

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 45 OF 2022

FUEL MASTER (T) LIMITED PLAINTIFF

VERSUS

STAR OIL (T) LIMITED DEFENDANT

Date of Last Order: 25/10/2022

Date of Judgement: 25/11/2022

JUDGEMENT

MAGOIGA, J.

Parties' in this suit squabbles on breach of contract and its consequences.

The plaintiff, **FUEL MASTER (T) LIMITED** by way of a plaint instituted the instant suit against the defendant praying for this court be pleased to enter judgement and decree in the following orders, namely:-

- a. Payment of Tshs.75,680,000/= being the principal amount paid to the defendant, plus interest at commercial rate of 19% from the date of the claim to the date of judgement;
- b. Payment of Tshs.1,259,337,686/= being loss of business from 29th day of July, 2016 to 31st day of January, 2022 plus interest at the commercial rate of 19% from the date of the claim to the date of judgement;



- c. Interest on the decretal sum at the court's rate of 12% from the date of judgement until payment in full;
- d. General damages of an amount to be determined by the court;
- e. Costs of the suit;
- f. Any other relief(s) this Honourable court may deem fit and just to grant.

Upon being served with the plaint, the defendant filed a written statement of defence, save for a balance of Tshs.12,042,500/= which was admitted and is ready to reimburse to the plaintiff, disputed all other claims as unfounded and urged this court to dismiss this suit with costs.

For better understanding the gist of this suit, the facts, albeit in brief, as gathered in the pleadings are imperative to be stated. In the year 2016, parties' herein had smooth business relationship for supply of petroleum products initiated by purchase orders to the defendant who upon payment supplied petroleum products to the plaintiff. Undisputed facts go that, on 29th day of July, 2016, the plaintiff made oral purchase order for 43,000 litres of petrol valued at Tshs.75,680,000/-, which purchase price amount was on the same date deposited into the account No.019103012864 in the name of the defendant maintained with NBC.



Facts went on that despite being paid in full amount of the order as stated above, the defendant utterly failed to supply the petrol as ordered and paid for, consequently, among others, leading to business loss to the plaintiff, hence, this suit claiming the reliefs as contained in the plaint.

On the other part of the defendant stated to have delivered the petrol immediately after receiving payments. Facts go that in their business dealings the defendant received and accepted petrol which was billed to other customers and upon reconciliation the amount which the plaintiff is entitled for reimbursement is Tshs.12,042,500/= and no more.


It is against the above background, this court is duty bound to decide this dispute after hearing both parties', hence, this judgement.

The plaintiff at all material time of this suit was enjoying the legal services of Messrs. Wang'eya Nyamhanga Kube and Denis Ignas, learned advocates, whereas the defendant was equally enjoying the legal services of Ms. Neema Mahunga and Ms. Zakia Ally, learned advocates.

When this suit was called on for Final Pre-Trial Conference, the following issues were agreed and recorded by the court upon consultation with the learned advocates for parties' for the determination of this suit, namely:-

1. Whether the defendant delivered the said petrol as ordered and paid for by the plaintiff;
2. If the first issue is answered in the negative, whether the plaintiff suffered any loss due to non-delivery?;
3. Whether the plaintiff received petrol which was billed to other customers?;
4. To what reliefs parties are entitled to?.

In proof of the plaintiff's case two witnesses were paraded. The first witness was **Mr. BERA ANDREW KARUMBA** (to be referred in these proceedings as "**PW1**"). PW1 under oath and through his written witness statement told the court that he is the director of the plaintiff which deals with petrol, diesel and kerosene since 1994 with retail office at Uvinza and Kigoma. According to PW1, the plaintiff and defendant relationship started in 2014 up to 2017 whereby in most cases orders were negotiated through phone calls and after striking a deal on the price and quantity, they deposit money into the account of the defendant maintained with NBC Kigoma branch. PW1 went on telling the court that upon payment for the order and confirmed by the defendant the petrol, the load the truck for delivery.



