IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 86 OF 2019

KAHAMA OIL MILLS LTD.....1ST PLAINTIFF

MEDITERANEAN LINK LTD .....2ND PLAINTIFF

VERSUS

MESSINA (T) LTD.....DEFENDANT

JUDGMENT.

Date of the last Order: 31/05/2022.

Date of Judgment: 26/07/2022.

Z.A MARUMA J.

The dispute in this case arose from the accrued demurrage charges of US$10,760.00 following the lease agreement between the Plaintiffs and the Defendant a customary in the shipping business entered on 30th January, 2019 of 40 containers for carrying industrial machines of the Plaintiffs from abroad via the Defendant's vessel MV Jolly Quarzo Voyage No. 186225, Bill of Lading No. G 1854392 destined to Kahama-Shinyanga.

It is alleged that the Defendant released to the 2nd plaintiffs on behalf of the 1st Plaintiff 40 containers of 38 x 40 feet and 2 x 20 feet of industrial machines of the 1st Plaintiff which were destined to Kahama, Shinyanga Region. Among the terms of the agreement was for the Plaintiffs to return the said containers to the Defendant within 14 days and in case of default, the plaintiff would oblige to pay demurrage charges of USD 500 per day. The agreement was entered on 30th day of January, 2019 with free demurrage charges of 14 days which were ended by 14th February 2019. Unfortunately, the plaintiff failed to return 12 containers within the agreed time as a result an invoice of USS 10.760.00 as a sum of demurrage was issued by the defendant to the plaintiff hence this case disputing the claimed demurrage charges for the reasons which will be advanced later.

Before this Court, the plaintiffs pray for judgment and decree as follows:

1. A declaration that the plaintiffs are not bound to pay demurrage charges as per para. 13 herein above;
2. An order that the defendants take delivery of the 12 containers currently lying at the Tanzania Railways Corporation yard at Ilala Goods Shed

upon them paying the storage charges due;

3. The Defendant to pay the Plaintiff's costs of and incidental to the suit;
4. Any other reliefs that this Court may deem fit.

On the other hand, the Defendant filed a written statement of defence on 11th December 2020, in which it raised a counter claim against the Plaintiff on demurrage charges of the 1 unreturned and 11 returned containers on different dates which were in a damaged condition. The Defendant is also seeking payment of costs to be incurred for the repair of the damage as, USD 1,100.00 per Exhibit D7 and cost for the survey of the damage, USSD 550.00 as per container inspection reports admitted as Exhibit D6 leading to prayers for the following:

(a) Payment of USD 130,920.00 being the demurrage charges accrued in respect to the delay to return 12 containers as at 21st August 2019.

(b) Payment of USD 208,320.00. being accrued demurrage charges for I1 containers from 21st August 2019 to their respective dates of return.

(c) Payment of USD 25,980.00 being accrued demurrage charges for I unreturned container from 21st August 2019 to 26th October 2020.

(d) Payment of USD 5,200.00 being the replacement value of the unreturned container.

(e) Payment of accrued demurrage charges for I unreturned container, at the contractual rate of USD 60.00 per day from 26th October 2020 to the date of return of the container or payment of its replacement value.

(f) Payment of USD 1,100.00 being the total repair costs for the 11 returned containers.

(g) Payment of USD 550.00. being the survey fees for the 11 returned containers.

(h) Interest on (a), (b). (c) and (e) at the prevailing commercial rate to the date of Judgment.

(i) Interest on the decretal amount at the court's rate from the date of judgment to the date of payment in full;

(j) Costs of the suit; and

(k) Any other reliefs that the court may deem fit to grant in favour of the Plaintiff.

