

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**CIVIL CASE NO. 71 OF 2011**

**MALIMI LUBATULA NG'HOLO.....1<sup>ST</sup> PLAINTIFF  
MPANDUJI MAKANGA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOSEPHAT M. KITUNDU.....1<sup>ST</sup> DEFENDANT  
DRTC TRADING COMPANY LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

*23 Feb. & 13 Mar. 2018*

**DYANSOBERA, J.:**

The plaintiffs have filed a suit in which they are praying for immediate refund payment of Tshs. 40,400,000/= arising from business transaction, or in the alternative, an order for delivery of sugar consignment worth Tshs. 38,400,000/= as purchase price plus Tshs. 2,000,000/= being transportation costs to the plaintiffs, interests, general damages amounting to Tshs. 20,000,000/= and costs of the suit.

The defendants have denied the claims presented. The defendants are represented by Mr. Msemwa, learned advocate while the plaintiffs are prosecuting the case on their own, unrepresented.

At the commencement of the case, four issues were framed, namely:

1. *Whether there was a contract between the plaintiffs and defendants for the purchase and delivery of the sugar*
2. *If so, what were the terms of contract in terms of price, amount and mode of delivery*
3. *Who was in breach of the contract?*
4. *To what reliefs are the parties entitled.*

In a bid to establish the case against the defendants, the plaintiffs called two witnesses, viz. MALIMI LUBATULA NG'HOLO (PW 1) and MPANDUJI MAKANGA (PW 2) while in rebuttal of the claims, the two defendants called three witnesses, that is, ADAM MWABUSILA (DW 1), MARY MUSIRA (DW 2) and JOSEPHAT KITUNDU (DW 3).

The plaintiffs' case according to these two witnesses was as follows. PW 1 and PW 2 hereinafter called, respectively, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, are businessmen and residents of Magu District in Mwanza Region. On 26<sup>th</sup> day of October, 2010 the 1<sup>st</sup> plaintiff went to the 2<sup>nd</sup> defendant's shop to buy some sugar and bought 300 sacks of 50 kilogrammes each and 400 sacks of 25 kilogrammes each, all total valued at Tshs. 30,000,000/= . The shop keeper was the 1<sup>st</sup> defendant. After the purchase and payment, he left the sugar consignment there. The following day, the 1<sup>st</sup> defendant informed him that he had got a motor vehicle capable of carrying 32 tonnes. On 28<sup>th</sup> day of October, 2010, the 1<sup>st</sup> plaintiff informed the 2<sup>nd</sup> plaintiff who was also in Dar es Salaam that the 1<sup>st</sup> defendant had secured transport. The 2<sup>nd</sup> plaintiff went to the 2<sup>nd</sup>

defendant and bought 280 sacks of sugar each weighing 25 kilogrammes valued at Tshs. 8,400,000/=. After the payment, the 1<sup>st</sup> defendant told them that their motor vehicles were by then away from office (yako mikoani) and promised to load and transport the consignment to the plaintiffs after the motor vehicles were back. The 1<sup>st</sup> defendant asked the plaintiffs to surrender their original receipts to him to enable him transport the consignment and upon that agreement, the 1<sup>st</sup> plaintiff went to have the receipts photocopied and certified and they, plaintiffs remained with a copy while the 1<sup>st</sup> defendant retained the original. It was their evidence that after handing over the original receipts to the 1<sup>st</sup> defendant they left, leaving behind the sugar consignment to be transported after the 1<sup>st</sup> defendant had got transport. It was plaintiffs' further evidence that on 30<sup>th</sup> day of October, 2010 the 1<sup>st</sup> defendant informed 1<sup>st</sup> plaintiff that their office motor vehicles were then back and that the plaintiffs therefore had to pay the fare by depositing the money in the Exim Bank of Africa account. The 1<sup>st</sup> plaintiff paid Tshs.1, 500,000/= while the 2<sup>nd</sup> plaintiff contributed 500,000/= and the whole amount was deposited by the 1<sup>st</sup> plaintiff in the said bank into the 1<sup>st</sup> defendant's account. The plaintiffs waited for the consignment to arrive. However, three days passed without receiving the consignment and without communicating with the driver. Seeing this, the plaintiffs decided to make a follow up and managed to meet the 1<sup>st</sup> defendant who asked them to give him time so that he

