

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 93 OF 2017

21ST CENTURY FOOD & PACKAGING LTD.....PLAINTIFF

VRS

G.T.S LOGISTICS.....DEFENDANT

JUDGMENT

B.K.PHILLIP, J

This case arises from a contract between the plaintiff and the defendant in which, defendant leased its silos to the plaintiff for storage of the plaintiff's wheat. It is the plaintiff's case that between 22nd July, 2016 and 26 July 2016, the plaintiff delivered 10,061.16 Metric Tons of Wheat in the defendant's silos for safe custody as per the agreement between them. The plaintiff alleged that during the period between 19th August, 2016 and 22nd September, 2016, when it took its wheat from the silos it weighed 9,801.58 Metric tons ,hence there was a loss of 259.58 Metric Tons, worth USD 60,611.93.The plaintiff further alleged that it reported the aforesaid loss of wheat to Collateral Management International (Pty) Limited (CMI) , a company consulted by the defendant to supervise the operation of wheat storage at the defendant's silos by checking each and every delivery. Moreover, the plaintiff alleged that it paid various charges

and taxes in respect of the aforesaid lost stock of wheat. In this case the plaintiff prays for judgment and decree against the defendant as follows;

- i. The defendant be ordered to pay the plaintiff a total of USD 60,611.93 being the payment for 259.58 Metric Tons.
- ii. The payment of USD 7,334.04 as duties and taxes at 12.1% by defendant.
- iii. The defendant be ordered to pay handling charges USD 7,040.25 at rate of 10%.
- iv. Payment of USD 1,826.34 as storage charges at 7.4 per Metric ton.
- v. Payment of general damages to be assessed by the court.
- vi. Costs of this suit be provided for.
- vii. Any other relief the honourable court shall deem fit and just to grant.

In its defence, the defendant refute all of the plaintiff's claims and alleged that the plaintiff did hire the defendant's silos for storage of its wheat, but their agreement did not place any responsibility to the defendant on the safe custody of the wheat or taking care of any loss of the wheat. The defendant alleged further that the defendant's silos were just used to keep the plaintiff's wheat. The plaintiff himself had full control of the movement of the stocks of wheat kept the silos. Furthermore, the defendant averred that the Collateral Management International (Pty) Limited ("CMI") was the plaintiff's agent duly appointed to supervise the plaintiff's wheat.

The following issues were framed for determination by the court;

- i) Whether or not the plaintiff hired the defendant's facilities for storage.
- ii) If the answer to the 1st issue is in the affirmative , whether or not the wheat stored therein were in the control of the defendant.
- iii) Whether or not the defendant was responsible for storing and safe keeping of the plaintiff's wheat.
- iv) Whether or not there was any shortage of the plaintiff's wheat stored in the defendant's storage facilities.
- v) Whether or not the defendant is responsible for the shortage (if any) of the plaintiff's wheat.
- vi) Whether or not the defendant is liable or responsible for taxes ,handling and storage charges levied on the shortage of wheat.
- vii) What reliefs are the parties entitled to.

At the hearing of this case, the learned advocates Dr. Masumbuko Lamwai and Catherine Kisasa appeared for the plaintiff while the learned advocates Issa Chundo and Twarah Yusufu appeared for the defendant.

The Plaintiff had five witnesses; namely, Govin Pathod (PW1), Ameninderjit Singh (PW2), Boaz Kitaja (PW3), Rashid Shaib Muhammad (PW4) and Faridi Kitumbi(PW5). On the other hand, the defendant brought in court three witnesses , namely Roshanali Mohamed Hassan (DW1), Patrick Karengi (DW2) and Rashid Aggarwal(DW3).

Starting with the first issue , that is, **Whether or not the plaintiff hired the defendant's facilities for storage**, the testimonies of all of the defendant's witnesses (DW1, DW2, and DW3) are to the effect that the plaintiff hired the defendant's storage facilities for storage of its wheat, likewise the closing submissions of the advocates from both sides indicate that there was a lease agreement between the plaintiff and the defendant where by the plaintiff hired the defendant's silos for storage of its wheat. Therefore this issue is answered in the affirmative.