Supporting the plaint, the Plaintiffs had the services of Mr. Romani S. Lamwai, the learned Advocate as a leading counsel, assisted by Ms. Mary Masumbuko Lamwai, Advocate They called two witnesses Mr. William Matonance the General Manager of the 1st Plaintiff (PW1) and Mr. Zakaria Mhando, Principal Officer of the 2nd Plaintiff (PW2) to testify in support of the agreement of 30th January 2019 (exhibit P1), Handling charges bill of 9 containers (exhibit P2), photographs of the containers (exhibit P3 collectively), Request to waive bill for 12 containers dated 20th May 2019 (exhibit P4), Request to waive bill for 12 containers dated 31st May 2019 (exhibit P5) and a letter to offload the containers (exhibit P6).

On the other hand defending the case and in support of the counter claim the defendant represented by Ms. Miriam Machuba, the learned counsel called Julius Joseph Mwaimu Marketing and Operation Manager (DW1) who adduced his testimony supported by exhibits included a letter on import Container Undertaking dated 28th January 2019 (Exhibit D-1), Email correspondence dated 6th June 2019 and 25th May 2019 reply to the plaintiff's

letter indicating its inability to discount the demurrage charges (Exhibit D-2), Email correspondence dated 12th April 2019 on responded to the Plaintiffs who are Defendants in counter claim a letter dated 8th April 2019 (exhibit D-3), email correspondences several reminders to the Plaintiffs/Defendants failed to pay the demurrage charges and return the 12 containers. (exhibit D-4 collectively), Statement of demurrage charges for 11 containers and 1 container (exhibit D-5), Empty containers inspection report (exhibit D-6), Costs for repair of the 11 containers (exhibit D-7), and email correspondences dated 15th July 2020 and 13th July 2020 on replacement value of the containers (Exhibit D-8).

In determining the claims raised from the pleadings, this Court framed the following issues:

1. Whether the Plaintiffs are liable to pay demurrage charges to the Defendant in respect with the 12 containers.
2. If the answer to issue no. 1 is in affirmative, to what extent are the Plaintiffs liable to pay.
3. Whether the defendant who is the plaintiff to the counter claim, is entitled to payment of repair costs and survey fees in respect

of the 11 returned containers.

4. Whether the defendant who is the plaintiff in the counter claim is entitled to payment of replacement value of the unreturned container.

5. To what reliefs are the parties entitled.

Before determining the above dispute and in appreciating the partiers' submissions made in respective to their pleadings, witness statements, submissions during the hearing in court as well as their closing submissions filed at the end of the hearing. I will summarize the facts which are not in dispute and then proceed to determine the issues in dispute in respect to the pleadings, adduced testimonies and exhibits tendered and reasons for those tendered promised to be done through the cause of crafting the evidence.

Starting with facts not in dispute, it is evident that the plaintiffs and the defendant entered into a contract on 30th January 2019 in respect of the 40 containers of 38 x 40 feet and 2 x 20 feet to import industrial machines of the 1st Plaintiff's which were destined to Kahama, Shinyanga Region. It is not disputed that the relationship between the Plaintiffs and the Defendant, is

governed by the terms of the Container Undertaking (Exhibit Pl) and Container Guarantees (Exhibit DI). It is also an undisputed fact that among the terms of the agreement was for the Plaintiffs to return the said containers to the Defendant within 14 days. Also, in case of default, the plaintiffs would obliged to pay demurrage charges of USD 500 per day and the Plaintiffs do not dispute the existence of the demurrage charges (Exhibit Pl). It is further not disputed that the Plaintiffs retuned 28 containers on or around 16th February 2019 and 26th February 2019, after payment of the accrued demurrage charges of USD 5,500. It is also not in dispute that this matter involves 12 containers out of 40 containers released to the Plaintiffs after being failing to return them within the agreed time. It is also an undisputed fact that until 10th March 2019, accrued demurrage charges was USD 10,760.00 due to delays in returning of the 12 containers. It is also an undisputed fact that following the court order issued on 22nd April 202022, 11 containers were received by the defendants on the different dates between 30th June 2020 to 4th July 2020.

Back to the issue in dispute starting with the 1st issue on whether the Plaintiffs are liable to pay demurrage charges to the Defendant in respect of

the 12 containers.

