

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 2 OF 2019.**

**TANZANIA BREWERIES LIMITED.....PLAINTIFF**

**VERSUS**

**EDEN TANZANIA LIMITED ..... DEFENDANT**

**Date of Last order: 18/2/2022**

**Date of Judgement: 11/03/2022**

**EX-PARTE JUDGEMENT**

**MAGOIGA, J.**

The plaintiff, **TANZANIA BREWERIES PLC** by way of a plaint instituted the instant suit against the above-named defendant praying for judgement and decree in the following orders:

(a) Declaration that the defendant is in breach of the Pallet Purchase Agreement between parties;

(b) An order compelling the defendant to pay the plaintiff the sum of TZS. 300,000,000/=being specific damages for the advance payment that was made under the mistake of fact in respect of purchase order No 002266 and 093692 respectively and Tshs 306,733,080 being outstanding balance out of advance payment for the unsupplied new wooden pallets in respect of purchase order No 099017 thus making the total sum of Tshs. 606,733,080.00;



- (c) Interest at commercial rate of 21% on (ii) above from December 2016 to the date of filling this suit;
- (d) Interest at the rate of 12% on (ii) and (iii) above from the date of filling this suit up to the date of judgement;
- (e) Interest at the commercial rate of 7% on (ii), (ii), (iii) and (iv) above from the date of judgement to the date full satisfaction of the whole sum.
- (f) An order condemning the defendant to pay general damages as may be assessed by the court
- (g) Costs of the suit
- (h) Any other reliefs this honourable court may deem fit to grant

Upon being served with the plaint, defendant filed written statement of defence disputing plaintiff's claims on ground that, it was the plaintiff who breached the supply agreement by unilaterally cancelling orders without prior notice. Simultaneously, the defendant raised a counter claim against the plaintiff praying for judgement and decree in the following orders;-

- (i) Payment of Tshs.125,670,000.00 (say One Hundred Twenty-Five Million Six Hundred Seventy Thousand) being principal amount claimed;
- (ii) Payment claim for breach of contract;
- (iii) Payment of loss of business;
- (iv) Payment of loss of profits and future earnings;
- (v) Interest on above sums at commercial Bank rate from the date of filling to the date of judgement and thereafter at court rate to the date of full satisfaction;



(vi) Payment of general damages as the court may award;

(vii) Costs of the suit;

(viii) Any reliefs the honourable court may deem proper to grant.

The facts pertaining to this suit are not complicated. On 31<sup>st</sup> August, 2016 plaintiff and defendant entered into wooden pallets supply contract, the plaintiff (as buyer) and the defendant (as supplier). On diver dates the plaintiff issued purchase orders to the defendant as follows:

(i) On 29<sup>th</sup> March 2016, plaintiff issued purchase order No 002266 for supply of 5,000 wooden pallets worth TZS. 477,900,000.00 VAT inclusive;

(ii) On 31<sup>st</sup> August 2016 plaintiff issues purchase order No. 093692 for supply of 2000 wooden pallets worth 191,160,000/=;

(iii) On 23<sup>rd</sup> December, 2016 plaintiff issued purchase order No. 099017 for supply of 10000 new wooden pallets with the agreed purchase price of TZS. 937,628,000/= VAT inclusive;

As results of such orders the defendant was able to supply only 4800 new wooden pallets out of 5000 ordered worthy TZS.436,128,000.00. However, out of invoices raised the plaintiff paid the full amount of invoices through the defendant's bank No. 0150395959400 maintained by the Standard Chartered Bank. As to the Order of 2000 pallets, the defendant supplied only 900 new wooden pallets but defendant paid full amount for the order in the same account.

Facts go that, despite paid in full but the defendant did not supply in full, and on 6<sup>th</sup> December, 2016 the plaintiff mistakenly upon the defendant raised invoices Nos. 320



and 327 did credit his account with TZS. 300,000,000/= an amount which was credited into defendant Account No 0150395959400 maintained and operated by Standard Chartered Bank.

