IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL CASE NO. 228 OF 2012

EAST COAST OILS AND FATS LIMITED .....PLAINTIFF

VERSUS

MOTOR TANKER, EVA SCHULTE .....1ST DEFENDANT

FORT CANNING PARK SHIPPING CO. Pte LTD...2ND DEFENDANT

LOUIS DREYFUS COMMODITIES SUISSE S.A.....3RD DEFENDANT

30/11/2017 & 7/2/2018

JUDGMENT

KITUSI,J.

The plaintiff, East Coast Oils and Fats Limited, a company registered under the laws of and operating in Tanzania owns a factory for manufacture of oils and facts for human consumption. The raw materials from which the said oil and fats are manufactured are imported from sources outside Tanzania and transported by ship. Motor Tanker Eva Schulte the first defendant is a Vessal that was used by the plaintiff to ship in a cargo of raw materials from Indonesia, which transaction forms the subject matter of this suit.

Fort Canning Park shipping Co. Pte LTD, the second defendant, is the owner of the first defendant while Lous Dreyfus Commodities Suisse S.A, the third defendant, is the Company that was, at the material time, operating the first defendant under a charter agreement with the second defendant .

It is the plaintiff's contention that the second and third defendants were parties to the shipping contract by virtue of their being owner and charterer of the vessel respectively. The third defendant maintained both in the pleadings and evidence that under the Charter party, the Management and operations of the vessel was left with the first and second defendants.

At Dar es Salaam Port where the first defendant was destined and where delivery of the cargo was to be made, there are several points (referred to as jets) for offloading Cargo from tankers. Relevant to this suit are points KOJ -1 and KOJ – 2. On arrival at a port, vessels remain at the outer anchorage to want for permission and direction as to when and where to berth, and so did the first defendant. There is no dispute that the first defendant arrived at the outer anchorage of the Dar es Salaam Port on 12th October 2012.

There is a dispute, however, as to the berthing point. According to the plaintiff, the Master or captain of the first defendant had been asked to berth at KOJ – 2 and had agreed to, the reason being that KOJ – 1 where the vessel had initially been lined up for berthing was congested

and that the Master had been made to understand the urgency of the delivery of the raw materials to the plaintiff.

On the other hand the first defendant disputed having indicated his preparedness to berth at KOJ -2. The first defendant has maintained that its Master did not go along with the suggestion to berth at KOJ- 2 because that jet was too unsafe for his vessel given its size and the weight of the Cargo.

The essence of the suit is, therefore, an alleged unjustified refusal by the first defendant to berth at KOJ – 2 resulting to alleged loss to the plaintiff and attracting demurrage charges. Given this background it is not a coincidence that, of the six substantive issues drawn at the commencement of trial, four relate to reasons or absence of reasons for the first defendant's refusal to berth at KOJ – 2.

The issues agreed upon at the commencement of the trial were;

1. Whether the first defendant deliberately refused to berth at KOJ – 2.
2. Whether the 3rd defendant was a party to the contract of carriage of the plaintiff's goods by sea by the first and second defendant.
3. Whether the 3rd defendant was given permission to berth and offload the consignment at berth No KOJ-2 on the 12th day of October, 2012.
4. Whether the Master Tanzania Ports Authority sent a Pilot Vessel to meet the 1st defendant, and if yes, whether the 1st defendant refused to allow the local Pilot to board the vessel.

5. If the answer to issue No. 4 is in the affirmative what were the reasons for such refusal.
6. Whether there was a delay in offloading the consignment and if yes, whether the plaintiff suffered any economic loss
7. To what reliefs are the parties entitled

The issues that address the refusal by the first defendant to berth at KOJ – 2 and whether or not at KOJ – 2 and whether or not there was justification for that refusal are issues No. 1, 3,4 and 5. These issues are so intertwined, I am afraid, that only where it is possible and necessary I shall discuss them distinctly from one another. I think the plaintiff's case rests on the determination of these issues.