This issue is answered in the affirmative based on the evidence from the Plaintiffs' and defendant's sides which is also supported by the undertaking agreement (exhibit P-1) under paragraph 2 where the Plaintiffs agreed to undertake to return the containers within the agreed time ie was before 10th February 2022 and paragraph 3 that the Plaintiffs would be liable to pay demurrage charges in case of failing to return the containers within the prescribed time. This was also affirmed by the plaintiffs at paragraphs 8 and 9 of the Plaint that the Plaintiffs do not dispute the existence of the demurrage charges. The Plaintiff was aware of the consequences of failure to return the containers in time as testified by PW1 during the cross examination that the containers will not be received until demurrage charges are paid.

Coming to the 2nd issue if the answer to the issue no. 1 is in affirmative, as to what extent are the Plaintiffs liable to pay. This issue has been strongly argued and contested by the parties based on the evidence and proofs as follows.

The Plaintiffs' claim against the defendant is that the plaintiffs are not liable to pay demurrage charges due to the ***"force majeure"*** of the inability of the plaintiffs to transport the containers to Kahama within the agreed time due to reasons beyond their control. Submitting on the reasons for delays contrary to the agreement which was to return the container before 10th day of February, 2019 the plaintiffs through the evidence of PW1 testified that among the 12 containers 9 of them were of abnormal load which could not be transported through Tanzanian roads. The situation forced the Plaintiff to book and paid for carriage wagons through railway transport on the 8th day of February, 2019 (exhibit P-2) which were loaded and dispatched on the 19th day of February, 2019 to Kahama since the Plaintiffs had no control over the Tanzania Railways Corporation. These facts are also reflected in paragraphs 6 and 7 of the plaint.

PW1 also testified that on their way to Kahama the said containers were involved in an accident because of their size which led to further delays to the destination. This was supported by photographs of the damaged containers (exhibit P3). However, the said containers were returned to the Railway's yard at the llala goods shed on the 8th day of March, 2019 which

was 30 days after they were handed over to the railway's corporation for transportation. Immediately thereafter the 2nd Plaintiff gave the defendant notice of the return of the containers and the defendants issued an invoice for demurrage in the sum of USS 10.760.00 through the invoice No. VY1NV/0028/2019 dated 8th March 2019 as mentioned in exhibit P4 and paragraph 9 of the plaint. PW1 further testified that upon receipt of the said invoice, the plaintiffs asked for 100% of waiver of the charges (exhibit P4) with reminders through the letters dated 20th May 2019 and 31st May 2019 (exhibit P5) with no reply from the defendant to date. The facts reflected under paragraphs 8, 9 and 10 of the plaint. The Plaintiffs submitted that such charge was imposed for purposes of ensuring a quick return of the containers after offloading and does not include a charge on the delays caused by the plaintiffs which delays were outside the plaintiff's control.

PW1 further testified in his witness statement that despite of the request for waiver they wrote a letter to the defendant requesting for offloading of containers dated 8th April 2019 (exhibit P6) but the defendant refused to receive the returned containers as stated also in paragraph 12 of the plaint. These facts were almost supported by the evidence of PW2 in his

witness statement and I find no need for repetition.

Contesting the plaintiffs' allegations, the defendant through written statement of defense and the evidence of the sole witness DW1. The defendant's arguments were based on contractual obligations under the deed of undertaking (exhibit P1) and the Import Container Guarantees dated 28th January 2019 and 29th January 2019 (Exhibit DI collectively). DW1, the Marketing and Operation Manager of the defendant in his witness statement testified that, the Defendant accepted all terms and conditions as contained in the Container Undertaking and Container Guarantee (Exhibit DI collectively) whereby they guaranteed among others to pay all demurrage charges that may accrue as a result of delay in returning the empty containers within the stipulated free period. Also, to pay all the demurrage charges within seven (7) days of receipt of the invoices. He further testified that since the Plaintiffs failed to return the containers within the agreed free time, they are under contractual obligation to pay demurrage charges accrued as agreed in the Container Guarantees. He also argued that the defendant was not a party nor involved to any transaction between the Plaintiffs and the Tanzania Railways Corporation and that did not form part

