

TANZANIA / JUDGMENT

omega fish limited vs benjamin elikana masota benjamin masota

2022 tzhccomd 164 10 june 2022

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TZHCCOMDDECIDED
10 June 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
MWANZA COMMERCIAL CASE NO. 04 OF 2020 OMEGA FISH LIMITED.....

^kAINTIFF VERSUS BENJAMIN ELIKANA MASOTA @ BENJAMIN

MASOTA..... .^^^W^NT Date of Last Order:.03/06/2022 Date of Judgment:

efe/06/2022. 9%, 9 NANGELA, J.: This is a suipfor reco^ry Ajpney. The Plaintiff, a Company
incor^ratAunde^^^/SWTanzania and licensed to carry on ^h^^usi^^^ processing, is suing
the DefenddfISIMing fowe following orders and reliefs: A decl^^ron that the Defendant has /
^^^ed and breached the terms and k conditions of the agreement with the

2. That the Defendant should pay the Plaintiff the sum of Tanzania Shilling one Hundred Million (TZS 100,000,000/=) being the loan advanced by the Plaintiff and received by the Defendant failure of which the Plaintiff should sell the Defendant's Page 1 of 27 house in paragraph 7 of the Plaint in full recovery of the loan.
3. That the Defendant should pay the Plaintiff interest on the principal sum at the rate of 21% per annum from the date when the debt was due to date of judgment.
4. That the Defendant should ^^the Plaintiff interest on the decretal^jr^^ the court rate of 21% p^^nnum^^ the date of judg|pj|^to t^^ate^ payment in fulkL l(that ^^Kmber 2011, the Defendant requdsKd thib Plainta financial support of Tanzania ^which ^e afterwards supplied to the Plaintiff. However, Awhile the An Was still undischarged, the Defendant requested financial support of Tanzania Shillings Seventy Million (TZS 70,000,000) to boost his business and, to that effect, the Plaintiff and the Defendant entered into loan agreement on the 18th day of June 2016. To secure the loan the Defendant pledged and surrendered original title deed of his house as security and the Page 2 of 27 Plaintiff made all necessary procedures to ensure the Notice of Deposit of certificate of Title is registered with the Registrar of Title. It is alleged that, the loan and fish purchase advanced to the Defendant was Tanzania Shillings One Hundred and Sixty Million, One Hundred Fifty Two Thousand only (162,152,000/=). It is alleged that the Defendant mana^^^ repdf|jtotal of Tanzania Shilling Sixty Million One^Hundr^ Thousand only (60,152,000/=) out ^^h s^^^ro^feds.

However, the outstanding balai filings One Hundred Million (TZS 100,000,000/=) remained unpaid despite fruitless efforts by the Plaintiff. It is alleged, therefore, that the Defendant failed to comply with the terms of the agreement entered into with the Plaintiff on the 18th day of July 2016. The outstanding amount arising from the parties' narrated here above. The suit was filed under the Summary Suit. However, on the 11th day of March 2021, the Defendant filed an application applying for leave to appear and defend the suit and the same was granted by this Court. Page 3 of 27 Subsequently, the Defendant filed his Written Statement of Defence refuting the Plaintiff's claim of TZS 160,152,000/= but admitting to have been given only TZS 30,000,000/= by the Plaintiff. On the 10th December 2021, this Court conducted a final pre-trial conference (FPTC) and the following were issues agreed upon and recorded by the court:

