IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 106 OF 2019

CHINESE TANZANIA JOINT

SHIPPING COMPANY (SINOTA) ..... PLAINTIFF

VERSUS

BASSAM COMPANY LIMITED ..... 1ST DEFENDANT

HENRY OTIENO ..... 2ND DEFENDANT

TANZANIA INTERNATIONAL CONTAINER

TERMINAL SERVICES LIMITED ..... THIRD PARTY

Date of Last Order: 16/03/2022

Date of Judgement: 29/04/2022

JUDGEMENT

MAGOIGA, J.

The plaintiff, CHINESE TANZANIA JOINT SHIPPING COMPANY (SINOTA) by way of plaint instituted the instant suit jointly and severally against the above named defendants praying for judgement and decree in the following orders, namely:

a. Payment of specific damages United State Dollars Forty Five Thousand One Hundred and Eighty (USD.45,180.00), an amount arrived as follows:

(i) Demurrage charges of United State Dollars Forty One Thousand Six Hundred and eighty (USD.41,680);

(ii) Costs o cargo destruction United State Dollars Three Hundred Five Hundred only(USD.3,500);

b. Payment of interest on the claimed amount from the 1st day of May, 2019 when the destruction exercise of the defendant's cargo was conducted to the date of the final payment at commercial rate of 21%;

c. Payment of general damages as may be assessed by the honourable court ;

d. The defendants be ordered to pay costs of this suit;

e. Any other relief the honourable court may deem fit and just to grant.

Upon being served with the plaint, the defendants filed a joint written statement of defence seriously disputing claims by the plaintiff and prayed that the instant suit be dismissed with costs. Simultaneously, the defendants applied for third party procedure and were granted to bring in, in these proceedings the third party, one, TANZANIA INTERNATIONAL CONTAINERS TERMINAL SERVICES LIMITED (TICTS).

The third party as well filed written statement of defence disputing the defendants' claims and prayed that the instant suit be dismissed with costs.

The facts pertaining to this suit are that on 25th day of October, 2017, the master MV KOTA GANTENG of which the plaintiff was her agent in Tanzania arrived at Dar es Salaam port with container No. CCLU 8590754 on board. On 28th day of October,2017 MV KOTA GANTENG authorized and allowed TICTS (Tanzania International Container Terminal Services Limited) to discharged the said container from the ship and on 8th November, 2017 the second defendant was issued with Delivery Order to collect the container in order to receive cargo and return the empty container but failed to do so. Further facts were that, the cargo was suspected of being unfit for human consumption, necessitating the 2nd defendant to write the authorities to allow physical verification, which revealed that the cargo was unfit for human consumption and it was later destroyed.

Against that background, the plaintiff instituted this suit claiming for demurrage, hence, this judgement.

The plaintiff at all material has been enjoying the legal services of Captain Ibrahim Bendera, learned advocate. On the other hand of the 1st and 2nd defendant were enjoying the legal services of Mr. Jimmy Mrosso, learned advocate. The third party had the legal services of Mr. Gerald Nangi, learned advocate.

Before hearing started parties learned advocates agreed and proposed the following issues which were recorded for the determination of this suit, namely:-

1. Whether the defendants caused demurrage on container No.CCLU8590754;
2. Whether the defendant caused costs for cargo destruction in container No.CCLU8590754;
3. Whether the plaintiff has a container guarantee arrangement with the defendant ;
4. Whether there is any liability of the third party to make contribution or pay indemnity claimed in whole or in part;
5. What reliefs parties are entitled to.

In proof of her case, the plaintiff called two witnesses. The first one was, one Mr. CHEN SHIGUANG (Hereinafter to be referred as PW1). PW1 under affirmation and through his witness statement adopted to be his testimony in chief told the court that, is the employee of the defendant as Ship Manager. According to PW1, the plaintiff is the legal entity owned by the Government of Tanzania and China.

PW1 went on to testify that the 1st defendant is the consignee of goods transported by the ship MV KOTA GAYA under Bill of Lading No. COSU 61464473320 in which the goods were transported in container No. CCLU8590754 from China to Tanzania. The 2nd defendant being director of the TOPMAX Tanzania Limited a company collaborating with the 1st defendant in Tanzania on all commercial and legal claims at Dar es Salaam concerning the cargo prescribed in the Bill of Lading was responsible for clearing and forwarding for the said goods.

PW1 went on to testify that the cargo arrived in Dar es Salaam on 25th day of October, 2017 and the ship authorized TICTS to discharge the container. However, after discharge, the container which was connected to refrigerating facility was disconnected from the ship electricity and was placed ashore in the yard managed by TICTS and was expected to be disconnected to electricity network.