As regards the second issue, that is, **whether or not the wheat stored therein were in the control of the defendant**, according to the testimony of PW1, the plaintiff's wheat stored in the defendant's silos was released subject to the plaintiff's demand upon presentation of release order from the Bank by the plaintiff. PW1 testified further that the plaintiff had contracted Collateral Management International (Pty) Limited ("CMI") to manage the operation of the wheat storage in the defendant's silos by monitoring each and every delivery, and that CMI was only involved to ensure that the amount of wheat released to the plaintiff was as per the discharge order cleared by the respective banks. PW2's testimony was similar to the testimony of PW1, however, he gave detailed explanations of how the silos are operated, that is how wheat /grains are received in the silos and released. In short his testimony was to the effect that the whole process of receiving and taking wheat out of the silos is automated since there are systems set for the storage processes. PW2 tendered a sketch map showing how the storage system works (Exhibit D 10).

However, during cross examination PW1 told this court that CMI was appointed by the Bank to check the wheat taken in and out of the silos, so CMI was employed to check the quantity of wheat and the operations. Furthermore, PW1, told this court that the defendant and CMI were involved in opening and closing the silos, and that both CMI and the defendant kept the documents signed by the driver showing wheat taken out of the silos. According to PW2 the system for storage of wheat in the silos is under the control of the defendant and CMI has an active role at intake point of the wheat and at the outgoing point only. PW3, who is the country manager of CMI testified that one among his duties is to ensure proper input and output of wheat together with the defendant. While responding to the question during cross examination, PW3 told this court that CMI was involved in cutting the seal and closing the same. PW5, who is a driver working at the plaintiff's company, testified that it is the defendant's employees who open the gate to allow the vehicles to get into the silos upon inspecting the required documents and after loading the vehicles the defendant's employees and CMI officials are the ones responsible for issuing the discharge order for the vehicle to get out of the premises. On other side, the testimonies of the defendant's witnesses on the issue of control is similar to the testimonies of the plaintiff's witnesses. All of the defendant witnesses (DW1, DW2 and DW3) testified that CMI was the plaintiff's agent whose duty was to supervise the quantity of wheat take in and out of the silos. DW3 testified that CMI was responsible for closing and opening the silos. Furthermore, DW1 who is the defendant's assistant manager of the Silos Depot testified that the

defendant's responsibility was the general supervision of the silos depot including other silos which were not used by the plaintiff.

Having analyzed the testimonies of the witnesses from both sides, in my considered view the evidences adduced by all witnesses as summarized herein above, reveal that the control of the plaintiff's wheat stored in the defendant's silos was not under the entire control of one part. To my understanding the control of the wheat entailed the taking in and out of the same, now the evidences adduced show clearly that CMI who was the agent of Plaintiff (21st Century) was involved in the process of taking wheat in and out of the silos. Responding to questions during cross examination, PW3 (the country manager of CMI) told this court that CMI was being paid by the plaintiff and was fully involved in supervision, and checking the quantity of wheat taken in and out of silos as well as in cutting the seal at the silos and closing the same. I decline to agree with the views held by Dr. Lamwai as expressed in his closing submissions that this issue should be answered in the affirmative. Mr. Lamwai based his above said position on the testimonies made by the witnesses in their witness statements, for instance the testimony of Boaz Kitaja (PW3), who in paragraph 7 of his witness statement stated that *"...all gates releasing the wheat are under the control of the defendant"*, testimony of DW2, in paragraph 2 of his witness statement in which he stated that his duties were *"... to supervise and control all of the defendant's storage facilities and to make sure that all undertaking go smoothly"*. With due respect to Dr. Lamwai, it seems he overlooked to take into consideration the response

made by PW3 during cross examination who made clarifications on the role and duty of CMI in the whole process of taking wheat in the silos. PW3 said that CMI was involved in cutting the seal (opening) and closing it, thus CMI participated fully during the taking in and out of the wheat. As regards the above quoted testimony of DW2 in his witness statement, in my opinion the statement talks about supervision and control of defendant's storage facilities, not the wheat stored in the silos hired by the plaintiff. To me, DW2's testimony makes sense bearing in mind that the evidences adduced reveal that the silos hired by the defendant were not the only one in the premises.

On the same reasons, I am also not in agreement with the closing submissions made by the learned advocate Chundo, who had the view that the control of wheat stored in the defendant's silos were under the control of the defendant. My finding is that both parties were involved in the control of wheat stored in the defendant's silos.