or amend the terms of the Container Undertaking and relevant Bill of Lading. DW1 also argued that through the letter dated 8th April 2019 15 (exhibit P6), the 1st Plaintiff admitted the daily accrual of the demurrage charges for the containers. He further testified that the defendant could have not accepted delivery of the containers before the accrued demurrage charges were paid and was under no obligation to accept the Plaintiff's request for waiver of their contractual obligation to pay for demurrage charges. DW1 testified that the total amount of accrued demurrage charges in respect of the 11 returned containers, from 21st August 2019 to the date of return of the containers is USD 208,320.00 being USD 151,200.00, for 8 containers returned on 30th June 2020, USD 18,960.00, for 1 container returned on 1st July 2020, USD 19.020.00 for 1 container returned on 2nd July 2020 and USD 19,140.00, for 1 container returned on 4th July 2020. To support the defendant's case the counsel for the defendant referred this Court to the cases of **Civil Appeal No. 160 of 2018, Simon Kichele Chacha vs Aveline M. Kilaue. (Unreported).** The Court, at page 8, on the position of the law that parties are bound by the agreements they freely entered into. The case **Lulu Victor Kayombo vs Oceanic Bay Limited & Mchinga**

Bay Limited, Consolidated Civil Appeals No. 22 & 155 of 2020, (Unreported) at page 11, the Court of Appeal quoted part of its decision in Civil Appeal No. 41 of 2009, Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA Enterprises on restriction for the courts to change those clauses which the parties have agreed between themselves but to enforce those clauses where parties are in dispute. Also, the issue of "force majure" the cited decision in **Ryde v. Bushell and Other**, [1967] E.A 817, in defining parameters of Acts of God in applying the plea.

Analysing the evidence in support and against for, I have started with a guided principle that parties are bound by their agreements. This is provided under section 37(1) of the Law of Contract Act, Cap. 345 R.E 2019, ("LCA") that;

> " ….*Parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of the LCA or and other written law…."*

This is also stated in case of **Simon Kichele Chacha vs Aveline M. Kilaue**, Civil Appeal No. 160 of 2018 (Unreported). The Court, at page 8, stated:

"…It is a settled law that parties are bound by the agreements they freely entered into, and this is the cardinal principle of the law of contract…."

Going through the terms and conditions in the agreement of container guarantee/undertaking (exhibit P1) between the plaintiffs and the defendant, it is stipulated very clearly and the plaintiff admitted that there is existed demurrage charges in case of delay in returning of the containers as per stipulated schedule and amount under paragraph 3.

In addition to the above, the Plaintiffs also argued that such charge was imposed for purposes of ensuring a quick return of the containers after offloading and does not include a charge on the delays caused by the plaintiffs which delays were outside the plaintiff's control. I find this argument to be of no weight as the terms under paragraph 2 and 3 of the container undertaking clearly stipulated the plaintiffs' liabilities in case they failed to return the containers on time.

The argument by the plaintiff that the reasons for the delay was caused by "force majure" which was strongly disputed by the defendant that no event occurred during this transaction that constituted an act of God. At all material times, the Plaintiffs were aware and admitted liability to pay

demurrage charges as stipulated above so, they cannot allege otherwise.

I have also taken an effort to go through the terms in the container undertaking (exhibit P1) and import container guarantees (exhibit D1 collectively) and found nothing to cover the alleged "force majure" such as the cause for the plaintiff's failure to return the containers at the agreed times. Considering the arguments raised by the plaintiff that the 12 containers were lately dispatched to Kahama on 19th day of February, 2019 and the fact that accident occurred when the said containers were on the way to Kahama via railway line through the services of Tanzania Railways Corporation. I am also of the settled mind that these facts as well do not fall under the ambit of "force majure" as strongly argued by the defendant's counsel.