PW1 further testimony was that they informed the consignee that the container arrived in Dar es Salaam, who in turn, introduced the agent casted with duties to process the clearing and forwarding and after the process the process was completed. PW1 went on tell the court that after the agent fulfilled all conditions for container releasing, on 9th November, 2017 the

plaintiff issued a Deliver Order to the 2nd defendant who was to return the container in a specified time but failed to do so. It was the testimony of PW1 that after six days on 14th day of November, 2017, the 2nd defendant through his company TOPMAX TANZANIA LTD wrote a letter to TRA requesting for physical custom verification on the alleged container. The inspection was jointly and together done on 21st day of December 2017 in the presence of ROBMARINE P& I SERVICES LTD, TOPMAX (T) LTD,TRA officials, TFDA officials, and KK security and it revealed that the cargo was unfit for human consumption.

PW1 went on to tell the court that the defendant instituted a suit against the plaintiff at Kisutu RM's Court but which was dismissed for want of jurisdiction.

PW1 further testimony was that on 25th September, 2018 they issued an invoice to the defendants of USD.24,240.00 covering 11 months since Delivery Order was issued and amount which was increasing at rate of USD.80 per day a claim which they have not paid to date.

Later on 1st May, 2019 the cargo was destroyed at the costs of USD.3,500.00 and the total demurrage by then was USD.41,680.00 and as such the total value of demurrage was USD.45,180.00.

On that note, PW1 prayed that this suit be allowed as prayed in the plaint.

In proof of the plaintiff's claims, PW1 tendered the following exhibits, namely:

1. Power of Attorney from Bassam to Henry Otieno as **exhibit P1;**
2. Guarantee letter (blank copy) from the agent for release of the container as **exhibit P2;**
3. Invoice dated 7/11/2017 as **exhibit P3;**
4. Letter from the plaintiff to the consignee and agent dated 27/05/2019 as **exhibit P4;**

Under cross examination, PW1 told the court that the purpose of exhibit P1 was to show that the 1st defendant authorized the 2nd defendant as agent to clear the cargo. Pressed with question, PW1 said the agent was TOPMAX (T) Limited, who was to clear and transport the goods to the consignee. The responsibility of the agent was to pay demurrage, insisted PW1.

PW1 upon shown exhibit P2 and pressed with questions admitted that the Deliver Order was delivered in the name of TOPMAX (T) LTD and not the 2nd defendant. PW1 told the court the defendant refused to take the cargo because it was damaged unless a joint inspection is done to verify the status of the cargo. One the container is discharged it no longer in the hand of the

ship owner. PW1 admitted that the cargo was in good condition when arrived. PW1 went on to tell the court that after inspection, it was realized the cargo was not in good condition. PW1 pressed with questions admitted that the source of accumulated demurrage was, among others, due to rotten cargo. PW1 insisted that much as no exemption was given, then, demurrage has to be paid. PW1 insisted that the demurrage should be paid by the defendants.

Under cross examination by Mr. Nangi, PW1 told the court that he knows what he claim as demurrage from the defendants of USD.41,680. PW1 shown exhibit P1 and say it was the one which makes them sue the defendants. But pressed with questions admitted that same was limited. PW1 when shown exhibit P2 admitted that it was not a contract because was not signed. PW1 admitted as well that TICTS was not a party.

Under re-examination, PW1 told the court that the ship owner is responsible if the container is in the ship. According to PW1, after discharge the responsibility shifts to the terminal operators. In this case, PW1 told the court that TICTS were paid discharging and offloading fees. PW told the court the corgi was destroyed in 2019 and was discharged in 2017.

The second witness for the plaintiff was Mr. UHURU MICHAEL KIKWETE (herein after to be referred in these proceedings as **'PW2'**). Under oath and through his witness statement adopted in these proceedings as his testimony in chief, PW2 told the court that he is the employee of ROBMARINE P & I SERVICES LIMITED as a Marine Surveyor since the year 2005. According to PW2, their main activities is to survey ships, cargo damage claims against the ships and assist ship master on crew matters.

PW1 told the court that he is the one who inspected the disputed container on 27th day of October, 2017 while on board and found its cargo was in order with no damage and as such the container was discharged. According to PW2, the second inspection was done on 21st day of December, 2018 and the container was not damaged.

In proof of the plaintiff case, PW2 tendered Survey Report and its annexures as **exhibit P4.**

Under cross examination by Mr. Mrosso, PW2 told the court that he has 15 years experience in survey. Shown exhibit P4 and asked where the survey was done and says it was done in the ship. PW2 told the court that they opened the cargi and observed that it was rotten and subsequently was destroyed.

Under cross examination by Mr. Nangi, PW2 told the court that he is the independent surveyor for SINOTA and reported what he saw. PW2 denied to have been an expert in refrigerator but remember it was connected to TICTS electricity.