More so for purchase order No. 099017 defendant supplied only 3900 out of 10000 wooden pallets worth TZS. 306,733,080.

Further facts were that, on 14<sup>th</sup> October, 2018 defendant through her letter RE/EP/2018/15 agreed to pay TZS. 563,000,000 with a condition that the outstanding balance of undelivered wooden pallets be converted to purchase order in the following year. However, defendant did not supply the wooden pallets nor repaid for unsupplied as agreed. The efforts by plaintiff to make arrangement for defendant to fulfil his obligation proved futile and as a such on 7<sup>th</sup> August, 2020 plaintiff's lawyer served the defendant with demand notice for payment of the amount paid in excess of the pallets not supplied. On 14<sup>th</sup> August, 2020 defendant's lawyer responded to the said demand.

The legal dispute ensued between parties each throwing blames against each other for breach of contract and eventually on 21 December, 2020 plaintiff instituted this suit claiming for payment of TZS.306 733.080 for unpaid balance for unsupplied pieces of wooden pallets and TZS.300,000,000/=mistakenly credited into the defendant's account and other consequential reliefs as contained in the plaint.

On the other hand, the facts as to the counter claim were that, in course of business the term of the agreement were frustrated by the government order dated on 26<sup>th</sup> September, 2016 banning the harvest of the particular piece of trees which, were being used for making wooden pallets, and outright to denial to pay for services



rendered by the plaintiff. Facts go that, around October, 2017 the defendant cum counter claim unilaterally cancelled the orders without prior notice nor any justification and subsequently defendant went on announcing a general tender to the public and allocated the plaintiff 1000 pallets only contrary to their contract.

This conduct, according to the plaintiff in the counter claim, caused her to suffer serious trading losses for unfairly termination of orders at her detriment, hence, this counter claim claiming the prayers as contained in the written statement of defence.

The plaintiff at all material time has been enjoying the legal services of Messrs. Issa Mrindoka and Mr, Augustine Rutakolezibwa, learned advocates. On the other adversary part, defendant at all material time has been equally enjoying the legal services Mr. Mwita Waissaka, learned advocate.

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

- (1) Whether there was a mistake of facts in the payments made from plaintiff to the defendant?
- (2) Whether the defendant fully discharged her obligations in the supply of wooden pallets ordered by the plaintiff?
- (3) What reliefs' parties are entitled?


This court during final pre trial conference, among others, ordered and directed parties' learned advocates to file their respective witness statements within prescribed time of 14 days which was to end on 9<sup>th</sup> November, 2021 of that order and the suit was set for hearing on 25/11/2021. On 18<sup>th</sup> February, 2022, when this suit was called on for defence hearing, Mr. Mrindoka, learned advocate for the



plaintiff objected the adoption of witness statements of DW1 and DW2 in the proceedings because they were filed out of time without leave of the court and prayed that, the witness statements filed out of time be struck out and the matter proceed ex-parte against the defendant. This court granted the prayer and this tells why this is an ex-parte judgement.

In proof of the suit the plaintiff called one witness **Mr. MAHSEN ZAHORO** (to be referred in these proceedings hereinafter as '**PW1**'). PW1 under affirmation and through his witness statement adopted in these proceedings as her testimony in chief, told the court that he is Finance Manager of the plaintiff and as such principla officer conversant with the facts of the suit. PW1 went on to tell the court that, on 29<sup>th</sup> March, 2016 plaintiff through purchase order No. 002266 ordered defendant to supply her with 5,000 wooden pallets at a price Tshs.477,900,000.00.VAT inclusive. According to PW1, as per pro-forma invoice No. 320 raised on 7<sup>th</sup> March, 2016, plaintiff effected payments through defendant Account No 0150395959400 which is maintained and operated by standard Chartered Bank. PW1 further told the court that, defendant was able on diver dates to supply only 4,800 wooden pallets out of 5000 worth Tshs 436,128,000/=

It was a testimony of PW1 that, on 31<sup>st</sup> August, 2016 the plaintiff created another purchase order No.093692 in favour of the defendant for supply of 2000 pallets worth TZS.191,160,000.00 VAT inclusive. According to PW1,he defendant was able to supply only 900 new wooden pallets worth TZS.81,774,000.00 which was proceeded by pro-forma invoice No. 327 dated 29<sup>th</sup> August, 2016 which was paid in full through defendant's Account No. 0150395959400.



