

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 121 OF 2014

MULTSOL MAURITIUS LIMITED.....PLAINTIFF

VERSUS

ECO BANK TANZANIA LIMITED.....1st DEFENDANT

EXCO OIL COMPANY LIMITED.....2nd DEFENDANT

PEGUSUS OIL COMPANY LIMITED.....3rd DEFENDANT

JUDGMENT

MRUMA J

The plaintiff is a foreign company incorporated under the laws of Mauritius and it deals with various business worldwide Tanzania inclusive. The plaintiff's claim against Defendants jointly and severally is for release without any condition of goods worth USD 93,115.20 which were allegedly unlawful locked by the 1st Defendant, general damages, damages for loss of income/business and for declaration order that the act of seizing or locking of the goods of the Plaintiff stored in the warehouse rented by the 3rd Defendant is unlawfully.

It is the Plaintiff case that in June 2013, it executed a contract of Distribution and Lien Agreement with the third Defendant's company Pegasus Oil Company Limited for distribution of lubricants, specialities, lubricant additives, chemicals and other goods/products which were to be transported or exported in Tanzania and upon arrival they were to be cleared in the name of the 3rd Defendant. The consignment of goods/or product worth USD 93,115.20 were shipped from Dubai to Dar Es Salaam in December 2013 after the execution of the said agreement.

According to the Plaintiff's the goods were cleared at Dar Es Salaam Port and were authorized by the Tanzania Bureau Standards (TBS) and all necessary ports' charges, services and taxes were paid.

It is further Plaintiff's case that under clause 2.1, 2.2, and 2.3 of her agreement with the 3rd Defendant the goods shipped by the Plaintiff were to be stored in the 3rd Defendant's rented warehouse where in addition to general lien, the Plaintiff would have absolute discretion to poses them in the event the 3rd Defendant defaults.

The plaintiff contends that up to the date she instituted this suit the general lien over the goods had not abated and no payment had been made by the 3rd Defendant her in respect of those goods.

In May, 2014 the Plaintiff informed the 3rd Defendant of her intention to enforce her lien agreement and for the possession of the stocked goods shipped to her. This attempt was, however unsuccessful because the Warehouse was locked by the first Defendant ECO Bank Tanzania Limited denying the Plaintiff access and repossession of the goods.

Upon inquiry the Plaintiff realized that the Managing Director of the 3rd Defendant who is also the Managing Director of the 2nd Defendant had entered into a separate arrangement with the 1st defendant bank whereby the bank financed the procurement and shipment of different assortment of goods in favour of the 2nd Defendant's company.

It is the Plaintiff's further assertion that she negotiated with the 1st Defendant for release of the goods in vain. The 1st Defendant refused and showed intention of disposing of the goods through a public auction. As stated above the plaintiff's claim against the 1st and 2nd Defendants jointly and severally is for the release of the goods allegedly locked by the 1st Defendant and for a declaration that the act of seizing the goods or locking the goods of the Plaintiff stored in the warehouse rented by the 3rd Defendant.

The first Defendant filed her written statement of defence denying the Plaintiff's claims and contending that the Plaintiff didn't duly execute the alleged Distribution and Lien Agreements because the said agreements were witnessed by one Director only and they are not sealed.

It is further contention of the 1st Defendant that in any event she is not bound by the alleged Distribution and Lien Agreements because she is stranger to it.

In paragraph 5 of her Written Statement of Defence, the 1st Defendant states that the 3rd Defendant doesn't own the goods which are in store in the 2nd Defendant's godown located on Plot No.1 Block 47 at Sinza Africana Area Kinondoni Dar Es Salaam. she alleges that the goods

were purchased through a credit facility which she extended to the 2nd Defendant and therefore they belong to the 2nd Defendant.

It is further stated that the goods constitute securities for the repayment of the said credit facility extended to the 2nd Defendant and they are under the Management of the Collateral Management Agent known as ACE GLOBAL DEPOSITORY (T) Ltd who has exclusive possession of the area where the goods are stored. According to the 1st Defendant the goods were delivered into the godown where they are now and were handed over to the Collateral Management Agent in the name of the 2nd Defendant.

It is averred under paragraph 6 (c) of the Written Statement of Defence that due to non performance of the credit facility the first Defendant invoked recovery measures to reposes the goods and repay the loan.

Furthermore it is the 1st Defendant's contention in her statement of defence that she met with the Plaintiff and the 2nd Defendant to discuss among other things ways of disposing the goods to realize the loan owed to her. That the 1st Defendant being a debenture holder over fixed and floating assets of the 2nd Defendant and an assignee of her receivables is also entitled to the benefit of the goods belonging to the 2nd Defendant because the goods alleged to be owned by the Plaintiff were delivered to the Collateral Management Agent in the name of the 2nd Defendant in compliance with the terms and conditions of Credit Facility Letter.

