

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL COURT)

AT DAR ES SALAAM

**CONSOLIDATED COMMERCIAL CASES NOS. 124 AND 125 OF 2017
AND 41 OF 2019**

MOHAMED ENTERPRISES TANZANIA LIMITED PLAINTIFF

VERSUS

E TG COMMODITIES LIMITED DEFENDANT

Date of Last Order:06.05.2021

Date of Judgement:28.05.2021

JUDGEMENT

MAGOIGA, J.

These are consolidated Commercial Cases Nos. 124 of 2017, 125 of 2017 and 41 of 2019 arising between the same parties and transactions, and hence, this judgment on consolidated suits.

The plaintiff, MOHAMED ENTERPRISES TANZANIA LIMITED by way of complaints instituted the above consolidated suits against the defendant praying for judgement and decree in the following orders namely:-

- a. In Commercial Case No.124 of 2017 payment of USD.56,213.00, in Commercial Case No. 125 of 2017 payment of USD.54,550.00 and in Commercial Case No.41 of 2019 payment of USD.18,600.00 or their



equivalent as claimed on each case in paragraph 3 in their respective
plaints;

- b. The defendant pay the plaintiff on each case interest on the principal amount at the rate of 25% per annum from the time monies were paid till the date of judgement as mercantile custom;
- c. The defendant pay the plaintiff on each case interest on decretal amount at the court's rate of 11% per annum from the date of judgement till when payment is made in full;
- d. The defendant pay costs of and incidental to each suit;
- e. Any other relief(s) that the Honourable Court may deem fit.


Upon being served with the complaints on each case, the defendant filed written statements of defence disputing every claim of the plaintiff and prayed that each suit be dismissed with costs for being false claims and called upon the plaintiff into strict proof of the claims.

To state the facts of these consolidated cases is imperative. From the pleadings it is alleged that on 23rd day of April, 2015 and 08th day of May, 2015 parties herein entered into three agreements whereby the defendant agreed to sale to the plaintiff 1,300 ex India, 2,500 ex-Thailand and 1,040 ex India metric tons of sugar respectively all to be delivered in Dar es

Salaam. The facts went on that, it was an implied term of the contract that, the defendant being a seller would present the relevant contractual documents within a reasonable time of the arrival of the vessel carrying the shipment in order to facilitate clearance of the consignment. In breach of the above term the defendant on each consignment delayed the delivery of the documents that would have made the offloading possible within reasonable period, causing additional charges in terms of storage and warehouse charges which the plaintiff incurred and suffered loss as claimed in the plaints.

The plaintiff's efforts to be compensated by the defendant were in vain despite served with demand notices, hence, this suit claiming the reliefs as contained in the plaints.

On the part of the defendant, it was stated that all documents were presented for clearance within 14 days free -days as provided in the contract and it was the term of the contract that, the plaintiff will incur all costs, additional costs inclusive relating to clearance, storage and other related costs. Otherwise, the defendant implored this court to dismiss these consolidated claims with costs.



At all material time, the plaintiff has been enjoying the legal services of Ms. Neema Mahunga and Zakia Ally, learned advocates. On the other hand, the defendant at all material time has been equally enjoying the legal services of Mr. Symphorian Revelian Kitale, Senior Learned Advocate.

Before hearing started, the following issues were framed and agreed inter parties that will be used in the determination of this suit, namely:-


1. Whether there were an agreements between the plaintiff and defendant under which the defendant would sale to the plaintiff 1040,1,300 ex- India and 2500ex-Thailand metric tons of sugar to be delivered in Dar es Salaam;
2. (i) If issue number one is answered in the affirmative, whether there was an implied term in the agreements that the defendant would present to the bank the relevant documents within a reasonable time of the arrival of the vessel in Dar es Salaam. carrying the consignment;
(ii) Whether there was delay by the defendant in presenting the said documents for the consignment and what were the consequences;
3. (i) Whether there was late delivery of the consignment;