traced the driver. At the 2<sup>nd</sup> defendant, DW 2 told the plaintiffs that those matters were of the 1<sup>st</sup> defendant and did not concern the office of the 2<sup>nd</sup> defendant. Thinking that they were gyped, the plaintiffs referred the matter to the police but they were told that the matter was civil fit to be taken to a court of law. On 4<sup>th</sup> day of January, 2011 the 1<sup>st</sup> defendant complained to the IGP that the RCO had failed to deal with his complaint. The IGP responded in writing in his letter (Exh. P. 1). The plaintiffs insisted that it is the defendants who breached the contract by their failure to deliver the goods to their destination.

In cross-examination, the 1<sup>st</sup> plaintiff admitted that he was familiar with the 2<sup>nd</sup> defendant business-wise and the problem arose only with the 1<sup>st</sup> defendant. He said that it is the 1<sup>st</sup> defendant who had promised them that the office had motor vehicles to transport the sugar consignment but failed to deliver the goods to its destination. The 1<sup>st</sup> plaintiff admitted that at the time of payment there was no agreement to deliver the goods to the destination at Bunda. The plaintiffs explained that there was trust between them and the defendants.

Adam Mwabusiila (DW 1), works with the 2<sup>nd</sup> defendant as a store keeper. He testified that on 26<sup>th</sup> day of October, 2010 he was given a receipt from the 1<sup>st</sup> plaintiff which was on sale of sugar of 300 sacks of 50 kilogrammes each valued at Tshs. 18,000,000/= and 280 sacks of 25 kilogrammes each valued at Tshs. 12,000,000/=. There was also a sale of 200 sacks of

25 kilogrammes valued at Tshs. 12, 000,000/= belonging to the 2<sup>nd</sup> plaintiff. DW 1 confirmed that the receipts were genuine and counted the goods. DW 1 explained the procedure that after counting, he would hand over the goods to the purchaser and then stamp the receipts signifying that the goods are delivered. He told this court that the plaintiffs collected the sugar consignment at different periods. According to him, the 1<sup>st</sup> plaintiff collected the sugar on 26<sup>th</sup> day of October, 2010 while the 2<sup>nd</sup> plaintiff collected it on 28<sup>th</sup> day of October, 2010 and that those are the dates the payments were made and DW 1 stamped the receipts. According to DW 1 and DW 2, the 1<sup>st</sup> defendant was the store keeper, supervising at Nkrumah shop. He was managing the shop by negotiating with the customers, selling the goods, writing the sale receipts and then giving the original receipts to the customers. DW 1 insisted that the 1<sup>st</sup> defendant was not responsible for the goods he, DW 1, was keeping. He told this court that the office was not responsible for transporting the consignment and that is why it was not reflected in the receipts.

In cross-examination by the plaintiffs, DW 1 told the court that he gave 300 big sacks and 400 small sacks to the plaintiffs. He admitted to have not seen the motor vehicle loading that consignment but explained that he saw people carrying the goods. He insisted that the goods are handed over to the purchaser upon his producing a genuine receipt. He told this court that the person collecting the goods does not

sign. He admitted that on 26-28 October, 2010 the 1<sup>st</sup> defendant was an employee of the 2<sup>nd</sup> defendant and authored the said receipts. He also admitted that what he was doing was on behalf of the 2<sup>nd</sup> defendant. He maintained that the original receipts were handed over to the plaintiffs.

Mary Musira (DW 2) who was working with the 2<sup>nd</sup> defendant as a General Manager since 1997 supported the DW1's evidence that the 1<sup>st</sup> defendant was the 2<sup>nd</sup> defendant's employee until his contract came to an end in 2011, he having been employed as shop keeper charged with receiving money from sale of goods, meeting with the customers and negotiating with them and that after receiving the money, the 1<sup>st</sup> defendant was issuing original receipts to the customers who would take them to the store keeper and after satisfying himself that the receipts tally, would supply the goods. DW 2 also supported the evidence that the 2<sup>nd</sup> defendant had no procedure of transporting the customers' goods to the destination explaining that the procedure was cash and carry that is you buy and collect your goods.

