

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 87 OF 2015

YARA TANZANIA LIMITED PLAINTIFF

VERSUS

RUSA INVESTMENT AND GENERAL SUPPLIES 1st DEFENDANT

EXIM BANK (TANZANIA) LIMITED 2nd DEFENDANT

JUDGMENT

Date of the Last Order: 19/06/2018

Date of the Judgement 24/07/2018

SEHEL, J.

Yara Tanzania Limited the Plaintiff herein filed a suit against the defendants jointly and severally for declaratory orders that the 1st defendant is in breach of the Fertilizers Supply contract and Guarantee Contract and that the 2nd defendant is in breach of the Guarantee Contract and for payment of Tshs. 431,620,000/= being an outstanding purchase price of fertilizers; interest at the

commercial rate of 25% from the date when the debt became due to the date of judgment; interest on decretal sum from the date of judgment to the date of full payment; general damages; and costs of the suit.

The 1st defendant didn't appear and didn't file any defence despite being duly served through publication in Mwananchi and Daily News papers of 29th March, 2016. Therefore, the suit against the 1st defendant proceeded ex-parte. The 2nd defendant in her written statement of defence denied to have entered into any guarantee agreement with the plaintiff.

At the hearing of the suit, the Court framed the following issues to be proved by the plaintiff during trial against the defendants:


1. Whether the 1st defendant being a non-juristic person is capable of contracting and being sued;
2. Whether the 1st defendant is indebted to the plaintiff to a sum of Tshs. 431,620,000/= or at all;

3. Whether the 1st defendant is in breach of contract;
4. If the answer in 3 above is yes, whether the 2nd defendant guaranteed the transactions in issue and/ or in any way misled the plaintiff into realising the goods to the 1st defendant;
5. Whether the plaintiff has suffered any damages;
6. To what relief (s) are parties entitled to.

To prove its case the plaintiff filed three witness statements and they all appeared for cross examination and re-examination. Mr. Aveline Mungumsaidie (PW1) appeared before the Court on 4th December, 2017. His witness statement and supplementary witness statement were received to form part of his examination in chief.

It was the testimony of PW1 that on 23rd November, 2011 the plaintiff entered into a contract with the 1st defendant to purchase fertilizers; it was a pre-requisite that the 1st defendant should provide to the plaintiff a bank guarantee from a reputable bank thus on 22nd November, 2011 the officer of the 2nd defendant visited the plaintiff's ~~office~~

company and inquired about the details of the 1st defendant and the type of business that they are doing; a bank guarantee to pay Tshs. 445,600,000/= upon a first demand in writing was issued to the plaintiff; an agreement was prepared by Hillary Patto on 23rd November, 2011 and signed by PW1 on behalf of the Managing Director and other parties i.e 1st defendant signed the agreement by his officer namely Selestine Sanze who is the partner of the 1st defendant; the supply of fertilizer was done on credit basis upon request by the 1st defendant valued at Tshs. 523,920,000/=; the 1st defendant made payment of Tshs. 92,300,000/= leaving a balance of Tshs. 431,620,000/= of which the plaintiff is claiming from the defendants. He also tendered:

1. Board Resolution authorising the institution of the suit (Exh.P1);
2. TIN number of the 1st defendant; Certificate of Registration in the name of Rusa Investment & General Supplies; BRELA Extract from Register of the 1st defendant; Business Licence of the 1st 

defendant and BRELA receipt for official search (Collectively Exh. P2);

3. Copy of an agreement dated 18th November, 2011 entered between the Plaintiff and 1st defendant and police loss report (Exh. P3);

4. Letter dated 16th December, 2011 from Exim Bank to the Plaintiff titled "verification of Bank Guarantee no. EXIM/PER/GET/146/2011" attached to it with a copy of the Bank Guarantee dated 22nd December, 2011 (Collectively Exh. P4);