(ii) if the answer to issue number 3(1) is answered in the affirmative, whether the plaintiff suffered the loss of USD.18,600.00, USD.56,213.00 and USD.54,550.00 or any at all;

4. What relief(s) parties are entitled to.

The plaintiff in proof of her case called one witness, one, Mr. ABBAS RAFIKI ALLY to be referred in these proceedings as PW1. PW1 through his witness statements adopted in these proceedings to be his testimony in chief told the court that, he is the Import Manager of the plaintiff company and that by agreements dated 8th day of May, 2015 vide contract No.S00012, dated 23rd day of April 2015 vide contract No.ETGZ-S-8623 and 23rd day of April, 2015 vide contract No.S0009 the defendant agreed to sell to the plaintiff sugar ex- India and ex-Thailand 1040, 1300 and 2500 metric tons to be delivered in Dar es Salaam. According to PW1, it was an implied term of the contracts that the defendant, being a seller, would present the relevant contractual documents within a reasonable time before the arrival of the vessel carrying the shipment in order to facilitate clearance of the consignment.



According to PW1, the contract dated 8th May, 2015, its consignment was shipped in two consignments of 260 metric tons and 780 metric tons under the bills of lading Nos.IN70282244 dated 27th May, 2015 and MUNDARI150000031 dated 31st May, 2015. PW1 went on to tell the court that, the original documents for the first shipment were delivered in time but the second shipment arrived on 18th Day of June, 2015. But, in breach of the terms of the agreement the defendant delayed delivery of the documents till on 26th day of June, 2015 and the plaintiff's bank notified the plaintiff on the delivery of the original documents on 29th day of June, 2015. In the circumstances, the plaintiff demanded commitment from the defendant that would pay the resultant additional charges in term of the storage and warehouse charged in which the defendant committed to pay in writing on 30th day of June, 2015 which was 13 days after the vessel arrived causing delay in clearance of the consignment.

PW1 further testified that in consequences, the plaintiff is entitled to loss suffered of USD.18,600.00 whose breakdown is given and with interest as per mercantile customs and court's interest as prayed.

Further, PW1 told the court on the contract dated 23rd day of April 2015, the sugar was made aboard MV RHL AQUA voyage No.ZRAQ011E under bill

of Lading No MUNDARI150000029 which arrived in Dar es Salaam on 10th day of June, 2015 but the defendant in breach of the contract delivered the documents for clearance on 22nd day of June, 2015 and the plaintiff was notified on 26th June, 2015, which was 18 days after the vessel arrived in Dar es Salaam. In the circumstances, plaintiff demanded commitment from the defendant that she would pay the resultant additional charges in which the defendant committed to do so on 2nd day of July, 2015 after causing delay of 24 days.

PW went on to testify that in consequences of the late delivery of the documents, the plaintiff suffered a loss of USD.56,213.00 whose breakdown is given and is entitled to that amount plus interest as claimed in the plaint.

Furthermore, PW1 told the court that, on the contract dated 23rd April, 2015 on ex-Thailand sugar, the same arrived in three consignments; the first one of 800 metric tons shipped aboard MV Thea S voyage No.1506 under bill of lading 953680784 arrived on 10th June, 2015 but the original document were sent to the plaintiff's bank on 22nd June, 2015 and was notified on 26th June 2015 which was a delay of 12 days after the vessel arrived in breach of the contract. PW1 went on to testify that, in the

circumstances, the plaintiff notified the defendant of the delay who replied on 2nd July, 2015 committing to pay the delay charges which were 18 days of delay.

As to the second shipment, it was the testimony of PW1 that, it was of 1,125 metric tons was made aboard MV STADT SEVILLA voyage NO 1507 under bill of lading No.95680819 which arrived in Dar es Salaam on 24th June, 2015. But the defendant, in breach if the terms of contract presented the documents on 1st July, 2015 and the bank notified the plaintiff on 3rd July, 2015 which was a delay of 10 days after the vessel arrived, insisted PW1.