It was Vijayaraghavan Ramchandran (PW1) who told the plaintiff's story to berth at KOJ -2 and the resultant delay in offloading the raw materials. He is the Chief Executive Officer of the plaintiff company and was the author of some of the e- mails that were sent to the captain of the vessel requesting him to berth at KOJ – 2.

The other e – mails were sent by one John Mashauri of a Shipping Agency known as Sturrock Flex Shipping Ltd.

These e – mail correspondences forming a total of nine pages were collectively tendered and admitted as Exhibit P1. They tell a story similar to PW1's as follows; when the vessel arrived on 12/10/2012 and issued a Notice of Readiness (NOR), the shipping Agent Communicated to the captain a Line up showing that the expected date of berthing (ETB) for the

Vessel was on 24/10/2012 at 08.00 at KOJ -1. The reason the vessel had to wait that long was a congestion at KOJ – 1.

Since the plaintiff's factory had run short of raw materials forcing it to stop production, PW1 intervened by impressing on both the shipping Agency and the Captain of the first defendant that berthing art KOJ – 2 where there was no congestion, was possible, stating the reason. The first reason was that the same vessel had previously berther at KOJ- 2. Secondly, bigger vessels had berthed at KOJ-2 including one known as Theresa which had berthed earlier on the same day. Thirdly, the draft of the vessel of only 6.7 meters was small compared to that of other vessel like Theresa whose draft was 7.5 metres. Captain Ibrahim Mbiu Bendera (DW1) a practising advocate who had previously worked as a captain of ships for 22 years told us that draft is a dimension referring to that part of the ship which is immersed in water. According to DW1 and Captain Abdula Yusuf Mwingano (DW3) a Habour Master working for Tanzania Ports Authority, determination of where to berth is informed by a vessel's length, draft and weight.

The shipping Agency and the Ports Authority saw PW1's point regarding the possibility of the first defendant vessel to berth at KOJ- 2. The shipping Agency wrote to the Captain to convince him to see PW1's reasoning. The Harbour Master sent out a Pilot to meet the first defendant's vessel in preparation for berthing at KJO-2. The undisputed evidence of DW3 regarding the role of the Pilot is that he being an officer who knows the harbor gets on board a ship that is about to berth and advices the captain on how to navigate the vessel to the berthing point.

In this case the Captain's response was a refusal, communicated by e – mails to PW1 and to the shipping Agency as well as a verbal refusal to the Pilot causing him to disembark from the vessel. The Captain's ground for refusing to berth at KOJ-2 was that it was unsafe to berth at that jet and that although he had previously been on board that vessel when it berthed at that jet, he was not going to take that risk again.

PW1's testimony on the safety of the ship was that by sending their Pilot to lead the first defendant vessel to KOJ=2, the Port Authority was assuring the Captain of the Vessel that it was safe to berth there. But PW1, went further to promise indemnity to the first defendant should berthing at KOJ – 2 cause any damage. All these were to no avail.

It seems that PW1 did not give up for he recruited the assistance of the third defendant the Charterer of the vessel asking her to bear pressure on the Captain. According to Alain Ralph Wurch (DW4) the Chartering Manager of the third defendant, the Captain's refusal to berth at KOJ-2 surprised him because the same vessel had previously berthed at that jet. To DW4 the Captain's refusal to berth at KOJ -2 was un founded. DW4 shared the view that by sending the Pilot to lead the vessel to KOJ- 2, the Port Master was assuring the Captain that it was safe for him to berth there. DW4 testified that when the Captain refused to see their reason or bend to their pressure they withheld payment of the hire fee. Yet the Captain did not give in.

According to DW1, DW3 and DW4, the Captain's refusal to berth on ground of safety could not be faulted. This is so despite the fact

that DW3 sent a Pilot to lead the vessel to KOJ – 2, and the decision was considered by DW4 as unreasonable. DW1 was outright in support of the Captain's decision, citing the length (145.5. metres), Draft (8.8 metres) and weight (16621 metric tonnes) as being inconsistent with the capacity of KOJ – 2; 120 meters long, 7 meters draft and 5000 metric tonnes weight.