Efforts to save the 2nd and 3rd Defendants by ordinary service proved futile. They were served by substituted service by publication but they didn't enter appearance. This case proceeded ex-parte against them.

At the commencement of the trial (Before my brother **Mwambegele J**, prior to his elevation to the Court of Appeal) two issues were framed for determination. They are:-

1. Who is the rightful owner of the disputed goods locked in the 3rd Defendant's warehouse and;
2. To what reliefs are the parties entitled.

To prove her case issues the Plaintiff called one witness **Mr. Robert Bell**, the Plaintiff's Director who testified as PW1. On her part the 1st Defendant lined two witnesses to disapprove the Plaintiff's case, **Ms. Hope Hamis Liana** Acting Legal Manager and Company Secretary of the 1st Defendant bank who testified as DW1 and **Mr. Joseph Osoro Aden** Regional Credit Support Manager of the Ace Global Depository (T) Limited who gave his testimony as DW2.

In his evidence PW1 testified that way back in June 2013, his company executed a contract of distribution and lien with the third Defendant company, Pegasus Oil Company Limited for distribution of lubricants, specialities, lubricant additives, chemicals and other goods or any part thereof which were transported or exported in Tanzania and upon arrival they were cleared in the name of the 3rd Defendant. He tendered in evidence a copy of Distribution Agreement (Exhibit P1) and Lien Agreement (Exhibit P2) and referred this court to a consignment of aeroshell products

which was shipped in December 2013 as a consignment which is bound by the terms of the two agreements.

It is the evidence of the witness that following the signing of the two agreements the Plaintiff shipped from Dubai in United Arab Emirates to Dar Es Salaam in Tanzania goods worth USD 93, 115.20. According to the shipping documents which were tendered in evidence the goods were authorized by the Tanzania Bureau of Standard and were cleared at Dar Es Salaam Port subject to payment of all necessary taxes and services.

The witness tendered in evidence Commercial (exporter) invoice, Bill of Lading for ocean transport, Packing List and Receipts for Import Permit fees and registration of chemical premises (Exhibit P3).

The witness testified further that the 3rd Defendant failed to perform her part of the Distribution and Lien Agreements (Exhibit P1) as a result of which in May, 2014 the Plaintiff informed the 3rd Defendant her intention to enforce the Lien Agreement and for the possession of the stocked goods. However, this could not take place because the Plaintiff realized that the goods she had shipped to the 3rd Defendant were locked in a warehouse by the first Defendants bank as the Managing Director of the 3rd Defendant who is also the Managing Director of the 2nd Defendant had entered into a separate arrangement with the 1st Defendant under the auspice of the 2nd Defendant company wherein the 1st Defendant financed procurements and shipments of distinct assortments of goods in favour of the 2nd Defendant.

According to this witness the Plaintiff goods are different and of distinctive assortments from those which the first Defendant financed its procurements by the second Defendant. He said that the nature of the

goods under management of the collateral agent of the first Defendant and as pleaded in the Written Statement of Defence are different goods from those of the Plaintiff and the first Defendant was not privy to the lien agreement between the Plaintiff and the third Defendant.

Hope Hamis Liana, the Acting Legal Manager of the 1st Defendant's bank testified as **DW1**. She testified that the first Defendant financed the 2nd Defendant through a credit facility in the form of letters of credit for procuring petroleum products for onward local sale off-takers. She said that the goods which were procured through the 1st Defendant financing formed part of the securities for the repayment of the said credit facility which was between the 1st Defendant and 2nd Defendant. She tendered in evidence credit facility letter which was received as exhibit D1.

The witness testified further that by a charge over Collection Account, the 2nd Defendant charged by way of a continuing security in respect of all of its liabilities to the 1st Defendant all monies standing to the credit of its Collection Account held at the 1st Defendant and undertook to upfront the total value of credit facility within two weeks of the maturity of letters of credit. The 2nd Defendant also charged all its present and future rights, title, benefit and interest in the deposits in the said Collection Account.

It is further evidence of this witness that by a Deed of assignment of receivables the 2nd Defendant assigned to the 1st Defendant and agreed to the 1st Defendant holding, retaining and having a lien over the sales proceeds and receivables due to the 2nd Defendant from existing and future contracts including contract with off-takers for all the sums which the 2nd

Defendant would from time to time be liable to the 2nd Defendant. That by a letter of pledge the 2nd Defendant agreed to the 1st Defendant having a pledge of all goods and other items as would be delivered by the 2nd Defendant into possession of the 1st Defendant or its agent and upon all bills of lading warrants delivery orders and all documents of title and securities in respect of goods that would be deposited with the 1st Defendant or the collateral management agent. It is the evidence of DW1 that these goods and documents of titles and securities were pledged as security for repayment to the 1st Defendant on demand of all outstanding monies and liabilities.