In the circumstances, PW1 told the court that, the plaintiff on 4th July, 2015 informed the defendant of the delay in presenting the documents and sought his commitment to pay for the delay. According to PW1, the defendant committed himself to pay on 7th July, 2015, which was 14 days of delay.

As to the third consignment, it was the testimony of PW1 that, it was of 575 metric tons made aboard MV STADT SEVILLA voyage No.1507 under the bill of lading No. 953786565 which arrived in Dar es Salaam on 24th



June, 2015. But in breach of the terms of the contract, the defendant presented the documents on 3rd July, 2015 and the bank notified the plaintiff on 6th July 2015 which was a delay by 13 days, PW1 testified. PW1 went on to tell the court that, in the circumstances, the plaintiff informed the defendant of the delay in presenting the clearance documents and the defendant committed to pay the delay costs on 7th July, 2015.

PW1 further testified that in consequences, the plaintiff is entitled to loss suffered of USD.54,550.00 whose breakdown is given and with interest as per mercantile customs and court's interest as prayed.

In proof of the above testimony, PW1 tendered in evidence the following exhibits, namely:

1. Contract between the plaintiff and defendant dated 23/04/2015 as exhibit P1;
2. Contract between the plaintiff and defendant dated 08/05/2015 as exhibit P2;
3. Delivery Order dated 17/07/2015 as exhibit P3;
4. Delivery Order dated 15/07/2015 as exhibit P4;
5. Two delivery orders date 15/07/2015 as exhibit P5a-b;



6. Bill of lading dated 31/05/2015 as exhibit P6;
7. Shipment acknowledgement way bill No.3217332020 as exhibit P7;
8. Acknowledgement of delivery by DHL dated 22/06/2015, 26/06/2015, 01/07/2015 and 03/07/2015 as exhibit P8a-d;
9. Commitment and confirmation of undertaking of the plaintiff by supplier dated 23/04/2015, 02/07/2015 and 29/06/2015 as exhibit P9;
10. Calculations of the initial losses in all cases as exhibit 10 a-c;
11. Demand notice for payments as exhibit P11;
12. Invoices of Maersk together with emails and covering letters as exhibit P12;
13. Invoices referred in CC41/2017 as exhibit P13
14. Plaintiff's claim for demurrage, storage and removal costs as exhibit P14;

PW1 under cross examination by Mr. Kitale, learned advocate for the defendant, told the court that, costs which the plaintiff claim arises at destination point. PW1 when shown exhibit P1 in CC 124/2017, and in particular, item 5 stated that charges at destination point will be on buyer's account who is the plaintiff. Pressed with questions, PW1 admitted that,



item 7 in exhibit P1a says costs will be on buyer's account. In CC41/2017 it states same to be on buyers account in item 5, however, was quick to point out that presentation of documents was imperative for earlier clearance of the consignment. PW1 asked if the contract stated the date for presentation of the documents but replied no date was set.

PW1 shown exhibit P1 in CC 124 of 2017 and asked to read para 5 of his witness statement and said the vessel arrived on 10th June 2015 and the consignment has 14 free wharf age charges.

PW1 shown exhibit P4 in CC 124 and asked expiry of the order and said it was valid up to 18th July, 2015. PW1 further pressed with questions admitted that the documents were given on 21st June, 2015 and it was 4 days after the defendant delivered the documents. Nevertheless, PW1 insisted delays were caused by the defendant and the plaintiff incurred loss by paying costs caused by delay in presentation of the documents. PW1 clarified that in CC 125 there were more than two consignments.

In CC 41 of 2017 PW1 said item 3 of the contract shows 14 days were for demurrage and not storage, which are basic international terms in such



business. PW1 when shown exhibit P9 he told the court that, they were addressed to him and he knows them well.