I appreciate the decision cited by the counsel for the defendant providing parameter of the act of "force majure" as defined in **Ryde** (Supra) in which the Court of Appeal for East Africa held that,

> "*…Nothing can be said to be an Act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been*

foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence…."

Based on the position laid above, there is no any arguments from the plaintiffs could amount to be happened beyond their anticipation. This is said so based on the facts that by the time they discovered the 9 containers to be abnormal. As reasonable persons could anticipate the risks to be involved and take the appropriate measures which could prevent such risks as an alleged accident. Also, the fact that the plaintiffs opted to take an alternative means of transport through the railway line which is known to them that it could take much longer time based on the facts from PW1 that the wagon departed on 19th February 2019 so to foresee the delays which could happen and to notify the defendant before the departure. Instead, all these were not considered by the plaintiff and unfortunately there is no room for the same to fall under the parameters of force majure as alleged. At this juncture I join hands with the defendant's arguments raised in respect of these arguments.

Besides, the plaintiffs alleged the accident to occur in the cause of transport by the railway line through the evidence of PW1 which might only be supported by the photographs of damaged containers exhibit P3 collectively. However, nothing was explained as to when the accident occurred and how long it took to sort out the accident and to reach to the final destination point. Also, no notice was sent to the defendant in respect of the alleged anticipated accident neither in the letter dated 20th May 2019 nor in the one dated 30th May 2019 which were requested for the waiver of the demurrage charges.

Moreover, I tried to analyze the arguments raised by the plaintiff counsel and relate with the alleged act of God for the plaintiffs to be exempted from paying demurrage charges based on section S.56 (1) and S. 56 (2) of the Law of Contract Act Cap 345 R.E 2019 which provides that:-

"……56 (1) An agreement to do an act impossible in itself is void;

> *56 (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."*

Taking the above Plaintiff's arguments and the referred provisions above, I think the counsel for the plaintiff mixed the concepts to be applied in this case. There is nothing impossible under the circumstances in the plaintiff's case as stipulated above so fit on the provisions above. The fact that since the consignments arrived at Dar es Salam port, all material time the 1st Plaintiff's used to clear and forwarded the containers to be ready for dispatch to Kahama and the moment they discovered about abnormalities. The plaintiff could foresee the applicability of the contract he entered freely on 30th January 2019 and if it was impossible, they had a plenty of time about nine days before the expiring of the return date which they could cancel or change the agreement's terms before the consignments were loaded into Tanzania Railways Corporation wagon ready for transportation to Kahama on the 19th February, 2019. But the plaintiff opted to be silent and proceeded with the transport arrangement having the knowledge of executing the agreement which they saw to be impossible. In lieu of the facts above, the argument of impossibility that the Plaintiff could not prevent the situation thus the contract to come to an end due to the doctrine of frustration is a mere afterthought which cannot release the plaintiffs from

the liability to pay demurrage charges.

Moreover, in their evidence the plaintiffs several times mentioned, referred to and alleged of abnormalities of nine containers and nothing has been adduced to justify in respect of the three containers which were also delayed in return and subject to the demurrage charges.

Besides, the argument that DW1 testimony in chief did not testify as to when the container was delivered to the Plaintiff and during cross examination that he failed to give evidence as to when the containers delivered to the Plaintiffs. I am of the considered view that these arguments have no basis on the presence of documentary evidence which stipulated clearly in the container guarantee (exhibit P1) which was signed voluntarily by the plaintiffs on 30th January 2019 agreed to undertake to return the said containers by 10th February 2019.

Also, it is a trite law that in the existence of evidence in writing the same will prevail over the oral evidence. This was held in the case of **MS. Msolopa Versus Paul Warema & Others** (Land Case No.23 of 2017 [2020] TZHC 2078 (26th February 2020) it was discussed that *"where there is documentary evidence it is valid and that oral evidence cannot superseded"*. Also, in the

case of **Umico Limited Versus Salu Limited**, Civil Appeal No. 91 OF 2015 at page 15, The Court of Appeal directed very clear that,

"So long as the lease agreement was in writing there is no room for oral evidence to come in."

