THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 318 OF 2011

ROPANI INTERNATIONAL LTD :: PLAINTIFF

VERSUS

SDV TRANSAMI UGANDA LTD :: DEFENDANT

BEFORE HON. JUSTICE B. KAINAMURA

JUDGEMENT

The Plaintiff brought this case against the Defendant seeking orders for (a) US $ 61,034. 375 of which $ 43,784.375 was balance on contract sum and $ 17,250 was demurrage charges (b) general damages, (c) interest on the decretal amount at 24% from the date of default till payment in full, (d) costs of the suit.

The plaint sets out the case for the plaintiff.

The plaintiff company entered into an agreement with the defendant company for transportation of relief cargo of World Food Program (WFP) from Kampala to different destinations in DRC Congo namely; Tadu, Awago, and Nzopi. The plaintiff's servants off loaded the cargo at Aru in DRC on the orders of WFP; the defendant's principals/agent. The plaintiff therefore never proceeded to the destinations as agreed in the contract. The defendant had paid half the contract amount and the balance was to be paid upon delivery of the goods to the final

destination in DRC. When the plaintiff was stopped from proceeding further, the defendant refused to pay the balance.

The plaintiff similarly was contracted by the defendant to transport tobacco from Auzi DRC to Kampala. The trucks were loaded on the 21st of Dec 2010 and released to leave for Kampala on 7th and 8th of January 2011. The trucks reached the BAT premises on the 26th of January 2011 and were offloaded, and thereafter released on the 5th of February 2011. The plaintiff therefore claims unreasonable delay on the part of the defendant for which it claims demurrage charges for the days that were unaccounted for in both DRC and Kampala.

The plaintiff further avers that they did work for the defendant as per the agreement. However, despite several remainders to the defendant company for payment of the balance due, the plaintiff company has not been paid. Additionally, the plaintiff contends that the conduct of the defendant has caused them a lot of inconveniences and expenses which entitles it to general damages and other reliefs sought for in the suit.

The defendant in the written statement of defence denied it owned the plaintiff any money and in particular contended that the contract sum agreed upon was US $ 87,568 for the transportation and delivery of goods to three destinations i.e Tadu, Awago, and Nzopi. The defendant also contends that at the commencement of the contract, US $ 44,318 being a deposit of over a half of the contract sum was paid to the plaintiff.

Furthermore, it is the defendant's case that by reason of the insurgency in DRC, the consignment could not be delivered to the destinations agreed upon. Additionally, the defendant asserts that the plaintiff was aware of the existing war situation which was the reason for the alternative destination of Aru in DRC and

by that fact the plaintiff is estopped from claiming US$ 43,784.4 as balance. Additionally, the defendant asserts that the alternative destination of Aru in DRC is less than half of the distance from Kampala to the contract destination and the initially paid deposit of US $ 44,318 is adequate thereby fully discharges all the defendant's obligations to the plaintiff under the contract.

The defendant also denies the plaintiff's claim of US $ 17,250 as demurrage charges as misconceived and that the plaintiff is not entitled to that sum because it did not suffered any inconveniences.

In reply to the written statement of defence the plaintiff reiterated the contents in the plaint. The plaintiff emphasised the claim that the defendant varied the contract by changing the destinations agreed upon. The plaintiff having met its obligations is entitled to payment in full as agreed upon in the contract.

The plaintiff also averred that its servants were stopped by the principals/agents of the defendants and ordered to offload at Aru. Furthermore, the distance to Aru the alternative destination at which the offloading was done is ¾ of the distance to the agreed destinations.

Additionally, the plaintiff emphasised that this was a business transaction which entitles the plaintiff to demurrage charges regardless of whether it was contained in the contract or not.

At the commencement of the trial the following issues were framed;

1. *Whether the defendant is liable to pay the plaintiff the balance of the contract sum*
2. *Whether there were delays which entitled the plaintiff to demurrage charges*

3. *Whether the plaintiff is entitled to the reliefs sought*.

