IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(ORIGINAL JURISDICTION)

CIVIL CASE NO. 03 OF 2020

KABEZA MULTI SCRAPPER LTD..... 1st PLAINTIFF

ABUAND INVESTMENT.....2nd PLAINTIFF

VERSUS

TANZANIA PORTS AUTHORITY.....1st RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

J U D G E M E N T

06th August, & 04th October, 2021

A. MATUMA, J.

The Plaintiffs are jointly suing the defendants for compensation of Tshs 28,000,000/= being the value of 35 CBM of metal scraps allegedly entrusted for custody to the 1st Defendant but subsequently lost in her hands without being accounted for, Tshs 10,000,000/= as compensation for breach of contract and trust thereby occasioning economic loses to the Plaintiffs, Tshs. 10,000,000/= as general damages subject to the assessment of this court, interests both at Bank rate and Court rate, costs of the suit any other relief.

The brief background leading to the herein above claims can be summarized as hereunder.

The 1st Plaintiff is a registered legal person carrying metal scraps business. On 27th March, 2019 she bought 55 tons of scraps materials at the Yard of the 1st Defendant which were allegedly equivalent to 55 CBM. The seller thereof was one Ramadhani Kalonda from DRC – Congo who had imported those materials on 26/03/2019.

After the purchase of the Cargo the 1st Plaintiff used the 2nd Plaintiff her clearing agent to process the discharge of the said Cargo from the 1st Defendant but soon as the process started the government cancelled all permits relating to scraps businesses until further directives. That necessitated the retaining of the Cargo by the 1st Defendant up to 16/01/2020 almost a year later when the permit for the release of the Cargo was issued. The Plaintiffs then continued the process to have the Cargo discharged but unfortunately, they were given only 19960 Kilograms of the Scraps material which were rounded up to 20 tons allegedly equivalent to 20 CBM.

In the circumstances the 1st plaintiffs alleges her 35 tons equal to 35 CBM lost in the hands of the first Defendant whose business value at that particular time was Tshs. 28,000,000/= and thus the 1st Defendant be

ordered to pay the 1st Plaintiff such amount as compensation or alternatively the 1st Defendant be ordered to handle to her the 35 tons/CBM which was not handled to her at the time of the discharge of the Cargo.

At the hearing of this suit, the Plaintiffs were represented by their respective officers namely Mussa Said Bandiko the marketing manager of the 1st Plaintiff who testified as PW1 and Shabani Yasin Yabulula the clearing agent of the 2nd Plaintiff who testified as PW2.

Mr. Ignatius R. Kagashe learned Advocate represented all the Plaintiffs.

On the other hand, the defendants were jointly represented by Mr. Allan Shija learned State Attorney and Mr. Leonard Mpemba learned legal officer of the 1st Defendant.

At the final pretrial conference, the parties agreed four issues for determination in the disposal of this suit. The agreed issues were;

i. *Whether the Plaintiffs stored with the 1st Defendant metal scraps amounting to 55 tons which for Tanzania Ports Authority (TPA) charges amounted to 55 Cubic meters (CBM).*

ii. *Depending on the first issue, whether the 1st Defendant did not deliver to the Plaintiffs the whole stored metal scraps.*

iii. *Depending on the first and second issues above, to what amount of the metal scraps got lost in the hands of the 1st Defendant.*

iv. *To what reliefs are the parties entitled to.*

Starting with the 1st issue, the parties did not agree on it. While the plaintiffs alleged that the Cargo at the time of its discharge from the ship to the 1st Defendant's Yard was measured on tonnage basis which resulted into 55 tons, the defendants maintained that the Cargo was not measured by weight but by Cubic meters (CBM) which resulted into 55 CBM.

Now whether the Cargo stored by the plaintiffs to the 1st defendant was 55 tons or 55 CBM let us visit the evidence of the parties particularly PW1 for the Plaintiffs and DW1 for the defendants who were the witnesses to the discharge of the Cargo from the ship and its storage at the said yard.

