

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 326 OF 1996

RIZWAN KASSAMALIAPPELLANT

V E R S U S

1. TANZANIA REVENUE AUTHORITY
2. THE NATIONAL SHIPPING CORP
3. THE TANZANIA HOUBOURS AUTHORITY
4. M/S ARMSTRON CLEARING AND FORWARDING AGENCY... RESPONDENT

RULING

Kaji, J.

This is an application by the applicant RIZWANI KASSAMALI for an order that the properties the subject matter in the main suit should be delivered to him for safe custody pending determination of the main suit.

It has been made under Order XXVII rr 2 and 3 of the Civil Procedure Code, 1966, and any other enabling provisions of law.

It was drawn, filed and argued by M.R.M. Lamwai & Co (Advocates)

On 13th November, 1996, the applicant/plaintiff instituted Civil Case No. 326 of 1996 alleging that in 1995 properties comprising of used household and personal effects and one Mercedes Benz Registration No. CGF 888X, Chassis No. NDB 12309322009989, were stuffed into Container No KNLJ 304931 - 9 and consigned to him from Great Britain as per Bill of Lading nexture P.1.

That container with its contents arrived at D'Salaam harbour in or about December, 1995. That container with its contents were delivered to the 3rd respondent TANZANIA HARBOURS AUTHORITY (hereinafter to be referred to as THA) to be handled by the 2nd respondent THE NATIONAL SHIPPING AGENCIES COMPANY (hereinafter to be referred to as NASACO).

He averred that he completed all clearing formalities and was allowed by the 1st respondent TANZANIA REVENUE AUTHORITY (hereinafter to be referred to as TRA) to remove the said goods from the post as per Annexure P.2.

However the 4th Respondent M/S ARMSTRONG CLEARING AND FORWARDING LTD., being the carrier's agent at D'Salaam amended to Bill of Lading and instructed the other respondents not to release those goods and they obliged.

It is his averment that the 4th respondent did so unlawfully and without any colour of right nor instruction from the consignor or consignee. He said the act of retaining those properties had occasioned loss in the sum of Shs. 40,000,000/= being loss of use of those goods and costs for making a follow up.

He therefore claimed for the following reliefs:-

- (i) A declaration that the properties stuffed into container No. KNLU 304931 - 9 and Mercedes Benz car Registration No. CGF 888X Chassis No. NDB 12309322009989 now in the custody of the 2nd respondent NASACO belong to him,
- (ii) An order that the said good be delivered to him immediately and in good condition,
- (iii) The respondents/defendants jointly and/or severally pay him the sum of Shs. 40,000,000/= being damages for the loss of use of the said goods and the costs of claiming those properties,
- (iv) Interest on the decretal amount at the Court's rate from the date of judgment till when payment is made in full.
- (v) The defendants/respondents to pay him his costs of and incidental to the suit.
- (vii) Any other relief(s) that the court may deem fit

While the main suit is still pending, the applicant has filed this application alleging that those goods have been removed from the container and left in the open at Ubungo yard and subject to destruction by weather, a result of which some of them have already been stolen and the car has been vandalised. He further alleged that the continued storage of those goods at Ubungo will lead to a substantial loss to him as the respondents are totally unable to guard against destruction and theft. He went on deponing that on the balance of convenience he stands to lose more if those goods are not delivered to him at this stage than the respondents would suffer if this application is granted.

It was his feeling that he has very good chances of success in the suit. He said he is prepared to execute a Security Bond so that in case he loses the case whoever will be declared entitled to those properties may easily recover.

The respondents resisted the application on various grounds.

The 1st respondent TRA resisted this application on the ground that releasing those properties to the applicant will prejudice TRA's efforts towards recovery of Government Revenue as the applicant has so far failed to pay Impost taxes and other relevant duties. TRA went on saying that although the applicant tendered Annexure P2 purporting to have cleared those goods and paid the relevant taxes, yet no money was received by TRA, and the said annexure was not passed by TRA and that the applicant probably used false customs documents in his attempt to clear those goods. It is TRA's feeling that under those circumstances those goods should be deemed to be uncustomed goods which are liable to for ^{forfeiture} by T.R.A.

The 2nd respondent NASACO is resisting the release of those goods to the applicant on the ground that after amendment of the first Bill of Lading where the applicant was a "Notify party" his name disappeared. He is not mentioned anywhere in the amended Bill of Lading either as a ~~consignee~~ consignee, notify party or anything. The amended Bill of Lading mentioned B Adinani of Nairobi Kenya as both the consignee and notify party. NASACO doubted the authenticity of annexure P.1 because the name of the Line mentioned there - TRANSAFRICA LINE IS unknown to them.

The 3rd respondent T.H.A. is resisting this application on the ground that it was served with a stop order by NASACO not to release those goods to the applicant, and that the Mercedes Benz car was seized by Customs Authority in August, 1996, and therefore no longer under its custody.

The 4th respondent M/S Armstrong clearing and Forwarding Agency is resisting the application on the ground that the applicant or his agent purported to pay purchase price, freight charge and other charges in Great Britain by cheque. But that cheque was dishoused by the Banker. This made the shipper amended the Bill of Lading whereby B. Adinani of Nairobi Kenya was named as both the consignee and notify party and that the shipper did so in accordance with its rights for exercising its right of lieu over those goods.