PW1 testified that on 29th day of July, 2016 he spoke to the Sales Manager of the defendant, one, Vicash and negotiated the price of that day and agreed at TShs.1750 per litre and on the same day was able to deposit Tshs.75,680,000.00 into account No.019103012864 through cheque No.002300 being the price of 43,000 litres of petrol. PW1 further testified that after payment he communicated with the defendant's employee, one, Urnish Antani through whatsapp No.+255 757 989872 who acknowledged receipt of payment and promised to fulfill their obligations. PW1 went on telling the court that despite the promise to supply the petrol, the defendant for no apparent and justifiable reasons failed to fulfill her contractual obligations and has failed to reimburse the plaintiff with the money had and received from the plaintiff.

It was further testimony of PW1 that on 1st August, 2016 the plaintiff was forced to buy petrol from other suppliers and managed to buy same quantity and price petrol from Lake Oil (T) Limited. PW1 went on telling the court that even his effort to be refunded the money by the defendant was not taken heed and decided to complain to EWURA which dispute went up to Fair Competition Tribunal which found that EWURA had no jurisdiction and the matter was re-opened here.

PW1 further testimony was that since 29th day of July, 2016, the plaintiff has not received the ordered petrol or any other consignment of that amount from the defendant. As such, PW1 pointed out that such failure by the defendant to do her obligations, amounts to breach of contract as such has caused the plaintiff to suffer loss of business to the tune of TShs.1,259,377,686.00 from 29th day of July, 2016 up to 31st day of January, 2022 inclusive. PW1 pointed out that the conduct of the defendant through its employees Vicash and Muhammed is clear breach of contract and prayed that this court be pleased to grant all prayers as contained in the plaint.

In proof of the plaintiff's case PW1 tendered in evidence the following exhibits, namely:-

1. Loss report dated 20/07/2018 as **exhibit P1;**
2. Pay in slip to Star Oil (T) Limited, cheque of Tshs.75,680,000/= and cheque of the same amount to Lake Oil (T) Limited as **exhibit P2a-c;**
3. Letter dated 05.10.2017 as **exhibit P3;**
4. List of fuel purchases from Star Oil (T) Limited for the year 2016 starting 15/2/2016 to 13/08/2018 as **exhibit P4;**
5. Financial statement reports of the years 2014 to 2020 and Auditors reports as **exhibit P5a-h;**

6. Board resolution by plaintiff dated 08/03/2022 as **exhibit P6;**

Under cross examination by Ms. Mahunga, PW1 told the court that if the price was 1750 for 4300 litre the amount was Tshs.75,250,000/= and not 75,680,000/=. PW1 when shown few orders and asked if had price, told the court that had no prices but number of vehicles and driver's names. Pressed with questions, PW1 admitted that he has no evidence that he was communicating with Vicash, no email nor whatsapp as stated in paragraph 7 of his witness statement. PW1 went on admitting that the number stated in paragraph 12 of his witness statement was not of Vicash and told the court that paragraph 7 and 12 are misleading.

PW1 when shown exhibit P5a-b and asked who prepared it and he replied that exhibit P5a had no signature, name of the person who prepared it and was not taken to TRA. As to exhibit P5c, PW1 told the court that it shows the figure of 2014 are shown in 2015 but when compared are different and at variance and he cannot tell which ones are correct. As to exhibit P5d for 2016 has different figures as well for 2015 which are different and at variance as well. PW1 when taken through all financial statements for 2017 up to 2020 admitted that do not show the author and figures are at variance and was not able to explain the variance.

Further pressed with questions, PW1 admitted that he has no monthly sales or loss, receipts, bank details and have never stopped selling petrol to prove the loss he claims because he got petrol from Lake Oil (T) Limited. PW1 further admitted to have no TRA returns for loss relating to the case.

PW1 when shown exhibit P4 and asked if he complained to TRA and said they never complained to TRA and all the financial statements tendered non shows loss of profit and said he is not an accountant and the next witness will explain further the loss.

Under re-examination by Mr. Kung'e, PW1 told the court that the account will explain the difference in figures and variances noted in the financial statements exhibit P5. PW1 when shown exhibit P4 testified that he has never received the report of Star Oil (T) Limited. PW1 insisted that the 43000 litres ordered on 29/07/2016 have not been delivered. PW1 when asked about the Tshs.12,240,500/= admitted by the defendant said I he is aware as to how that figure was arrived. As to the documents from NSK admitted that the documents are not his but he received the petroleum.