Joseph Ossoro Aden (DW2), Regional Credit Support Manager of Ace Global Depository Tanzania Limited. He testified that simultaneously the 1st and 2nd Defendants appointed her company as a collateral management agent to manage the stocking and sales of petroleum products which were procured through the financing provided by the 1st Defendant.

As stated at the outset of this judgment the only substantive issue is;
Who is the rightful owner of the disputed goods locked in the warehouse?

As stated hereinbefore it is in the evidence of Robert Bell PW1, that the first Defendant financed procurements and shipments of different goods from those of the Plaintiff. He said that the difference was exhibited by its nature and batch numbers the documents which were accessed by the Plaintiff from the first Defendant during the negotiation process for release of the same. The witness tendered in evidence Original Bill of

Lading, Packing list, Commercial Invoices and Authorization of Importation into the Country of Chemicals (which is issued by the Ministry of Health) of the goods in dispute. These documents were received and were admitted in evidence as exhibit P3 without any resistance from the 1st Defendant.

On the other hand the 1st Defendant gave evidence to the effect that the Plaintiff does not won the goods in dispute which are in the 2nd Defendant's Godown located in Sinza Africa Sana area on Plot No. 1 Block 47 Kinondoni District in Dar Es Salaam and that the same belongs to the 2nd Defendant and were purchased through the credit facility extended.

The 2nd Defendant didn't enter appearance in this case despite of the fact that she was dully served. This case therefore proceeded ex-parte against her. She didn't seize opportunity afforded to her by the law of procedure to explain whether she owns the disputed goods or not. This opportunity had been seized by the 1st Defendant.

Section **110(2) of the Evidence Act [Cap 6 R.E. 2002]** is to the effect that whoever desires court to give judgment in his favour on existence of certain facts he has to prove that those facts do exist. The law says:-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

In the present case parties are required to prove ownership of the disputed goods. The plaintiff in a bid to prove ownership of the same produced in evidence shipping documents including the original bill of lading, commercial invoices, packing list and a permit to import

chemicals in the country (Exhibit P3). The original bill of lading (part of exhibit P1) indicates that Multisol Mauritius Limited (the Plaintiff herein) did on 10.10.2013 shipped on board a 20' container. That container had 10 pallets of Aero shell fluids and greases with gross weight of 7693.00 Kgs. That container was cleared at Dar Es Salaam Port by MS. Sun Fresh Ltd who paid wharfage and other port charges on behalf of the 3rd Defendant Pegasus Oil (T) Limited who was named as the consignee of the goods. These goods i.e. aero shell products are the same as those mentioned in the Contract of Distribution (Exhibit P1) and Lien Agreements (Exhibit P2) which were entered between the Plaintiff and 3rd Defendant. The fact that the Plaintiff has the original bill of lading which according to **Halsbury's Laws of England 4th Edition re-issue Vol. 43 (2) paragraph 1532** is a document signed by the ship owner or by the master or other agent of the ship in a particular ship to acknowledge receipts of goods and purports to set out the terms in which the goods have been delivered to and received by the ship, signifies the fact that the plaintiff is one who loaded the goods in Dubai. By delivering the goods to the ship owner or its master, the plaintiff was in a way proving that the goods were his. **Atiya in the Law of Contract page 186** states that an agreement for the carriage of goods by sea is invariably recorded in the bill of lading, it goes without saying that a bill of lading (Exhibit P3), tendered by the Plaintiff constitutes an agreement for carriage of goods entered between the Plaintiff (who was the owner of the goods) and the ship owner for carriage of aero shell products from Dubai to

Dar Es Salaam. These are same goods which were in the Distribution and Lien agreement between the Plaintiff and the 3rd Defendant. This puts wait to the Plaintiff's claims that she is the lawful owner of the goods in dispute.

On the other hand the 1st Defendant didn't lead any evidence to prove that the goods were owned by the 2nd Defendant as she alleged in her written statement of defence. DW1 simply stated that the goods which are stored in a warehouse located on Plot No. 1 Block 47 at Sinza Africa Sana area belongs to the Defendant and they were procured through a credit facility extended to her by the 1st Defendant's bank.

Thus, on the available evidence I find and hold that the Plaintiff has been able to prove her ownership over the goods in dispute on the balance of probability as required by the law.

The second issue is about the reliefs. The Plaintiff is praying for orders for the release of the goods worthy USD 93,115.20. I have found as a matter of fact that on the evidence adduced the disputed goods belongs to the Plaintiff. The allegation that the goods are locked in the 3rd Defendant's warehouse at the 1st Defendant's instance has not been disputed. It follows therefore that the owner is entitled to have her goods back. Accordingly, I order the 1st and 2nd Defendants to release the goods worth USD 93,115.20 to the Plaintiff or compensate her for the value of the goods as prayed in prayer (a) of the plaintiff's claim.