She told the court that the company was not aware that the 1<sup>st</sup> defendant undertook to transport the plaintiff's sugar to the destination and that they only became aware when the matter was already in court. She maintained that if the plaintiffs bought the sugar but did not carry it that was not the business of the 2<sup>nd</sup> defendant. She said that the agreement of carrying the plaintiffs' goods was not official, rather, it was

personal between the plaintiffs and the 1<sup>st</sup> defendant. She insisted that she had come to court to state what the procedure was and that on 26, 27 and 28 October, the 1<sup>st</sup> defendant was the employee of the 2<sup>nd</sup> defendant's company and was transacting for the company. She also admitted to have signed the letter of employment of the 1<sup>st</sup> defendant.

The last defence witness was Josephat Kitundu, the 1<sup>st</sup> defendant who testified as DW 3. He recalled that he was the 2<sup>nd</sup> defendant's employee and in 2011 before he retired from employment after his contract expired. He admitted that he was selling various goods at Nkrumah. Such goods included fertilisers, sugar and iron sheets. He was selling, receiving the money and issuing receipts. He admitted to have been acquainted with the plaintiffs their capacity as the customers. He admitted that on 26<sup>th</sup> day of October, the 1<sup>st</sup> plaintiff went there to buy sugar. On 28<sup>th</sup> day of October, 2010, the 2<sup>nd</sup> plaintiff also went there and bought sugar too. The plaintiffs paid the purchase price and he, the 1<sup>st</sup> defendant issued a receipt which bear the 1<sup>st</sup> defendant's handwriting and signature. The receipt was stamped with RECEIVED. The 1<sup>st</sup> defendant then gave copies to DW 1 who was a store keeper at the godown at the rear house. The 1<sup>st</sup> defendant told this court that the plaintiffs went at their own time to collect sugar and that that was the end of this duty.

As to the letter he wrote to the IGP, the 1<sup>st</sup> defendant stated that he was complaining about the failure by Mr Msangi to

show cooperation in assisting to arrest those people who had carried the sugar cargo and failed to deliver then to the plaintiffs. He said that his aim was to have the motor vehicle remain at the police station as exhibit. The 1<sup>st</sup> defendant explained that he was suspected to have obtained, by false pretences, the sum of Tshs. 40,000,000/= meaning that Tshs. 38,000,000/= was the purchase price while Tshs. 2,000,000/= was for transport. The 1<sup>st</sup> defendant denied to have received the sum of Tshs. 2,000,000/= to transport the sugar cargo. The 1<sup>st</sup> defendant, however, admitted to have assisted the 1<sup>st</sup> plaintiff to look for a driver to transport the cargo and to have supplied him with a telephone number of the transporter for purposes of communication. The 1<sup>st</sup> defendant informed this court that he had that those people who were responsible for transporting the sugar cargo were arrested and locked up. He, therefore, expressed his surprise to be sued alone without involving those other people. The 1<sup>st</sup> defendant admitted to have met the 1<sup>st</sup> plaintiff and said that he paid money for transport purposes. The 1<sup>st</sup> defendant admitted to have not involved the 2<sup>nd</sup> defendant in the transport issue as, according to him; it was personal and not official. He admitted that the 2<sup>nd</sup> defendant was not offering transport services. He said that Bunda District is not specific but general.

In cross-examination, the 1<sup>st</sup> defendant said that the plaintiffs did not complain on the stamping on the receipts. He maintained that the plaintiff did not deposit the money into

his bank account but he just gave to the 1<sup>st</sup> plaintiff a phone number of the transporter one Josephat Maige, admitting that he was involved in looking for the transporter. As to why he wrote a letter of complaint to the IGP, the 1<sup>st</sup> defendant told this court that he did so after he was alleged to have stolen the sugar cargo and thought that the Zonal Crimes Officer was not assisting him. When pressed as to whom the account in which the 1<sup>st</sup> plaintiff deposited the money belonged and how said plaintiff could have known that it belonged to the 1<sup>st</sup> defendant, the latter said that the said account might have been his and he could not tell how the 1<sup>st</sup> plaintiff could have known it. He admitted the account in which the money was deposited to be belong to him (1<sup>st</sup> defendant). He denied to have sent any letter fax to the 1<sup>st</sup> plaintiff.

