

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM
CIVIL CASE NUMBER 129 of 2007

DAR COAST ENTERPRISES..... PLAINTIFF

VS

TANZANIA PORTS AUTHORITY.....DEFENDANT

Last Order: 18-09-2012

Judgment: 29-10-2012

JUDGMENT

JUMA, J.

By a Plaint filed on 24th October 2007, the Plaintiff (Dar Coast Enterprises) claims that it rented out to Defendant (Tanzania Ports Authority) a mobile crane and two forklifts, and would now like this Court to order the Defendant to pay back USD 718,200.00 which was still outstanding on September 30, 2007. In addition, Dar Coast would like the Ports Authority to pay USD 74 hourly renting charges for mobile crane and USD 30 for two forklifts from October 1, 2007 until this date of Judgment.

The Plaintiff's case is that sometimes prior to August 2005 it had been contracted by Ports Authority to handle Dhow Wharf activities at the Port of Dar es Salaam. It was during this contract time when the Plaintiff Dar Coast acquired one fifteen-ton mobile crane, forklifts, weighing scale and a number of pallets. The handling of cargo at the Dhow Wharf was taken over by the Defendant Ports Authority when the contract expired in August 2005. Dar Coast did not take from the site its mobile crane and two forklifts when it vacated the contractual site. This was because the Ports Authority had expressed an interest to hire the equipment. The Dar Coast claims that a mutual understanding was reached in April 2006 whereby Ports Authority agreed to hire the mobile crane. The Plaintiff further claimed that as part of the consideration arising from the hire agreement, it had been paid only Tshs. 2,683,800/=. The Dar Coast was concerned that despite its request to the Ports Authority to expedite settlement of contractual sums, the Authority has so far declined to pay up.

In its written statement of defence, the Defendant Tanzania Ports Authority averred that it owes no monies to

the Dar Coast Enterprises as alleged. The Authority pleaded that while the parties had executed a Licence Agreement wherein the Ports Authority had leased to the Dar Coast Enterprises its Dhow Wharf Terminal, the Authority counter claimed that the Plaintiff had by the time of filing of the written statement of defence, failed to pay to the Defendant the rental and tonnage charges totalling USD 204,420.00. The Tanzania Ports Authority further pleaded that when the Licence Agreement to lease Dhow Wharf Terminal ended in 2005, the parties executed a Deed of Handover which showed the list of assets and fixtures which were handed over to the defendant.

According to the Ports Authority, it was the Dar Coast Enterprises who had during the handover, requested its equipment to remain temporarily at the Dhow Wharf Terminal while the plaintiff was making arrangements for the removal of equipment. The Authority pleaded that the Dar Coast's crane was hired by the Tanzania Ports Authority for only 28 hours, and the Authority had fully paid up the Tshs. 2,685,000/= for this hire. The Authority staunchly denied that

it ever entered into any further agreement with the plaintiff to rent mobile crane and two forklifts.

Apart from its written statement of defence, the Ports Authority also counterclaimed against the Plaintiff, claiming for payment of a sum of USD 111,675.00. The Authority averred that in November 1998 the Dar Coast and the Ports Authority entered into a contract whereby the two contracting parties agreed to allow the Dar Coast to provide the stevedoring and shore handling services at the Dhow Wharf Terminal. In consideration for these services, the Dar Coast was to pay rental charges and a tonnage-throughput fee (licence fee). The Tanzania Ports Authority averred that its counter claim against the Plaintiff Dar Coast is restricted to USD 11,675 for the outstanding licence fee.

The plaintiff Dar Coast Enterprises has disputed the contents of the counterclaim.

The following issues were endorsed by this court under both the claim by Dar Coast Enterprises and Counter Claim by the Tanzania Ports Authority:-

1. Whether there was any understanding or agreement between the parties for the Defendant Authority to hire Dar Coast Enterprises' mobile crane and two forklifts at an hourly rental charge of USD 75:00 (for mobile crane) and USD 30:00 (for two forklifts).
2. Whether the Tanzania Ports Authority was entitled to seize the Dar Coast Enterprises's mobile crane and forklifts; and what damages Dar Coast Enterprise suffered from that seizure.
3. Whether the Ports Authority paid the plaintiff Dar Coast a sum of Tshs.2,683,800/= as sufficient settlement of rental charges for hiring the mobile crane and two forklifts.
4. Whether the Dar Coast owes the Ports Authority any outstanding rental charges as claimed.
5. Whether under the counter claim, the Dar Coast is indebted to the Ports Authority for any unpaid licence fee/rent arising from agreement the parties executed.
6. What reliefs are parties entitled to?