Further testimony of PW1 was that, in addition to the above orders, plaintiff on 6<sup>th</sup> December, 2016 through his Creditors' Cheque Requisition, plaintiff mistakenly credited Tshs. 300,000,000/= to the defendant while making reference to purchase order No 002266 and 093692 which was created on 29<sup>th</sup> March,2016 and 31<sup>st</sup> August, 2016 respectively the pro-forma invoice No 320 and 327 raised on 7<sup>th</sup> March 2016 and 29<sup>th</sup> August,2016 in respect of two purchase order mentioned above.

According to PW1, the advanced payment of Tshs. 300.000,000/= was mistakenly paid and the defendant is required to refund it. PW1 denied that Tshs. 300,000,000/= to be a fund for facilitation of the business of BASHASHA MERCHANDISE DEALERS as claimed by the defendant and insisted that it was mistakenly credited. PW1 went on to tell the court that, 13<sup>th</sup> December ,2016 defendant raised a pro forma invoice No 350 and plaintiff issued a purchase order No. 099017 for supply of new wooden pallets 10000 worth Tshs 937,628,000/= and the same, on 23<sup>rd</sup> December,2016 the plaintiff credited Tshs 654,000,000/=being an advance payment for supply of 10000 wooden pallets to defendant Account No. 0150395959400, however defendant was able to supply 3900 new wooden pallets out of 10000 leaving undelivered balance of 6100 worth Tshs. 306,733,080 in which defendant is liable to refund

According to PW1, on 14<sup>th</sup> October,2018 defendant through her letter RE/EP/2018/15 agreed to pay Tshs. 563,000,000 with a condition that the said money be converted to purchase order in the following financial year in which the request was not accepted. PW1 further told the court that, the defendant did not supply the wooden pallets nor repaid for unsupplied wooden pallets as agreed despite all notices issued. Consequently, the defendant failed and/or neglected to





pay the outstanding due amount which stood Tshs 606,733,080, on the basis of the above testimony, PW1 prayed that this court be pleased to enter judgement and decree against the defendant as prayed in plaint.

In proof of the above facts, PW1 tendered in evidence the following exhibits, namely;

- (1) Proforma invoice No 320, Purchase order No 002266 as **exhibit Pa-b**
- (2) Tax invoice of invoices and 16 goods received note as **exhibit P2a-16**
- (3) Proforma invoice No 327, Purchase order No 0093692 as **exhibit P3a-b**
- (4) Tax invoice and 3 goods received note and purchase order No 0093692 as **P4a-c**
- (5) Affidavit to authenticate document, Credit Cheque Requisitions No 14361 and swift transfer as **exhibit P5a-c**
- (6) Pro forma invoice No 350, Purchase order No 099017 as **exhibit P6 a-b**
- (7) Swift transfer as **exhibit P7**
- (8) 13 Tax invoice and 13 goods received note for purchase No 099017 as **exhibit P81-13**
- (9) Letter dated 14/10/2018 as **exhibit P9**
- (10) Demand notice dated 7/8/2020 as **exhibit P10**
- (11) Reply to demand notice as **exhibit P11**

Under cross examination by Mr. Mwaissaka learned advocate, PW1 told the court that, he started working with the plaintiff since 1.11.2013. As Finance Manager he started in April 2019. PW1 admitted that when the transaction was done he was not in Dar es Salaam. PW1 when pressed with question told the court that, all invoice and pro-forma invoices have their procedure. As to be there formal agreement, PW1




told the court that no formal agreement apart from invoices and purchase orders which have been tendered in this evidence.