On the basis above, on the presence of the container undertaking (exhibit P1) which speaks of itself, there is no need of more evidence from the Defendant to establish the fact on when the containers were taken.

Therefore, from the balance of probabilities the plaintiffs have failed to justify why they should not be responsible to pay the demurrage charges resulted from delays in returning of the 12 containers released to them by the defendant.

The question as to what extent the Plaintiffs liable are to pay. In support of the evidence of the Defendant who is the Plaintiff in the counterclaim, to claim the payment of USD 372,070.00 against the Plaintiffs/Defendants in the counterclaim for the accrued demurrage charges due to delay in returning of the 12 containers within the stipulated time of 14 days. Also, as it is evident by the testimony of DW1 and supported evidence exhibit P5 and P6, exhibit D1 paragraph 3 and exhibit D5

respectively. The fact that the Defendants/Plaintiffs have returned 11 containers out of the 12 claimed containers, they are responsible for demurrages charges from the date of the default to the date of their return.

The defendant to support the claim over the 12 containers, also during examination in chief, through DW1 tendered invoices of the 12 containers which were rejected due to objection raised by the counsel for the Plaintiff for non-compliance with admissibility rule. The objection which was sustained with reasons to follow as I accordingly do. The objection was based on non-compliance of section 18 (3) and (4) of the Electronic Transaction Act, No.13 of 2015 on admission of electronic evidence which required authentication for the documents which are electronically generated. It was the argument of the counsel for the plaintiff that the said documents were electronically generated but neither of them was authenticated nor single reference to any of them found in paragraph 1 of the DW1's witness statement. The point of objection was to some extent admitted by the counsel for the defendant that the said invoices were not expressed in the certificate of the authenticity but they are read together in paragraph (iv) so they can be admitted as long as DW1 explained how they

were generated from the system and the law does not say if the document did not say if the document not listed in the certificate of authenticity can not be admitted.

Moreover, DW1 tendered a summary of demurrage charges which was objected by the Plaintiff's counsel on the ground that no certificate of authenticity even the one filed in court on 25th October 2021 do not referred the summary. It is only indicated a summary of invoices and receipts of 28 containers mixed up of demurrage and services of containers not in dispute. Dates are not clearly specified. Also, paragraph 23 of the DW1 witness statement refers demurrage but is difficulty to identify the document whether it is for demurrage or other issues and is contrary to section 18 (3) and (4) of the ETA of 2015. The counsel for the Defendant responding to this objection invited the Court to invoke section 3A and 3B of the CPC based on the principle of overriding objective. She admitted that the documents were mistakenly mixed up and attached marked wrongly in the pleadings but were the same pleaded in the witness statement, additional list of documents and written statement of defence. She was also admitted that no certificate of authenticity was issued in respect of the document intended to

be tendered as exhibit and is enough for the witness to explain that the system works properly. Also, there is no law barring admission of document because of no certificate.

Analyzing the arguments raised in respect of two objections raised, I think there is an issue of understanding of what is required by the law in regarding to admission of electronic evidence. It should be understood that electronic evidence is just like any evidence subject to rules of admissibility as provided under section 18(1) of the that;

> *"…In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message…"*

Therefore, it is for a party seeking for electronic evidence to be admitted in evidence to lead that evidence sufficiently on its authenticity to support the claim. This is why section 18(3) and (4) of the Electronic Transaction Act no.13 of 2015 comes in to regulate on how the electronic evidence can be authenticated without abandoning the existing rules of evidence. That it should show the entire process of record keeping and

reliability on how intact or secure it has been as provided hereunder;

"…. Electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where;

(a) there is evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system

(b) it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

(c) it is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record…".