- Whether the Plaintiff advanced the sum of TZS 60,152,000/=.
- If answer to 1 is answered in the affirmative, how much, if any, was the outstanding loan and advances as of hearing, the Plaintiff called two witnesses, one Mr. Amin Mohamed Hassanali (who testified as Pw-1) and Mr. Hamad Alsalman, (who testified as Pw-2). Page 4 of 27 In his testimony in chief, Pw-1 told this Court that he is one of the Directors of the Plaintiff Company who dealt with the loan and fish purchase advances requested for and advanced by the Plaintiff to the Defendant. He stated that, for the past 22 years he knew the Defendant, Mr. Benjamin Elikana Masota @ Benjamin Masota and, that, he trained and supported him in his fishing business. He told this Court further that, the tradition of advancing fish purchase loans is of enabling them to maintain the Plaintiff. As such, vide a letter of procuring fish and itiff. He tendered in Court a copy for such a loan and this was the request by the Defendant was granted by the KCB Bank cheque Number 007264 dated 6/11/2011, the Plaintiff granted the loan request to the Defendant in the sum of TZS 40,000,000/= which were received by the Defendant and acknowledged via loan payment voucher on the same day. The said Cheque and the payment voucher were tendered in Court and admitted as Exh. P-2. Page 5 of 27 Pw-1 testified further that, while the loan was still undischarged the Defendant asked for further financial support in sum of TZS 70,000,000/= to further revive his business. The same was through a letter dated 18/06/2016. The letter was admitted as Exhibit P-3. Following that request the Plaintiff and the Defendant signed a loan agreement dated 18/06/2016 which was tendered in Court As part of the Defendant's guarantee he surrendered his original title deed on 129 Wock AIX Kirumba area Mwanza Town deed and Notice of Deposit in Court as Exhibit P-5. Pw-1 testified that on disbursement of the first tranche of TZS 30,000,000/= vide KCB Bank Cheque Number 014134 and Payment Voucher dated 4/07/2016. The said cheque and payment voucher were not further stated a second disbursement amounting were made payable to the Defendant via KCB Bank cheque No. 01487 and Payment Voucher dated 9/0/2016. A copy of the said Cheque and Payment Voucher were tendered in Court and admitted as Exh. P-7. Beside, Pw-1 told this Court that, another disbursement of TZS 5,000,000/= was made to the Defendant via KCB Bank Cheque No. 014134 and payment voucher dated 13/07/2016. Both were admitted as Exhibit P-8. Page 6 of 27 In his testimony in chief, Pw-1 testified that, the Defendant approached him again for a request of TZS 58,000/=

as cash advanced for fuel to transport fish to the Plaintiff's factory. He stated that, the request was approved and the said cash was advanced via cash payment voucher dated 16/07/2016, which was tendered in Court and admitted as Exh. P-9. PW-1 further stated that, on the 23/08/2016 he received amounting to TZS 94,000/= to the voucher dated the 23/08/2016. The said payment voucher was admitted as Exhibit P-11. Also on the same date the Defendant delivered fish worth TZS 40,140,150 and the parties agreed to deduct TZS 94,000/= which was cash earlier advanced to the Defendant and TZS 30,000,000/= being part of the loan re-payment. The Page 7 of 27 payment voucher-cash advance payment to the Plaintiff was admitted as Exh. P-13. PW-1 told the Court that, on 24/08/2016, the Defendant requested for further advanced of TZS 20,000,000. PW-1 approved the request and disburse to the Defendant TZS 20,000,000/= via KCB Bank cheque No. 014268 dated 24/08/2016. The said cheque was admitted. To sum up his testimony, therefore, by 24/08/2016 the total amount advanced and disbursed, as documented and received and cash advanced to the Defendant the total of TZS 110,152,000/= out of which TZS 6,000/= was paid back via loan and advanced but leaving an outstanding balance of TZS 50,152,000/=. He told this Court that, other documents approved by his co-Director who testified as PW-2 in the proceedings examined by Mr. Dionise, PW-1 the Defendant for about 22 years and, written agreement as between the parties. He admitted that, the parties signed a loan agreement for a request for TZS 70,000,000/=. He told the Court that, the loan was for TZS 70,000,000/= as there was typing error on Page 8 of 27 Exh. P-4 and the purpose of it was to facilitate the Defendant to build his business and to supply fish to the Plaintiff and pay back the money earlier advanced to him. PW-1 told further this Court that, the total amount advanced to the Defendant was TZS. 160,152,000/= and the next witness for the Plaintiff was one Mr. Hamad Alsalman. He testified as PW-2. According to PW-2 he is a co-Director of the Plaintiff who also approved issuance of certain loan and advances to the Defendant expecting that the Page 9 of 27 Defendant would supply the Plaintiff with fish for processing. In his testimony in chief PW-2 told this Court that, he has known the Defendant for about 9 years now and, that, the advanced loan and advances were to be repaid from the proceeds of fish supply to be made by the Defendant. He testified further that, on 3/08/2016 he approved disbursement of TZS. 10,000,000/= to the Defendant on oral instruction from the Defendant via KCB Bank cheque No. 014245 dated 3/08/2016. The Cheque was received as Exh. P-14. He told the Court that, on 9th day of 7/08/2016. He said that, on 11/08/2016 the more money advances to increase his personal expenses TZS 50,000,000/= via KCB Bank cheque No. 014267 and payment voucher of the same date which were admitted Exh. P-16. He testified that, further on the Defendant approved disbursement of TZS 5,000,000/= via KCB cheque No. 014276 and payment voucher of 16/08/2016 and on 19/08/2016 and further approved a disbursement of TZS. 15,000,000/= via KCB Page 10 of 27 cheque No. 014280 and payment voucher dated 19/08/2016 which were admitted as Exhibit P-17 collectively. According to PW-2, by 19/08/2016, he had approved and disbursed loans and advances to the Defendant to the tune of TZS. 50,000,000/= and the others were disbursed by the other Managing Director of the Company (PW-1). As such, he stated that, as of the date of filing the suit and advances disbursed to the Defendant and one wrote the default payment notice and that the