When cross-examined by the 2<sup>nd</sup> plaintiff, the 1<sup>st</sup> defendant admitted that by the time, he was working with the 2<sup>nd</sup> defendant. He also admitted to have written Tshs. 40,000,000/= on the letter addressed to the IGP while at the same time he had written Tshs. 38,400,000/= on the purchase receipt stating that the difference was for transport. The 1<sup>st</sup> defendant admitted that by the time he was a shop keeper (muuzaji wa duka) contending the shop and the godown are in the neighbourhood. He also admitted that on 26<sup>th</sup> and 28<sup>th</sup> day of October, 2010 he was working for the 2<sup>nd</sup> defendant and all what he transacted was for the 2<sup>nd</sup> defendant. He admitted to have not released the cargo and could not tell who is in breach

of the contract. He, however, at a later stage during the same cross examination, admitted to have released the sugar cargo on 29<sup>th</sup> day of October, 2010 which was of 32 tonnes. The plaintiff denied to have been sacked from the job. He supported the evidence of the previous witnesses that after payment, the original receipt is given to the customer while a copy of it is given to the store keeper.

In re-examination, the 1<sup>st</sup> defendant told this court that there was communication and agreement with the transporter who transported the cargo from the godown where DW 1 was working. He concluded his evidence by telling this court that the shop was closed.

After the closure of the plaintiffs' and defence' cases, parties opted not to file closing submissions.

I now come to the issues framed. As far as the first and second issues are concerned that is whether there was a contract between the plaintiffs and defendants for the purchase and delivery of the sugar and if so, what were the terms of the contract in terms of price, amount and mode of delivery, both sides are at one that on 26<sup>th</sup> and 28<sup>th</sup> day of October, 2010 the plaintiffs bought sugar worthy Tshs. 38,400,000/= and the defendants supplied the said sugar to the plaintiffs together with the receipts. As to the mode of delivery, the evidence is clear that the 2<sup>nd</sup> defendant had no procedure of delivering the goods to the destination. This is what DW1 and DW 2 said. The 1<sup>st</sup> defendant who testified as

DW 3 supported this position of the 2<sup>nd</sup> defendant's company. However, it is the plaintiffs' evidence that the 1<sup>st</sup> defendant promised to look for the transporter to transport the sugar to Bunda where it was agreed that the sugar consignment would be delivered. This evidence was admitted by the 1<sup>st</sup> defendant who told this court that he not only looked for a transporter one Josephat Maige but also managed informed the 1<sup>st</sup> plaintiff of this, he called assistance. It was amply proved by the plaintiffs that the 1<sup>st</sup> defendant told them that he had transport of the office but by the time the motor vehicles were away from the office (yako mikoani). Later, the 1<sup>st</sup> defendant informed the plaintiffs that the motor vehicles were already back and had secured a motor vehicle for 32 tonnes. The 1<sup>st</sup> defendant did not end there but went further and asked the plaintiffs to pay for fare of transporting them. The plaintiffs deposited Tshs. 2,000,000/= into the Exim Bank of Tanzania account belonging to the 1<sup>st</sup> defendant for transport purposes. Although the 1<sup>st</sup> defendant denied to have received that sum in his account, his evidence is a suspect in that he did not state what consideration had the plaintiffs offered for him to look for and secure transport, how the 1<sup>st</sup> plaintiff came to know the 1<sup>st</sup> defendant's bank account and how the 1<sup>st</sup> defendant could have transported the sugar cargo on 29<sup>th</sup> October, 2010. Indeed Exh. P 1 is clear on the whole transaction and it reads in part as follows:

*“Kwa kifupi tu, kati ya taree 26/10/2010 na 29/10/2010, nilimwuzia mteja mmoja sukari kwa jina la Bw. Nghoro Malimi kiasi cha tani 32 za sukari zenye thamani ya Tshs. 40,000,000/=. Kwa muda kama siku tatu/nne hivi, mteja wangu huyo hakuchuku/kupakia mzigo wake godown kwa kuwa alikabiliwa na tatizo la usafiri. Mimi kwa kumjali mteja wangu, kwa nia njema nikiamini ninalinda mahusiano mema kati ya mimi, mteja na Kampuni, nilimuulizia iwapo atakuwa tayari mimi nimtafutie usafiri ili apakie sukari yake tani 32 ambapo ilikuwa inakwenda BUNDA, Musoma. Mteja alikubali wazo hili na aliruhusu nimtafutie usafiri. Ndipo nikaingia katika simu yangu na kumpata Bw. Josephat Maige, kama alivyojitambulisha kwangu mwanzoni kabisa kwa kumpigia simu ya kwamba kama nitakuwa na mzigo ambao unatakiwa kusafirishwa kwenda bara,yeye anayo magari ya kuanzia tani 30-32 hivyo naweza kumpigia simu wakaelewa na mwenye mzigo na yeye akasafirisha. Nikapata namba yake ya simu 0719969267 nikampigia kumweleza kama yuko tayari kupakia mzigo huo na kupeleka Bunda naye akakubali....”.*

The excerpt of the said letter is a clear evidence that the 1<sup>st</sup> defendant undertook to transport the sugar through the transporter and deliver it to Bunda in order to maintain good relationship between him, the 2<sup>nd</sup> defendant and their customer. It is possible that the 2<sup>nd</sup> defendant had no such procedure but the 1<sup>st</sup> defendant who was the 2<sup>nd</sup> defendant

employee and was transacting for the 2<sup>nd</sup> defendant undertook that duty to deliver the sugar cargo to Bunda. It is also possible that the undertaking was a personal matter between the 1<sup>st</sup> defendant and the plaintiffs but since there is no suggestion that the 2<sup>nd</sup> defendant disowned the move and proved that the 1<sup>st</sup> defendant was on frolic of his own. Indeed, the 1<sup>st</sup> defendant was clear that he made that undertaking for the good will of the office and their customer.

There is no dispute that the sugar cargo was not delivered to Bunda and hence was not received by the plaintiffs. This is clear from the evidence that the plaintiffs were given a copy of the purchase receipts, the defendants retaining the original for transport purposes. The plaintiffs having discharged their duty of paying for the sugar cargo and the transport, the defendants were duty bound to deliver the said cargo to the plaintiffs according to their oral agreement and the 1<sup>st</sup> defendant's undertaking. For that matter, the defendants were, clearly in breach of the contract and the 2<sup>nd</sup> defendant is vicariously liable as the 1<sup>st</sup> defendant was their employee, was transacting for the company and the 2<sup>nd</sup> defendant did not disown the whole transaction. That answers the 3<sup>rd</sup> issue.

On the 4<sup>th</sup> issue, there is no dispute that the defendants failed to deliver the goods to Bunda after having pocketed Tshs. 38,400,000/=. Both defendants are therefore jointly

liable to either return the sum of Tshs. 38,400,000/= paid as purchase price for the sugar which was not delivered or else, deliver the sugar for which the plaintiffs paid. The two defendants are also jointly liable to pay general damages assessed at Tshs. 20,000,000/=. Since there is ample evidence that the plaintiffs deposited Tshs. 2,000,000/= into the 1<sup>st</sup> defendant's bank account and there is nothing showing that the said amount was paid to his employer, the 2<sup>nd</sup> defendant, I order that the 1<sup>st</sup> defendant is solely liable to pay back the said sum to the plaintiffs.

The plaintiffs are awarded interest on the decretal sum at court's rate of 7% p. a. from today to the date of full payment.

- The plaintiffs are awarded costs of the suit.

Order accordingly.



  
W.P. DYANSOBERA,

JUDGE

13.3.2018

Delivered this 13<sup>th</sup> day of March, 2018 in the presence of the 2<sup>nd</sup> plaintiff and Mr. Justine Magafu, learned counsel holding brief for Mr. Msemwa, learned counsel for the defendants.



  
W.P. DYANSOBERA,

JUDGE