

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 33 OF 2009.

EFFICIENT FREIGHTER (T) LTD.....PLAINTIFF

VERSUS

LILIAN KANEMA.....DEFENDANT.

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JUDGMENT (EX PARTE)

Mruma J,

The defendant is a limited liability company registered under the laws of Tanzania and licensed to carry out clearing, forwarding, transportation and freight forwarding businesses in and around Tanzania. The defendant is a business woman who resides in Zambia.

The plaintiff's claim against the defendant is for payment of USD 23, 408.00. Being detention charges for the 2 x 20' containers, payment of USD 5000 being replacement costs for the 2 x 20' containers, another USD 1109 as per invoice No 0161 dated 29<sup>th</sup> March 2008. The plaintiff is further claiming USD 10,000.00 as general damages and interest at the rate of 30 per cent per annum in all prayers above from August 2007 to the date of judgment. Another interest of 12 per cent per annum is claimed from the date of judgment to the date of full payment of the decretal sum. The plaintiff is also claiming for costs and the traditional prayer of *"any other relief the honourable court may deem fit and proper to grant in favour of the plaintiff"*

When the case was called for mentioning on 5<sup>th</sup> June 2009, Mr Daimu, counsel for the plaintiff applied for leave to serve the defendant by substituted service by

courier on the ground that the defendant was living in Zambia therefore it would be difficult to serve her by ordinary service. Leave was granted and when the matter was called for mentioning on 2<sup>nd</sup> February 2009, Mr Mpoki who appeared for the plaintiff on that day informed the court that the defendant was served by D. H. L. on 11<sup>th</sup> June 2009. Since 21 days had elapsed and no written statement of defence had been filed, he prayed for leave to proceed ex-parte. The prayer was granted and a hearing date was set.

At the hearing the plaintiff called one witness Mr Gervas Paul Mmasi (PW1), the director of operations of the plaintiff's company. This witness testified that his company deals with clearing and forwarding of cargoes within and outside the country. He remembers that sometimes in 2007, the defendant who resides in Zambia sent to them a bill of lading, a copy of her passport, and custom invoices (exhibit P1), and she requested them to clear her cargo.

According to this witness there were two containers. The first container contained building and hardware materials. The plaintiff cleared the consignment and forwarded it to Zambia through TAZARA. The consignment was received in Zambia by the defendant. In the process of clearing the container the plaintiff had to fill the containers guarantee form (exhibit P2), to guarantee that the container will be returned to shipping agent- Diamond Shipping Services. They paid all port charges for the defendant and they were issued with tax invoice and receipts (exhibit P4). To date the defendant had not returned the container to the plaintiff as the result of which the shipping agent is claiming it back from the plaintiff who guaranteed for its return.

On top of claiming for its return, it is alleged that the shipping agent is also claiming against the plaintiff for USD 5600.00 as replacement value and another USD 11,704 as detention charges (exhibit P6). The plaintiff communicated with defendant in Zambia but she did not respond.

Regarding the second container, it is the evidence of PW1 that it contained a motor vehicle- Toyota Saloon. The plaintiff cleared the car for the defendant and prepared all documents necessary to enable it to be transported to Zambia (exhibit P8). As usual the plaintiff paid all port and shipping agent charges (exhibit

P9). The car was handed over to the defendant together with the plaintiff's invoices for USD 315.00. The defendant did not pay the plaintiff's claim and instead she sneaked and left with the car without settling the plaintiff's claim. Fortunately, she did not pick form TI which would enable her to cross the border with that car. Basing on that irregularity, the plaintiff reported to the custom officials at Tunduma boarder (exhibit P13), where the car was impounded and confined to-date.

The only issue to be considered by this court is whether on the evidence available the plaintiff is entitled to the prayers in the plaint.

As I said earlier the plaintiff's first prayer is for USD 23,308.00 being detention charges. This claim is based on the **demurrage report** prepared by Diamond Shipping Services Ltd (part of exhibit P6). In their demurrage report dated 19<sup>th</sup> November 2008, the Shipping agent Diamond Shipping Services had indicated that USD 11704.00 was chargeable for the two containers with number **GSTU5155660** and **APZU3377300** up to that date. They threatened to take legal action. They clearly stated that the plaintiff herein would be liable for any and all prejudice, and other, including costs, expenses and demurrage amount that their principal had suffered or may suffer as a result of the plaintiff's inability to return back the units.

However, in their invoice No 260109 dated 26<sup>th</sup> January 2009, Diamond Shipping Services claimed USD 5600 as replacement value for the 2 x20' missing APL units. This means that no damages had been suffered by the shipping agent otherwise they would have raised their claim against the plaintiff.

The plaintiff did not call evidence to prove that the shipping agent had claimed any amount for any and all prejudice, costs, expenses and demurrages suffered by its principal apart from replacement value. There is no evidence of how the claim of USD 23,408.00 came about. In the circumstances it is my view that in the absence of such evidence, the claim for USD 23, 408/= lacks basis.