At the trial, the Dar Coast Enterprises was represented by Mr. Nyika, while the Ports Authority was represented by Mr. Msuya. The Dar Coast Enterprises called one witness, Pascal Rutalala (PW1), its Managing Director. The defendant Ports Authority similarly called one witness, Mr. **SHABAN SADI MNGAZIJA (DW1)** its Revenue Manager.

From evidence on record, and also from submissions of the learned Counsel, the first issue regarding the existence of an agreement between the parties for hiring Dar Coast Enterprises' mobile crane and two forklifts; and the third issue, regarding whether the Ports Authority paid the plaintiff Dar Coast Enterprises a sum of Tshs.2,683,800/= as sufficient settlement of rental charges for hiring the mobile crane and two forklifts, are closely interlinked and I propose to look at these issues together.

There is no doubt that the Dar Coast Enterprises had a subsisting agreement with the Defendant Tanzania Ports Authority up to 2005 when that Agreement came to an end. In that agreement, the defendant, as the owner of the Dhow Wharf Terminal at Dar es Salaam Port had granted the Plaintiff

Company a licence to carry out stevedoring, shore-handling and related services at the Dar es Salaam Port. According to Deed of Handing over of Dhow Wharf Terminal (**Exhibit D2**) between the parties, the Dar Coast's licence expired and the Ports Authority took over the terminal from October 2005. Now, it is important to pause and pose a question whether after the October 2005 handing-over, there was any understanding or agreement between the parties for the hiring Plaintiff's mobile crane and two forklifts at an hourly rental charge of USD 75:00 (for mobile crane) and USD 30:00 (for two forklifts).

In his evidence, Pascal Rutalala (PW1) has in essence maintained what the Dar Coast pleaded. That the Ports Authority had rented a mobile crane and two forklifts for which the Ports Authority has refused to pay. Mr. Rutalala (PW1) tendered Payment Voucher (Exhibit P1) for Tshs. 2,236,500/= as his evidence to manifest how the Ports Authority had acknowledged the hiring of the mobile crane and the two forklifts. In their closing submissions, the learned Advocate for the Dar Coast Enterprise has urged me to

examine the Deed of Handing over of Dhow Wharf Terminal **(Exhibit D2)** between the parties. It was submitted that clause 4.2 of this Deed shows how the Port Authority's Operations Manager insisted on the hiring of the plaintiff's mobile crane. This was followed up by a letter offering to hire at proposed tariff of USD 75 per hour. In so far as the learned Advocate for the Dar Coast Enterprise was concerned, all these overtures amounted an offer as defined by section 2 (1) (a) of the **Law of Contract Act, Cap 345 (R.E. 2002)**. It was submitted on behalf of the Dar Coast that the Ports Authority demonstrated its acceptance of the hiring of forklift by paying the Dar Coast Enterprises Tshs. 2,236,500/= for 28 hours of work at the rate of USD 75 per hour.

Shaban Sadi Mngazija (DW1) testified that at the handing over of the terminal, it was the Dar Coast who had requested the Ports Authority to let their mobile crane and two forklifts to remain at the site wharf at least temporarily while the plaintiff was looking for where to take the equipment. And it was the Operations Manager of the Ports Authority who suggested that the defendant Authority should hire the

equipment. But the Operations Manager was directed to not only put his request in writing, but to also carry out technical check up of the equipment and establish the rate of hire. In so far as Mr. **Mngazija** (DW1) was concerned the hiring of forklifts was never discussed in the hand-over meeting evidenced by the minutes of Dhow Wharf Takeover/Handover **(Exhibit D3)**.