Next witness for the plaintiff was **MR. ERNEST BITURA KAGONGO** (to be referred in these proceedings as "**PW2**"). PW2 under oath and through his written witness statement told the court that he is holder of Advanced

Diploma in Accountancy and Certified Public Accountant. PW2 told the court ever since he has worked with several companies, Shebrila in 2008 and Fincare & Companies being among them. PW2 went on telling the court that FUEL MASTER (T) LIMITED is one of their clients since 2018 and that he received documents from the plaintiff for financial statement for various years. PW2 testified that in 2020 while working with Shebrila the plaintiff instructed them to prepare for them financial statements for the years 2018 to 2020 inclusive and that in order to carry out the exercise, they got financial statements of the years 2014 to 2017 which enabled him to prepare the financial statements for three years and in 2021 they conducted audit to plaintiff's business to establish if there was loss of business for failure to supply 43000 litre of petrol ordered from Star Oil (T) Limited. PW2 went on telling the court that after their conduct of the audit based on former financial background established that the plaintiff could have made a profit of Tshs.1,335,570,687/= in case the 43000 litre were supplied as ordered on 29th day of July, 2016 by 2021.

PW2 when shown exhibit P5 says are the financial statements of the plaintiff and that he was not the one who signed it.

In proof of the plaintiff's case, PW2 tendered the following exhibits, namely:-



1. Identity card (copy) of PW2 as employee of Fincare as **exhibit P7**.

Under cross examination by Ms. Mahunga, PW2 told the court that Shebrila was dissolved in 2019. Pressed with questions, changed the story and said it was dissolved in 2018. PW2 admitted that the financial statement prepared by SHEBRILA were prepared by non-existing entity because was not in existent by 2018. PW2 when shown exhibit P5e-g and asked to tell the court who prepared them, replied that none shows who prepared them and are not signed to be authenticated. Further pressed with questions, PW2 admitted that all documents are not showing who prepared them and himself no where he signed to have prepared one. Not only that, but PW2 admitted that he was not involved in preparation of exhibit P5.

Under re-examination by Mr. Kung'e, PW2 told the court that paragraph 4 and 9 of his witness statement contains typing errors because they continue to work. PW2 when shown exhibit P5e-g and asked if it was important to be signed, he replied that it was necessary to be signed and authenticated by person who prepared them. PW2 further insisted that he was not involved in their preparation but he was given to use them to prepare audit report.

PW2 when asked question by the court for clarification, clarified that, when given the financial statements his mind was not directed to know who

prepared them but pointed out that it was imperative to. Further was his clarification that nowhere in the report Tshs.75,680,000/= was the basis of the audit report.

This marked the end of the plaintiff's case and marked closed.

The defendant was fended by one witness, **Mr. URMISH ANTANI** (to be referred in these proceedings as ("**DW1**"). DW1 under affirmation and through his written witness statement told the court that he is the Chief Executive Officer of Mohamed Enterprises Tanzania Limited (METL) and the defendant is an affiliated company of METL. DW1 went on telling the court as CEO he was involved in the dispute between parties. Like PW1, DW1 told the court that the parties herein had business relationship where the plaintiff place an order after payment, the petrol is to be delivered through her drivers. DW1 admitted the 29th July, 2016 transaction for 43000 litres but in the course of delivery, DW1 noticed some conspiracy between some of the defendant customers and internal staffs behaving an investigations. DW1 as well admitted that in August 2016 he received complaint from the plaintiff for non delivery of the petrol which was rejected because the amount deposited on 29th day of July, 2016 was used to set-off the plaintiff's outstanding balance with the defendant from various invoices which the plaintiff took

delivery of having different prices or booked to other customers at different price.

DW1 went on testifying that with the spirit of maintaining business relationship with the plaintiff, upon receipt the plaintiff's complaint, the defendant requested from the plaintiff statement of account of all deliveries that the plaintiff received from the defendant which included invoice number, trucks which took deliveries, driver's name, order notes and any other documents which were relevant to substantiate the amount paid by the plaintiff and the total deliveries. DW1 told the court that the plaintiff produced statement of account to the defendant which contained among other things the invoice numbers, names of the drivers.