The plaintiff was represented by Ms. Shamirah Kitakule while the defendant was represented by Ms. Aidah Namusoke.

The plaintiff and the defendant called one witness each. They filed witness statements on which they were cross examined.

Issue one - whether the defendant is liable to pay the plaintiff the balance of the contract sum.

The plaintiff's Assistant General Manager, Mr. Yeka Banga testified as PW1. It was his testimony that the plaintiff's claim against the defendant is for the contract balance of US $ 43,784.375 for the hire of trucks as well as US $ 17,250 being demurrage charges, general damages and costs to the suit. It was his evidence that an agreement was entered into on the 1st of October 2010 for the transportation of relief cargo of WFP from Kampala to different destinations of Tadu, Awago, and Nzopi all in DRC at a total Contract sum of US $ 87,568.85. He admitted the receipt of half of the contract price. However he is claiming the balance of the contract sum following since they were ready to transport the goods to the agreed destinations but were stopped by the defendant's agents/principals who instructed them to offload the cargo at Aru DRC.

Furthermore it was his testimony that on their way back to Uganda, the defendant contracted the plaintiff to transport tobacco from Aru DRC to Kampala. That they reached the BAT compound on the 26th Jan 2011but got offloaded and released on the 5th Feb 2011.

The defendant's Assistant Hub Manager testified as DW1. He agreed that the contract was entered into between the plaintiff and the defendant on the 10th

December 2010 for transportation services and that they normally pool various transporters to work with. It was his evidence that the agreed contract price was US $ 87,568 taking into consideration the distance to be covered and the road condition. He also quoted the rates per metric tons which were; US $ 200 to Nzopi, US $ 235 to Awago, US $ 200 to Tadu. He stated that the plaintiff was paid half the price of US $ 44,318 and receipts were issued.

DW1 emphasised that trucks were stopped from proceeding to the agreed destinations for security reasons. That the journey from Uganda to Aru which boarders Uganda and DRC is approximately half of the journey to the original destinations and had better roads. He added that based on that fact, the defendant represented by him asked the plaintiff to amend their invoices to read Kampala to Aru at a rate of US $ 80 per ton which they declined. He admitted instructing the plaintiff to transport tobacco from Aru to Kampala which the plaintiff did.

In his submission Learned Counsel for the plaintiff referred to Mr. Yeka's evidence and stated that the distance covered by the plaintiff was more than half the agreed distance and that the trucks were prematurely stopped on the orders of the defendant's agent. She added that the plaintiff was willing to continue with the journey as agreed. Counsel cited a principle on contractual obligations as contained in **Chitty on Contracts Specific Contracts volume 2, at page 600**. It is to the effect that a party is not absolved from performance merely because it has become expensive, more difficult or even proves to be impossible. It was counsel's contention that the defendant should have put in place measures for the safe delivery of the cargo than prejudice the plaintiff by unilaterally altering the agreement. It was her submission therefore that it is exactly on this basis that the defendant cannot run away from its contractual obligations.

In response, defence counsel contended that the performance of the contract to the agreed destinations was frustrated by the insecurity which made it unreasonable and insecure to complete. She invited court to consider the evidence of DW1 Benard Opio which was to the effect that there was insecurity that hindered the full delivery to the agreed destinations which PW1 Mr Yeka admitted in his evidence. Counsel cited the case ***of Mulji v Cheog Yue Steamship Co. [1926] AC at page 505*** where it was held that:-

> *"The occurrence of the frustrating event brings the contract to an end forthwith and automatically"*.

She further cited the decision of Lord Wright in the case of ***Denny Mott & Dickson Ltd Vs James B Fraser & Co [1944] AC 265 at page 274*** where it was held that:-

> "*Where there is frustration, dissolution of a contract occurs automatically. It does not depend, as rescission of a contract, on the ground of repudiation or breach, on the choice or election of either party. It depends on what actually has happened on its effect on the possibility of performing the contract"*.