From the document tendered (exhibit P6), it would appear that Diamond Shipping Services Ltd has their offices at the 3<sup>rd</sup> floor, Peugeot House along Bibi Titi Road

here in Dar Es Salaam. One wonders why if the Shipping agent has any claim against the plaintiff as the plaintiff would like this court to believe, which claim the plaintiff would wish the defendant to make good of, did not bother to call the said Shipping agent to give evidence on its behalf? Under the law of evidence Act he who alleges must prove. Section 112 of the Evidence Act provides that:

***“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person”***

In the case at hand the plaintiff has not been able to discharge this burden which is placed on it by the law.

The second prayer is for the payment of USD 5000.00 being replacement costs for 2 x 20' containers. There is evidence on record that the two containers have not been returned as required. There is also evidence to the effect that the Shipping agent Diamond Shipping Services Limited sent an invoice No 260109 of 26<sup>th</sup> January 2009 (part of exhibit P6), though, in exhibit P6 the amount claimed is USD 5600.00. I find that this claim has been proved and I allow it.

In prayer No 3, the plaintiff is claiming for payment of USD 1109.00. This is said to constitute the amount chargeable by the plaintiff in the process of clearing of one unit of Toyota saloon car. To prove this claim PW1 tendered in evidence invoice No 0161(exhibit P11) which contains a breakdown of the amount claimed. It shows that USD 185.00 is claimed as a delivery order fee, while USD 25 is claimed as temporary insurance paid for the car, USD 5 is claimed as charges for temporary plate number and USD 100 is claimed as agency fees. The total amount claimed in exhibit P11 boils down to **USD 315.00**.

However and surprisingly **annexture E** to the plaint which purports to be a photo-stat copy of exhibit P11 shows that the total amount in the invoice is USD 1109.00. It is shown in annexture E that delivery order fees were USD 185, Insurance USD 25, temporary plate number USD 100, agency fee charges USD 100, ICD charges USD 764.40 and wharf age charges USD 30. The total comes down to USD 1109.00. This is the amount reflected in the plaint.

As I said earlier, annexure E purports and actually is supposed to be a true copy of exhibit P11. The two documents bear the same heading, same number and dates but different amounts. They are all addressed to the same persons. According to PW1, this is the invoice the plaintiff sent to the defendant for payment for services rendered to her by the plaintiff. I have carefully looked at the two documents (I. e. annexure E and Exhibit P11) and have also revisited the testimony of PW1 Gervas Paul Mmasi on the issue. In absence of explanation on the contradiction of these two documents, I am unable to comprehend the real basis of the claim in prayer No 3. It is trite law that parties are bound by their pleadings and pleadings are elaborated by evidence of witnesses. It does not click in my mind that the two documents explains the same thing. One may be tempted to ask; which between the two documents reflects the true amount claimed? In view of this contradiction, I am inclined to reject the prayers in claim No 3.

Claim No IV is for general damages. This is not easily quantifiable. Counsel for the plaintiff has fixed it at USD 10000.00. It is a trite law, however, that assessment of general damage is a matter in the exclusive avenue of the trial court.

General damages compensate the claimant for non-monetary aspects of the specific harm suffered. Example of this includes loss of business reputation. In order to succeed in a claim for general damages the plaintiff is ought to plead any material facts giving rise to the claim for general damages, and must provide such evidence as it is necessary and appropriate to support the claim.

For instance, the plaintiff may allege in the plaint that its business reputation has been injured by the defendant's act and proceed to prove those facts in the trial. In the case at hand the plaintiff did not plead any material facts which would give rise to the claims for general damages. I therefore decline to award the same.

In paragraphs V and VI, the plaintiff is claiming for interests. Normally interests are awarded in civil actions. I would allow interest on the decretal amount, however I note that the rates suggested by the plaintiff are exorbitantly high and no explanation had been given to support those rates. As it could noted the claim in this action is pegged in United States of America currency, that is to say US



dollars. The currency is among the strongest currency in the world. Charging an interest of over 20% per annum is to be rather unrealistic. I would reduce them to seven percent per annum in paragraph V and 3 per cent per annum in paragraph VI.

In fine therefore, Judgment is entered for the plaintiff for USD 5600.00 plus costs and interests as explained above.

Order accordingly.

A. R. Mruma.  
Judge  
23.10.2009

Date: 23.10.2009

Coram: Hon. A.R.Mruma, Judge.

For the Plaintiff – Mr. Mpoki for the Plaintiff.

For the Defendant – Absent.

CC: R.Mtey.

COURT: Judgment delivered.

A. R. Mruma.  
Judge  
23.10.2009

2,019 - words

I Certify that this is a true and correct  
copy of the original Certificate/Document  
Sign: [Signature]  
Registrar, Commercial Court. DSM.  
Date: 29/10/09