It was further testimony of DW1 that upon receipt of the statement of account, the defendant conducted reconciliation of the plaintiff statement by comparing the invoices which the plaintiff took deliveries and it revealed that, one, that during the year 2016 the plaintiff accepted delivery of fuel to other clients, no complaint to all deliveries made to either the plaintiff or its clients/colleagues at no material time, deliveries acknowledged by the plaintiff, were made to the plaintiff through trucks which were nominated by the plaintiff, vide orders notes, the plaintiff order notes did not mention



prices on which the plaintiff ordered the fuel from the plaintiff rather they mentioned quantity of fuel to be delivered, the deposits made by the plaintiff was Tshs.1,079,525,000/= whilst the total amount of fuel the plaintiff accepted to have been delivered was Tshs.1,143,167,500/= making a total difference of Tshs.63,642,500/=.

DW1 continued telling the court that after full reconciliation it was found that the balance due to the plaintiff was Tshs.12,042,500/= but which the plaintiff refused to take and the defendant is ready to reimburse the same. DW1 went on insisting the plaintiff is liable to pay Tshs.63,642,500/ which when deducted from the 75,680,000/ the balance is Tshs.12,042,500/= and that no loss of profit in the circumstances. On that note, DW1 invited this court to dismiss this suit with costs.

In disproof of the plaintiff's case tendered in evidence the following exhibits, namely:-

1. Prayed that exhibit P4 be part of the defence case;
2. Reconciliation on delivery and payments from Fuel Master, Invoices, Deliveries notes, record of safety checklist, internal sales orders, and EWURA fuel marking reports collectively **exhibit D1a-f**;



3. Fuel orders and deposit slips were collectively admitted as **exhibit D2(25)**.

Under cross examination by Mr. Kung'e, DW1 told the court that no dispute as to the amount of Tshs.75, 680, 500/= deposited into their account for 43000 litres of petrol. DW1 when shown exhibit D1 told the court that in reconciliation it shows NSK delivered fuel to Fuel Master though no record instructing NSK and insisted that there was instruction to NSK to deliver to Fuel Master. DW1 when shown exhibit P4 and says it was the one used to prepare reconciliation and got the actual claim. DW1 insisted that they are ready to pay back the balance of Tshs.12.042,500/=.

Under re-examination by Ms. Mahunga, DW1 insisted that the true account of Fuel Master submitted to us enabled to get the actual claim and delivery was done on 16/08/2016. DW1 insisted that the NSK record is reflected and was accepted by Fuel Master and the balance arises because of difference in prices.

This marked the end of hearing of defence case and same was marked closed.

Parties' learned advocates prayed for leave to file final written submissions in support of their respective stances. I granted the leave. I commend them for

observing the time line of filing the submissions and have read their input and I truly commend them for their valuable input on this matter. However, I will not be able to reproduce them but here and there in the course of answering issues will accordingly consider them.

However, before going to answering the issue framed and recorded, I have noted that there are matters not in dispute between parties. These are; **one**, there is no dispute that the plaintiff and defendant had long business relationship dating back from 2014 of buying and selling petrol to each other. **Two**, there is no dispute that, under that relationship, the plaintiff on 29th day of July, 2016 did deposit into the defendant's account No. 019103012864 maintained at NBC-Kigoma for supply of 43000 litres of petrol at a price of 1750 per litre. **Three**, there is no dispute as well that parties tried to reconcile their business transactions against payment and deliveries but all was in vain.

Against the above background on non-disputed facts, what is in serious dispute is on delivery or non-delivery of the 43000 litres and its consequences. With that in mind, is high time now I answer each issue framed against the evidence on record. The first issue was couched that ***"whether the defendant delivered the said petrol as ordered and***



paid by the plaintiff? Mr. Kung'e for the plaintiff in their final written submissions strongly argued and urged this court to find the first issue in the negative that no fuel was delivered as ordered and paid for by the plaintiff. The learned advocates for the plaintiff's submissions were pegged on exhibit P4 which shows that item 7 in respect of the order dated 29th July 2016 was not delivered, defendant's contradictory testimony in a number of ways such as the defendant delivered all orders which were made by the plaintiff, the plaintiff accepted delivery of fuel which were invoiced to other customers or invoiced to them but at a different price from the price which was different from the price booked, the statement that the amount was used to set off differences in transactions as the plaintiff was collecting its oil from defendant on later dates, the story of conspiracy between some of the defendant's customers with internal staffs on delivery made necessitating investigations to all customers. In the totality of this changing stories on the part of the defendant and exhibits tendered, Mr.Kung'e strongly concluded that it is clear the defendant never delivered the disputed 43000 litres of petrol and urged this court to find first issue in the negative.

