

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 149 OF 2021

YARA TANZANIA LIMITED.....PLAINTIFF

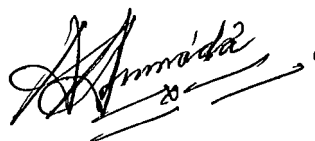
VERSUS

KALONGE FARM.....DEFENDANT

JUDGMENT

A.A. MBAGWA, J.

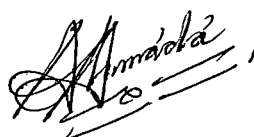
The plaintiff YARA TANZANIA LIMITED is a limited liability company which deals with sale and supply of fertilizers across the country whereas the defendant company is engaged in agricultural activities including purchasing fertilizers from various vendors. The plaintiff instituted this suit against the defendant on the contentions that the defendant company breached the contract for supply of fertilizer. The plaintiff averred that she supplied fertilizer on credit to the defendant but the latter failed to make full payment of the purchase price contrary to the agreement terms. According to the pleadings, the plaintiff issued several reminders to the defendant but to no

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avail. As such, the plaintiff resolved to bring this suit praying for judgment and decree against the defendant as follows;

1. A declaration that the defendant is in breach of contract for supply of fertilizers entered into between the plaintiff and defendant.
2. An order for payment of TZS 260, 721, 814/= (say Tanzania Shillings Two Hundred Sixty Million Seven Hundred Twenty-One Thousand Eight Hundred Fourteen) only.
3. Interest at commercial rate of 25% from the date when the debt became due to the date of judgment.
4. Interest on decretal sum at court rate from the date of judgment to the date of full settlement of the debt.
5. General damages.
6. Costs of this suit, and
7. Any other reliefs that this Honourable Court may deem fit and just to grant.

It was the plaintiff's contention that between 2017 and 2020 the plaintiff and defendant had contract for supply of fertilizer wherein the plaintiff was supplying the defendant with the said fertilizer on credit. The plaintiff elaborated that the defendant was issuing local purchase orders (LPO) to

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the defendant indicating the type and amount of fertilizer she was in need of. Upon receipt of the local purchase order, the plaintiff would deliver the requested products along with delivery notes and invoice indicating the type and value of the fertilizer delivered. The said delivery notes were being signed by the defendant to confirm the delivery of the items shown therein. The plaintiff further claimed that on divers dates she supplied fertilizer to the defendant worth TZS 886,524,880 but the defendant only managed to pay TZS 612,203,006 thus leaving an outstanding sum of TZS 271, 021,814. The plaintiff continued that she reminded the defendant of the outstanding debt but the defendant neglected to clear it. In consequence thereof, the plaintiff resorted to institute the present case for the reliefs indicated herein above.

In contrast, the defendant strongly refuted the plaintiff's claims through her written statement of defence for being baseless. Although the defendant admits existence of the contract for supply of fertilizer between the duo, she stated that the plaintiff had no pending payment against her. The defendant stated that the purchase price for the supplied fertilizer was fully paid through the tripartite agreement between Yara Tanzania Limited (the plaintiff), Kalonge Farm Limited (the defendant) and Mbozi Coffee Curing

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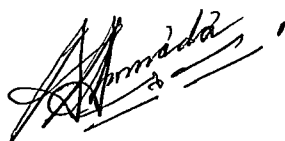
Limited. The defendant thus prayed for dismissal of the plaintiff's claims for being baseless.

Upon completion of the pleadings, this court framed three issues for determination;

1. Whether the defendant breached the contract for supply of fertilizer between the plaintiff and the defendant.
2. Whether the defendant is indebted to the plaintiff to a total sum of TZS. 260,721, 814/=.
3. What reliefs are the parties entitled to.

When the matter was called on for hearing, the plaintiff was represented by a team of attorneys namely, Reuben Robert, Erick Dengha and Ally Hamza, learned advocates whilst the defendant had services of Rose Kayumbo and Kelvin Kuboja, learned advocates.

In a bid to establish its claims, the plaintiff produced one witness namely, Jacqueline Ngeleshe (PW1) along with various documentary exhibits which were admitted and marked as exhibit P1 to P8. The plaintiff's exhibits include local purchase orders (LPO), delivery notes, invoices, commitment letter by



the defendant to pay the outstanding balance, plaintiff's account bank statement and demand notice.