PW1 shown exhibit P10 to all three cases and asked to explain how he arrived at the figures and said the figures were arrived after invoices they got from CID- Container Internal Department. PW1 further was shown exhibits P11, 12 and 13 and asked if he issued invoices to the defendant and said they did not but the invoices were raised against the importer. PW2 said they claim USD.56,213 and USD.54,550.

PW1 when referred to exhibit P1a and asked whether exhibit P1a has any relationship to this case, he replied that A-One is an affiliated company to plaintiff. Also pressed with question, PW1 admitted that no invoice can be issued against 3rd parties. PW1 insisted that they paid for the invoices and there is evidence. PW1 admitted that all contracts had arbitration clauses but no one referred the dispute to arbitration.

Under re-examination by Ms. Makunga, PW1 told the court that, the parties to contracts were plaintiff and defendant herein. PW1 when shown exhibit P2 said the consignee was A-One Products Limited who was issued with the invoices. PW1 went to tell the court that 3 days maximum are enough



to process the documents. Asked for 14 free days said they only cover wharf age and not storage.

PW1 shown exhibit P10 and asked to clarify and said these are email communications informing the defendant of additional costs which were anticipated at the time delay in receiving the original documents from the defendant. PW1 shown exhibits P11, P12 and P13 and asked whether the claim have VAT elements, PW1 said no it was deducted. According to PW1, they claimed only demurrage, storage and removal charges. PW1 clarified that the invoices were issued against A-One Products Limited and were paid by the plaintiff. PW1 insisted that the breakdown of all the claims were calculate based on the invoices given. PW1 told the court that, failure to refers the matter to arbitration do not fetter jurisdiction of the court.

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

The defendant had one witness, Mr. ERNEST JOHN MAHONGOLE- to be referred herein as DW1. Through his witness statements adopted as his testimony in chief in these proceedings, DW1 told the court that, he is the principal officer of the defendant and admitted that on 08/05/2015 the



defendant and plaintiff entered into sale agreement of sugar 1,040 metric tons ex-India and on 23rd day of April, 2015 the plaintiff and defendant entered into sale agreement of sugar 2,500 and 1,300 metric tons of sugar ex-Thailand, and 1 ex-India respectively.

DW1 went on to tell the court that, in the said contracts the plaintiff was to meet all costs of discharged, container demurrage and other disport costs and the defendant was to present the documents without delay in order to facilitate clearance of the consignment in terms of Refined Sugar Association Rules, which the defendant complied with.

Further testimony of DW1 was that, the defendant was informed by the plaintiff of the delay in presenting the documents to facilitate clearance and demanded commitment from the defendant to pay the all charges resulted by storage and warehousing charges, but the defendant denied to have caused the loss and advised the plaintiff to clear all costs to mitigate coats but the plaintiff kept writing emails, hence, causing accumulation of charges. DW1 denies all claims of USD.18,600, USD.56,213 and USD.54,550 by the plaintiff on the reasons that, one, invoices were from third party, one, **A-One Products and Bottlers Limited** not a party to



this suit, and two, that the amount claimed in the disputed invoices do not correspond with the amount of loss, if any.

On that note, DW1 prayed that the instant suit be dismissed with costs.

DW1 tendered the following exhibits in disproof of the plaintiff claims, namely:-

1. DW1 prayed that exhibits P1, P2, P3, P10b, P10c, P11, P13, P12, P12, P13 and P5 to form part of their defence.

Under cross examination by Ms. Makunga, DW1 told the court that, he was involved at all material time in the transaction by the plaintiff save contracts which he did not sign. According to DW1, the clearing process involved several procedures until it comes to an end. DW1 went to tell the court that, usually documents comes first and later on consignment and very few cases where consignment can arrive before the documents.

Pressed with questions, DW1 told the court that, in the instant suits the documents were to be handed over to plaintiff by defendant. DW1 referred to documents in Commercial Case no 124 of 2017 and said that the consignment arrived on 09/06/2015 but the documents were submitted on



24/06/2015 and admitted that in the absence of documents no way the plaintiff could clear the cargo.

