IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 80 OF 2019

(Arising from Commercial Case No. 86 of 2019)

BETWEEN

KAHAMA OIL MILLS LIMITED.....1st APPLICANT

MEDITERANIAN TRADE LINK LIMITED.....2nd APPLICANT

AND

I-MESSINA (T) LIMITED.....RESPONDENT

Last Order: 26th March, 2019

Date of Ruling: 22nd April 2020

RULING

FIKIRINI, J.

This application by Kahama Oil Mills Limited and Mediterranean Trade Link Limited, hereinafter referred as 1st and 2nd applicants, was brought before this honourable Court, under certificate of urgency in terms of section 68 (e) and section 95 of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC) against the respondent, I-Messina Limited, seeking for three declaratory orders. **First**, that the applicants be allowed to deposit the sum of US$ 10,760.0 into Court, as the admitted demurrage charge from the 1st applicant to the respondent, pending the hearing and final determination of the main suit. **Second**, that the respondent

accepts the delivery of 12 containers lying at Tanzania Railway Corporation yard (TRC). And **third**, cost of the application.

The application by way of chamber summons is supported by affidavits of Muhoja Nkwabi, and Julius Joseph Mwaimu. At the hearing the applicants were represented by Dr. Masumbuko Lamwai assisted by Ms. Mary Lamwai while the respondent who filed counter affidavit deponed by Julius Joseph Mwaimu, enjoyed the legal services of Mr. Laurian Magaka.

The background to this application rests on the Commercial Case No. 86 of 2019. The applicants and the respondent had a contractual agreement which obliged the applicants to return 12 containers to the respondent as agreed. The obligation was not fulfilled as the applicants delayed their return. The applicants stated to have informed the respondent as to why they were late to return the containers 14 days after the grace period. They informed the respondent that some of containers were of abnormal size and had to be transported by the Tanzania Railway Corporation which they had no control over its transportation logistics , and also that after the dispatch of the containers an accident occurred which delayed timely transportation of the containers.

Despite the explanation the respondent rejected receiving back the empty containers and claimed for demurrage charges for the days after 14 days grace period, hence this ruling.

It was the applicants' submission and prayer that, the applicants be at liberty to deposit USD 10,760.0 into Court as demurrage charges from the 1st applicant and the respondent be ordered to take the 12 containers lying at the TRC yard at Ilala Dar Es Salaam, while the main case is still in progress.

Expounding on the applicants' stance, it was Ms. Lamwai's submission that, there was no dispute at all that the applicants and the respondent entered into agreement on 30th January, 201, as seen in annexure A1, regarding shipping business. Amongst the terms of the agreement was that the applicants will have 14 days free of demurrage charges and thereafter increased charges will be imposed. Demurrage charges were imposed so as to compel quick return of the containers. As indicated in paragraph 4 of the 1st applicant's affidavit that the containers could not be transported on Tanzania roads, the only solution was for the containers to be transported by railway. 9 containers which could not be transported by road were handed to the TRC on 8th February, 2019, as per the payment receipt issued by the TRC, annexed as A2 collectively. Therefore, from the moment the containers were handed to TRC, the applicants had no control.

It was also averred that, the 9 containers which were dispatched on 19th February, 2019, on their way to Kahama were involved in an accident. This caused more delay in the containers reaching their destination. The said containers were returned on 8th March, 2019, which was 30 days after they were handed to TRC.

The 2nd applicant gave notice of return of the containers to the respondent who raised an invoice of USD. 10,760.0, as reflected in annexure A3 to the affidavit. It was as well the applicants' submission that a waiver was requested on the demurrage charges due to delay caused by the accident, vide a letter, which was never replied to. The 2nd applicant made follow up to the respondent's office, as averred in paragraph 11, where he was advised orally to write the Messina Shipping line in Mombasa and to its headquarters requesting for waiver, of which the 2nd applicant complied as per annexture A5 to the affidavit.

Submitting on the second prayer, Ms. Lamwai submitted that, the applicants were requesting for the respondent to take delivery of the 12 containers and that the applicants were ready to deposit USD 10,760.0. Instead of leaving the containers at the TRC which would lead to increases in damages and demurrage charges pending the hearing of the main suit, she stressed.

Opposing the submission, Mr. Magaka submitted that the application has not stated sufficient ground to provide for the orders sought. Under paragraph 2 of the applicants' affidavit, the respondent acknowledged releasing the containers to the 2nd applicant on behalf of the 1st applicant, as per terms of the agreement as shown in A1 to the applicants' affidavit. He further submitted that paragraph 5 of the counter affidavit stipulated that the release of the containers was subject to the terms of the agreement. This include the terms that failure to return the containers

before 10th February, 2019 the respondent will be entitled not to accept the containers at the depot until the full demurrages charges are paid. The applicants under paragraph 6 are contractually obliged to pay all demurrages that accrued as a result of the delay in returning the empty containers, argued Mr. Magaka.

Calculating the accrued demurrage charges, he submitted that the applicants under paragraph 16 have failed to pay the demurrage charges counting from the 20th August, 2019. The amount has risen to USD 130,920.0 as per annexure 1-Messina-5. According to Mr. Magaka, return of the containers and payment of demurrage charges were the obligations which should be done simultaneously. Neither the applicants nor their counsel deny their contractual obligation of paying demurrage charges and return of containers, but instead of doing it, they relied on accident without producing evidence to prove the claimed accident.