DW3 stated further that during the period relevant to this case, berthing lineups were being fixed during daily meetings in which shipping agents participated. He mentioned other factors which are usually considered in determining berthing points as including water tides. Further that Dead weight of a vessel is a total of the vessel's weight and that of the cargo it carries. He went on to state that Dead weight affects a vessel's draft such that a vessel that is small in size may be required to berth at KOJ – 1, meant for bigger vessels, if it is carrying a cargo whose weight has affected its draft making it bigger.

On the fact that the first defendant vessel had previously berthered at KOJ – 2, DW3 stated that the Captain is at liberty to take or to refuse the advice of the Pilot for, eventually he is solely responsible for the safety of the vessel. Nor does a decision of a Captain to berth at a particular point bind another Captain of the same vessel to berth at that point.

I am satisfied that the evidence supports the following findings of fact. First that the decision as to where and when a ship should berth is or was being reached by joint meetings involving, among other stakeholders, shipping agents representing the ship in question. In this case Sturrock

Flex Shipping Ltd participated. Two, that the chief factors for consideration in determining berthing are the vessel's dimensions, that is, length, weight and draft, but also the tide of the waters. Three that the first defendant had initially been lined up to berth at KOJ – 1, but decision was subsequently reached to have it berth at KOJ – 2, which decision the Captain did not go along with.

The parties were all ably represented by counsel, Dr. Masumbuko Lamwai appearing for the plaintiff while Mr. Stanslaus Ishengoma represented the first and second defendants. The third defendant was first represented by Mr. Gaspar Nyika learned counsel from whom instructions were subsequently withdrawn and given to Mr. Francis Ramadhani learned counsel.

In their closing submissions made orally, Mr. Ishengoma stated that there is no evidence that the Port Authority sent out a Pilot to meet the first defendant vessel. The learned counsel submitted that only the Pilot himself or another officer from his office would be competent to testify on that fact. He submitted in the alternative that even if the Pilot was sent, the captains decision on the safety of the ship was final. The learned counsel invited the court to answer the fourth issue in the negative. He also moved the court to answer the third issue in the negative on the ground that no witness testified on the alleged fact that the captain was given permission to berth at KOJ- 2.

On his part, Dr. Lamwai for the plaintiff submitted that communication between the Ports Authority and the Captain was by

fax, radio or through the Pilot. The learned counsel submitted that although no radio messages or fax were produced in evidence that the vessel was proceeding to the Pilot Boarding ground is proof that there had been communication or permission to berth.

Dr. Lamwai referred to the testimony of Emmanuel Thomas Nagunwa (DW2) working for the insurer of the first and second defendants who stated that in the previous berthing the first defendant relied on instructions made by the Port Master by radio or e-mail. Counsel invited the court to make a finding that the captain had been given permission to berth at KOJ- 2 but refused to.

While aware that this case raises issues, that are uncommon in our jurisdiction, determination of a good number of those issues depends on my assessment of the evidence presented by both sides. And of all the issues, I shall start with the fourth, it being the most convenient and straightforward.

The fourth issue is whether the Harbour Master of the Tanzania Ports Authority sent out a Pilot Vessel to meet the first defendant and whether the latter declined. On this there is the evidence of PW1 and that of DW3, the Harbour Master himself establishing the fact that a pilot was sent out to lead the first defendant into KOJ- 2. Mr Ishengoma for the first and second defendants submitted that only the Pilot would be competent to testify on this fact.

With respect, apart from the Amended written Statement of Defence by the first and second defendants in which they deny the

allegation that a Pilot was sent out, no evidence has been adduced by them to contradict PW1. If anything DW1 rationalized the captains refusal to take the Pilot's advice, which is not the same way as saying no Pilot was sent. DW1 and DW3 were unanimous on the fact that the captain's decision would be final in the circumstances.

There is also the e-mail (Part of ExhibitP1) dated October 12th 2012 at 2.29 P.M. from the shipping Agent informing the recipient that;

> *"just before pilot boarded the vessel, C*
>
> *apt of the vessel refused to go to KOJ 2.*
>
> *Pilot on his way back to shore....."*

Based on the evidence both for the plaintiff and for the first and second defendants, my conclusion on the fourth issue is that the pilot was sent to meet the captain of the first defendant vessel but the captain refused him permission to board the vessel. My answer is in the affirmative.