It is the 4th respondent's feeling that releasing those goods to the applicant who is not mentioned in the Bill of Lading as consignee would be tantamount to allowing him to benefit from his own wrong and unjust enrichment.

In short that is the gist of matter.

I have carefully considered the pleadings, learned counsel's submissions and the numerous annexures some of which are difficult to read.

I have also considered very carefully the overall circumstances surrounding this case.

None of the respondents has seriously challenged the applicant's allegation that the goods in question are stored in the open and subject to theft and destruction by weather and that some of them have already been stolen and the Mercedes Benz car has been vandalised. It is therefore my holding that they are not in safe custody. A safer custody is therefore needed to prevent the injury complained of.

The crucial issue is as to which custody is safer. Under normal circumstances custody by owner should be safer. The reason is obvious. It is like the Swahili saying "UCHUNGU WA M'ANA AUJUAYE MZAZI".

But in the present case there is a dispute over ownership. While the applicant is saying he is the one by virtue of the Bill of Lading Annexure P.1, the 2nd and 4th respondents are saying it is somebody in Nairobi Kenya in the name of B. Adinani by virtue of the amended Bill of Lading. Or alternatively it is the shipper or shipowner. This issue of determination of ownership is one of the issues in the main suit. This being the case it cannot be dealt with at this stage. Under those circumstances, at this stage the court will only look at as to who, on the face of it, appears to be the most probable true owner.

According to the pleadings, submissions, annexures and the overall circumstances surrounding this case it would appear, initially the applicant was the owner/consignee when those goods were consigned to him to be handled by Trans Africa Line which issued him with the Bill of Lading Annexure P.1.

TRANSAFRICA LINE appointed Ariel Maritime (UK) LTD (Nedlloyd) as carrier agent which issued also its own Bill of Lading mentioning the 4th respondent as consignee and the applicant as "Notify Party" (Annexure 1 by 2nd respondent.

But when the cheque paid for freight charges was dishonoured by the Banker, the shipper decided to exercise its right in lien in those goods by directing that those goods should now be delivered to Adinani, of Nairobi Kenya. Whether that act of exercising the right of lien at that stage was proper is yet another issue to be determined in the main suit.

Thus, theoretically, the applicant, Adinani and the shipper each has a claim of right over those goods until determination of true owner. It would appear Adinani and the shipper forwarding agent one represented by the 2nd and 4th respondent. But none of them has shown any keen interest in the safety of those goods despite the unchallenged allegation by the applicant on theft, vandalism, destruction by weather and lack of proper guarding. It would appear they are only interested in payment of their charges regardless of the condition or safety of those goods or damage or other charges that might accrue.

Since it is only the applicant who has shown keen interest in the safety of those goods, it is my view that he is the one who deserves to take care of them during the pendency of the main suit if the principles of an interlocutory order of this nature are also in his favour.

These are:-

- (i) Whether he has a prima facie case in the main suit against the respondents with overwhelming chances of success
- (ii) whether he cannot be adequately compensated in monetary terms for any injury he would suffer in the event the order applied for is not granted.
- (iii) whether he would suffer more if the order applied for is not granted than the respondents would suffer if the order applied for is granted.
- (iv) whether the intervention of the court is necessary so as to prevent the mischief complained of.

In their written submissions learned counsel for the 2nd and 4th respondents pleaded lack of locus stand and cause of action by the applicant against them. But since they have raised the same issue in their written statements of defence as a preliminary objection on point of law, it will be dealt with in the main suit.

According to the pleadings I am quite satisfied that the applicant has a prima facie case against the respondents jointly and/or severally. But it is not easy at this stage to say whether he has over whelming chances of success. This will depend on evidence which can only be available at the trial.

The applicant is interested in his goods and not their monetary value. Therefore if the order applied for is not granted he will suffer on injury which can not be adequately compensated in monetary terms.

According to the overall circumstances surrounding this case I am satisfied that the applicant will suffer more if the order applied for is not granted than the respondents would suffer if order applied for is granted.

With all this I am quite satisfied that the interversion of the court is necessary so as to prevent the mischief complained of. Also this will serve as a mitigation of loss in the event the applicant succeeds in his suit.

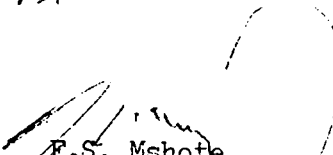
It is upon the above reasons that I grant the applicant's application as presented under the following strict conditions:-

- 1) Applicant to pay all relevant and proper taxes to TRA as required by law.
- 2) Applicant to pay post charges to THA (if any)
- 3) Applicant to execute a Security Bond of the value of those goods.
- 4) Applicant to execute a Security Bond to cover due costs to the 2nd and 4th respondents (if any) on behalf of their principals.

Application granted with costs in the cause.

S. N. Kaji
JUDGE
 19/12/97

I Certify that true copy of the Original.


 F.S. Mshote
DISTRICT REGISTRAR
 24/4/1998