In conclusion Counsel submitted that the delivery of the cargo to the agreed destinations was more risky and would impose extra contractual obligations which primarily did not exist. She further submitted that the distance covered was approximately half of the distance to the final destination. She thus contended that basing on the principle of *quantum meruit*, the half amount already paid was sufficient to cover the distance covered. The plaintiff is thus not entitled to more money.

In rejoinder Counsel for the plaintiff also relied on the case of ***Denny Mott & Dickson Ltd v James B Fraser & Co (supra)*** where it was held that where there is a contention between the parties as to whether the frustration took place or not, court has the discretion to decide what the true position is. It was her submission that there was no frustration as alleged by the defendant because the plaintiff delivered cargo up to where the defendant directed.

Furthermore counsel cited the case of ***Tamplin Steamship Co. Ltd v Anglo-Mexican Petroleum Products Co. Ltd*** (as was cited in Denny Mott's case) where Lord Porter stated that:-

> *"No court has absolving power but it can infer from the circumstances that a condition which is not expressed was a foundation on which the parties contracted"*.

She thus emphasised that the parties had a contract for the transportation of the relief cargo to DRC which the plaintiff was willing to complete. More to that Counsel emphasised the fact that the unrest in DRC was publically known and thus not a new situation and unanticipated as the defendant seeks to make it appear. She invited court to find in favour of the plaintiff and award the balance of the contractual sum.

Additionally, Counsel submitted that the principle of *quantum meruit* does not apply in this case because there was an express agreement which was written. She cited the case of ***Montes v Naismith and Trevino Construction Co., 459 S.W.2d 691 (Tex. Civ. App. 1970)*** where it was held that:-

> *"Where there is a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for quantum meruit on an implied assumpsi"*.

Counsel submitted that the principle applies by implication to the defendant as well.

In conclusion, counsel reiterated the prayer for award of the balance of the contract sum and general damages.

To determine this issue, one needs to first critically look at the Road Carriage Agreement entered into between the parties (See exhibited "D7"). Clause 1 (a) of the Road Carriage Agreement of 10th December 2010 provides that the carrier shall collect and deliver the consignment to be carried as instructed by the sender. In this instance, invoices exhibit "P1", "P2" and "P3" were issued by the plaintiff Company upon receiving instructions of carriage. "P1" was for the trip to Awago in DRC, "P2" was for the trip to Nzopi in DRC and "P3" was for the trip to Tadu in DRC. The total contract price for the three invoices was US $ 87,568.85. It is not in dispute that half of the contract price was paid and the balance would be payable upon delivery of the cargo to the final destinations indicated on the invoices. It is also not in dispute that the trucks were stopped by the personnel of the consignee i.e World Food Programme (WFP) at Aru in DRC and the cargo was off loaded. What is in dispute is whether the events in DRC i.e insecurity, had the effect of frustrating the contract of carriage.

In his testimony DW1 Benard Opio stated that the trucks were stopped at Aru on account of attacks by LRA in the region where the cargo was to be delivered. That he had learnt this information from an email from a one Jennifer Nalugonde of WFP dated 16th December 2010 (see Exh.D6).

The email said in part

> *"As per our telephone conversation this morning, distribution schedules Tadu, Awago and Nzopi was set for 15/12/2010 and considering that trucks -------- are still in transit, proceeding to previously allocated destinations will not be possible due to the following concerns raised by DRC Logistics coordinators.*
>
> a. *The customs clearance of Aba often poses problems sometimes more than two weeks we will be already beyond January.*
>
> b. *The territory of Faradje is the subject of several attacks by LRA these last three days, can be other attacks are in hand and for reasons of protection of our recipients i propose the suspension of the distribution while waiting more clearly to see the situation of Faradje.*
>
> *Based on the above reasons the DRC Logistics coordinators do recommended that deliveries be re-routed to Aru all trucks will be off loaded in Aru at the going rate of US $ 100/ton".*

Clearly it is the above e-email message that triggered the stoppage of the trucks from proceeding to their original destination and their diversion to Aru. According to the testimony of DW1, the reason for the diversion was the attacked by LRA. For this reason the defendant couteded that the contract was frustrated. Counsel for the plaintiff submitted that as a general principle, contracted obligations are binding and absolute and a party cannot be absolved from performance merely because performing the contract had become more expensive, more difficult or

proved to be impossible (see ***Chitty on Contracts Special contracts*** Vol. 2 pg 600 supra).