Issue No.5 is just as straightforward. All the witnesses stated that the captain cited safety as being the reason for his refusal to berth at KJO- 2. There is later a fierce tag of war as to whether the Captain's fear of safety of the ship was reasonable or not, but at this stage it suffices to conclude that safety of the ship was the captain's reason for the refusal. And that disposes of issue No.5.

I will now turn to the third issue which is related to the fourth and fifth issues already disposed of. The issues is whether the first defendant was given permission to berth and offload the consignment at KOJ – 2 on the 12th October 2012.

The evidence of PW1 and DW3 is that the initial Line up for berthing communicated to the captain was for him to berth at KOJ- 1. Subsequently there was change of plan for reasons that will be discussed later so that the first defendant vessel was adviced to berth at KOJ- 2. There are e – mails by the shipping Agent informing the captain about the revised line up and the reasons for the change.

There is in particular the e –mail (part of Exhibit P1) dated 12th October , 2012 at 12.00 PM, the relevant party of which reads;

" Good Morning Capt. Vladisalv Tokarer

Well noted yours below.

Please find attached revised KOJ 2 spec we received

from the Port.

With 145 M LOA you can still discharge at KOJ 2. Your tanker berthed safely and discharged at

KOJ 2 early in February 2012. Just for your info Mt Theresa Tiga LOA 149M Draft 7.5

M berthed and discharged safely at KOJ 2 from 10th to 12th October 2012.

The Port is trying to reduce congestion at Dar es Salaam by looking at best ways to plan the vessels.

Please give the PORT full cooperation once they call your to come to KOJ 2 on arrival"

The evidence of DW3, the Harbour Master is that by sending out a Pilot to a vessel, the Port Authority signifies permission for the vessel to berth.

It is my finding that not only was the captain invited by the shipping Agent to berth as planned (by e – mails) but the Port Authority gave him the requisite permission by dispatching its Pilot to the first defendant. The defendants' response that the captain considered berthing at KOJ – 2 unsafe does not in any way contradict the fact that permission was given. My answer to the third issue is in the affirmative.

Next for consideration now is issue No.1 whether the first defendant deliberately refused to berth at KOJ – 2. It is clear from the preceeding findings that the first defendant refused to berth at KOJ 2. The way the parties addressed this issue in my view invites me to determine whether the refusal was founded.

For the plaintiff it has been testified and submitted that the captain acted without justification and several reasons are cited. The first is that the first defendant vessel had previously berthed at the same point without problems . The second reason is that bigger vessels had berthed at that jet on the morning of the same date. The third reason is that the first defendant's draft on that date was small as it was carrying a lighter cargo. For these reasons PW1, PW2 and DW4 considered the Captain's refusal to berth at KOJ-2 unreasonable. The plaintiffs went on to imput ill motive on the part of the first defendant. The first defendant's ground for the refusal was safety. DW1 testified that given the dimensions of the first defendant it was unsafe to berth at KOJ 2. Dw3 said the first defendant could berth at KOJ- 2 but his word as to safety was final.

No cases were cited by counsel and my search within our jurisdiction did not bear fruits. I found myself wondering whether the fact that the Captain's word is final would apply in all circumstances including a situation where he is berthing at a particular port for the first time.

The principle that the captain or Master of a ship is responsible for its safety finds support in **Halsbury's Law of England** 4th Edition 43(1) para 468 where the learned Authors state;

> " *The Master is personally responsible to his owners for any injury or loss to the ship or cargo by reason of his*

negligence or misconduct, or for acting without authority"

However I am tempted to say that this duty on the Master does not apply without qualification when the Master in navigating the ship into a port. This I gather from the same Authors under paragraph 752 where they write;

"A united Kingdom pilot engaged in the berthing or unbrething of a ship to which these provisions apply in the United Kingdom, or engaged on such a ship bound for a port within a member state must immediately inform.