I have considered the evidence, exhibited documents and the submissions made on behalf of the disputing parties in relation to the first and third issues. It seems to me that the Minutes of Dhow Wharf Terminal Takeover/Handover **(Exhibit D3)** which took place on 22nd October, 2005 gives this court a useful opportunity to read the intention of the parties and determine whether after the handing over of the Dhow Wharf Terminal, there was any intention to enter into further legal relations in terms of hiring of a mobile crane and two forklifts. The Ports Authority's delegation at that meeting was led by Mr. J. Rugaihuruzza its Port Manager. Mr. P. Rutalala (PW1), the Managing Director of the plaintiff company led a team from

the Dar Coast Enterprises. The fate of Dar Coast's equipment is reflected in clauses **3.2** and **4.2**. These clauses state:

"3.2 Equipment

- *M/S Dar Coast Enterprises requested Port Management to allow their handling equipment remain in the Dhow Wharf area temporarily while arrangements were underway to move them out of the Port area. They emphasized that security and safety of the equipment would be at their own risk.*

4.2 Equipment

- *The Operations Manager insisted on the demand of hiring the Mobile Crane offered by M/S Dar Coast Enterprises. The Management therefore, directed the Operations Manager to put the request in writing to the Port Engineer for the latter to access and effect technical check up of the unit for final decision, including rates of hire."*

It is clear from my reading of clause **4.2**, only the mobile crane was subject of possible hire if certain pre-conditions were met. First, the Operations Manager had to put the

request in writing to the Port Engineer. Second, after receiving the request, the Port Engineer would carry out the check up. The third stage was to determine the rates of hire. The Plaintiff Dar Coast has not shown that these three pre-conditions were met. The Plaintiff has not also shown how and when the Defendant Ports Authority decided to hire not only the mobile crane but also the two forklifts which were not part of the directives arising from the meeting of 22nd October 2005.

It is therefore not clear to me whether or not the hiring of the mobile crane was one isolated incident of hire or it was part of an agreement between the Plaintiff Dar Coast and the defendant Ports Authority. The law on the burden to remove this uncertainty is definitely on the plaintiff Dar Coast Enterprise. The plaintiff in this civil case had the burden to prove its case on the balance of probabilities. With due respect, payment Tshs. 2,236,500/= was an isolated payment which does not by itself prove on balance of probabilities that three pre-conditions for this court to

conclude that the Defendant Ports Authority had hired not only the mobile crane but also the two forklifts.

It is therefore my finding on first and third issues that there was neither an understanding nor an agreement after the Handing Over of Dhow Wharf Terminal for the Ports Authority to hire Dar Coast's mobile crane and two forklifts at an hourly rental charge of USD 75:00 (for mobile crane) and USD 30:00 (for two forklifts).

The second issue, as to whether the Ports Authority was entitled to seize the Plaintiff's mobile crane and forklifts, and fourth issue, as to whether the Dar Coast Enterprises owes the Tanzania Ports Authority owes any outstanding rental charges, can conveniently be dealt with together. It seems to me that the basis of the Ports Authority's claim against

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licence Agreement they concluded in
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the Dar Coast is a L
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activities at a fee. The annual fee which the licensee Dar Coast Enterprises was contracted to pay was disclosed in paragraph 2 of this Agreement:

2.1 The Licensee shall pay an annual license fee, the minimum of which shall be USD 25,000..... or its equivalent in the Tanzanian Currency for up to a tonnage of 75,000 (rental annual tonnage).

2.2. In the event that the actual tonnage handled exceeds the rental annual tonnage, the annual license fee shall be accordingly increased by a proportional percentage of the actual increase above the rental annual tonnage up to a maximum license fee of USD 30000 USD.]

Mr. Pascal Rutalala (PW1) the Managing Director of the Dar Coast complained that his company was during the subsistence of its agreement with the Defendant Ports Authority aggrieved by the decision of the Defendant to also licence other competing companies who had better handling equipment and boats, to participate at the dhow wharf terminal. This prevented the Plaintiff from attaining the 75,000 annual tonnage the annual tonnage handled by

the Dar Coast. According to Mr. Pascal Rutalala, the Dar Coast complained and a special negotiating team was appointed to look into the dwindling tonnage of goods handled through the dhow wharf terminal.

Upon cross examination by Mr. Msuya, Mr. Rutalala (PW1) could not remember if Dar Coast Enterprises had ever paid its annual licence fee for usage of the Dhow Wharf Terminal. Mr. Rutalala in fact requested for more time to consult Dar Coast's Financial Manager to be able to answer the question whether any annual licence fee had been paid to the Defendant. To Mr. Rutalala, the question of how much rental annual tonnage Dar Coast still owe the Ports Authority was not settled because it was at one time subjected to a study which was designed to revisit the tonnage to determine how much annual license fee was to be paid under the prevailing circumstances.