Learned Counsel for the defendant in support of the defendant's contention that the contract had been frustrated cited in the case of ***Mulji Vs Cheog Yue Stemship Co (supra)*** where court held that the occurrence of the frustrating event brings the contract to an end forthwith without notice and automatically Counsel urged that once it was established by WFP and communicated to the plaintiff (in this case PW1) that there was insecurity in the region where the cargo was to be delivered then the contract was frustrated notwithstanding the plaintiffs willingness to continue performing its part of the contract.

Section 101 of the Evidence Act Cap 6 laws of Uganda 2000 provides:

> *101 Burden of proof*
>
> *(1) Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove that those facts exist.*
>
> *(2) When a person is boud to prove the existence of any fact, it is said that the burden of proof lies on that person.*

The above section read together with S.102 and S.103 of the Act clearly point to the fact that as a general rule the evidentially burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all was given on either side and that the burden of proof as to any particular fact lies on that party who wishes the court to believe in its existence. As for the standard of proof, the degree is now well settled – it must carry a reasonable degree of probability such

that a tribunal can say; *"We think it more probable than not"* that the burden is discharged.

A close look at the evidence adduced by the defendant in this case to support the notion that the trucks were stopped on account of the insecurity in DRC is to my mind insufficient to lead this court to say that it is more probable that not. I have arrived at this conclusion because Exh "D 6" relied on by the defendant to explain why the trucks were stopped from proceeding is not helpful as it is insufficient to meet the test as set out above. According to Exh "D6" the reasons advanced for trucks not proceeding to their original destination is twofold –: that the clearance of goods at Aba takes more than two weeks, and that the territory of Faradje is subject of attacks by LRA in last three days (i read 13th, 14th, and 15th Dec). No evidence was adduced to show to what extent the attacks in DRC if any had disrupted traffic to the contract destination hence necessitating the halt of the vehicles of the plaintiff. Indeed during cross examination DW1 admitted that according to the e-mail from WFP earlier mentioned (D6) the insecurity problem had affected the distribution points. In fact the e-mail (D6) clearly states ".....for reasons of *protection* of our recipients....." My reading of this is that WFP was more concerned with distribution of relief goods post delivery than concern about delivery to the contract destinations.

Counsel for the plaintiff referred court to the words of Lord Wright in ***Denny Mott & Dickson Vs James B. Fraser & Co (supra)*** where he stated:-

> *"it is now i think settled that.....where as generally happens and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it* ***ex post facto*** *on the actual circumstances of the*

case between the parties, it is the court which has to decide what is the true position."

I cannot agree more. In the instant case i am not persuaded by the claim of insecurity to the contract destination as being the cause of the diversion of the trucks to Aru DRC. As i have analysed above, the defendant has not been able to prove the frustrating events to the accepted standards and accordingly issue number one is resolved in the affirmative.

Issue two - whether there were delays which entitled the plaintiff to demurrage charges

PW1, Mr. Yeka testified that the plaintiff's drivers drove to DRC and were told to offload the cargo at Aru. Furthermore he stated that on their way back to Uganda, the defendant contracted the plaintiff to transport tobacco from Aru DRC to Kampala. That they reached the BAT compound on the 26th January 2011 but got offloaded and released on the 5th February 2011. It was Mr. Yeka Banga's evidence however that the time taken by the defendant to load and off load the trucks was unreasonable thus the plaintiff had to charge demurrage. Additionally, it was his evidence that the company had sub-contracted other subcontractors who continually demand for their payment and this has inconvenienced the plaintiff company financially.