Under re-examination, DW1 told the court that the contracts did not set time line for presentation of documents. DW1 went on to explain that at times the process can start with copies and original documents to be presented later. DW1 concluded his testimony that no where the plaintiff complained of being inconvenienced for late delivery of the documents.

DW1 asked to clarify to court and told the court that their role was bring the documents and that they never informed the plaintiff of any delay.

This marked the end of hearing of the defendant's case and same was marked closed. At the closure of defence case, the parties' learned advocates prayed and were granted leave to file final closing submissions. In the first place I commend the learned advocates for parties for their insightful input in their final rival written closing submissions. I will here and there refers to them where necessary, but it suffices to say, same are accorded the weight they deserve.

The noble task of this court now is to determine the merits or demerits of these consolidated commercial cases. However, I have noted that, from



the parties' pleadings, testimonies and exhibits tendered in court as exhibits respectively, there are some of the facts which are not in dispute. These are; **one**, there is no dispute that parties herein entered into sale agreements for supply of sugar ex-India 2,340 metric tons and ex-Thailand 2,500 which were accordingly supplied as ordered. **Two**, there is no dispute as well that, the sugar subject of this dispute was paid for as agreed.

However, what is in serious dispute is the payment of the amount claimed being damages for loss occasioned by failure of the defendant to deliver original documents relating to clearance of the consignment.

Now I revert back to issues framed and see if the same are to be answered in the affirmative or negative. I have carefully gone through the pleadings, the testimonies of the PW1 and DW1 there is no dispute that the parties' hereinabove entered into agreements for the sale of sugar as stated in the respective complaints and written statement of defence. While Ms. Makunga and Mr. Kitale learned counsel for parties' join hands that, this issue has to be answered in the affirmative as far as Commercial Case No.124 of 2017 and 41 of 2019 are concerned, but partly on Commercial Case No.125 of 2017. Ms. Makunga had it that it be answered in the affirmative because it



was admitted at paragraph 2 of the witness statement of DW1, but as to Mr. Kitale was of the diametrical different view that, same was not proved because no documentary agreement was tendered to prove that actually there was an agreement.

I have taken my time to deliberate this point and I am entitled go by the arguments by Ms. Makunga that paragraph 2 of the witness statement there is admissions and add that, DW1 averred in paragraph 5 of the written statement of defence that, the contract provided that the buyer was to pay all costs of discharge, container demurrage and other disport costs and the defendant was to present documents. This kind of statement and guided by holding in the case of PAULINA NDAWAVYA vs. THERESIA MADAHA, CIVIL APPEAL NO.45 OF 2017 (CAT)MWANZA (UNREPORTED) in which it was held and insisted that, parties are bound by their pleadings, no way the defendant can deny this obvious.

Therefore, issue number one must be, and is hereby answered in the affirmative that parties had agreements to the three cases.



With the above findings in issue number one, takes me to issue number two which was couched that, 'if issue number one is answered in the affirmative:

- (i) Whether there was implied term in the agreements that the defendant would present to the plaintiff's bank the relevant contractual documents within a reasonable time of the arrival of the vessel carrying the consignment at Dar es Salaam;
- (ii) Whether there was delay by the defendant in presenting the said documents.

On this issue, and according to Mr. Kitale, the first part of issue number two should be answered in the negative because it amounts to entertain action outside the agreements for want of such important clause not stated in the contract and even on the second part of that issue he was of the firm view that, there was no delay in presenting the documents as alleged at all.

On the other hand, Ms. Makunga submitted that, the first part of the issue has to be answered in the affirmative on reason that DW1 admitted to that effect at paragraphs 2 and 3 of his witness statement and that no way



clearance could be possible without those documents and that the defendant shall reimburse the plaintiff additional costs as claimed.