The Plaintiff is also requesting this court to declare that the act of the 1st Defendant locking the goods stored in the 3rd Defendant's warehouse is unlawful. I have found as a matter of fact that the goods belong to the

Plaintiff. The act of the 1st Defendant to lock them in without the plaintiff's consent was wrongful and has entitled the Plaintiff to a claim in detinue which is a common law action to recover personal property wrongfully taken by another. Accordingly I grant prayer (b) and declare that the act of the 1st Defendant's act of locking goods stored in the warehouse rented by the 3rd Defendant was unlawful.

Further to that the Plaintiff is claiming for general damages for loss of business/income. The Plaintiff claims that by the act of the 1st Defendant she has suffered loss as she was prevented from operating her business thereby losing income and suffering loss and damages. She is claiming general damages for detinue from the date of the warehouse closure to the date of release. The general rule is that once goods have been taken permanently from its owner, the Judgment is usually for the return of the goods detained or their value together with damages for its detention.

The measure of damages under this head is usually market value of the goods (if they are not returned) plus the consequential loss. In the case of **Rasental Versus Alderton & Sons Ltd [1946] K.B. 374** it was held that:-

"In an action of detinue, the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not at the date the defendant refused to return the goods....."

The consequential loss to the detention of the goods, additional to the value of goods may be the loss of earning that a plaintiff suffers as a result

of detention of its income bearing property or goods. In *Kibimba Rice Co. Ltd Versus Umar Salim* SCCA No. 7 of 1988 Uganda court under Platt JSC held that:-

"It is not true to say that daily income can never be proved. Accounts of receipts against outgoings can be proved to arrive at a net figure. If no accounts were kept then a claim for general damages should be considered"

Again in Ugandan case of **Uganda Commercial Bank Versus Matiya Waswaa Court of Appeal (Supreme Court) Civil Appeal No. 6 of 1982** (unreported), the Court held that:-

".....the Respondent is entitled to an award of general damages as consequence of the detention of his bus since he cannot prove his actual loss earnings"

In that case the Appellant had seized the Respondent's bus and detained it unlawfully. It was noted on appeal that the respondent had failed to prove the loss of earnings that he had suffered. The trial court awarded him general damages for loss of earnings and on appeal the court decided that the respondent could rightly be compensated by an award of general damages in respect of lost earnings though he had failed to prove specifically the loss of earnings.

On the evidence adduced in this case, PW1 gave evidence to the effect that the Plaintiff suffered loss of income and/or business as a result of unlawfully locking of her goods in the 3rd Defendant's warehouse. He didn't not give any detail of the loss suffered, however on the totality of the evidence adduced there can be no doubt that the

goods involved were business goods and they were meant to be traded. Like in Uganda Commercial bank's case, the Plaintiff is entitled to general damages as consequence of the detention of her goods despite the fact that she didn't prove the actual loss of business.

In assessing the amount payable under this head I take into consideration the fact that the Plaintiff couldn't take her goods to the market at the time she had wanted to. The market value of the goods may have changed either positively or negatively but I shall not attempt to speculate. Doing the best I can in the circumstances, I am of the view that an award of general damages of USD 20,000.00 for value of the goods held by the 1st Defendant would be sufficient recompense for the loss of business and/or income for the period of locking of her goods.

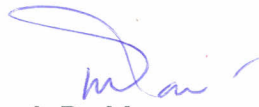
In summary therefore Judgment is hereby entered in favour of the Plaintiff and against the Defendants jointly and severally as follows:-

1. That the act of the 1st Defendant locking the Plaintiff's goods stored in the 3rd Defendant warehouse was and still is unlawfully;
2. That the 1st Defendant, Eco Bank Tanzania Limited is hereby ordered to release the Plaintiff goods worth USD 93,115. 20 or compensate her for the value of the said goods without any condition whatsoever;
3. The 1st and 2nd Defendants are jointly and severally ordered to pay the Plaintiff USD 20,000.00 being general damages for the loss of business and/or income resulting from the unlawfully

locking of her goods in the warehouse rented by the 3rd Defendant.

4. That the Distribution and Lien Agreement entered between the Plaintiff and 3rd Defendant are binding as between the parties. However, a prayer that this court declares that the 3rd Defendant owes nothing to the plaintiff is rejected as being vague. Similarly this court lacks material basis to order payment of rent arrears and related costs by the 3rd Defendant in respect of the warehouse under which the goods are stored.
5. The principal sum of USD 93,115.20 shall attract interest at the rate of 3% per annum from the date of filing the suit to the date of judgment and further court's interest of 1% per annum shall be chargeable on the decretal sum from the date of judgment till payment in full. The plaintiff is awarded costs of the suit.

Order accordingly,


A.R. Mruma,
Judge.



Dated at Dar Es Salaam this 12th day of February, 2018.