On the other hand of the defendant, Ms. Mahunga brief to the point admitted the deposit of the amount of TShs.75,680,000/= for 43000 litres of petrol but



was quick to point out that, according to exhibit P2, the order of 29th July 2016 was delivered on 16th August 2016. Further was the argument that, according to exhibit P4, which the defendant prayed to form part of the defence case, the plaintiff (PW1) acknowledged during cross examination the delivery of petrol from the defendant which was covering the 29th July, 2016 order.

Further arguments by defendant's learned advocate were that, when the defendant received the complaint for non-delivery of the disputed order, the defendant asked the plaintiff to bring her statement of account which is exhibit P4 and upon receipt of exhibit P4, the defendant conducted a reconciliation which revealed that the delivery of the disputed order was delivered on 16th day of August, 2016 through invoice No.09151 a fact which is acknowledged by the plaintiff in exhibit P4.

On that note, Ms. Mahunga strongly urged this court to find that in the presence of exhibit P4 and exhibit D1, the first issue must be answered in the affirmative that the defendant delivered all fuel ordered and paid for by the plaintiff.

Before answering the first issue, I wish to state that, is trite law in our jurisdiction that under the provisions of section 110 of the Tanzania Evidence

Act, [Cap 6 R.E.2019] whoever wishes the court to decide in her/his favour has burden of proof, albeit, on balance of probability, that what he alleges exists. The burden shifts only when she/he discharges that duty for the other party to rebut also on balance of probability.

Now back to the first issue. Having carefully considered the rivaling pleadings, testimonies of the parties' respective stances and exhibits tendered and final written submissions, in my strong considered opinion, based on the reasons I am shortly going to give, I am inclined to find the first issue in the affirmative in this dispute. The reasons are; **one**, starting with pleadings by which parties' are bound by in any case, at paragraph 10 of the written statement of defence, the defendant precisely stated the actual amount of deposits by the plaintiff as Tshs.1,155,210,000/=, and the actual amount so far supplied as Tshs.1,143,167,500/= leaving a balance of Tshs.12,042,500/= an amount which is also reflected in exhibit P4 -the creature of PW1 for the plaintiff as Managing Director. In reply to this paragraph which is the basis of the defence in this case, the plaintiff simply replied that it is vehemently disputed without providing different figures of the amount and required the defendant to prove the amount which was not duty bound as such. **Two**, it was the defence of the defendant that under



the arrangement, with instructions of the defendant, the plaintiff received petrol from other customers with difference price and mentioned NSK as the customer. The NSK transaction is reflected in both **exhibits P4 and D1** dated 13th August, 2016 and 16th August, 2016 respectively, but no explanation was offered by the plaintiff who wanted this court to decide in her favour to dispute this amount of fuel received on 13th August, 2016 as reflected in exhibits P4 and D1. The amount of fuel received is 42500 litres of petrol. **Three**, much as the amount of 42500 litres from NSK were received by the plaintiff as reflected in exhibit P4 on 13th August, 2016 as correctly argued by Ms. Mahunga, and rightly so in my own opinion, and is included in exhibit P4 tendered by the plaintiff to show list of purchases from STAR OIL (T) LIMITED and in the absence of any plausible explanation to the contrary, it cannot be said there was no delivery of the fuel as ordered and paid for on 29th July, 2016. **Four**, The arguments by Mr. Kung'e learned advocate for the plaintiff that the defence of the defendant is contradictory is misconceived and misplaced because here the dispute is on delivery and the defendant was exhaustive on the way delivery was done which the plaintiff herself acknowledge and indicates in her exhibits. **Five**, in the absence of any other explanation from the plaintiff why he received 42500 litres from NSK on 13th August, 2016 and included it in the list of purchases from the defendant as

reflected in exhibit P4 is other than supporting the defence by the defendant that he received fuel from other customers with different price under the instructions of the defendant and which fuel plaintiff do not dispute to have received. **Six**, the plaintiff in this suit has failed to prove non delivery by his own document exhibit P4 as against the defence of the defendant that he received all fuel as ordered and paid for by the plaintiff, some of which were from billed orders of other customers, NSK inclusive.

