

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.41 OF 2017

JOSEPH JUMA BIGAZIPLAINTIFF

VERSUS

SIMON JOHN MALIMBO.....1ST DEFENDANT

KERVIN JOSHUA.....2ND DEFENDANT

SAJAD HABIB RAI.....3RD DEFENDANT

JUDGMENT

B.K. PHILLIP, J

This case arises from an oral contract for supply of petrol which the plaintiff alleges that it was breached by the defendants. It is the plaintiff's case that under an oral agreement between him and the defendants that was entered into on 6th day of April 2016, the defendants agreed to supply him 38,000 litres of petrol. He paid, to the 1st defendant a sum of Tshs. 57,750,000/= through the 2nd defendant's bank account No. 70110003280 at NMB Bank under the instructions of the 1st defendant. The 3rd defendant is the manager at Moil depot where the petrol/fuel subject of this case was supposed to be obtained for supplying the same to the plaintiff. Furthermore, the plaintiff alleged that despite paying the

despite paying the agreed purchase price for the petrol, the defendants refused to supply him the said petrol. Thus, in this case the plaintiff prays for judgment and decree against the defendants jointly and severally as follows;

- i. Payment of the sum of Tshs. 57,750,000/= being principal sum.
- ii. Payment of Tshs. 83,600,000/= being special damages.
- iii. Payment of Tshs. 7,600,000/= per month from the date of filing the suit to the date of full satisfaction of the debt.
- iv. Payment of General Damages.
- v. Payment of interests on the amount in (i) and (ii) herein above at a commercial rate of 30% from the date of the cause of action arose to the date of final payment of the debt.
- vi. Payment of interest at courts rate of 12% on item (ii) above from the date of judgment to the date of full satisfaction of the debt.
- vii. Costs be provided for
- viii. Any other reliefs this honourable court may deem fit and/ or just to grant.

In their joint written statement of defence, the 1st and 2nd defendants stated as follows; That the plaintiff was owing the 1st defendant a sum of Tshs. 65,000,000/= being outstanding balance for business executed between the plaintiff and the 1st defendant in mid february 2017. The 1st defendant directed the plaintiff to pay that money through 2nd defendant's Bank account, because the 1st defendant was owing the 2nd defendant some money. They refuted the alleged agreement on supply of petrol to the plaintiff. On his part, the 3rd defendant in his defence stated that he

never entered into any agreement with the plaintiff and has never breached any agreement whatsoever.

The following issues were framed for determination by the Court.

- i) Whether there was an agreement between the plaintiff and the defendants for supply of 38,000 litres of fuel and the plaintiff paid Tshs. 57,750,000/= as consideration for the said 38,000 litres of fuel.
- ii) If the first issue is answered in the affirmative, whether there was a breach of the said oral agreement between the plaintiff and the defendants.
- iii) To what reliefs are the parties entitled to.

This case proceeded ex-parte against the 1st defendant since he did not attend to court during the hearing despite the fact that he was quite aware of the existence of this case and filed his defence as stated herein above.

At the hearing of this case, the learned advocates Daniel Rumenyela appeared for the plaintiff, whereas the learned Advocates Bakari Juma and Halfani Msumi appeared for the 2nd and 3rd defendants respectively.

Now let me proceed with the analysis of the evidence adduced and the determination of the issue. Starting with the first issue, that is, **Whether there was an agreement between the plaintiff and the defendants for supply of 38,000 litres of fuel and the plaintiff paid Tshs. 57,750,000/= as consideration for the said 38,000 litres of fuel,** in his witness statement, the Plaintiff, who testified as PW1, stated that

he is a businessman, dealing with supply of fuel in Kigoma and Kasulu Districts in Kigoma Region. That on 9th April 2016 he went to Moil depot for the purpose of purchasing fuel for business purposes. He was informed that Simon John Malimbo, (1st defendant) who was the agent of Moil depot had his fuel at Moil depot available for selling to clients. He called the 1st defendant who confirmed that indeed he had the fuel for sale and was selling the same at Tshs. 1520 per litre.