Defendant was supposed to pay them TZS. 100,000,000/= which still remains due. He admitted, however, that, as per their agreement, for each trip of fish supplied, the Plaintiff was to deduct TZS Page 11 of 27 1,500,000/=. Pw-2 told this Court, however, that, the Defendant had supplied the Plaintiff only two consignments of fish, of which the Plaintiff made the deductions amounting TZS 60,152,000/=. During re-examination, Pw-2 told this Court that, the Plaintiff had advanced the loan amounts to the Defendant by way of cash and cheque paym^^ At that juncture the Plaintiff's case came to an end ^^ng wa^^r the Defence case to start. As stated earlier, the Defendant^Mj. ^fena Masota @ Benjamin Masota) ^Jness w*10 testified. In his testimony, ^||)asotxl|pld that, he is suppl^^W^Plain^^/as also issuing loans to her suppliers and fj^sam^ used t^^ repaid through deductions from was to be supplied to the Plaintiff as p might hl^ bitflag reed by the parties. Mr. Aasota testified further that, on 18/06/2016 he r^lggg^or the loan of TZS 70,000,000/= as stated in a contract dated 18/06/2016 and, that, out of what he had requested, he was only given TZS 30,000,000/=. He told this Court that, he had asked for that amount stipulated in the contract because he wanted to clear a debt he had with Victoria Page 12 of 27 Perch Factory where he had another loan and intended to reclaim his Title Deed in respect of Plot No. 129 Block AIX Kirumba area. He told this Court, he wanted to discharge such a loan with Victoria Perch Factory, so that he could put that same Title Deed as collateral to the Plaintiff for a loan advance. Mr Masota further stated that, after getting%|^h a loan from the Plaintiff, he was never given cop||||gf the^ptract and any other documents in relation ciphe he was never given the remainidf^ balAw^Df WZS. 40,000,000/= and, hence, he^^^^^ic^usiness as agreed in the contract dat^^8/0^^6,^B^^of which he was not able to co^^^his "^^ness^^e stated that, the money could have ||en us^^o to plaint'^s industry and \$|e F^jptiff ^Mjhjpaife deducted his loaned money throu^^^de^^^^^Defendant had he be given the rem^^fehbalan^^ Masdia told thfiCourt that, the previous amount of W18/06/201fj| and, that he had already repaid such amount. ie never tendered any document to prove that he had repaid such amount. He utterly denied receiving any amount via cheques in relation to the contract apart from the initial loan of TZS 30,000,000/- which he received from the Plaintiff. He told this Curt that, the rest of cheques that are Page 13 of 27 alleged to constitute the remaining loan balance were payments made to him after delivering fish consignments to the Plaintiff's industry, that being a usual business between them. In his testimony in chief, Mr Masota further told this Court that, the Plaintiff never fulfilled the contractual terms as nowhere is it shown that the deductions wi^of TZS 1,500,000/= as agreed by the parties. I^^^refoi^^nied the alleged claim of TZS. 100,000,0^/= a^e^^^acW^ He told the Court that, the only moi^^he received amounting to TZS ||pady been cleared and, that, he had ^^sup^^n^^^isignment of fish to the Plaintiff th|gjtehe P^^iff hc^yen mentioned. He finally urged this Com: to refept tl^^^ntlff's claims as they are false. TZS 40,000,000/= as loan but ^^claimed^^t,^^h advance was made long time ago and had Repaid it. Ille told the Court that the consignment of fish he the Plaintiff was valued at more than TZS 400,000,000/=. He stated therefore, that, the loan given to him of TZS. 30,000,000/= was for the purpose of redeeming his Title Deed and later to do business with the Plaintiff, even if those words do not appear in Exh.P4. Page 14 of 27 So far, that was the brief evidence of the Defendant as