That said and done, without much ado, the first issue must be and is hereby found in the affirmative that the defendant delivered the disputed fuel through NSK on 13th August, 2016 as reflected in **exhibits P4 and D1**.


This takes this court to the second issue couched that **"if the answer to first issue is answered in the negative, whether the plaintiff suffered loss due to non-delivery"** Much as I have answered the first issue in the affirmative as demonstrated above with reasons, definitely, the second issue dies a natural death in the circumstances of this case.

However, by the way, even if I had found that the first issue in the negative, still the plaintiff utterly failed to prove loss of profit given the number of deficiencies noted and admitted by both PW1 and PW2 in the financial statements intended to establish the plaintiff suffered loss of profit. Loss of

profit, in my own considered opinion, are special claims in nature and need strict proof as well, which is seriously wanting in this suit.

This trickles down third issue which was couched that **"whether the plaintiff received fuel which was billed to other customers?"** Mr. Kung'e for the plaintiff submitted nothing on this issue either out of his conscience that it was not disputed as far as the contents of exhibit P4 is concern, which is clear as day light that the plaintiff received fuel from NSK of 42500 litre of petrol at a different price.

On the other side of the story, Ms. Mahunga for the defendant guided by contents of exhibit D1 and exhibit P4 both shows that the plaintiff received fuel which were billed to other customers at price different from what was ordered. One of the customers is as indicated in the ninth column of the **exhibit D1** and eighth column in **exhibit P4**. The learned advocate for the defendant pointed out that much as no complaint and the petroleum was not returned, then, the plaintiff cannot denied the contents of her own exhibit tendered in this case. Further guided by the provisions of section 37 of the Sales of Goods Act, [Cap 214 E.E 2019] the advocate for the defendant argued that, the plaintiff is stopped to complaint that he never received the goods ordered and paid for.



On that note the learned advocate for the plaintiff invited this court to answer the third issue in the affirmative that the plaintiff received petrol billed to other customers with different price.

Having carefully followed the one sided arguments on this issue without much ado, as rightly argued by Ms. Mahunga, and rightly so in my own opinion and observation after going through the contents of exhibits P4 and D1, and the admission made by PW1 during cross examination, then, is clear that the plaintiff received fuel billed to other customers at price different from the one ordered.

That being the position, this court is without much ado inclined to find and hold that, in the circumstances of this suit, the third issue is to be answered in the affirmative that the plaintiff received fuel from other customers.

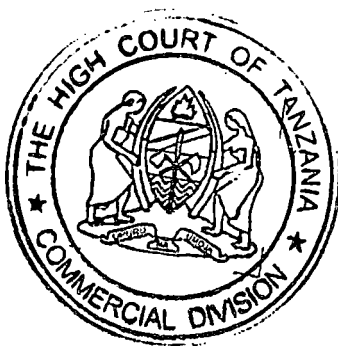
This takes me to the fourth issue which was couched that **"what reliefs parties are entitled to?"** The plaintiff prayed for several reliefs as contained in the plaint but given what I have found above in respect of the the issues framed, this suit deserve a dismissal order, but before going to that, I noted that there is an admission both in the pleadings, testimony of DW1 of Tshs.12,042,500/= by the defendant. Guided by the pleadings and the testimonies of the defendant at all material time has admitted the liability

of Tshs.12.042,500/= as the money due in the entire transaction in this suit, I cannot close my eyes on the admitted amount. I wonder why the plaintiff's advocates did not want to move this court under the provisions of Order XII Rule 4 of the Civil Procedure Code, [Cap 33 R.E 2022] to apply for judgement on admission. Notwithstanding the above findings, I hereby enter judgement on admitted amount of Tshs.12,042,500/= in favour of the plaintiff which has never been an issue between parties.

Consequently, save to the extent explained above, the entire suit for the plaintiff is akin to fail and is hereby dismissed with costs to the defendant.

It is so ordered.

Dated at Dar es Salaam this 25th day of November, 2022.



A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a series of vertical lines and a long horizontal stroke.

S. M. MAGOIGA
JUDGE
25/11/2022