PW1 further pressed with questions told the court that, the amount paid in advance was Tshs.300,000,000/=. However, PW1 admitted that, there was no audit report was done or no loss report statement and no financial statement in this court showing the loss, however, he insisted that Tshs.300,000,000.00 was mistakenly credited into the account of the defendant. PW1 denied that this claim is a cooked story. PW1 went on to tell the court the plaintiff and defendant had arrangement on advance payment in their relationship which was to be deducted from the actual supplies.

Shown exhibit P1, PW1 recognized it and said it was signed on 30/3/2016 though not dated which by itself do not invalidate its genuineness. Shown exhibit P3, PW1 recognized it and told the court that, it was dated 31/8/2026 and the signing date was on 1/9/2016. As to exhibit P5 told the court that the credit cheque is evidencing payment done under mistake.

Under re-examination by Mr. Mrindoka, learned advocate, PW1 told the court that, exhibit P9 was in regard to transaction of 2016 and no point in time the discrepancies thereon were nor raised by the defendant. The payments were made but the truth is that they had already been paid. According to PW1, it was a double payment but the defendant treated it as advanced payments while the payment was reflected on purchase order given. PW1 further told the court that all institution have their own systems which are used to keep their records.



PW1 when asked question for clarification told the court that, the payments were done on 7/12/2016 and that exhibit P5 is requisition cheque and swift transfer.

This marked the end of hearing of this suit ex-parte and the plaintiff's case was marked closed. Parties' learned advocates sought leave of the court to file closing written submissions. I granted the prayer. I am grateful to the learned minds of the parties for their insightful input on this suit. Their respective submissions, which I had an opportunity to read will be of great help in answering the issues framed. To avoid long and unnecessary judgement, I will not repeat each point raised and argued but it suffices to say I have taken them seriously and will be using them here and there while answering the framed issues.

Now the notable duty of this court is to determine the merits or otherwise of this suit. However, before I embark on raised issues, I noted some facts not in dispute and which I wish to point them out and narrow down non contentious issues. **One**, it is not disputed by parties herein that they entered into purchasing agreement for supply wooden pallets. **Two** it is not disputed that the plaintiff transferred Tshs. 477,900,000/=, Tshs. 191,160,000/=, and Tshs 654,000.000/= to defendant account No. 0150395959400 maintained at Standard chartered Bank. However, what is in disputed is whether the plaintiff under the business arrangement mistakenly credited the defendant more money than what was supplied and whether the defendant is entitled to amount of Tshs. 125,670,000.00 in this suit.

Basically the plaintiff is claiming for payment of outstanding balance of TZS. 306,733,080/= being a balance of undelivered wooden pallets and Tshs.300,000,000/= an amount mistakenly credited and that it was the defendant who breached the contract. With the above contention, therefore, it is imperative to

determine the first issue against the evidence on record. The first issue was thus coached '**whether there was a mistake of facts in the payments made from the plaintiff to defendant?**' The plaintiff's sole witness testified that, he mistakenly credited Tshs. 300,000,000/= to defendant account No. 0150395959400 maintained by Standard Chartered Bank while making reference to purchase order No. 002266 and 093692 together with pro-forma invoice No 320 and 327 which money were paid for. On the other hand, defendant in his written statement of defence strongly denied and argued that Tshs.300,000,000/= was a fund requested to facilitate the business.

Mr. Waissaka though the defendant did not enter defence but had opportunity to cross examined PW1 and by way of final written submissions faulted the testimony of PW1 in number of ways, namely; exhibits tendered were photocopies, PW1 was not present during the alleged agreements, PW1 had no knowledge of the payments done, failure to prove double payment of Tshs.300,000,000/=: failure to prove inside job allegations, want of Audit report or external report or financial report showing the alleged amount or want of bank statement and failure to account for discrepancies in the documents tendered.