(i) In the case of an unauthorized pilot the port authority, authorising the pilot, who must immediately inform the Coastguard Agency for onward transmission to the Marine safety Agency or

(ii) In the case of other pilots

(a) The Coastguard Agency for onward transmission to the Marine Safety Agency

(b) The competent authority of another member state"

There is also the case of **Mv Banglar Mook: Owners of Mv Banglar Mook V. Transnet Limited** (2012) (4) **SA 300 (SCA)** reported in the **Commonwealth Judicial Journal** Vol. 22 No.4 December 2016. The issue for determination in this case was whether the pilot who was bringing the vessel into Cape Town

port was either reckless or grossly negligent as to cause the ship to strike a structure in the port resulting into damage to the said ship. The Master of the ship was the witness for the owners of the vessel.

The foregoing references inspire me to conclude that there is no authority for holding as suggested by the first and second defendants that the captain's responsibility regarding the safety of the ship extends to the point when he is navigating the ship into a port under directions of a pilot of that port. For if an accident occurs he will be deemed not to have been negligent as suggested in Halsbury or that the pilot may be held responsible as is the situation in the South African case.

My conclusion is that the captain of the first defendant acted unreasonably in refusing to berth at KOJ- 2 because that vessel had previously berthed at that jet and a bigger vessel had berthed in the morning of the same day. The copy of the lineup for KOJ- 1 exhibited in court as part of Exhibit P1 shows that the first defendant weighed 8,699 metric tonnes while all other vessels, except one that weighed 27000 metric tonnes, were over 35,000 metric tonnes. The first defendant was more than three times lighter than the other vessels.

My conclusion of the first issue therefore is that the first defendant unreasonably refused to berth at KOJ – 2. With respect I do not accept DW1'S testimony for the reasons shown.

The sixth issue is whether there was a delay in offloading the consignment and if yes, whether the plaintiff suffered economic loss. The fact that there was a delay in offloading is beyond dispute on the evidence adduced because while the vesses was given permission to offload at KOJ -2 on 12th October 2012, it had to wait until 29th October 2012 to offload at KOJ -1.

As for the alleged economic loss there is the evidence of PW1 and one Bonaventura Modest Hakili (PW2) a financial Consultant engage by the plaintiff for over ten year. According to these witnesses the economic losses are in the form of demurrage charges drop of sales as a result of closure of factory, salaries to worker and bank interest and charges.

As regards demurrage it was testified that 14,000 USD was being paid per day as per Exhibit P2 and that USD 203680.57 was paid. For the first and second defendants Mr Ishengoma submitted that the original Line up indicated that the first defendant was to offload on 29/10/2012. According to the learned counsel, the first defendant should not be blamed for the berthing arrangement which was not prepared by it.

With respect I have already made a finding that the first defendant 's Master caused the delay by refusing to berth at KOJ 2 unreasonably despite being permitted to do so.

The learned counsel cited quite a few cases for the principle that specific damages must be strictly proved, including the cases of **Juma Misonya & Another Vs Ndurumai** [1983] T.LR 245; **Banprass Star Service V. Fatuma Mwale** [2002] 390 and **Gitwam Investments Limited Vs Iajmal Limited & Others** [2006] 2.A 76.

It is my finding on the basis of Exhibit P2 and the testimonies of Pw1 and Pw2 that the plaintiff paid demurrage charges and this constitutes an economic loss. For that reason my answer to the sixth issue is in the affirmative.

At the closure of trial and just before making closing submissions, at the instance of Mr. Ishengoma for the 1st and 2nd defendants another issue was adopted which was meant to address the first defendant 's counter claim. The issue reads; Whether the arrest of the vessel caused any loss to the first and second defendant.

There was evidence from DW2 that the first defendant vessel was restrained from 31st October 2012 to 20th November, 2012. He testified that the vessel was released upon Rob Marine PNI Services Limited, a shipping Insurance Company that he works for, paying a bond to the tune of USD 629699.06. DW2 prayed for payment of USD 100,000 in general damages, because the first and second defendants were wrongly sued.