Finalizing his submission, Mr. Magaka submitted that the applicants under paragraph 14 of their affidavit admitted to the amount of USD 15,910.0 without stating the basis of how the liability arose to that much amount. This amount was different from the one reflected in chamber summons that of USD 10,760.0.

He concluded his submission by submitting that the application has no merit and prayed for it to be dismissed.

In rejoinder Ms. Lamwai submitted admitting that under paragraph 5 of the affidavit parties agreed on the terms of the contract, however the terms did not take

into consideration "*force majeure.*" Responding to the payment of demurrage charges as averred under paragraph 6 of the affidavit, she submitted that the respondent was the ones dilly dallying and the respondent failed to respond to the applicant's request on the existence of "*force majeure*". Otherwise, the applicants did not decline paying the demurrage charges but contested the daily accrual of demurrage charges caused by the respondent unjustifiable refusal to take back the containers. She urged the Court not to allow the respondent to benefit from their inequitable conduct.

Lastly, she recapped the applicants' request to deposit USD. 10,760.0, the amount reflected in the invoice raised by the respondent and as reflected in annexure A3. Continuing leaving the containers where are, would lead to accrual demurrages and therefore prayed the applicants be left to deposit what they wish to and if there is more that will be determined in the main suit.

Thorough and careful examination of the chamber summons, relief sought, affidavit in support and against, and the oral submissions by the counsels on behalf of their respective parties, in determining the merits or demerits of this application, for its consideration, the Court will take into account two issues:

One, whether the deposit of USD 10.760.0 into the Court as admitted demurrage charges, pending the hearing of the main suit will cause injustice to the respondent.

Two, whether the acceptance of 12 containers will have any adverse effect on the respondent.

On the first issue on whether the deposit of USD 10.760.0 into the Court as admitted demurrage charges pending the hearing of the main suit will cause injustice to the other party. The answer is no because the issue of whether the respondent deserves demurrage charges is not disputed. Equally the fact that an invoice amounting to USD. 10, 760.0 was raised as per annexture A3, is not disputed, despite the fact the applicants under paragraph 14 of the affidavit deponed indicated to be ready to deposit USD 15,910.0. but there is no evidence on how the figure was arrived at and no supporting evidence was annexed to that effect, while annexture A3, has been annexed as supporting evidence in respect of USD. 10,760.0. From the narrative, I do not see any reasonable ground to decline the applicants' application that they be allowed to deposit the uncontested amount into Court's account pending determination of the Commercial Case No. 86 of 2019. Allowing the applicants to do this, does not mean the contested demurrage charges has been resolved once and for all. During the hearing the respondent will have an opportunity to prove its other unpaid demurrage charges claimed as well as the counter claim raised against the applicants. So the right to be heard of the respondent will still be available and exercisable. The arrangement does not indicate to me that there will be any injustice caused to respondent.

The second issue on whether acceptance of 12 containers will cause the respondent to suffer irreparable loss, the answer is, in this instance there is no loss which cannot be compensated in monetary terms. As indicated in the applicants' affidavit and submission, by Ms. Lamwai, and not disputed by the respondent, that there was contractual obligation, requiring the applicants to return the containers to the respondent as exhibited on annexure A-1. While it is not contested that under clause 3 of the said agreement entered on 30th January 2019, it strictly prohibited receiving of the containers until the payment of demurrage charges, but sound reason does not stop logic and common sense to be applied. Continuing leaving the containers at the TRC yard is not sensible at all due to the fact that damages/destruction will undoubtedly continue to occur to those containers. The outcome of which will neither be beneficial to respondent who own the containers nor the applicants who delayed returning them before end of the grace period. Also taking into account that those containers are not exhibits, such that, their acceptance by the respondent would interfere with any investigation, as there was none ongoing, logical act is for the respondent to accept return of the containers.

Furthermore, the submission that there was "*force majeure*" factor which is alleged by the applicants to have led to the delay in returning the containers, even though no evidence was furnished in support, as pointed out by Mr. Magaka, but the Court has on the other hand not completely disregarded the applicants' submission that

the respondent was the one dilly dallying receiving the containers after they had failed to respond to the applicants request for waiver, on explanation that there existed "*force majeure*" factor. Mr. Magaka has not controverted that assertion.

Considering all the above, it nonetheless remains as truth of the matter and before the eyes of law, that to continue leaving the containers at the TRC's yard would be disadvantages to the respondent compared to the applicants. The 12 containers are the respondent's tools of work, leaving them wasted while there is an opportunity to recover the warranted claimed expenses is in my opinion not a sound decision. I would thus lean towards ordering the respondent to receive the returned containers lying at the TRC yards. The claim for the demurrages can be assessed even after the containers have been returned and accepted by the respondent. The issue of accrued storage charges would definitely be sorted out during the hearing of the main suit.

For the interest of justice and since the respondent will not suffer any irreparable loss which cannot be recovered in monetary terms, I find the application that they should accept the containers is worth granting, and consequently proceed to do so.

The second issue is answered in affirmative.

In the light of the above, I, hereby proceed to grant both reliefs sought with no order as to costs. It is so ordered.

P.S FIKIRINI

JUDGE

22nd MARCH 2020