

**IN THE HIGH COURT OF TANZANIA  
COMMERCIAL DIVISION  
AT DAR ES SALAAM**

**COMMERCIAL CASE NO.23 OF 2010**

**TANZANIA PORTS AUTHORITY.....DEFENDANT**

**VERSUS**

**DIAMOND MOTORS AUTHORITY.....DEFENDANT**

**EUKOR CAR CARRIERS INC.....THIRD PARTY**

Date of the last order: 22/09/2011

Date of final submissions: 27/10/2011

Date of ruling: 11/11/2011

**RULING**

**MAKARAMBA, J.:**

This is a ruling on three points of preliminary objection raised by the Third Party. On the 22<sup>nd</sup> day of August 2011, the Third Party in its Written Statement of Defence raised the following points of preliminary objection:

- 1. This Honourable Court lacks jurisdiction to try and adjudicate the Third Party proceedings.*
- 2. The Defendant's claim against the Third Party is time barred.*
- 3. The Defendant has no cause of action against the Third Party.*

On the 22 day of September 2011, by consent of the learned Counsel for the parties, Mr. Msuya, learned Counsel advocated for the Plaintiff, Mr.

Kobus, learned Counsel for the Defendant and Mr. Magusu, learned Counsel, for the Third Party, agreed to argue the three points of preliminary objection by written submissions. This Court accordingly issued a scheduling order, the Third Party to file its submissions on or before 06/10/2011, reply by or on 20/10/2011 and rejoinder (if any) by or on 27/10/2011. As it turned out, and as is borne out by the court record, only the Third Party files its submissions as ordered.

In his rejoinder, the learned Counsel for the Third Party submitted that, since the Defendant did not file his reply to the submissions by the Third Party as ordered by this Court, therefore the submissions in chief of the Third Party stand uncontroverted. As I intimated to earlier in this ruling, as the Court record will show, the learned Counsel for the Third Party rightly submitted, and correctly so, that the Defendant did not filed a reply to the submissions in chief by the Third Party as ordered by this Court. As per the scheduling order of this Court dated the 22<sup>nd</sup> day of September 2011, the Defendant was required to file his reply submissions on or before the 20<sup>th</sup> day of October, 2011 but did not. In the circumstances, the failure by the Defendant to file his reply to the submissions in chief of the Third Party amounts to a waiver of his right to defend the matter. This Court accordingly proceeded to determine the preliminary points of objection on the strength of only the submissions in chief by the Third Party.

It is trite in order to appreciate the gist of the preliminary objection, that a background to this matter albeit briefly is apposite. Briefly, on the 30<sup>th</sup> day of March 2010, the Plaintiff, TANZANIA PORTS AUTHORITY

presented a Plaint in this Court suing the Defendant, M/S DIAMOND MOTORS LIMITED claiming for the breach of contract for supply, delivery and commissioning of five (5) units 2WD Mitsubishi Pick-Ups, the Plaintiff claims that the Defendant failed to deliver to the Plaintiff for the reason that the original Bill of Lading for the said goods was misplaced during transit and/or during inter-banking systems thus making it difficult for the Plaintiff to secure delivery of the said motor vehicles from the port. The Plaintiff claims further that the Defendant requested the Third Party to reissue a Bill of Lading and/or release documents to enable the vehicles shipped in the Plaintiff's name to be cleared by the Plaintiff, but the Defendant has been reluctant to do so. Under such circumstance the Defendant decided to issue a Third Party Notice to join the Third Party in this suit.

The nature of the Third Party Notice is that, M/S TRADE MIDDLE EAST FZE being the supplier of the Defendant entered into a contract of carriage with the Third Party whereby five (5) units 2WD Mitsubishi Pick-ups were required to be delivered to the Plaintiff. The Third Party further entered into a contract with M/S DIAMOND SHIPPING SERVICES LTD., being the local company, for shipping the said vehicles to Dar es Salaam. The said vehicles were shipped to Dar es Salaam Port on board MV MORNING MIDAS on or about 27<sup>th</sup> September, 2008 by the shipping agent, M/S DIAMOND SHIPPING SERVICES LTD. The said vehicles are lying at the Plaintiff's Port awaiting documents enabling the Plaintiff to clear them.