In the totality of the above reasons, Mr. Waissaka urged this court to find and hold that the plaintiff has utterly failed to prove the claim of Tshs. 300,000,000/- and Tshs.306,733,080/= then, the instant suit is amenable to be dismissed with costs.

On the part of the plaintiff, Mr. Mrindoko laboured at length to differ with the defence counsel and pointed out that the issue of Tshs.300,000,000/= was answered by exhibit P5a-c which are an affidavit to authenticate documents, Customer Cheque Requisition No.14361 and Swift Transfer. Further evidence,

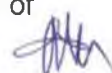
according to Mr. Mrindiko, is the pleadings by parties whereby in paragraph 12 of the counter claim the defendant admitted to have received Tshs.300,000,000/=. The admission, according to Mr. Mrindoko, bound by the defendant by her pleadings and should not be allowed to change the goal posts. Mr. Mrindiko as such in support of his stance cited the cases of CRDB BANK LIMITED Vs. DAMAS JOSEPH MALLYA [2003] TLR 166 in which it was held that:-

***"the general principal underlying the requirement paid by mistake of fact must be refunded is that the law should not countenance unjust enrichment; the law should not permit a person to retain a benefit unjustly derived from the law."***

Further, Mr. Mrindoko also cited the case of KITUNDA ENGINEERING COMPANY LIMITED & 2 OTHERS vs. CRDB BANK PLC, CIVIL APPEAL NO.63 OF 2013 (CAT ARUSHA) Unreported in which the pronounced as follows:

***"Appellants received money from the respondent bank knowingly that it did not belong them and the money had been credited to their account as a result of some fraud played upon the respondent's bank. The appellant knew that they had no good title to that money. In the circumstances, ... money paid to the appellants was made under mistake of fact and the respondent is entitled to a refund."***

Mr. Mrindoko charged that much as the plaintiff's sole witness (PW1) was not cross examined by the learned advocate for the defendant on the point, then, it should be taken to be an admission or acceptance. To buttress his point cited 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 not cross examine the 1<sup>st</sup> respondent on the above piece of evidence. We would, therefore, agree with the learned judges' inferences that the appellant's failure to cross examine the 1<sup>st</sup> respondent amounted to acceptance of the truthfulness of the appellant's account."***

On the account of the above reasons, Mr. Mrindoko equally urged this court to find and hold that the first issue in the affirmative that the money amount of Tshs.300,000,000/= was paid under a mistake of facts and as such the defendant is liable to refund the same.

It is worth noting that, in civil cases like this one, the onus of proof lies to the party who alleges. This is in tandem with 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 a 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) Civil Appeal Mo 118 of 2014 CAT (Unreported)** 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, the court find that a burden of proof of the mistakenly payments lies on the plaintiff to prove that indeed the defendants were paid mistakenly.

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 inclined to answer this issue in the affirmative. The reasons why I am taking this instance are not far -fetched. **One**, the plaintiff's claim on mistaken transfer was based on **exhibits P5b** and **P5c**. Careful perusal of the said exhibits indicates or show that the Plaintiff credited Tshs.300,000,000/= through swift transfer **exhibit P5c** to defendant account which is not disputed is the account of the defendant on 06.12.2016

**Two**, had the amount of Tshs.300,000,000/= were really for pro-forma invoices Nos. 093692 and 002266 and invoices numbers 327 and 320 dating back to August 2016 and parties agrees that advance payment was their way of conducting business cannot be other than payments done mistakenly.

**Three**, the arguments by Mr. Waissaka that the documents were photocopies do not hold water much as they complied with the law in tendering secondary evidence as provided for under sections 67 and 68 of the Tanzania Evidence Act [Cap 11 R.E. 2019] and section 18 the Electronic Transaction Act, 2015. In this case the plaintiff complied with the law and the said secondary documents were properly admitted and this court will act on them.





On the totality of the above reasons, I hereby find and hold that the plaintiff mistakenly credited the defendant's account of Tshs.300,000,000/= as such the plaintiff has satisfied this court on balance of probability that actually the defendant as inspired by the cases cited by Mr. Mrindoko is obliged to refund the money had and received by mistake.