Coming to the third issue, that is, **Whether or not the defendant was responsible for storing and safe keeping of the plaintiff's wheat**, the testimonies of the witnesses from both sides are to the effect that there was an agreement between the plaintiff and defendant, in which the defendant hired the defendant's storage facilities. Normally, the agreement stipulates the terms and conditions which includes the responsibilities of the parties in the agreement. However, in this case the agreement was an oral agreement and there were no clear terms on the responsibilities of the parties. In his witness statement DW1 testified

that the plaintiff and the defendant entered into lease agreement in respect of the defendant's storage facilities /depot whereby the plaintiff leased three silos, which are silos numbers 1,2 and 3 at the wheat storage depot. A similar testimony is made by PW2 in his witness statement. As I have pointed out herein above, the agreement for hiring the defendant's aforesaid storage facilities was an oral agreement as none of the witnesses tendered a written agreement. DW3 in his witness statement stated that *".... After conclusion of the oral agreement I instructed our silos depot manager one Kumar Ran and his assistant one Roshanal Mahammed Hassan Daudi to clean and arrange the handover of silos number 1,2,and 3 on the basis of lease to the plaintiff for the purpose of storing her wheat.."* Under the circumstances , the terms of the lease agreement have to be deduced from the evidence adduced by the witnesses on what was going on at the silos depot.

At this juncture, let me make it clear that in my understanding, the issue of *"safe keeping of the wheat"* has two aspects. First, *protecting the wheat from being stolen or tempered with in anyway* and secondly, *protecting the wheat from being destroyed by fire, flood and the like*. It has to be noted that for the purpose of the controversy between the parties in this case, *"safe keeping of the wheat"* refers to the first aspect stated herein above.

Looking at the evidence adduced as analyzed in issue No.(ii) herein above, in my considered view, as far as the second aspect of "safe keeping of the wheat" as elaborated herein above is concerned, the defendant was responsible in the sense that it had to protect the wheat stored in the silos from various calamities such as fire and the like as

well as providing necessary facilities, since it was responsible for the general management of the silos depot as the owner. This position is supported by the testimonies of the witnesses from both sides. DW3 at paragraph 9 of his witness statement testified that *"The defendant operations in the storage facility remain to be general activities of the whole depot and supervise the remaining Silos which are not leased and to make sure any lessee who leased her silos are facilitated with some equipment and other facilitation machines include weighbridge and make sure one lessee don't intervene another in situation of disposing and discharging wheat in the Silos facilities"*. While PW 3 (Boaz Kitaja) at paragraph 3 of his witness statement testified as follows *"... one among my duties is to ensure proper input and output of wheat together with the defendant. I also manage and ensure the amount of wheat discharged to the plaintiff is per the release order issued by the bank in favor of the Plaintiff as presented at the defendant's silos during intake of wheat..."* and while responding to questions during cross examination he told this court that CMI was involved in cutting the seal and closing it. Thus, looking at the evidence adduced on the way the wheat was handled at the silos depot, the responsibility of "safe keeping of the wheat" in respect of the first aspect stated herein above that is protecting the wheat from being stolen or tempered with, that responsibility was being done jointly by both the defendant and the plaintiff.

In his closing submission in respect of this issue, Dr Lamwai relied on his submission and analysis of the evidence in issue number (ii). Moreover, he submitted that the DW1 and DW3 were very unreliable witnesses and

invited this court not to admit the witness statement of DW3 on the ground that during cross examination DW3 admitted that he did not take oath before the commissioner for oath who attested his witness statement as it is required under the provisions of section 8 of the Notaries Public and Commissioner for Oaths Act Cap 12 R.E 2002. Dr Lamwai proceed to make a prayer that the witness statement of DW3 should be expunged from the courts record. With due respect to Dr. Lamwai, his prayer for expunging the witness statement of DW3 cannot be considered at this stage since the hearing of the case is over and this court cannot issue any order pertaining to the admissibility of the witness statement at this stage, doing so will be contravening the well lied down procedures in the hearing of cases including the right of the other party to be heard on that issue. If Dr. Lamwai wanted to have the aforesaid witnesses statement expunged, he was supposed to make that prayer during the hearing and the court would have made a ruling on that prayer after giving the other side opportunity to respond accordingly. However, I think it is also worth mentioning here that in my assessments DW1 and DW3 are credible witnesses.