In making his submissions, the Counsel for the Third Party elected to tackle the third point of preliminary objection that the Defendant has no



cause of action against the Third Party. The Counsel for the Third Party Counsel submitted that this issue has already been canvassed and adjudicated upon in the ruling of this Court dated the 18<sup>th</sup> day of April 2011. In its ruling, the Counsel for the Third Party further submitted, this Court determined that the Defendant herein is a stranger to the contract of carriage, because the Bill of Lading was issued by the Third Party to one M/S TRADEX MIDDLE EAST FZE and not to the Defendant. The situation has not changed, the learned Counsel for the Third Party added, and submitted further that therefore, the contracting parties to the Contract of Carriage are EUKOR CAR CARRIERS INC as Third party and M/S TRADEX MIDDLE EAST FZE. The Defendant is not the contracting party with EUKOR CAR CARRIERS INC, the learned Counsel for the Third Party further submitted, and therefore the Defendant continues to remain a total stranger to the contract of carriage. The learned Counsel for the Third Party surmised that, the earlier ruling of this Court dated the 18<sup>th</sup> day of April, 2011 has not been challenged or appealed against and therefore the position that the Defendant as a stranger to the Contract of Carriage (Bill of Lading) has no cause of action still stands.

Making his submissions on the second point of preliminary objection that the Defendant's claim against the Third party is time barred, the learned Counsel for the Third Party argued that this objection has arisen from Clauses 2(A) and 20(B) of the terms and conditions printed on the reverse side of the Bill of Lading, a copy of which was annexed as Annexure TP1 to the Third Party's Written Statement of Defence. The Counsel for the Third Party submitted further that under Clause 20(B)

thereof, the Third Party, EUKOR CAR CARRIERS INC, as carrier is contractually discharged from all liability because no suit was brought against it within one year after delivery of the goods or the date when the goods should have been delivered. The learned Counsel for the Third Party submitted further that at paragraph 2 of the Third Party Notice, the Defendant admits that the goods arrived at the Dar es Salaam Port in mid September 2008. The Third Party Notice issued on 27<sup>th</sup> July 2011, is therefore hopelessly time barred by almost two years, the learned Counsel for the Third Party further submitted. Clause 2(A) of the Contract of Carriage expressly stipulates that THE HAGUE RULES contained in the UNIFICATION OF CERTAIN RULES RELATING TO BILLS OF LADING shall apply, the learned Counsel for the Third Party further submitted. The learned Counsel for the Third Party submitted further that paragraph 6 of Articles 3 of The Hague Rules, (the Rules came into force in Tanzania on the 3<sup>rd</sup> day of December 1962), provides as follows:-

*"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless the suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."*

The learned Counsel for the Third Party surmised that the Third Party Notice was not instituted within one year from the date of delivery of the goods, instead the suit against the Third Party has been instituted almost three years after the date of delivery of the goods, which is time barred



and should stand dismissed, the learned Counsel for the Third Party prayed.

On the first point of preliminary objection that this Honourable Court lacks jurisdiction to try and adjudicate the Third Party proceedings, the learned Counsel for the Third Party submitted that this objection arises from Clause 25 of the Bill of Lading, which expressly stipulates that all claims "*shall be exclusively governed by the law of Korea*" and that "*any action shall be brought before the Seoul Civil District Court in Korea.*" Ousting the jurisdiction of this Court is not against the interest of justice the learned Counsel for the Third Party further submitted, and buttressed his point by citing section 7(1) of the Civil Procedure Code, Cap.33 [R.E. 2002], which provides categorically that:

*"Subject to this Act the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly bared."*

The learned Counsel for the Third Party also made reference to the decision in **AFRI SCAN GROUP (TANZANIA) LTD V. PACIFIC INTERNATIONAL (TANZANIA) LTD**, Civil Case No.14 of 2001, where Hon. Kimaro, J. (as she then was) reiterated that a restriction in a contract which expressly or impliedly bars jurisdiction of our Courts is not contrary to law or public policy. The learned Counsel for the Third Party also referred to the case of **FRIENDSHIP CONTAINER MANUFACTURING LIMITED V. MITCHELL COTTS (K) LIMITED** (2001) E.A 38 where it was held that:

*"All parties should be held to their agreement as regards of jurisdiction clause and a heavy burden of showing strong cause from departing from exclusive jurisdiction clause lies on the party wishing to do so."*

In buttressing further his point on oust of jurisdiction, the learned Counsel for the Third Party also cited the decision in **Commercial Case No.30 of 2006** between **JAMILA SAWAYA V. ROYAL MARINE SHIPPING OF DUBAI AND 4 OTHERS**, where Honourable Bwana, J. (as he then was) determined that:

*"The ousting jurisdiction of our Courts is not in conflict with the provisions of Section 7(1) of the Civil Procedure Code and proceeded to strike out the suit for want of jurisdiction."*