5. Various LPOs; Tax Invoices; Sales Orders and Delivery Notes (Collectively Exh. P5);

6. Bank Statements from Barclays Bank and NMB Bank (Collectively Exh.P6);

7. Demand Notice dated 16th July, 2012 (Exh.P7);

8. Letters dated 14th February, 2012 and 28th February, 2012 titled "Payment Request for Guarantee No. EXIM/PER.GTE/146/2011" (Collectively Exh. P8); and
9. Letter from 1st defendant to the plaintiff dated 14th February, 2012 titled "Letter of application for extension of our payments for 15 days as from today" (Exh.P9)

The second witness for the plaintiff is D.5739 D/Ssgt Emily Mwaijibe (PW2) who appeared before the Court on 4th December, 2017 and his witness statement was received to form part of his examination in chief. He also tendered a letter dated 4th April, 2012 titled "Kibali cha Kumtangaza Mtuhumiwa Katika Vyombo vya Habari Jalada: BUG/IR/2515/2012 Kosa: Kujipatia mali kwa udanganyifu Mtuh: Selestine Jonathan Sanze (Exh.P10) and newspapers of Mwananchi dated 20th April, 2012 and 9th May, 2012 (Collectively P11). His testimony was essentially that the plaintiff lodged a complaint against the 1st defendant's failure to repay fertilizers supplied to it on credit facility and that the bank refused to have issued the bank

guarantee. PW2 testified that he conducted the investigation and interrogated Mwinyimkuu Ngalima who acknowledged that the 1st defendant has a bank account with their branch for purposes of trading. PW2 in his investigation established that the 1st defendant obtained fertilizers from the plaintiff on misrepresentation thus failed to pay.

The last witness is Hillary Dickson Patto (PW3) who appeared on 23rd April, 2018 and his witness statement was received to form part of his examination in chief. He did not tender any document. Generally he collaborated the testimony of PW1.

The 2nd defendant filed one witness statement of Mwinyimkuu Ngalima (DW1) who appeared before the Court on 30th May, 2018 and his witness statement was received to form part of his examination in chief. He had no exhibit to tender. He denied to have ever issued any bank guarantee in favour of the plaintiff. He said for the bank guarantee to be genuine it must be approved and furnished by the head office of the 2nd defendant itself directly to

customer and not by him as an Assistant Branch Manager and that all bank guarantees have specific authorised signatories who must sign and approve it and it must be affixed with the seal of the bank. It was the testimony of DW1 that the alleged bank guarantee lacks all the qualities he stated, thus it is a forged document.

The above are the evidences brought forward by the parties to establish their respective cases.

Let me now start with the first issue that is **whether the 1st defendant being a non-juristic person is capable of contracting and being sued**

The plaintiff in its plaint described the 1st defendant as a business firm registered under the Business Names (Registration) Ordinance, Cap. 213 of the Laws of Tanzania with Registration No. 178089 and the partners are Selestine Jonathan Sanze and Thomas Lawrence Rutahakana. The copies of registration of the 1st defendant; TIN number; extract from register; and business licence were admitted as Exhibit P2. Order XXIX Rule 1 (1) of the Civil Procedure Cap. 33

(hereinafter referred to as CPC) provides that two or more partners in the firm may sue or be sued in the name of the firm. As correctly, submitted by the counsel for the 2nd defendant there is no dispute that the 1st defendant is a business firm dealing with agricultural products as such it is capable of contracting and being sued in the name of the firm. With these clear evidences then issue number one is answered in the affirmative.

I now turn to issue number two and three as they overlap. These are **whether the 1st defendant is indebted to the plaintiff to a sum of Tshs. 431,620,000/= or at all** and **whether the 1st defendant is in breach of contract**. It is alleged by the plaintiff that it entered into the agreement with the 1st defendant for the supply of fertilizer. It was the testimony of PW1 that the said supply agreement was entered on 23rd November, 2011 as evidenced by Exhibit P3. Both PW1 and PW3 testified that the plaintiff in good faith supplied the 1st defendant with fertilizers covering the total sum of Tshs. 523,290,000/= and Local Purchase Orders (LPOs); and delivery/dispatch notes were

tendered as Exhibit P6. They also stated that the 1st defendant partly paid Tshs. 92,300,000/= leaving a balance of Tshs. 431,620,000/=.