PW1 testified that Ramadhani Kalonda who imported the cargo from Congo had importation documents from Congo exhibit P4 which was declaring the cargo to be 30 tons but TPA officials did not believe it and decided to measure the cargo physically to verify the weight of the cargo

due to the fact that TPA charges are charged per each tonnage of the cargo and did not believe the importation documents of the cargo. They thus measured the whole cargo in his presence by using the TPA crane (winch) whose total weight was found to be 55 tons. He thereafter bought the cargo at such quantity (55 tons) and paid the TPA charges for the 55 verified tons and not 30 tons as per the importing documents. He further testified that the cargo having been measured was declared by the 1st defendant to be equal to 55 CBM and therefore on the Declaration Form exhibit P1, the 1st Defendant filled on the column of weight 55 CBM which was in fact 55 tons.

On his part DW1 testified that he was the officer on duty as the operation clerk and it was him who measured the cargo by Cubic meters (CBM) and not weight. As to why he measured only Cubic meters without weight, he was clear that the supporting documents of the Cargo were reading 30 tons but its volume was seen huge as it took a big space of the Yard. He thus preferred to measure by Cubic meters for the purposes of the TPA charges.

From the evidence of these two witnesses, I prefer to believe the testimony of PW1 rather than that of DW1. This is because the evidence of PW1 got corroborated from two pieces of independent evidence.

The 1st corroborative evidence is the testimony PW2. PW2 gave unchallenged evidence by the defendants that TPA charges are charged per tonnage or per cubic meters (CBM) whichever greater than the other. In the circumstances when the cargo is imported it is measured by both weight in Kilograms and volume by Cubic meters for the purposes of ascertaining which among the two should be used for TPA charges as they would normally and compulsorily charge on the greater measurement between the weight and volume. That if the weight per tonnage is big than the volume per Cubic meter, then the charges would run per tonnage and the vise-versus is true. This witness further testified that each ton is charged equal to the charges that would be charged per each Cubic meter. Therefore, one ton is chargeable equal to the charges of one Cubic meter. The witness further testified that if the tonnage happens to be equal to the Cubic meters, then the officer responsible for TPA would opt the charges to either of the two. In his testimony the witness stated unchallenged, that under the International Standard Law on the Bill of landing both the weight and Cubic meters must be indicated to ascertain which is greater than the other for Port Charges and that failure to indicate the weight in exhibit P1 does not have any other interpretation than that the Cargo was 55 tons and its Cubic meters were also 55 CBM and that is why the TPA operation officer opted to indicate only CBM as they would

be charged equally to tonnages as they were both measuring equally (55 tons/CBM). PW1's evidence, is further corroborated by exhibit P9 the TPA document which was issued to the Plaintiffs at the time of releasing the Cargo. In it, the cargo was measured only at 19960 Kilograms which was rounded up to 20 tons according to DW2. Exhibit P9 is reading clearly that those rounded up 20 tons were equivalent to 20 CBM. It was DW2 Nuru Abubakar Kiruwasha who measured the cargo at the time of its release as per exhibit P9 and the same was 19960 Kilograms. According to her evidence she rounded up that figure to 20 tons and the machine thereof generated the document indicating the cargo to be 20 CBM.

Despite the fact that the manner in which the two measurements (weight v/s CBM) are measured are different, for the purpose of this suit the two measurements were at equal footing. The cargo was 55 tons by weight and it was equally 55 Cubic meters by volume. I have no good reasons for not believing the testimony of PW1 which is well corroborated as herein above indicated. More so, is the question that if the respective cargo was not measured by weight at the time of storage, why and for what purposes the weight was measured at the time of its discharge. This unanswered question by the defendants would only be inferred that they calculated to hide the truth and raise up unnecessary arguments. If at all

they stored the cargo by CBM they should have released it by the same measurement for ascertaining that what was stored is what was exactly discharged. Let me put it clear that according to the evidence on record, it is not always necessary that the cargo per weight must resemble with its Cubic meters. The weight might be small but Cubic meters big or the Cubic meters might be small but the weight big. DW2 gave a good example of the bags of cement versus mattresses. He stated that the bag of cement would normally be charged per weight as its volume (CBM) is normally small compared to its weight. In the like manner the mattresses would normally be charged per CBM as its weight is normally small compared to its CBM.