The learned Counsel for the Third Party wound up his submissions on this point by referring to two decisions of this Court, **Commercial Case No. 35 of 2009** between **PRINTO WRAPPING LIMITED V. SAFMARINE TANZANIA LIMITED** by Honourable Makaramba, J., **Commercial Case No. 97 of 2010** between **JOHN KAPETA (SUING UNDER POWER OF ATTORNEY OF MBOMBO MAKEMA V. NYOTA TANZANIA LIMITED AND MAERSK LINE** where Hon. Mruma, J. reiterated the legal position that:

*"Ousting jurisdiction of our court is not against public policy or interest of justice; that the terms of the contract freely entered into must be upheld and given full effect and that the onus was on the*



*Plaintiff to show strong grounds or exceptional circumstances why the exclusive jurisdiction clause should not be enforced."*

The learned Counsel for the Third Party surmised that the Defendant has not shown any strong cause or otherwise for departing from the exclusive jurisdiction clause.

In his submissions, the learned Counsel for the Third Party referred this Court to its own decision which it delivered on the 18<sup>th</sup> day of April 2011 (per Makaramba, J.) in **Commercial Case No.23 of 2010** between **TANZANIA PORT AUTHORITY AND M/S DIAMOND MOTORS LTD AND M/S DIAMOND SHIPPING SERVICES LTD** who joined as Third Party. In that ruling, it was observed among other things that the Defendant, M/S DIAMOND MOTORS LIMITED, through its agent M/S TRADEX MIDDLE EAST FZE, the shipper, contracted with EUKOR CAR CARRIERS INC., the carrier, for carriage of goods from the United Arab Emirates to Tanzania. As correctly submitted by the learned Counsel for the Third Party, it is the Defendant's agent, M/S TRADEX MIDDLE EAST FZE, the shipper, who entered into a contract for the carriage of goods with the Third Party and not the Defendant. This therefore, as the learned Counsel for the Third Party rightly submitted, makes the Defendant a total stranger to the Contract of Carriage. The settled legal position is that "***no stranger to the consideration can take advantage of a contract although made for his benefit.***" This principle was amply established in the famous case of **TWEEDLE V. ATKINSON (1861) B & S 393**. Since there appears to have been no privity of contract between the Defendant and



the Third Party, it is not therefore possible for the Defendant to enforce the contract against the Third Party. This legal position was succinctly stated in the famous case of **DUNLOP PNEUMATIC TYRE CO. LTD V. SELFRIDGE & CO. LTD (1915) AC 847.** I am also alive to the decision of the Court of Appeal of Tanzania per Lubuva, JA. (as he then was) in **Consolidated Holding Cooperation v. Rajani Industries Limited and the Bank of Tanzania, Civil Appeal No.2 of 2003, in the Court of Appeal,** where his Lordship stated that:

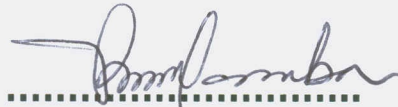
*"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such right may be conferred on a stranger to a contract as a right to enforce the contract in personam."*

Clearly the Defendant being a stranger to the contract of carriage cannot impose any liability against the Third Party. As rightly submitted by the learned Counsel for the Third Party, the earlier ruling of this Court dated the 18<sup>th</sup> of April, 2011 in **Commercial Case No.23 of 2010** between **TANZANIA PORT AUTHORITY AND M/S DIAMOND MOTORS LTD AND M/S DIAMOND SHIPPING SERVICES LTD** having not been challenged or appealed against by the either party in this suit, the Defendant remains to be a stranger to the Contract of Carriage (Bill of Lading), and therefore he has no cause of action against the Third Party.

It is for the foregoing reasons that this Court upholds the third point of preliminary objection that the Defendant has no cause of action against

the Third Party. This holding, in my view will suffice to dispose of the matter at hand entirely. In the circumstances, it will serve no useful purpose for this Court to traverse the remaining two points of preliminary objection raised by the Third Party.

In the event and for the foregoing reasons, the Third Party Notice is hereby rejected with costs, which costs shall be in the cause. Order accordingly.

A handwritten signature in dark ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.


**R.V. MAKARAMBA**

**JUDGE**

**11/11/2011**



Ruling delivered this 11<sup>th</sup> day of November, 2011 in the presence of Mr. Marwa, Advocate for the Defendant, Mr. D. Kesaria, Advocate for the Third Party and in the absence of the Plaintiff.

  
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**R.V. MAKARAMBA**  
**JUDGE**  
**11/11/2011**

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