As correctly submitted by the counsel for the 2nd defendant, the burden of proof is placed upon the plaintiff to prove his allegation. It is the principle of law that "He who alleges must prove". In the case of **Rock Beach Hotel Limited Vs Tanzania Revenue Authority**, Civil Application No. 52 of 2003 (Unreported) Court of Appeal of Tanzania stated:

"We are mindful of the provisions of Section 110 of the Evidence Act, Cap. 6 R.E 2002 which places the burden of proof on him who alleged by stating inter alia:

110 (1) whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist;

(2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

WAA

It is thus upon the plaintiff to establish its case on the balance of probabilities (See Section 3 of the Evidence Act, Cap. 6) that the 1st defendant is in breach of the contract and that it is indebted to the plaintiff to the tune of Tshs. 431,620,000/=.

The plaintiff through PW1 tendered Exhibit P3 which is an agreement for sale of fertilizers that was entered between the plaintiff and the 1st defendant. The terms and conditions of the said agreement according to Exhibit P3 are such that: the goods to be supplied is fertilizers in a quantity of 100MT and 200MT whereby delivery will be ex works Dar es Salaam Yara warehouse in Kipawa; Loading/offloading conditions are that Yara Tz Ltd will ensure that goods are loaded on time and issuing a delivery note with a driver and a customer will receive the invoices within seven working days from the dispatch. Payments are to be made 30 days from the date of dispatch covered payment guarantee from a reputable bank.

The agreement further provides that the goods are to be supplied to the buyer on ex works basis which means that the plaintiff, who is

the seller in this matter makes the goods (fertilizers) available at a designated location which is Yara warehouse in Kipawa, Dar es Salaam and the buyer, the 1st defendant, incurs the transport costs.

It is on records through Exhibit P5 that the 1st defendant was supplied with fertilizers totalling Tshs. 523,290,000/=. It is contended by the counsel for the 2nd defendant that none of delivery notes contain the name and signature of any of the partners of the 1st defendant acknowledging receipt of the consignment. Upon close scrutiny of Exhibit P5 especially LPOs and the accompanied delivery notes, I note that the 1st defendant made the request through LPOs and in it specified the goods requested, quantity of the goods ordered, and the motor vehicle registration number that will collect the goods. For instance, the LPO dated 23rd November, 2011 requested for supply of urea; 660 bags; to be collected by T 440 AZA trailer T 944 AZA and also requested for supply of DAP; 660 bags to be collected by T 743 BTK with trailer T 917 BUE. The delivery note number 23095 shows that on 23rd November, 2011 the urea was

delivered and collected by Michael Eloy Kahawa with truck number T 743 BTK/ T 917 BUE, and driver was Edison Raphael Mgeni who signed the delivery note; and delivery note number 23094 shows that on 23rd November, 2011 the DAP was delivered and collected by Yohanes Lini Sanga with truck number T 940 AZA/ T 944 ZAA, and driver was Christopher Sanga who signed the delivery note. Further LPO dated 24th November, 2011 requested for urea; 660 bags; to be collected by T 436 BVP trailer T 623 BVH. The accompanied delivery note number 22891 shows that on 24th November, 2011 the goods were delivered and collected by Rusa Investment and General with truck number T 436 BVP/ T 623 BVH, driver Ramadhani Selemani and the driver signed the delivery note. There is also evidence on record through Exhibit P6 that the 1st defendant partly paid Tshs. 92,300,000/= leaving a balance of Tshs. 431,620,000/=.

From the above evidences the next obvious question is whether the plaintiff managed to discharge its duty. In **Miller V. Minister of**

Pensions (1937) 2 ALL ER 372 His Lordship Denning, J at page 374 stated:

"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not."