In his testimony, Shabani Sadi Mngazija (DW1) the Revenue Manager of the Defendant Ports Authority stated that the Plaintiff was supposed to pay the rental annual tonnage but later complained that the tonnage it was

handling through the dhow wharf terminal was not sufficient for purposes of meeting its obligations to pay annual licence fee for usage of the Dhow Wharf Terminal under the Licence Agreement of 2002.

It seems to me that in order to sue for a breach of the Licence Agreement which the plaintiff and defendant concluded in 2002, there must be a failure to uphold a terms and conditions of that agreement. The Licence Agreement between the Dar Coast Enterprises and Ports Authority was concluded in 2002. Neither Mr. Pascal Rutalala (PW1) who testified in support of Dar Coast Enterprises, nor Shabani Sadi Mngazija (DW1) who testified in support of the Tanzania Ports Authority, were sure if any money had been paid during the subsistence of that agreement.

Without proof of how much was to be paid under the agreement and how much remains outstanding, it will not be possible to answer in the affirmative the issues whether the Ports Authority has any claim over the Plaintiff's mobile crane and forklifts. It will also be difficult to answer in

affirmative the question whether the Dar Coast owes the Ports Authority any outstanding rental charges as claimed to entitle the Ports Authority to seize the mobile crane and forklifts. I find it to be significant that even Mr. Mngazija (DW1) the Revenue Manager of the Ports Authority was not certain in his testimony how much Dar Coast Enterprises still owed the Ports Authority under their Licence Agreement of 2002. So much so he had to request for a chance to peruse the documents back in office to determine how much Dar Coast owes the Ports Authority.

It further seems to me strange that if indeed the Dar Coast owes the Ports Authority outstanding annual licence fee for usage of the Dhow Wharf Terminal, why this debt was not stated both in the Deed of Handing over of Dhow Wharf Terminal **(Exhibit D2)** and also in the Minutes of Dhow Wharf Takeover/Handover **(Exhibit D3)**.

From the foregoing, the Minutes of Dhow Wharf Takeover/Handover **(Exhibit D3)** clearly confirm that the mobile crane and two forklifts belong to the Plaintiff Dar Coast Enterprises.

With regard to the second issue, it is my finding that the Tanzania Ports Authority has not on balance of probabilities proved that it was entitled under the terms of its Licence Agreement with Dar Coast, to seize the Dar Coast Enterprises' mobile crane and forklifts. With respect to the fourth issue, it is my finding that it has not been established by preponderance of evidence that the Dar Coast Ports Authority owes the Ports Authority any outstanding rental charges under the Licence Agreement of 2002.

I propose to explain why I think my finding with regard to second and fourth issues applies to the fifth issue, regarding the question whether under the counter claim, the Dar Coast is indebted to the Tanzania Ports Authority for any unpaid licence fee/rent arising from agreement the parties executed. Mr. Pascal Rutalala (PW1) and Mr. Mngazija (DW1), the two witnesses who respectively testified in support of Dar Coast Enterprises and the Tanzania Ports Authority alluded to a special negotiating team which had been appointed to look into the dwindling tonnage of goods handled through the dhow wharf terminal which affected the ability of the Dar

Coast to meet its licence obligations. The findings of the negotiating team were not brought out in evidence and hence my attention. Instead, the two witnesses painted a picture of uncertainty whether any annual license fee, the minimum of which was USD 25,000 was ever paid by the Dar Coast Enterprises. This uncertainty created doubts in the counter claim which the Defendant Tanzania Ports Authority raised.

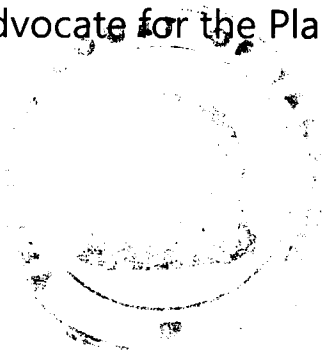
As to reliefs which Dar Coast and Tanzania Ports Authority are parties entitled to, claims in the suit and in counter claim are not proved. I accordingly dismiss the suit and counter claim. In the circumstances, I shall order each party to bear its own costs.

DATED at DAR ES SALAAM this 29th day of October, 2012



**I.H. Juma
JUDGE**

Judgment is delivered in the presence of Ms Linda Murungi
(Advocate for the Plaintiff).



**I.H. Juma
JUDGE
29/10/2012**