On the 201st of the P6, TZS 3M.000 were disbursed to the J16, as per Exh.P7, TZS were disbursed to the as advance. pn,th July 2016, as per Exh.P8, TZS |,000,000/- were disbursed to the Defendant as advance payment. On 16th July 2016, as per Exh.P9, TZS 58,000/- were cash advanced to the Defendant by the Plaintiff. Page 17 of 27 On 23rd August 2016, as per Exh.P11, TZS 94,000 were cash advanced to the Defendant by the Plaintiff. On 03rd of August 2016, as per Exh.P14, TZS 10,000,000/- were advanced to the Defendant by the Plaintiff. On 9th August 2016, as per 10,000,000/- were also a Defendant by the Plaintiff. On the 11th August 2016, as TZS 10,000,000/- wen the Defendant by t^ai On 16th August 2^^ On errxhP.17, TZS 1 ere as well advanced to the total amount advanced to the the date when the amounts were |e I shall revert on that point of dates) was TZS Thgj|ls, however, TZS 20,000,000/- which the Plaintiff claifWSmave been advanced to the Defendant and tendered

in a copy of a cheque received as Exh.P12. This cheque unlike all others was not accompanied by any Cheque Payment Voucher and for that reason one could not tell whether it was paid to the Defendant as advance or not. Since the Defendant Page 18 of 27 does also contend that he supplied more fish than what he was paid for, the fact that the TZS 20,000,000 cheque was not accompanied by any cheque voucher like the rest indicating whether it was advance to the Defendant or it was payment he received from any supply he made, I will not consider this as an advance payment, as the benefit of doubt will go to the Defendant. From the foregoing discussion, the respondent responded to in the affirmative in that, the amount advanced to the Defendant was a sum of and not TZS 160,152,000/= (as alleged by the Plaintiff) and neither was it TZS 30,000,000 as claimed by the Defendant. The second issue agreed by the parties and recorded by this Court was that the Defendant ever made part of the loan tendered by Pw-1 and Pw-2, that is, that the Defendant did not repay the whole amount but only part of it, amounting to TZS 140,152,000/=. Two Exhibits tendered in Court by Pw-1 do indicate that, on 18th July 2016 and 24th August 2016 the Defendant was issued a payment voucher- cheque /cash amounting to a total of TZS 70,465,800/- as payments in respect of two fish consignments supplied by the Defendant. The two Exhibits tendered were Exh.P.10 and Exh.P.13. Page 19 of 27 Out of the above amount, as per Exh.P.10 and P.13, deductions were made as follows:

- Firstly, from 18th July 2016, as per Exh.P.10, TZS 58,000/- were deducted as (cash advance payment earlier made to the Defendant). Besides, TZS 30,000,000 the Plaintiff made the following deductions: (TZS 94,000 + 30,000) = TZS 124,000/- From the above total deductions were TZS (30,058,000 + 30,000) = TZS 60,152,000/-. This means, therefore, that out of 140,152,000/- the amount which was repaid by the Defendant in view of this fact, the second issue is affirmatively resolved. Specifically, the third issue was to the effect that: If issue No. 2 is answered in the affirmative, how much if any, was the outstanding loan and/or advances as of the date of filing this suit. According to the available evidence, although the parties had an agreement (Exh.P4) which shows that the Plaintiff had Page 20 of 27 agreed to advance a loan amounting to TZS 70,000,000/-, the evidence tendered before this Court showed that, the Defendant was, at different times, advanced monies by the Plaintiff which amounts were never proved to have been returned in full. As pointed out in the course of addressing the first issue, a total of TZS 140,152,000/= were advanced to the Defendant and the Defendant was only able to repay TZS 60,152,000/= out of that sum from the TZS 140,152,000/-, if one deducts the amount repaid by the Defendant which was to the tune of TZS 60,152,000/-, the remaining balance will be TZS 80,000,000/-. As I stated earlier, there is a need to examine the following dates when the advances were made and the dates when the Plaintiff's claim arose to determine whether there are claims which are time barred or not. Even if the issue of limitation is raised, this Court is to look at the pleadings and see if the claims or part thereof are barred by the Plaintiff's testimony and Exh.P.1 and P.2 it is shown that the advances amounted to TZS 40,000,000/=. However, let me pose a bit and reflect on this payment. Later, in June 2016, as per Exh.P3 and P4, there was an agreement which was executed by the two parties for a loan

amounting to Page 21 of 27 TZS 70,000,000/-. Unfortunately, nothing is said about the earlier TZS 40,000,000 which were advanced to the Defendant some four and a-half years ago. In his testimony, however, the Defendant stated that, the previous loan was long ago settled by the parties, although no 40,000,000 / were not availed to him^{^^}nce^{^^}Kig^{^^}tt his plans. One question I asked ^{^^}^^^It^{^^}ed at the testimony of the Defendan^{^^}het^{^^}he^{^^}B^{^^}nt wants to bank on the defence ^{^^}^^trati^{^^} the^{^^}ptract. Well, even if hpwas, tl^{^^}^/vou^{^^}^^have come to his aid. I hold so became, l^{^^}our (ixtrine of frustration as provided for d^{^^}^^ec^{^^}^^^Bw of Contract Act, Cap.345 R.E 2^{^^}^^the^{^^}bt the^{^^}: JA contracjMrdo an act which after the made becomes impossible, becomes void when the act becomes |||However, l|ie a^{^^}ove defence of frustration is not just lightly ilbpked. Jt, when can one invoke it? The case of M/S Kanyarwe Building Contractor vs. The Attorney General and Another [1985] T.L.R 161, has the answer. In that case, this Court (Mwalusanya J, as he then was) observed that: "our courts do not readily invoke the doctrine of frustration unless it is shown that the contract as originally conceived, Page 22 of 27 bears little or no resemblance to the new state of things. It is not sufficient merely to show that conditions have changed so that one party is in a more onerous position, financially or personally. It should be shown that it is now impossible to perform the contract not merely more difficult or expensive ... [Frustration] is a sort shorthand: it means that a contract ha^{^^} ceased to bind the parties becaj||, the common basis on which by understanding it was base^{^^}as fail^{^^} If would be more accurate to sdy|ppt th contract has been frustrated, buwpt th^{^^}® has been a failur^{^^}^^fat Ak tHt| supervening events, notiite to tne default of eith^{^^}party, i^{^^}^^the ^{^^}^^mance of a J^{^^}itracAdefini^{^^}y im||^{^^}sfffle and there is ^{^^}pder^{^^} to bjUjpond in any event, frus^{^^}n ^{^^}^^^mave underlined the ^{^^}hrase^{^^}indefinitely impossible' for Anphasis.^{^^}^^- fact that it has become ^{^^}^^iner^{^^} or more expensive for one ^{^^}ar^{^^}Wz he thought, is not sufficient to l^{^^}ing about a frustration. It must be more f^{^^}h merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done. And it is for the courts to do it as matter of law." In this case even if the Defendant was blaming the Plaintiff on the ground that the latter frustrated the contract, Page 23 of 27 the conditions or facts on the ground do not warrant invoking the doctrine of frustration. Aside from the above considerations, however, there is yet another concern which requires the attention of this Court. Since it was not readily stated in the Contract whether the previous amount of TZS 40,000,000/ was partlf|^{^^}xh.P4 or not, and since the loan was or should ^{^^}^^garc^{^^}s a separate transaction altogether, was ^{^^}appr^{^^}a^{^^}^^tW^{^^} to claim for the refund of the said amt|gt oAwrocWber 24th 2020 when the Plaint was Ayzdibt? In other words, was the Plaintiff wit^{^^}ie timy rescrfil|jto be able to claim for the refund? As it may bynoted tom and P-2 the TZS 40,000,000 ckp^{^^}ed thiRli|pdim as loan advanced to the Defendari^{^^}^^adW^{^^}^^^n on the 06th December ZO1^{^^}^^^eans^{^^}t, if any repayment claim was to be made'z<^{^^}cerrj^{^^}g this ^{^^}^^nt, it should have been made the which was a date within the sixth p years, ^{^^}hi^{^^}outside that date would be time-barred. This is ^{^^}jppe to theAct that, the debt amounting to TZS 40,000,000/- v^{^^}^^^red debt and under the schedule to the law of limitation, the debt having been unsecured one; its recovery must have been commenced within 6 years. The period of limitation commences when the debt becomes due and payable. Page 24 of 27 From the