Under re-examination by Captain Bendera, PW2 told the court that observation was done at the ship and at TICTS.

This marked the end of hearing of the plaintiff's case, and, same was marked closed.

The first witness for defence was Mr. ANDREW OTIENO OWOR (to be referred hereinafter in these proceedings as **'DW1'**). Under oath and through his witness and supplementary statement adopted in these proceedings as his testimony in chief, DW1 told the court that he is the director of TOPMAX (T) Limited since its inception. DW1 remembers that around October, 2017, the 1st defendant imported goods (mackerel fish) with Bill of Lading NO.COSU 6146447320 in container No.CCLU8590754 which arrived at Dar from China. In the circumstances, the 1st defendant engaged TOPMAX (T) Limited to clear the goods and forward the container to Kigali. According to DW1, he signed the container guarantee agreement with the plaintiff to collect the container form port, convey the goods to its

destination and return the container in good time or else pay demurrage at the stipulated rates. DW2 went on to tell the court that the exercise was frustrated by the fact that TICTS as cargo handler restrained movement of the cargo after noticing the cargo was not in good order until an expert verification was performed.

DW1 further testimony was that the exercise became complicated and other authorities intervened and it was resolved that the cargo be destroyed and was actually destroyed on 25th May 2019. DW1 denied the claims by the plaintiff against the defendants because the cargo got rotten in the yard of TICTS who mishandled the cargo.

According to DW1, the obligations to pay demurrage, if any, goes to the person whose actions or omissions caused the accrual of demurrage charges and in this case the third part TICTS. According to DW1 liability cannot be borne by the defendants and DW1 told the court that there is another case in Dar es Salaam registry against parties herein.

DW1 in disproof of the plaintiff's case tendered the following exhibits, namely:

1. Plaintiff letter to agent dated 25/09/2018, demurrage invoice dated 27/10/2017, equipment interchange receipt and delivery order collectively as **exhibit D1a-d;**
2. Letter from TRA to TOPMAX (T) Ltd As **exhibit D2;**
3. An affidavit authenticating an email conversation as **exhibit D3a-b;**
4. Two letters dated 28/03/2019 and 17/04/2019 as **exhibit D4a-b;**
5. Original Bill of Lading as **exhibit D5;**

Under cross examination by Captain Bendera, DW1 asked to read the number of Bill of Lading and state them as COSU 6146447320. Shown exhibit D4 and says the representative of the defendant was Mwanahamisi Shemkange. DW1 again shown exhibit D4 and asked if is the same with the one on WSD and says no. According to exhibit D4 the consignee was TOPMAX (T) Limited. DW1 despite seeing the report exhibit P4 but denied that the container was delivered to them. DW1 shown exhibit D1 and says was for the release of container and the consignee was BASSAM and the agent was TOPMAX (T) Limited. DW1 when shown exhibit P2 says it resembles to guarantee agreement. DW1 insisted at all the time the container was with TICTS.

Under cross examination by Nangi, DW1 told the court that they are sued because of demurrage costs. DW1 told the court that there was guarantee agreement in which TICTS was a party, but upon pressed with questions changed the story that TICTS was not a party and was not aware of the terms to the guarantee agreement. Further pressed with question agrees that TOPMAX were the one to pay demurrage and said in the circumstances, TICTS were right to stop the container. As to whether TICTS are wrong or right, he left to the court. DW1 went on to tell the court that TICTS said the cargo was rotten and refused to release it. DW1 asked why TOPMAX is not a party said I don't know why. DW1 told the court that director and company are two different legal personalities.

Under cross examination by Mr. Mrosso, DW1 told the court that Delivery Order is the exchange of Bill of Lading against the shipping line. According to DW1, the agent did not collect the container because it was rotten and it was not yet within their mandate. DW1 told the court that they signed the guarantee form to enable them take the container. As to why TICTS were sued, DW1 said it is because are the ones who hold Delivery Order and the process was not complete and up to date is under their responsibility. DW1 insisted that the moment TICTS stopped them, the container remained with

TICTS. DW1 told the court that he cannot tell exactly who was negligent but the facts remained that TICTS failed to raise an alarm.

This marked the end of defence case and same was marked closed.

Third party was defended by Mr. LEONARD CHIWANGO (to be referred in these proceedings as **'DW2'**). Under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that he is the principle officer of the third party and his duties is to investigate all claims brought against the third party, propose settlement and keeping proper records. DW2 told the court he knows this case and is aware of indemnification prayed in case the defendants are held liable.

According to DW2, much as the case is based on contractual relationship between plaintiff and defendants and third party not being a party to that relationship and not involved in anyhow cannot be held liable for indemnification.DW1 went on denying stopping the loading of the container, the alleged fish mackerel were destroyed under her custody, nor involved in physical verification or destruction, and no way can the third party be held liable to indemnify anyone in the circumstances.