Neither of the above conditions have been demonstrated in the present

matter. In that basis the fact that the documents to be tendered by the defendant raised an issue of authentication on how they have been processed, stored until they came into possession of DW1 to tender them as exhibits. The argument by the counsel for the defendant that the law does not say the document not listed in the certificate of authenticity cannot be admitted, yes that might be true, however this should not be interpreted that the tests of authenticity can be ignored or because the witness has testified that the document is generated from the computer can suffice the issue of authenticity. Also, the admission of electronic evidence should not abandon the existing rules of evidence when admitting electronic evidence. In additional to this, the defendant also failed to have specific explanation on how the documents in issue do lead to support the claim apart from the fact that the documents were not authenticated, they were wrongly mixed and marked so to confuse in which fact or evidence are in support of.

Also, DW1 prompted to tender a letter dated 19th June 2019 concerning a request for waiver of demurrage charges printed from computer which was objected by the counsel for the Plaintiff on the reason that the document is not among the electronic evidence as it is evident to

be signed and stamped by the 1st Plaintiff though the foundation laid as the document is electronic evidence. So, it should be produced the original or copy in compliance with admissibility rule under section 68 of the Evidence Act and no notice to rely on the secondary evidence as indicated in paragraph 22 of the DW1 witness statement. Responding to this point of objection the counsel for the defendant admitted that the document was not an electronic one but was attached to email and they had brought the one which have been endorsed by the defendant on top of it. She submitted that they don't need to issue a notice under section 68 (a) as the document itself is a notice and it has been received through the email.

Looking into the point of objection raised and the argument by the counsel for the defendant. It is again the issue of rules of evidence. The law is very clear on what should be done when a party seeking to tender a document as exhibit in Court. In case of the present case, since the defendant is admitted that the document is not electronic one but it was attached to an email and it was printed from the computer. The rules of admissibility of electronic evidence should be applied as guided by section 18 (3) of the ETA or if the defendant wanted to rely on secondary evidence

as she admitted that the documents was received through mail but endorsed by hand on top of it and the original one is with the sender of the mail. Then the proper procedure was to comply with section 67 (a) and 68 of the Evidence Act, No.6 RE 2019. However, none of them was complied with by the defendant as for this reason the document was rejected. Therefore, it is on the basis of the aforementioned reasons the documents could not be admitted and relied by the Court to determine the issue in claims.

Coming back to the argument raised by the plaintiffs that none of demurrage charges were not admitted in the plaint so to invoke this court to apply the principle of estoppel provided under section 123 of the law of Evidence Act Cap 6 R.E 2019 and the findings of this court in Miscellaneous Commercial Application No. 80 of 2019 reflecting the same parties, so to confer on amount admitted by the Plaintiffs. This argument is baseless in the event of the evidence and findings discussed above in the respective issues.

Coming to the 3rd issue on whether the defendant who is the plaintiff to the counter claim, is entitled to the payment of repair costs and survey fees in respect of the 11 returned containers.

The evidence given by the defendant, the Plaintiff in the counter claim was based on the terms of the gurantee undertaking (exhibit P1) clause 5 where the Plaintiffs promised to undertake to pay repair costs where the plaintiff is responsible to undertake repair of the damaged containers which stated that,

"…*We shall return the container/s in clean condition without odor as CONTAINER/IN DIRTY CONDITION ARE NOT ACCEPTED. If we return the container/s in damage condition, we authorize you to repair the container/s as necessary and debit us with cost accordingly and which we shall pay for them on presentation of your invoice... "*

Moreover, clause 2 of Exhibit DI, where the terms held the Plaintiffs liable to undertake repair costs as I quote hereunder that,

"….*To meet the repair costs of the subject container(s) and hereby accept that the repairs shall be carried out by reputable contractor duly approved by Ignacio Messina & Co. at their sole discretion….".*

It is evident that the Plaintiffs testified that the accident occurred when the abnormal consignment was on the way to Shinyanga. This was corroborated by DW1's testimony who testified that the 11 containers

returned were damaged, hence the Defendant engaged an independent surveyor to survey the damages. That the survey fees were USD 550.0 and the repair costs for the 11 containers were assessed to be USD 1,100 on a flat rate of USS 100 per container. This was corroborated by Container inspection report/interchange (exhibit D6).