He emphasised the fact that the delay caused by the defendant was un reasonable and had financial implication of US $ 250 per truck per day. He admitted that there was no contract to that effect but that it was their company policy relating to regulation of the trucks.

DW1 Benard Opio testified that the trucks from Aru arrived in Kampala on the 26th January and offloading began the next day and ended on the 5th of February. He

furthermore explained that the URA monitoring unit took three days to clear the cargo. Furthermore, the tobacco was too dry and delicate and thus required extra care to load and offload. He also stated that if there was any delay in Kampala, it was only for three days and was not at all caused by the negligence of the defendant.

In her submissions Learned Counsel for the plaintiff referred to PW1, Mr Yeka's evidence where he had stated that the trucks were loaded on the 21st December 2010 but were released to proceed to Kampala on 7th and 8th of January 2011, and that the trucks arrived on 26th Feb. 2011 but were offloaded on the 5th February 2011. Counsel urged that such delay was unreasonable considering that the delay in DRC was of 7 days which excluded public holidays and the delay in Kampala was of 6 days which the court should consider as unreasonable.

Counsel further submitted that there was a gentleman's agreement reached over the phone and that both the plaintiff's and the defendant's witness made mention of a discussion of money to be charged for the delay of the trucks. It was her contention therefore that the defendant ought to pay the demurrage charges owing.

Defence Counsel in her submissions contended that there were no delays within the meaning of the contract between the parties that could entitle the plaintiff to the demurrage charges. She referred to clause 10 of the Contract which was to the effect that the plaintiff is entitled to demurrage if the defendant was negligent which the plaintiff neither pleaded nor proved.

Counsel made reference to the evidence of the DW1 to the effect that the delay was caused by a number of reasons such as the dryness of the tobacco which created the need to load and off load with care. Additionally, the URA Transit Monitoring Unit took some days to clear the cargo all of which contributed to the delay.

Counsel also contended that there was no such agreement made with the defendant as charges for the delay. She concluded by asserting that since there was no proof thereof, the plaintiff is not entitled to the charges so pleaded.

In rejoinder, Counsel for the plaintiff submitted that there were emails and telephone calls exchanged during the transaction and that an understanding was reached between the parties and the defendant undertook to pay for the demurrage charges. She conceded however that there was no evidence led in court to that effect.

In conclusion counsel submitted that the plaintiff is entitled to the demurrage charges so pleaded.

This is a claim in demurrage. Demurrage is a term concerned with delay during the terminal operations. According to ***Butterworths Words and Phraces Legally defined*** 3rd Edn at page 43, the word "demurage" signifies the agreed addition at payment beyond a period either specified in or to be collected from the instrument but it has also a popular or more general meaning of compensation for undue detention. As to the distinction between "demurrage" and damages for detention, the Author has this to say:-

> *"Demurrage is more applicable to a delay after time expressly fixed than to delay after a time which is only implied as reasonable*
>
> ---
>
> *---A claim under either head is a claim in respect of detention and is in the nature of a claim of damages. Amongst merchantile men, indeed "demurrage" is often used in a wider sense as including both demurrage strictly so called and damages for detention" (**Moor Line Ltd V Distillers Co. Ltd 1912 Sc 5 14 at 520 per Lord Salevsen)***

According to PW1, the loading of the trucks commenced on 21st December 2010 and the trucks were released to proceed to Kampala on 7th and 8th January 2011. The vehicles reached the destination in Kampala on 26th January 2011 and offloading went on up to 5th February 2011.

PW1 asserts this was unreasonable delay and they should be compensated. DW1 does not deny the events but asserts it was due to delays partly caused by Uganda Revenue Authority procedures and the fact that the tobacco was dry and very delicate to deny and offloaded. In all the plaintiff claims demurrage charges of US $ 17,250, although this was a claim for demurrage, as stated above, the term demurrage, is used in a wider sense to include both demurrage and damages for detention. I am of the opinion that the plaintiff's trucks were unduly delayed and detained for a period i find unreasonable. In the circumstances i award the plaintiff US $ 10,000 (United States Dollars Ten Thousand) as damages for detention.