In her written statement which was adopted and admitted by the court, PW1 Jacqueline Ngelesha, the plaintiff's business controller told the court that between 2018, 2019 and 2020, the plaintiff and defendant had contract for supply of fertilizer on credit. She recounted that until 21st November, 2019 the defendant had an outstanding debt of TZS 366, 450,600/= being the purchase price of the fertilizer supplied in 2018 and 2019. PW1 continued that the defendant acknowledged the outstanding debt of TZS 366, 450,600/= through a letter which she wrote to the plaintiff. Jacqueline tendered the said debt acknowledgement letter dated 21st September, 2019 and the same was admitted and marked exhibit P1. The plaintiff's witness further stated that after acknowledgment of debt, the plaintiff continued to supply fertilizer as per the defendant's requests through the local purchase orders. PW1 tendered the local purchase orders No. 55, 56, 57, 58 and 59 along with their corresponding delivery notes and invoices and the same were admitted and marked exhibits P2, P3, P4, P5 and P6 respectively. PW1 stated that the plaintiff supplied fertilizer amounting to a total sum of TZS 886, 524,880/= but the defendant only paid TZS 612, 203, 006/= thereby



leaving an outstanding balance of TZS 260,721,814/=. As such, the plaintiff witness stressed that the defendant is in breach of contract for failure to pay the purchase price contrary to the agreement terms.

On the adversary, the defendant paraded two witnesses to wit, Adam Ambien Kalonge (DW1) and Isack Allan Sika (DW2). Besides, the defendant's side produced various documents which were marked as exhibit D1 to D5 being a request letter by the defendant for confirmation of balance (exhibit D1), tripartite payment agreement (D2), two bank slips (D3), a letter dated 22/01/2021 (D4) and financial report dated 8th March, 2022 (D5).

In his written statement which was adopted by the Court, Adam Ambien Kalonge (DW1) told the court that he is the managing director and shareholder of the defendant's company. He stated that the plaintiff and defendant had business relationship since 2016. He elaborated that in 2016 and 2017, the defendant was buying fertilizer from the plaintiff by cash hence she was making payments into the plaintiff's accounts at CRDB Bank and NMB Bank in advance. DW1 continued that as the business flourished, in August, 2017, the plaintiff upgraded the defendant's status and started to supply fertilizer to the defendant on credit. Mr. Kalonge explained further that in the course of business, the plaintiff learnt that the defendant was

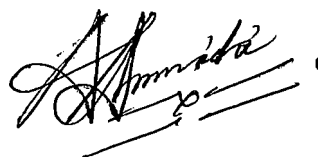


supplying fertilizer to Mbozi Coffee Curing Limited. As such, the plaintiff, defendant and Mbozi Coffee Curing Limited (MCC) entered into agreement in which the plaintiff was supplying fertilizer to MCC through the defendant that is to say the defendant was pressing order through its account (name) and the plaintiff was transporting and delivering the fertilizer to MCC. Further, DW1 stated that on 21st September, 2020 they entered into tripartite agreement between the plaintiff, defendant and MCC in which it was agreed that MCC would pay the outstanding debt for the fertilizer which the defendant had been supplied by the plaintiff. He tendered the tripartite agreement and the same was marked as exhibit D2. DW1 continued that at the time of signing the tripartite agreement, the debt stood at TZS 335, 506, 066/= which was immediately paid into the plaintiff's bank accounts as shown in the bank pay in slips exhibit D3. DW1 lamented that the squabbles arose when the plaintiff started to transact with MCC directly. According to DW1, it was their agreement that MCC would be supplied fertilizer through the defendant's company. Mr. Kalonge stated that the plaintiff breached their agreement and when the defendant complained, the plaintiff raised a concocted claim of TZS 260, 506, 006/= as a way to silence him. DW1


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concluded that the plaintiff's claims are devoid of merits and therefore prayed the court to dismiss them.

In addition, the defendant brought Isack Allan Sika (DW2) whose evidence was basically on financial audit. He stated that his account firm was engaged by the defendant, Kalonge Farm to audit their financial statement. He testified that in the audit he covered the transactions between the duo for the period from November, 2019 to February, 2022. According to DW2 the total purchase price for fertilizer supplied between 21st September and 19th December, 2019 was TZS 520, 044, 280/=. At paragraph 6 of his statement, DW2 said that Kalonge Farm paid the plaintiff a sum of TZS 319, 747, 500/= while Mbezi Curing Company Limited paid the plaintiff TZS 335,503,066/=. As such, DW2 stated that in the end he found that there was overpayment to the plaintiff of TZS 135, 205, 786/=. I should say, at the outset, that I did not give much reliance on DW2's evidence owing to the fact that he is not the one who prepared and signed the said financial report (exhibit D5). I have dispassionately analysed the evidence and thoroughly considered the rival submissions which were prepared and duly filed by the learned counsel.