The issue now is whether the first and second defendants have been wrongly sued.

My earlier findings as regards the first and second defendants are that the Master's refusal to berth was based on unfounded grounds and it caused a delay of 17 days. On that basis it cannot be said that the first and second defendants have been wrong sued. That fact **apart**, if I had to find for the defendants in the counter claim I would have no material at my disposal to determine the numerous specifics reliefs that were claimed because no evidence was led to prove them.

My answer to the issue raised in relation to the counter claim is that there is no evidence to prove the alleged losses.

I will now deal with the issue of reliefs and discuss the second issue last. I have already made a finding that the plaintiff has proved that they paid USD 203233 in demurrage as per exhibit P2. It is my finding that this claim has been proved and I grant it.

The second claim is decrease in sales as a result of closure of the plaintiff's factory from shillings 14.74 billion per month to 3.9 billion shillings per month which caused it loss of profit of shilling 431 million calculating by a profit margin of 4.2 to 4.5 percent. Pw2 was reffering to Exhibit P4 showing the trend of sales from July to December 2012. The exhibit shows that the average sales per month was 14 billion shillings except for October which had sales of 3.9 billion shillings.

Mr. Gaspar Nyika learned counsel then acting for the third defendant raised an issue by way of cross- examination whether the delay of 14 days of production accounted for the loss of 10 billion shillings. I think Mr. Nyika had a valid point in that closure of the factory for half a month cannot account for two third of loss of income. Mindful of the principle that there is no wrong without a remedy [**China Heman Interanational Co – operation Group Co Limited V. Salvand K.A Rwegasira ,** Civil Appeal No. 57 of 20011 CAT (unreported)] I will divide the loss of Shs 431 347 988.79 by two and award Shs 215,673,994.40 for loss of profit. That is the amount awarded.

The plaintiff has also claimed for loss of profit before the arrival of the vessel. I find this not only strange but hard to comprehend. I am unable to see how the defendants may be held responsible for loss of profit caused by acts that were not committed by the defendants. This claim is not granted

The plaintiff claimed for bank interest and charges. I consider these claims to be too remote to link with the defendants, and not capable of being distinguished from the loss of profit already granted. This claim is not granted.

There is also a prayer for general damages. I am aware of the principle that general damage are;

> *"Damages that the law presumes follow*
> *from the type of wrong complained of.*

General damages do not need to be specifically have been sustained"

[**Legend Aviation (PTY) Limited t/a King Shaka Aviation V. Whirlwind Aviation Limited** Commercial Case No. 61 of 2013 (unreported)

Considering the facts of this case, I award general damages at fifty million shillings.

Last is the second issue whether the third defendant was a party to the contract of carriage of the plaintiff's goods by sea by the first and second defendants. While the plaintiff joined the 3rd defendant under a Charter Party agreement , the third defendant under paragraph 5 of their written statement of defence averred that under that agreement the Management and operations of the ship was to be under the first and second defendants. The testimony of DW4 and the submissions of Mr. Ramadhani for the third defendant were to the same effect.

The copy of the charter Party Agreement was not tendered by either side. The third defendant's version that they were not involved in the management and operations of the vessel has not been controverted . As DW4 is entitled to credence as every witness is, I accept his story and find that the third defendant was not involved in

the management and operations of the vessel. [See **Goodluck Kyando V Republic**, Criminal Appeal No. 118 of 2003, CAT at Mbeya]

My answer to issue No. 2 is therefore that there is no proof that the third defendant was a party to the contract of carriage of the plaintiff's goods by sea by the first and second defendants.

In fine, judgment is entered for the plaintiff against the first and second defendants jointly as follows; payment of USD 203,233.33 for demurrage, and Shs 215,673 994.40 as loss of profit during closure of the plaintiffs factory caused by the delay in offloading the raw materials from the first defendant's vessel. General damages of fifty million shillings are also awarded with costs and interest as prayed.

THE HIGH COURT OF TANZANIA

I.P.KITUSI

JUDGE

7/2/2018