Issue three - whether the plaintiff is entitled to the reliefs sought.

Counsel for the plaintiff contended in her submissions that the following remedies be awarded;

1. The sum of US $43,784.375 on the contract price.
2. Demurrage charges of US $17,250
3. general damages
4. Interest at a rate of 24 p.a from the date of default till payment in full.
5. Costs of this suit.

Counsel submitted that the plaintiff had prepared the trucks to reach the agreed destinations in DRC. On interest she stated that in commercial contracts such as this, courts have been inclined to grant interest at a high rate because the parties are expecting to gain a profit at the time of the transaction. She relied on the case of ***BM Technical Services Ltd versus Cresent Transporters Ltd C.A No.8 of 2002***. She also cited the case of ***Sietco v Noble Builders (u) Ltd C.A No. 31 of 1995*** where court stated that court's discretion is to be exercised if sufficient cause has been established for the court to award interest at 24% p.a till payment in full from the date of filing.

On costs Counsel stated that costs follow the event and therefore prayed court awards costs of this suit to the plaintiff.

Counsel for the defendant contended that the plaintiff is not entitled to the reliefs so sought. She submitted that;

a) The contract was frustrated and as such the plaintiff and defendant were discharged of future obligations and the amount paid to the plaintiff was sufficient.
b) The circumstances that give rise to demurrage charge under a contract of carriage had not been pleaded nor proved by the plaintiff at all.
c) Interest

   Counsel submitted that the plaintiff has not shown sufficient cause for the award of interest at the rate of 24%.
d) General damages

   The plaintiff had not adduced sufficient evidence to show the inconvenience suffered.

e) Counsel adopted the plaintiff's submission on costs that costs follow the event.

As a general rule each party to a Contract must perform exactly what he or she undertook to do. Where the defendant wrongfully prevents the claimant from complying with his performance – as i have found he did in this case –the claimant is entitled to recover damages for breach of contract. In the case of ***Dharamshi Vs Karsan [1974] 1 EA 4***1 the East African Court of Appeal held that the basic principle to be applied in a claim for general damages is the common law doctrine of ***restituto in integrum,*** that the plaintiff has to be restored as nearly as possible to the position he/she would have been had the injury complained of not occurred. It is not in dispute that the contract price was US $ 87,568 out of which US $ 43,784 was paid in advance leaving a balance of US $ 43784. It is also agreed that the plaintiff's trucks were stopped mid-way and instead directed to offload at Aru DRC which as i have found above was a clear breach of contract. As indicated above, once the defendant is wrongfully prevented from completing the performance of the contract, then he is entitled to recover damages for breach of contract. From the evidence adduced, the balance outstanding on the contract though known cannot be fully recovered because the defendant was stopped from performing the remaining leg of the distance contracted for. I would have expected the defendant to lead evidence to show what his profit would have been had he not been stopped from performing the remainer of the journey. He did not.

That notwithstanding, i will attempt to assess the loss of profit suffered by the plaintiff as a result of the defendant's breach. I am alive of the fact that the plaintiff was contracted by the defendant to transport tobacco from Aru DRC to Kampala. Accordingly all the above facts taken into consideration i am of the view that a sum of US $ 15,000 would be sufficient recompense for the loss suffered by the

defendant on account of the breach of contract by the plaintiff I so hold.

In the result judgement is entered for the plaintiff for:

1. A sum of US $ 15,000 being damages for breach of contract.
2. A sum of US $ 10,000 being damages for detention.
3. The sums in 1 and 2 to carry an interest rate of 14% per annum from date of judgment till payment is full.
4. Costs of the suit are awarded to the plaintiff.

B. Kainamura

Judge

06.05.2014