Furthermore, PW1 testified as follows; That the 1st defendant directed him to pay for the fuel through bank account No. 7011003280 NMB Bank which belongs to the 2nd defendant. He paid the purchase price into three installments, of Tshs. 46,364,500/=, Tshs. 885,500 and Tshs. 10,500,000/= (Exhibit P1 collectively). The first two instalments were deposited into the bank by his wife, one Leah M. Nkulagowe and the last installment was deposited by his friend one Fedel Bawa. After payment of the purchase price aforesaid, fuel was loaded into the plaintiff's Motor Vehicle with registration No. T970 AWH and a trailer No.169 BQH. That while the above mentioned Motor Vehicle was about to leave from the premises of Moil depot, in Dar Es Salaam, the 3rd defendant told PW1 that the Motor Vehicle would be released on 11th April 2016. However, the motor vehicle was not released until 13th April 2016, when 3rd defendant told the plaintiff that there was no any payment effected in bank account of Moil depot for payment of the fuel, thus he informed the plaintiff that, he was going to take back the fuel.

PW1 further testified that, on 14th April 2016 he travelled to Dar Es Salaam and on 15th April 2016, he managed to meet the 3rd defendant in

his office, who told him that he was supposed look for the 1st defendant. He managed to find the 1st defendant and reported the matter to the police. The 3rd defendant requested him to be calm while awaiting for the matter to be sorted out, but refused to give him the petrol. PW1 alleged that he went back to Kigoma, but he did not get any promising response from the 3rd defendant as far as his request to be given his fuel is concerned. PW1 tendered in court a contract for handing over of his Motor Vehicle with the registration No.T970 AWH and a Trailer No.169 BQH by Moil depot (Exhibit P2) whose content shows that the said Motor Vehicle was handed over to the plaintiff without any fuel since the alleged money for the purchase of the fuel, paid by the plaintiff to the 1st defendant was not remitted to Moil depot's Bank account. Exhibit P2 shows that it was signed by the 3rd defendant and the plaintiff.

Responding to the questions posed by Mr. Bakari During cross examination PW1 told this court that , he deposited the sum of Tshs. 57,750,000/= into 2nd defendant's Bank account for payment of the fuel under the instruction of the 1st defendant. In response to the questions posed by Mr. Msumi, PW1 told this court that he never made any payment to the 3rd defendant ,but it is the 3rd defendant who loaded the fuel into his Motor Vehicle and later on ordered the same to be removed from the Motor Vehicle.

On the other hand , the 2nd defendant , who testified as DW1, his testimony in chief was to the effect that the plaintiff owed the 1st defendant a sum of Tshs. 65,000,000/= arising from a certain business which he did not disclose it. That the 1st defendant owed DW1 certain

amount of money after he had assisted him (1st defendant) to buy a land in Mtwara Region, so he directed the plaintiff to deposit the money into his (DW1) bank account. Furthermore, DW1 testified that the money deposited in his bank account No 70110003280 NMB was not meant for the purchase of 38,000 litres of fuel as alleged by the plaintiff. DW1 contended that even the pay-in-slip for the said sum of Tshs. 57,750,000/= did not indicate that it was for payment of fuel.

Responding to questions posed by advocate Daniel during cross examination, DW 1 admitted that the Bank account in which the money at issue was deposited belongs to him. DW1 also informed this court that the 1st defendant is his uncle. He admitted that the 1st defendant deals with selling of fuel and it is the 1st defendant who gave the plaintiff DW1's Bank account. He admitted that he has used that money in his business. In addition to the above he said that if need be he is ready to pay back the money to the one who deposited the same into his bank account.

The 3rd defendant testified as DW2 and in his testimony in chief, stated as follows; That he is employed by Mansoor Industries since 2006, as a country manager. He denied to have entered into any agreement with the plaintiff and stated further that he has no any contractual obligations to the plaintiff.