But again, it is on record by the evidence of PW1 who physically witnessed the measurement and PW2 the expert in the clearing and Forwarding that at times as it happened in this case the weight happens to tally with the volume of the Cargo. Under the circumstances, TPA would opt on one of the two, as in this case charges by CBM were preferred for there was no difference with tonnages otherwise the tonnages of the Cargo should have as well reflected as required in the Bill of Landing to make the difference clear and authenticate why the charges were preferred to certain measurement against the other.

I thus determine the 1st issue in the affirmative that the Plaintiffs stored to the 1st defendants 55 tons of metal scraps which were equivalent to its volume of 55 CBM.

The second issue is whether the 1st defendant did not deliver to the Plaintiffs the whole stored scrap metals.

As resolved in the first issue, the stored scraps were 55 tons equal to 55 CBM. Both oral and documentary evidence is quite clear that the Cargo which ultimately was released by the 1st defendant to the plaintiffs was only 19960 Kilograms which was rounded up to 20 tons equal to 20 CBM. This is per evidence of both PW1, PW2 and even DW2 and exhibit P9. In that respect the released Cargo by the 1st defendant was less to the exact stored one. The less Cargo was 35 tons equivalent to 35 CBM. Even if it would have to be considered the weight of the Cargo as per importation documents which declared the Cargo to be only 30 tons still the released Cargo was less to ten (10) tons. Even though TPA doubted such declaration and decided to make its physical measurement which resulted into 55 tons. It is on the basis of their measurements, the 1st Plaintiff purchased the Cargo at that weight.

Be it as it may, weight by tonnage or Volume by Cubic meters, it is at least uncontroverted that out of 55 CBM only 20 CBM were released

thereby 35 CBM unaccounted for by the 1st defendant. To the contrary, the defendants have no any sort of evidence that they released to the plaintiffs all the 55 CBM which they acknowledge to have been entrusted for storage as per exhibit P1.

I am aware that there was some sort of evidence by the defendants trying to establish that despite of having measured the cargo per volume (55 CBM) at the time of storage, they did not measure it by same measurement (volume) at the time of discharging or releasing the Cargo. As I have said earlier, common sense does not dictate such argument. This is because the 1st defendant was expected to release what she exactly stored. As they contended to have stored volume, they were expected to discharge or hand over the same volume and not weight or any other sort of measurement. According to exhibit P1 which is the 1st defendant's document the Inward/Outward Cargo Declaration Form, it is clear the quantity stored should be the quantity delivered to the owner in its good order. Both the delivering clerk of TPA and the receiving Cargo Agent must sign the form to authenticate and verify that the Cargo has been released in good order and quantity as it was stored.

In the instant case, PW2 who was the Cargo Agent did not sign exhibit P1 for the obvious explanation on record that there was deficit of the Cargo

to the extent herein above explained. The Cargo was thus not whole delivered to the plaintiffs.

I am also aware that the learned State Attorney Mr. Allan Shija in leading DW2 tended to reveal that the stored Cargo were 400 packages and the released Cargo as per gate pass exhibit P10 were 400 packages as well. In that respect they were purporting to establish that the whole stored Cargo per packages was released to the plaintiffs.

This is unfounded. It is just ***ujanja ujanja tu wa kutaka kuhalalisha dhuluma.*** DW1 who is the author of exhibit P10 was clear in his evidence on record that he did not count the packages at the time he was filling the gate pass but relied on the documents from the Yard. Therefore, the filling of the gate pass exhibit P10 was not by physical verification of such packages but a mere recording from other documents which were even not named nor stated to whom they came from. The person alleged to have counted the packages at the Yard was not brought as a material witness for the defendants. More so, exhibit P9 reflects clearly that the released Cargo was only 19960 Kilograms which was equal to 20 CBM. The stored 400 packages had 55 CBM. In no way the defendants can argue that the 400 stored packages which were 55 CBM at the time of storage devalued its volume into only 20 CBM or ~~20~~ rounded up tons.

That argument would only be of a person with a dishonest mind, and cannot be accepted. To the contrary there should have been clear explanation as to how 400 packages with the volume 55 CBM at the time of storage would have dropped its volume into only 20 CBM at the time of its release, more so, the cargo were metal scraps which cannot be said to have been lost its volume (kusinyaa).

The (iii) issue is already covered in the (ii) issue that the quantity lost of the scrap metals into the hands of the 1st defendant is 35 tons which for the purposes of this instant suit was equal to 35 CBM.