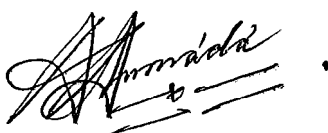


To start with the 1st issue as to whether the defendant breached the contract for supply of fertilizer between the plaintiff and the defendant. The plaintiff has contended that the defendant breached the contract due to its failure to pay the purchase price for the supplied fertilizer within thirty (30) days. The plaintiff counsel, in his submission, referred this court to the contents of invoice and delivery notes (part of exhibits P2 to P6) and submitted that the defendant was required to make the respective payments within thirty days but the defendant failed to comply with this condition. To the contrary, the defendant disputed the allegations stating that there was no breach of contract. She clarified that the debt which she owed the plaintiff was liquidated through a tripartite agreement (exhibit D2). It is important to note, at this juncture, that the plaintiff did not dispute the tripartite agreement (exhibit D2). The agreement is titled 'tripartite payment agreement' between YARA TANZANIA LIMITED (Creditor), Kalonge Farm Limited (1st Debtor) and Mbozi Coffee Curing Co. Limited (2nd Debtor). The agreement was signed by the parties, on 21st September, 2020 and the plaintiff was represented by Andrew Ndundulu, Sales Agromist and January Fabian, Business Controller. At the expense of making this judgment tedious, I find it apt to reproduce some of the clauses in the tripartite agreement. The agreement provides;



1. That 1st Debtor was supplied with fertilizers from the Creditor on credit basis. To date the 1st Debtor's indebtedness has accumulated to a tune of Tshs....(figure not filled in)
2. That the 2nd Debtor owes a sum of Tshs 335, 503, 066/= to the 1st Debtor arising from the supply of fertilizers
3. That 1st Debtor with consultation of both Creditor and 2nd Debtor has unreservedly agreed to transfer her liabilities from the Creditor to the extent stated under clause 1 above to the 2nd Debtor to the extent of discharging the Creditor's debt only.
4. That the 2nd Debtor has unreservedly agreed that she will be responsible to pay the Creditor the outstanding debt due to the 1st Creditor as stated under clause 1 above.

Clause 3 is very straight and clear that at the time of signing the agreement, the defendant's liabilities to the plaintiff were transferred to Mbozi Coffee Curing Co. Limited. The plaintiff did not sue Mbozi Coffee Curing Limited for breach of contract. This implies, in my view, that Mbozi Curing Limited performed its contractual obligation accordingly by paying the plaintiff full debt which was due to the defendant at the time of signing the agreement (exhibit D2).

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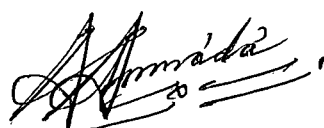
The plaintiff states that the defendant owed the plaintiff purchase price of fertilizer supplied via local purchase orders No. 55 to 59 which are exhibits P2 to P6 whose total amount is TZS 520,044, 280/= plus a sum of TZS 366,480,600/= which the defendant admitted and committed herself to pay via letter (exhibit P1). It was the plaintiff's version that TZS 366, 480, 600/= was in respect of fertilizer that was supplied prior to 21st November, 2019. However, there is no any clause whatsoever in the agreement to the effect that the defendant's outstanding debt was confined to local purchase orders No. 55 to 59. PW1 stated that after commitment letter (P1), the plaintiff continued to supply the defendant other consignments through exhibits P2 to P6 whose total value is TZS 520,044,280/=.

The commitment letter is dated 21st November, 2019 whereas the tripartite agreement (exhibit D2) was entered into on 21st September, 2020 and there is no dispute on this. This is to say that the tripartite agreement came into existence almost a year after the commitment letter. Clause 2 of the agreement (exhibit D2) clearly tells it all that at the time of signing, the defendant had an existing debt of TZS 335, 503,066= which was transferred to Mbozi Coffee Curing Co. Limited. The defendant through the statement of DW1 states that the said sum of TZS 335, 503,066/= was paid in two



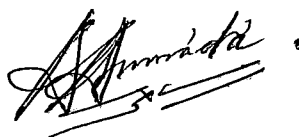
instalments of TZS 100,000,000/= and 235, 503, 066/=. DW1 tendered two bank deposit slips and the same were collectively admitted and marked as exhibit D3. DW1 reiterated that the defendant had no outstanding debt to the plaintiff as everything was settled via the tripartite agreement (D2).

