendant because 2nd defendant had not known 1st defendant until at the time of sale of leased property by the Bank under lender's power of sale.

Two, this argument was not substantiated, there is no iota of evidence to substantiate that 1st defendant and 2nd defendant colluded to defeat plaintiff interest save only for speculation that since 1st and 2nd defendant were competitive in business they know each other, this is a just a speculation which the court cannot act upon it. It is worth noting that the onus of proof lies to the party who alleges. I found this issue wanting in evidence on the part of plaintiff in the circumstance of this suit. Guided by the provision of Section 110 of Tanzania Evidence Act, [Cap 6 R; E 2019] which provides that: -

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

The same legal position was stated by the Court of Appeal of Tanzania in the case of ANTONY M. MASANG V (1) PENINA (mama Mgesi) (2)(supra) that the burden of proof lays on the party who alleges anything to be decided in his favour.

It is common knowledge that in civil proceedings the party with burden also bears the evidential burden and the standard in each case is on balance of probabilities.

Guided, by the above cited legal principles, this court finds that a burden of proof of the collusion to defeat plaintiff interest lies on the plaintiff to prove that indeed the defendants colluded. On the above reasons the arguments by Ms. Ulomi are far from convincing this court otherwise.

That said and done, I associate myself to the conclusion by Mr. Welwel and Mr. Ndunguru that the issue is to be answered in negative that there was no collusion by the defendants to defeat plaintiff interest as a such the sale agreement was lawfully executed and transferred to the 1st defendant.

The next issue was couched that "**whether the court, in this suit can deal with matters subject of the Civil case number 12 of 2015 in the district court at njombe**. I should make it clear at the outset that, based on the evidence on record, this issue was raised out of context, and therefore, it will not detain this court much, because the dispute is not on appeal or revision rather who breached the contract and payments of goods purchased on credit.

The next issue couched that "**whether the 2nddefendant is in breach of the lease agreement entered into with plaintiff.** The learned counsel for plaintiff submitted that, by collusion of the defendants vitiated lease agreement.

On the other hand the learned advocate for 1st defendant has nothing to submit because he was not party to lease agreement while the learned counsel for 2nd defendant submitted that, 2nd did not collude to defeat plaintiff's interest.This issue will not detain this court much, as would only have been relevant, if the third issue had been answered in affirmative. Having concluded and answered in the 3rd issue in negative it follows that 2nd defendant did no breach lease agreement.

This trickles down to the last issue **that what reliefs parties are entitled**. Based on my findings in above, this suit must be and is hereby dismissed with costs to the defendants.

It is so ordered.

Dated at Dar es Salaam this 22nd day of April, 2022.

S. M. MAGOIGA

JUDGE

22/04/2022