foregoing, it will mean, therefore, that, the claim of TZS 40,000,000/= advanced to the Defendant on 06th of December 2011 was belatedly claimed at a time when the Plaintiff was already time-barred. It must thus, be deducted from the amount due, since the rest of the claims were made within time. It follows, therefore, that, if one is to respond to the third issue regarding how much is the Plaintiff paid, the answer will be that, the Plaintiff is I (TZS 80,000,000 less TZS 40,000,000 (In view in to be TZS Before I consider the last issue regarding what the parties are entitled to: I will now consider as to whether both adhered to the terms of Exhibit P4 or not. In the case of *Vitani v. Imalaseko Investment*, Civil Case No. 1 of 1994 (citing the cases of *Nakana Coffee Marketing Board [1990 - 1994]* was held that a breach of contract may be occasioned by both parties particularly when both parties fail to fulfil their obligations imposed by the terms of their contract. In the current suit at hand, as I look at Exh.P4 and how the parties implemented its terms, I find that, each of them did not adhere to its terms strictly. In particular, while it is evident that the Defendant failed to supply the fish consignment as Page 25 of 27 agreed under the agreement and failed as well to repay the loan amount advanced to him under Exh.P4, the Plaintiff did also fail to adhere to the terms of Exh.P4 in respect of the amounts which ought to be deducted from any of the consignment supplied by the Defendant. Instead of deducting TZS 1,500,000/- as agreed, the Plaintiff as per P.10 and P.13, deducted far more than was agreed. Having said so, let me now proceed and consider the last issue which is about the reliefs to which the parties are entitled. Essentially, the party who succeeds to prove the case to the required standards is the one who wins the day and will be entitled to reliefs. In this case, to a larger extent the balance of probabilities lies in favour of the Plaintiff as against the Defendant. In other words, the Plaintiff has been able to discharge his burden and has proved the case to the required standards although he may not be entitled to all that he has for. In view of the above, this Court enters judgment and decree in favour of the Plaintiff as follows:

1. That the Defendant should pay the Plaintiff the sum of Tanzania Shilling forty million only (TZS 40,000,000/=) being outstanding amount forming part of the loan advanced by the Plaintiff and received by the Defendant, failure of Page 26 of 27 which the Plaintiff should sell the Defendant's house located at Plot 129 Block "AIX" Kirumba Area, Mwanza Township, CT.No.22047, L.O. Number 41491 in full recovery of the loan. Page 27 of 27

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