Having analyzed the evidence adduced by the witnesses as well as read the closing submissions made by the learned advocates for the plaintiff and the 3rd defendants, I am inclined to agree with Mr. Msumi that the evidence adduced is not enough to establish any contractual relationship

between the plaintiff and the third defendant as far as the issue of supply of fuel to the plaintiff is concerned. In his testimony in chief the plaintiff stated clearly that he was buying fuel from the 1st defendant through an oral agreement with him. That the 1st defendant directed him to pay the purchase price through the 2nd defendant by depositing the purchase price into his (2nd defendant) bank account at NMB. The evidence shows that the fuel that was subject of the contract between the plaintiff and the defendant was at Moil depot owned by Mansoor Industries Limited, where the 3rd defendant was working as a manager. PW1's testimony shows that the 2nd defendant was not a part to the oral agreement between the plaintiff and the 1st defendant. However, he has been involved in this matter because the purchase price for the fuel was deposited into his account and he did not dispute that. In its totality the evidence shows that the oral contract for purchase of fuel was between the plaintiff and the 1st defendant. It is worth pointing out here that the 3rd defendant is just an employee of Moil depot. Exhibit P2 indicates that the 3rd defendant signed it in his capacity as a manager at Moil depot. For the sake of argument, even if it is assumed that there was a contract between Moil depot and the plaintiff, the 3rd defendant being a mere employee of Moil depot, cannot be held liable for breach of contract.

Likewise, no evidence has been adduced to prove that there was any contract between the plaintiff and the 2nd defendant. The 2nd defendant has been joined in this case because the 1st defendant directed the plaintiff to deposit the money into his Bank account.

However, the plaintiff's (PW1) testimony in chief together with Exhibits P1 and P2 leave no doubt that there was a contract between the plaintiff and the 1st defendant for buying 38,000 litres of fuel and that the plaintiff did pay to the 1st defendant, through the 2nd defendant's bank account a sum of Tshs. 57,750,000/= which was the purchase price for the said 38,000 litres of fuel. During cross examination the 2nd defendant admitted that the claimed sum of Tshs. 57,750,000/= was deposited into his Bank account No. 70110003280 at NMB Bank and he is willing to give back the money to the owner, if it is proved that the money were intended for buying fuel.

From the foregoing , the answer to this issue is that there was an oral contract between the plaintiff and the 1st defendant for the supply of 38,000 litres of fuel and the plaintiff did pay the sum of Tshs. 57,750,000/= as consideration for 38,000 litres of fuel.

As regards the second issue, that is, **If the first issue is answered in the affirmative, whether there was a breach of the said oral agreement between the plaintiff and the defendants,** PW1's testimony in chief shows that despite the fact that the money for buying the fuel as agreed was deposited into the 2nd defendant's Bank account aforementioned, fuel was not supplied to the plaintiff. PW1's testimony is supported by Exhibit P2 in which it is clearly stated that fuel was removed from the plaintiff's motor vehicle. Thus it is evident that the contract was breached as no fuel was supplied to the plaintiff.

Coming to the reliefs the parties entitled to, as I have mentioned herein above the evidence adduced leaves no doubt that the sum of Tshs

57,750,000/= was paid into the 2nd defendant's Bank account and the same was for the purpose of buying fuel as alleged by the plaintiff. The 2nd defendant failed completely to prove that the money was for other purposes as he did not produce any evidence to that effect. So, as admitted by the 2nd defendant, that amount of money has to be paid back to the plaintiff. The claims for payment of special damages to a tune of Tshs. 83,600,000/= and loss of income to a tune of Tshs. 7,600,000/= have not been proved. The position of the law is very clear that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (See section 110 (1) (2) of the Evidence Act.) Moreover, specific damages need to be strictly proved as opposed to general damages which do not need to be strictly proved. (see the case of **Masolele General Agencies Vs African Inland Church (1994) T.L.R.192**)

From the foregoing I hereby enter judgment against the 1st and 2nd defendant as follows;

- i) That the 1st and 2nd defendants shall jointly and severally pay the plaintiff a sum of Tshs 57,750,000/=
- ii) That the 1st and 2nd defendants shall jointly and severally pay the defendant interests on the decretal sum in item (i) herein above at the rate of 20% from the date of filing this case to the date of judgment.
- iii) The 1st and 2nd defendants shall jointly and severally pay the plaintiff general damages to a tune Tshs 2,310,000/=.

- iv) The 1st and 2nd defendants shall jointly and severally pay the plaintiff interests on the decretal sum in item (i) and (iii) herein above at the court rate of 7% from the date of judgment to the date of payment in full.
- v) That the 1st and 2nd defendants shall jointly and severally pay the plaintiff the costs of this case.

Dated at Dar Es Salaam on this 22nd day of May 2020.



B.K. PHILLIP

JUDGE