The next issue was couched that, **whether defendant fully discharge her obligations in the supply of wooden pallets ordered by the plaintiff?** The plaintiff has submitted that on 31<sup>st</sup> August, 2016 issued purchase order No 093692 for 2000 wooden pallets worth 191,160,000, defendant supplied 900 and purchase order for 5000 pallets worth TZS. 477,900,000/= defendant supplied 4800, further in December 23/12/2016 issued purchase order 099017 for supply of 10000 pieces of new wooden pallets and TZS. 654,000,000/= was credited as advance for supply of 10000 new wooden pallets but defendant supplied 3900 out of 10000. In rebuttal the defendant has argued that they could have fulfilled their obligation but plaintiff breached the supply agreement by unilaterally cancellation of orders without prior notice as a such they claim payment of TZS.125,670,000.00 for loss of business.

I have carefully gone through the pleadings, plaintiff exhibits tendered in evidence and the final written submission in the course of answering this issue with keen legal eyes and mind but all in all, I am inclined to answer this issue in negative, on the following reasons. Careful going through the content of **Exhibit P2 a, exhibit P2b, exhibit P8 and exhibit P4** there is no doubt that defendant did not discharge his obligation. I am entitle to hold so because the contents of purchase order No 093692 shows that defendant supplied only 900 new wooden pallets, out of 5000, under purchase order No. 002266 shows that defendant supplied 4800 new



wooden pallets and under purchase order No 099017 show that defendant supplied 3900 out of 10000 wooden pallets, which indicates that in all issued orders of purchase defendant did not supply wooden pallets as agreed. That cannot be other than breach of contract for failure to discharge obligation as per agreed terms in the purchasing order.

More so **exhibit P9** is loud and clear that defendant failed to discharge his obligation and her requesting outstanding balance be converted to purchasing order in the coming financial year is other than admission of failure to discharge obligation and therefore the claim of payment of TZS. 125,670,000 by defendant/ plaintiff in counterclaim is devoid of any useful merits and is rejected because it is the defendant who breached the contract for failure to discharge its obligation.

The last and usual issue was **"to what reliefs parties are entitled."** The defendants claimed several reliefs as contained in the counter claim against the plaintiff in the main suit. However, based on my findings in issues above the counter claim must be and is hereby dismissed. Therefore a claim of Tshs.306,733,080/= is justifiable by all intents and is equally proved herein on balance of probability.

On the other hand, the plaintiff claimed several reliefs as contained in the plaint for payment of TZS. 606,733,080/= which I am certain that plaintiff managed to prove as advanced payments of Tshs.306,733,080/= and Tshs.300,000,000/= money paid under mistake of fact.

In the fine, the plaintiff has proved her case to the standard required in civil cases entitled to her a judgement and decree in as prayed as follows:



- (i) The defendant is in breach of the pallets purchase arrangements between parties;
- (ii) The defendant is ordered to pay an aggregate sum of TZS. 606,733,080/= being specific damages for advance payment made under mistake and an outstanding balance out of advance payment for unsupplied new wooden pallets in respect of purchase order No.099017;
- (iii) Defendants are ordered to pay interest on the outstanding amount specified in (i) at the rate of (21%) from the date of institution of the suit to the date of judgement;
- (iv) The court further grant interest on the decretal amount at the rate of . 7% from the date of judgement until full and final payment;
- (v) The defendant is equally ordered to pay interest at commercial rate of 7% on (ii), (iii) and (iv) above from the date of judgement to the date of full satisfaction of the whole sum;
- (vi) The defendant are ordered to pay Tshs.5,000,000/= being general damages.

That said and done, the suit must be and is hereby allowed with costs.

It is so ordered.

Dated at Dar es Salaam this 11<sup>th</sup> day of March, 2022.



A handwritten signature in blue ink, appearing to read "S. M. Magoiga".

**S. M. MAGOIGA**

**JUDGE**

**11/03/2022**