I have carefully gone through the contents exhibits P1 and P2 and I must say with due respect to Ms. Makunga, learned advocate for the plaintiff, no such term can be implied in the said exhibits. To resolve this point the provisions of section 101 of the Tanzania Evidence Act, [Cap 6 R.E.2019] will assist this court. Section 101 for easy of reference provides that:-

Section 101. Exclusion of evidence of oral agreement

*When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 100, **no evidence of any oral agreement or statement shall be admitted**, as between the parties to that instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms:*

Provided that-

(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of

capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved and in considering whether or not this paragraph of this provision applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify the contract, grant or disposition of property may be proved, except in cases in which the contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that

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description may be proved, if the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

I have carefully gone through the provisions of section 101 in its entirety and I am certainly satisfied that, not only the section but also the proviso thereto do not in any way assist and advance the plaintiff's case. On that note, I agree with Mr. Kitale submissions that, if parties had intended such a serious term to be included in the contract they would have expressly stated so in the agreements. Also, I have come to the above conclusion because this is the term upon which the plaintiff instituted these suits. Indeed, the findings in this point, suffices to dispose of these suits.

But for the sake of arguments, let me test as well the second part of issue number two which was couched that 'whether there was delay by the defendant in presenting the said documents for consignments'. Having taken on board and considered both parties' arguments, this issue will be answered in the negative because in the entire exhibits P1 and P2 nowhere it was stated that original documents have to be submitted within which



time. The testimony of DW1 which was not challenged as rightly argued by Mr. Kitale and rightly so in my view was that, he submitted copies of the documents and the original were as submitted within 14 days free demurrage and detention as stipulated in the contract. Further, the parties never amended the contract to suit what the plaintiff is alleging now but has failed to prove it, hence the whole suits remained unproved as against the defendant.

This takes me to the fourth issue which was couched that, "whether there was late delivery of the consignment". This issue without much ado will not detain this court. The late delivery, if any, was caused by the plaintiff who when given documents instead of presenting for clearance started creating pressure on the defendant to accept new terms that were not in the original contract, hence, any delay in my own view was self creation of the plaintiff. The plaintiff if wanted to amend the contract was to do so in writing and be signed by both parties. The undue influence she was creating through emails was unacceptable in the circumstances.

The fifth issue was couched that if issue in (iii) is in the affirmative, whether the plaintiff suffered the loss of USD.56,213.00, USD.54,550.00 and USD.18,600.00 or any at all? Ms. Makunga argued that the contents of

exhibits P11 and P13 proves that the plaintiff suffered damages to the extent claimed. Mr. Kitale argued to the contrary that, since invoices were in the name of the third party who are A-One Products Limited though admitted should not be considered and are not addressed to anyone then should be disregarded and lastly that even if considered but are incompatible and at variance with the amount claimed in the plaint and witness statements.

I have as well gone through the claims of USD.56,213.00, USD.54,550.00 and USD.18,600.00 and the said invoices and I am with respect to Ms. Makunga not convinced with the contents of exhibits P11 and P13 for reasons as submitted by Mr. Kitale which I agree with him entirely and I beg to add that the claims of USD.56,213.00, USD.54,550.00 and USD18,600.00 was not strictly proved though specifically pleaded. The reasons I am taking this stance is that the contents of exhibits P1 and P2 specifically allowed documents from third party save for invoices and draft. There is no dispute that exhibits P11 and P13 are invoices but are in the names of third parties. This is what was stated in the 3 condition that:-

3.Third party documents are acceptable, except for invoices and draft.



So, with that note, issue number five is to be answered in the negative for want of evidence to prove because invoices apart from being at variance with the amount claimed but were barred under the agreements.

That takes me to the last issue which was couched that to 'what reliefs parties are entitled to?' Given my findings above to the other issues, the obvious is that this suit is devoid of any useful merits, hence, same must be, and is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 28th day of May, 2021.



S. M. MAGOIGA

JUDGE

28/05/2021