The last issue is all about the reliefs which the parties are entitled to.

The plaintiffs sought reliefs and my determination thereof is as follows;

That this court be pleased to order the 1st defendant to give back to the 1st plaintiff the lost quantity of the scraps which is 35 CBM or alternatively its market value at that particular moment Tshs. 28,000,000/=. I grant this relief as it is. This is because there is no doubt as herein above found that the first defendant was entrusted by the plaintiffs to store 55 CBM of the Cargoes which was equal to 55 tons pending its discharge. At the end of the day only 20 tons/CBM were handled back. The 1st Defendant thus remained with 35 tons/CBM. I decree this quantity to the 1st plaintiff

against the 1st defendant. The 2nd defendant is as well liable technically by operation of the law.

Alternatively, if the defendants shall have no such scraps to be handled back to the 1stplaintiff then they are hereby ordered to pay her its equivalent value of **Tshs 28,000,000/=** as demanded. Despite the fact the there was no direct proof of the market value, I am satisfied with the explanation of the plaintiffs' witness PW1 on how such amount was arrived at. First of all, her purchase price per each ton/CBM was Tshs. 450,000/=, transportation charges she suffered per each ton/CBM was Tshs. 120,000/=, they paid TPA charges at 649 USD which is equally to 11.8 USD per ton equivalent to Tshs. 27,140/= per exchange rate of Tshs 2300 per 1 USD although there was no evidence of exchange rate at that moment. They also payed to TRA a total of Tshs 263,739/= which is equally to Tshs. 4795 per ton. When all these charges are added together we find per each ton/CBM the purchase price Tshs 450,000/= + Transportation Tshs. 120,000/= + TPA charges Tshs. 27,140/= + Custom/TRA charges Tshs 4,795/= equal to total charges/expenses per each ton **Tshs 597,615/=.** This amount plus the profit at the sale price is rounded up to the claimed amount of Tshs 800,000/= per each ton/CBM. I thus grant Tshs. 28,000,000/= to the 1st plaintiff against the

defendants as an alternative award/relief if the defendants shall not hand back to the 1st plaintiff the 35 tons/CBM of the scraps. I can only add that in case the defendants opt to hand back the Cargo as herein above decreed instead of cash pay, they shall be necessitated to transport them to Mwanza as the plaintiffs had already incurred such costs which they paid with expectation to have the whole Cargo released. Alternatively, the defendants will have to hand the cargo plus transportation charges to Mwanza as shall be mutually agreed with the plaintiffs and the would be transporter.

The 1st plaintiff is also awarded Tshs. 5,000,000/= as general damages to all the consequences suffered including loss of business, retaining of the vehicle and breah of trust. Costs of the suit is as well awarded to the plaintiffs against the defendants.

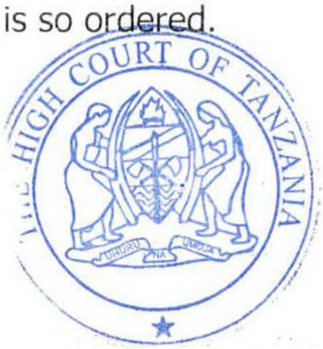
In the final analysis, this suit is allowed with costs and the plaintiffs are decreed against the defendants for payment of Tshs 28,000,000/= or physical metal scraps amounting to 35 tons/CBM and general damages of Tshs. 5,000,000/=.

In case the defendants do not settle the decree within a period of two months from the date of this judgment, then the plaintiffs are awarded interest at court rate of seven percent (7%) of the decretal amount from

the date of expiry of the two months to the date of full payment. For clarity the 7% decreed hereto shall be operational after two months from the date of this judgment in case the decree is not settled by the defendants.

Whoever aggrieved with this judgment and the decree is hereby informed of her rights of appeal to the Court of Appeal of Tanzania subject to the guiding laws and rules thereat.

It is so ordered.



A. Matuma

Judge

04/10/2021

Court: Judgment delivered in the presence of Mussa Said Bandiko an officer of the 1st Plaintiff and Advocate Kagashe for all Plaintiffs, and in the presence of Allan Shija learned State Attorney for the Defendants.

Right of Appeal explained.

It is so ordered.

Sgd: A. Matuma

Judge

04/10/2021