The plaintiff, despite admitting that fertilizer was supplied upon receipt of the local purchase order from the defendant, could not produce any local purchase order or delivery notes in respect of fertilizer which allegedly resulted in to the debt of TZS 366, 480, 600/=. the subject matter of the commitment letter (exhibit P1). The plaintiff solely banks on acknowledgement letter (exhibit P1) to claim TZS 366, 480, 600/=. In addition, no financial or audit report was brought by plaintiff to substantiate the defendant's outstanding debt. One would expect an audit report from the plaintiff's company showing the defendant's payment trend and outstanding debt. This anomaly made me to draw negative inference on the validity of the plaintiff's claims. To crown it, the defendant candidly stated both written statement of defence and his witness statement that its debt was liquidated through the tripartite agreement. Nonetheless, the plaintiff did not bother to call Andrew Ndundulu, Sales Agromist and January Fabian, Business Controller who signed the tripartite agreement on behalf the



plaintiff to offer explanations on the confinement of the debt stated under the agreement.

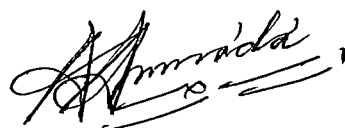
On reading the provisions of the tripartite agreement, I wonder why would the plaintiff agree that the defendant's outstanding debt was TZS 335, 503,066/= only if she knew that there was another pending debt of TZS 366, 480, 600/=. In addition, the provisions of clause 3 of the tripartite agreement (D2) clearly stipulate that the defendant's outstanding debt was transferred to Mbozi Coffee Curing Limited. It is the law that the duty of the court is to give effect to the intention of the parties to the contract and not to interpolate the terms of contract which was freely concluded. See the case of **Harold Sekiete Levira and Another vs African Banking Corporation Tanzania Limited (Bank ABC) and Another**, Civil Appeal No. 46 of 2022, CAT at Dar es Salaam. Since the tripartite agreement is a valid contract, parties are bound to honour its terms which are to the effect that the defendant's debt stood at TZS 335, 503,066/= as of 21st September, 2020 and by virtue of the agreement the same was transferred to Mbozi Coffee Curing Limited. Moreso, the said debt of TZS. 335,503,006 was subsequently paid to the plaintiff's bank account as exhibited via two bank deposit slips (exhibit D3).



All the above considered, I am firmly opined that there was no failure by the defendant to pay the outstanding debt after signing the tripartite agreement followed by payment of TZS. 335,503,006/=. As such, no breach of contract was committed by defendant.

Coming to the 2nd issue whether the defendant is indebted to the plaintiff to a total sum of TZS. 260,721, 814/=, the defendant counsel firmly submitted that the defendant's debt was fully paid via tripartite agreement (D2) and therefore there was no breach of contract. As I deliberated in the first issue, upon appraising the evidence of both parties, it is clear that until on 21st September, 2020 when the tripartite agreement was signed, the defendant was indebted to the plaintiff to a tune of TZS 335, 503,066/= only which was soon thereafter paid to the plaintiff as exhibited via the bank deposit slips (exhibit D3). Thus, without much ado, I hold that the 2nd issue is answered in negative.

Upon holistic assessment of the evidence, it is my findings that the plaintiff's evidence is weaker than the defendant's. In civil cases it is a trite law that a party who has strong evidence is entitled to win the case and the vice versa is true. See the case of **Hemed Said vs Mohamed Mbilu** 1984 TLR 113. It is further the position of law that in civil cases, the court always relies on



and sustain evidence which is more credible than the other. See **M & Food Processor Company Limited vs CRDB Bank Limited and 2 Others**, Civil Appeal No. 273 of 2020, CAT at Dar es Salaam. Indeed, in this case the defendant's evidence is more credible than the plaintiff's evidence particularly on the fact of discharging the outstanding debt through tripartite agreement. In view of what I have decided above, it necessarily follows that the plaintiff has failed to establish the claims on balance of probabilities, the consequence of which is to dismiss the suit. In that regard, I hereby dismiss the suit with an order to pay the defendant costs of the case.

It is so ordered.

Right of appeal is explained

Dated at Dar es Salaam this 26th May, 2023.




A.A. Mbagwa

JUDGE

26/05/2023