From the foregoing I decline to agree with Dr. Lamwai that the defendant was responsible for storing and safe keeping of the wheat on the reasons explained herein above, likewise I do not agree with the closing submissions made by Mr. Chundo that the plaintiff was responsible for storing and the safe keeping of the wheat. Mr Chundo's arguments that it is the plaintiff's and CMI officers only who were responsible for the monitoring the taking in and out of the wheat at the silos is not supported

by the testimonies of any witness including the defence witness. It is the finding of this court that the answer to the third issue is that both the defendant and the plaintiff were responsible for storing and safe keeping of the wheat.

Now, the fourth issue, that is **Whether or not there was any shortage of the plaintiff's wheat stored in the defendant's storage facilities**, PW1 and PW2 testified to the effect that plaintiff imported and stored 10,061.16 metric tons of wheat in the defendant's silos and when the plaintiff took the wheat from the defendant's silos during the period between 19th August 2016 and 22nd September 2016, it weighed 9,801.58 Metric Tons, hence there was shortage of 259.58 Metric Tons of wheat worth USD 60,611.93. The plaintiff also tendered in court Exhibits P1 collectively (Bill of lading for importation of wheat and commercial invoice dated 12 July 2016), P2 collectively (various email communication between the plaintiff's and the defendant's officers), P3 (Document titled " METL wheat intake 22.7.16) and P4 (a document titled " METL Wheat Transfer GTS to Shikelang & NMC). DW2 in his testimony confirmed that there were problems at the silos depot on the way the wheat were being taken out of the silos and wrote an email to the plaintiff's officer. This testimony is in line with the contents of the email communications in Exhibit P2 collectively. Also, during cross examination DW2 told this court that defendant's and plaintiff's officers went to the police station to report on the incidence pertaining to the vehicle that was compounded at the silos for taking out the wheat contrary to the acceptable procedure, this testimony is in line with the testimony of DW1 who testified that on 9th

September 2016, after being informed about the unusual removal of wheat he reported the matter to DW2, Mr. Patrick Karege, the defendant's fleet manager.

In his closing submission Dr. Lamwai invited this court to hold that there was shortage of the plaintiff's wheat stored in the defendant's silos as testified by PW1 and PW2, whose testimonies are collaborated by exhibits P1, P2,P3 and P4. Relying on the provisions of Order VIII Rule 5 of the Civil procedure Code Cap 33, R.E 2002, Dr Lamwai, argued that the defendant has neither specifically nor by implication denied the plaintiff's allegation that there were 10,061.16 Metric tons stored in the defendant's silos. Furthermore Dr. Lamwai argued that the defendant's witnesses opted to remain silent as far as the issue of the alleged shortage is concerned, thus, he invited this court to hold that there were 10,061.16 Metric Tons stored at the defendant's silos and that there was shortage of 259.58 Metric .

On the other hand, in his closing submission Mr. Chundo did not dispute Exhibit P1 (the Bill of Lading), his concern was that the plaintiff's witnesses failed to tender in court any document showing the amount of wheat alleged to have been stored in the defendant's silos (10,061.16 Metric Tons) so as to prove the quantity of the loss of wheat alleged by the plaintiff in the plaint. Mr. Chundo further submitted that even in the email correspondences between the plaintiff's and defendant's officers (Exhibit P2 collectively) no one mentioned the quantity of the wheat alleged to have been lost/stolen. Furthermore, Mr. Chundo submitted that even PW3

(the officer from CMI) failed to produce any document to prove the alleged loss and evidence shows that PW3 was not aware about the alleged loss as he was informed about the same by the plaintiff's officers. To cement his arguments Mr Chundo referred this court to the provisions of section 110(1) of the Evidence Act, which provide that "*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*". He contended that the plaintiff has failed to prove that 10,061.16 Metric Tons of wheat were stored in the defendant's silos, as well as failed to prove that there was a loss of 259.58 Metric tons of wheat.