In analyzing this claim based on the above facts, it is quite clear that the Plaintiff by signing the gurantee undertaking is bound to undertake the repair costs as stipulated in the above terms however, reading exhibit D6 which justified the claim and the emails correspondences in respect of repair of the alleged damaged containers (exhibit D, I failed to find evidence to establish how the figures of 500 USD has been reached to justify the repair costs of 11 containers at the flat rate. The inspection report (exhibit D6) does show some remark on five containers only which also do not show how the figures were arrived at in respect of each container or eleven container. This is contrary to the principle of proof as held in the case of **Barelia Karangirangi Versus Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017. The Court of Appeal at page 7,8,9,10 and 11 it was held that;

"....The burden of proof in a suit lies on that person who would fail if

no evidence at all were given on either side…"

Guided as above, the fact that testimony was not contradicted in cross-examination; therefore, it should be accepted as sufficient evidence to establish the Defendant's entitlement to the survey fees and repair costs has no basis regardless the Plaintiffs neither denied nor provided any evidence to contradict the Defendant's entitlement to repair costs and survey fees. On the aforesaid findings the issue no.3 is answered not in affirmative as it has not sufficiently established to warrant the prayer requested.

On the 4th issue on whether the defendant who is the plaintiff in the counter claim is entitled to payment of replacement value of the unreturned container.

It was undisputed that the Plaintiffs has not return 12 containers which are subject to the issues in dispute in this case. Also, there is no dispute that the Plaintiff returned only eleven (11) containers as evidenced by the testimony of DW1. These facts made the Plaintiff responsible for the one unreturned container which can be returned or replaced as agreed under clause 4 of the gurantee undertaking (exhibit P1) which states that,

"…*That we and our clients shall be fully responsible for the full replacement value of the container/s in the event of loss or constructive loss of the container/s cost of which shall be payable on demand. In addition to all other incidental costs, being in force as at the relevant time and expenses and damage which shall also be payable on demand…"*

Therefore, this issue is answered in affirmative as it has been confirmed by the Plaintiffs who are the defendants in the counterclaim that they are responsible for the replacement costs of the one unreturned container at a rate of USD 5,200.

Lastly, as to what reliefs are the parties entitled. Since the issues no.1,2 and 4 are answered in affirmative manner and taking into consideration the amount already deposited in the court as per order of this Court in Miscellaneous Commercial Application No. 80 of 2019. Judgment is entered in favaur of the defendant who is the plaintiff in the counterclaim as follows:

1. That the plaintiffs who are defendants in the counterclaim are bound to pay USD 208,320.00. being accrued demurrage charges for 11 containers from 21st August 2019 to their respective dates of return taking into account the amount of USD 10,760.00 which is already

deposited in court as per court order issued on 22nd April 2020.

2. The Plaintiffs who are defendants in the counterclaim to pay USD 25,980.00, being accrued demurrage charges for I unreturned container from 21st August 2019 to 26th October 2020 and until the date of return or replacement.
3. The Plaintiffs who are defendants in the counterclaim to pay of USD 5,200.00 being the replacement value of the 1 unreturned container.
4. The Plaintiff to pay interest on item no. (1) and (2) at the prevailing commercial rate to the date of Judgment.
5. The Plaintiffs who are defendants in the counterclaim to pay interest on the decretal amount at the court's rate of 7% from the date of judgment to the date of payment in full.
6. The plaintiffs who are defendants in the counter claim is to pay costs of and incidental to the suit.

Dated at Dar es Salaam, this 26th day of July, 2022.

Z.A.MARUMA,

JUDGE.

26/07/2022