Since all the evidences tendered before this Court pointed out that the 1st defendant was supplied with fertilizers and failed to pay

within the stipulated time of 30 days then I find that the 1st defendant breached the contract by failing to pay in time the goods supplied to it as such the 1st defendant is indebted to the plaintiff to a sum of Tshs. 431,620,000/=.

The fourth issue is **whether the 2nd defendant guaranteed the transaction or in any way misled the plaintiff into releasing the goods to the 1st defendant.** The burden of proof of existence of any fact is placed on the person who desires the Court to give judgment based on the existence of facts which he asserts exists. It is therefore upon the plaintiff to establish that the 2nd defendant guaranteed the transaction or in any way misled the plaintiff into releasing the goods to the 1st defendant.

As I said the plaintiff brought three witnesses to establish its allegation. All that was said by PW1 was such that the officer from the 2nd defendant one Mwinyimkuu Ngalima (DW1) visited their company and inquired about the details of the 1st defendant and the type of business that they are doing. PW1 further testified that

thereafter a bank guarantee was issued to the plaintiff. PW2 also testified that in November, the 2nd defendant one Mwinyimkuu Ngalima (DW1) together with Mr. Sanze visited the plaintiff's premises with the purpose of verifying the existence of the plaintiff's business so that they can issue the guarantee. He further said the director of the 1st defendant supplied them with a bank guarantee with reference number EXIM/PER.GTE/146/2011 to pay Tshs. 445,600,000/= upon demand in writing from the plaintiff. The said bank guarantee was tendered as Exhibit P. PW2 who conducted investigation after the plaintiff went to complain testified that in their investigation they revealed that the 1st defendant obtained fertilizers on the basis of misrepresentation.

The testimony of PW2 corroborates with the 2nd defendant's story who through its witness DW1 categorically denied to have issued any bank guarantee to the 1st defendant.

From these evidences it is evident that the 2nd defendant neither guaranteed the transaction nor in any way misled the ~~defendant~~

plaintiff into releasing the goods to the 1st defendant. PW3 stated that the guarantee was presented to them by the 1st defendant and not 2nd defendant in order to obtain fertilizers which fertilizers were obtained through misrepresentation as revealed by the police investigation. Therefore, issue number four is answered in the negative.

I now turn to issue number five that is **whether the plaintiff has suffered any damages**. This issue will not detain me much as I have shown in issues number two and three that the plaintiff supplied the 1st defendant fertilizers worth of Tshs. 523,290,000/= and the 1st defendant partly paid Tshs. 92,300,000/= leaving a balance of Tshs. 431,620,000/=. Therefore, the plaintiff obviously suffered the loss of Tshs. 431,260,000/= an amount arising from the goods supplied to the 1st defendant but not paid. As the plaintiff is a business entrepreneur then the money held by the 1st defendant if it were deposited in the bank could have generated profit or if re-invested could have

generated profit. Therefore, the plaintiff is entitled to payment of interest. Issue number five is therefore answered in the affirmative.

The last issue is what reliefs parties are entitled to. I have held herein that the plaintiff proved its case against the 1st defendant therefore judgment is hereby entered against the 1st defendant in favour of the plaintiff and it is hereby decreed that:-

1. The 1st defendant breached the Fertilizers Supply contract;
2. The 1st defendant shall pay the Plaintiff Tshs. 431,620,000 (Tanzanian Shillings Four Hundred Thirty One Six Hundred Twenty Thousand only) being the outstanding purchase price for fertilizers as of 6th December, 2016;
3. The 1st defendant shall pay the plaintiff commercial interest rate of 18% per month on Tshs. 431,620,000/= to be charged from 6th December, 2016 to the date of judgment;

4. The 1st defendant shall pay the plaintiff interest rate of 7% per annum on the decretal amount from the date of judgment to the date of full payment; and
5. Costs of the suit.

For avoidance of doubt the prayer for general damages is declined since interest awarded suffice to cover the loss suffered by the plaintiff. The suit against the 2nd defendant is dismissed with costs. It is so ordered.

Dated at Dar es Salaam this 24th day of July, 2018.



B.M.A Sehel

JUDGE

24th day of July, 2018.