Upon looking at the testimonies of the witnesses from both side and exhibit P2 collectively, (the email correspondences) I am of a settled view that there was a serious suspicion of shortage of the plaintiff's wheat stored in the defendant's silos. As I have demonstrated herein above, the witnesses from both side talk of unusual removal of the wheat, even Mr. Chundo in his closing submission does not dispute the fact that there was a such a serious suspicion on loss of the plaintiff's wheat, what he disputed is the quantity of the alleged loss and the allegation that the defendant is responsible for the loss.

I also agree with Mr. Lamwai that the defendant's witnesses have not testified on the quantity of wheat alleged to have been stored in the defendant's silos. However, according to the proviso in Order VIII Rule 5 of the CPC, I am of the view that the circumstances of this case, required the plaintiff to prove the alleged amount of wheat received and stored in

the defendant's silos and the total amount of wheat taken out the silos. As correctly submitted by Mr. Chundo, the plaintiff have not tendered any documentary evidence to prove the total amount of wheat received and taken out of the silos.

I am alive that a proof of an alleged fact can be by oral evidence or documentary evidence, however it depends on circumstances of the case and the issue in hand, in this particular case whereby the evidence shows that there were recording and monitoring of the movement of wheat from the silos, it is imperative that documentary evidence on the amount stored and removed had to be produced in court. I have perused Exhibit P3 (Document titled "METL wheat intake 22.7.16) and P4 (a document titled "METL Wheat Transfer GTS to Shikelang & NMC) which the plaintiff seems to rely upon as proof of the wheat taken in and out of the silos, with due respect to Dr Lamwai , Exhibit P3 and P4 are not worthy relying on as their authenticity is questionable since they do not show the one who prepared them, but most importantly, they not bear any stamp or signature of any of the parties, in particular the defendant, to signify that the amount of wheat indicated therein were really stored in the defendant's silos, despite the fact that the whole of the evidence adduced by both parties show that there were documents for each vehicle taking wheat into the silos or taking wheat from the silos. For the reasons I have just explained herein above , I will not accord any weight to Exhibit P3 and P4. Thus, the answer to this issue is that there is a suspicion on shortage of the plaintiff's wheat stored in the defendant's silos whose quantity was not established.

The next issue is ; **Whether or not the defendant is responsible for the shortage (if any) of the plaintiff's wheat,** In his closing submission Dr. Lamwai invited this court to hold that the defendant is responsible for the alleged shortage of wheat on the ground that the plaintiff's witnesses asserted that they did not take all of the amount of wheat they had stored in the defendant's silos and that since the issue of security of the silos was entirely in the hands of the defendant, who was supposed to know how the wheat was taken out of the silos. Mr. Chundo's closing submission was to the effect that the plaintiff failed to prove there was shortage of the wheat stored in the defendant's silos. To cement his arguments Mr. Chundo referred this court to section 110 (1) of the Law of Evidence Act, Cap 6 R.E 2002 which provides that:

"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".

And the case of the **Attorney General and 2 others Vrs Eligi Edward Massawe and 104 others , Civil Case No.394 of 1998 CA** (unreported), in which the Court held that according to the provisions of sections 110 and 111 of the Tanzania Evidence Act , Cap 6, the plaintiff has a burden of proof of what he alleges in the plaint.

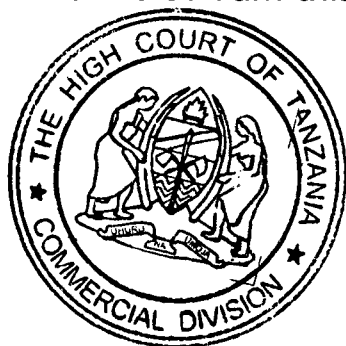
I am inclined to agree with Mr. Chundo that this issue has to be answered in a negative that is the defendant is not responsible for any shortage of the wheat that were stored in the defendant's silos since, I have already

held that the plaintiff failed to establish that there was a shortage of wheat stored in the defendant's wheat and to what extent.

Having made the above determination in respect of issue No. (iv) and (v), it goes without saying that issue No. (vi) that is, **Whether or not the defendant is liable or responsible for taxes, handling and storage charges levied on the shortage of wheat**, becomes redundant as it is dependent on the affirmative findings of issues No. (iv) and (v).

From the foregoing, it is the findings of this court that the plaintiff has failed to prove its case to the standard required by the law. This case is hereby dismissed with costs.

Dated at Dar es Salaam this 7th day of February 2020.




B.K. PHILLIP

JUDGE