DW1 went on to testify that the defendants in their pleadings and in their testimonies applauded the third party on what happened. DW2 drew the

attention of this court that there is another case between parties in the Dar es Salaam district registry.

And lastly, DW2 prayed that the claims against third party be dismissed with costs to the third party.

Under cross examination by Mr. Mrosso, DW2 told the court that he knows why they are in this suit for demurrage claims. DW2 remember they issue loading permit after payments and later refused because it was rotten. According to DW2, free storage is for 21 days but this disputed container has been in the yard for more than 2 years.

Under cross examination by Mr. Julius, DW2 told the court that upon arrival of the ship, the container was discharged from the ship.

Under re-examination by Mr. Nangi, DW2 told the court that once it established that the cargo is rotten all delivery documents were cancelled.

This marked the end of hearing of the defendants' case and same was marked closed.

Parties learned trained advocates sought and were granted leave to file final closing submissions in support of their respective stances. However, it was only the defendants and third party who managed to do so. For reasons best known to the plaintiff's counsel no final submissions were filed. I have had

time to go through them and I respectively commend them for the industrious input on the matter. Though, I will not be able to quote them but where necessary will refer to them. However, it suffices to say are sufficiently noted.

The first issue was couched that **"whether the defendant caused demurrages on container No.CCLU8590754?"** The learned advocate for the defendants strongly argued that based on evidence on record no evidence was put forward to prove that the defendants, in anyway, caused demurrage on container in dispute because by the time were issued with Delivery Order, the inspection done within six days revealed that the cargo was rotten and as such unfit for human consumption and same was restrained from being released. On the above reason, among others, in his final closing submissions, Mr. Mrosso urged this court to find issue number one in the negative.

Mr. Nangi join hands with the defendants that the plaintiff testimony is devoid of proving any of the issues 1-3 inclusive. He urged this court to dismiss this suit.

On the other hand, as noted above, the learned advocate for the plaintiff did not file final closing submissions. However, having considered the evidence

on record by her two witnesses, I find them wanting and cannot be said the demurrage was caused by defendants because the container was not physically handed over to the defendants to warrant them being charged with demurrage. The moment it was discovered and verified that the cargo was damaged, it will be unfair to impute demurrage to the defendants who despite paying all charged but no container was handed over to them and it was destroyed before same reached to their control. Evidence is clear and loud that even the Delivery Order given to the agent was of no use and TICTS was justified not to allow the cargo out while it was proven damaged.

On the above reasons, with due respect to the plaintiff's counsel, I find issue number one in the negative.

This takes me to the second issue couched that **"whether the defendant caused costs for cargo destruction in container No. CCLU8590754".** This issue will not detain this court much based on my findings in issue number one above. Much as the container was not physically handled over to the defendants until it was destroyed, no way any court of justice or tribunal can impute costs of destruction on the defendants. The plaintiffs have themselves to blame for mishandling the cargo in their hands and cannot be allowed to claim costs. Indeed, if the defendants have claimed

against the plaintiff and TICTS, in the circumstances, were responsible for the damages caused.

Therefore, on the foregoing issue number two has to be answered in the negative as well.

This trickles down to issue number three couched that **"whether the plaintiff has container guarantee arrangement with the defendants."** This issue on the part of the plaintiff was to be proved by exhibit P2 but unfortunately on his part, **exhibit P2** was blank document for failure to indicate Bill of Lading numbers, Port of loading, Consignee, container numbers, guarantor and its address and signature of the authorized personnel.

Without much, ado this issue was not proved at all. Section 110 of the Tanzania Evidence Act, [Cap 6 R.E. 2019] is clear that whoever wants the court to give judgement in his favour has a legal duty to prove what he alleges. In this case the plaintiff utterly failed to prove any container guarantee arrangement between the plaintiff and the defendants.

On that note, issue number three has to be answered in the negative as well.

Next is issue number four on the third party couched that **"whether there is any liability of the third party to make contribution or pay indemnity claimed in whole or part."** The principle underlying the liability of the third party is first to establish the liability of the defendants.

Mr. Nangi strongly submitted in favour of the above stance and concluded that what the third part did was within her legal powers. On that note, urged this court to find issue in respect of third party in the negative.

Much as the defendants from what I have found hereinabove are discharged from the liability in this suit, it goes tandem that indemnity or contribution against third party cannot stand in this suit and the same fails in its face value.

In the foregoing, the plaintiff utterly failed to prove his case on standard required in civil cases. Therefore, this suit must be and is hereby dismissed with costs to the defendants and third party.

It is so ordered

Dated at Dar es Salaam this 29th day of April, 2022.

S. M. MAGOIGA

JUDGE

29/04/2022