

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 230 OF 2009

1. BUFFALO TUNGSTEN INC

2. THE BARNES COMPANY PLAINTIFF

VERSUS

SGS UGANDA LIMITED..... DEFENDANT

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiffs' claim against the defendant is for the recovery of special damages of **US\$ 1,400,000 (United States Dollars one million four hundred thousand only)**, general damages, costs and interest as a result of fraud, negligence, misrepresentation and breach of contract by the defendant in the performance of its obligations.

The history of this case is that by plaint dated 26th May 2009, Buffalo Tungsten Inc the 1st plaintiff commenced a suit against the defendant claiming for special and general damages arising from breach of contract. The defendant filed a written statement of defence (WSD) contending inter alia that the plaint disclosed no cause of action since the plaintiff had never had any dealings with the defendant, contractual or otherwise and that the defendant had only dealt with the Barnes Company who was not a party to the suit.

The 1st plaintiff then filed an application to amend the plaint seeking to add the Barnes Company as a 2nd plaintiff so as to bring the suit as principal through its agent the Barnes Company in an effort to resolve all matters in controversy between the parties. The court granted the application to amend the plaint whereupon an amended plaint and an amended WSD were filed in court.

The plaintiffs' case is that the defendant negligently and or fraudulently drew samples from the heap of Wolframite thereby representing to the plaintiff that the samples were representatives of the heap whereas, when the materials were shipped to Moscow and assayed, they were found to be non-compliant, that is, had no commercial tungsten and as a result of the acts of the defendant, the plaintiff lost substantial amounts of money totaling to US\$ 1,050,020 (one million fifty thousand and twenty dollars only).

On the other hand, the defendants contend that the scope of its services was limited to sampling, weighing and sealing the material which it did and analysis of the material was not within the scope but was instead to be done by Alex Stewart and the certificate of analysis thereof was addressed directly to the 2nd plaintiff showing that the defendant had no control over the results. Further still, the defendants contend that they were not responsible for the storage of the goods and procuring the safety and untroubled journey of the goods to their place of delivery and the results certified by the defendant were only applicable to the time and place of inspection.

At the hearing, the plaintiffs were represented by Mr. Joseph Luswata from Sebalu & Lule Advocates while the defendant was represented by Mr. Peter Kauma from Kiwanuka & Karugire Advocates.

The facts agreed upon by the parties according to the joint scheduling notes are as follows:

1. Jeremy Barnes instructed the defendant to sample, weigh and seal 112,200.00kg of material described as Wolframite Ore.
2. The defendant drew samples on the 28th July 2007 and forwarded a sample for assaying to Alex Stewart UK Laboratory.
3. The defendant between 16th August 2007 and 19th August packed the material in 286 drums and sealed them. The materials were thereafter loaded into six containers.

The following issues were framed for trial:-

- a) Whether the defendant performed its duties as per the scope of services communicated by the 2nd plaintiff.

- b) Whether the defendant committed acts of fraud and misrepresentation in the performance of its duties.
- c) Whether the defendant is liable in negligence for loss occasioned by the plaintiffs.
- d) Whether the plaintiffs are entitled to the remedies sought.

The plaintiffs called two witnesses while the defendant called one witness. Following closure of hearing evidence, the parties filed written submissions which I have duly considered in this judgment. I must however point out that the plaintiff's three paged submissions were made haphazardly without specifically addressing the issues as framed. The defendant on the other hand systematically addressed the issues and this court shall consider them in the same order as framed above.

Issue No.1:

Whether the defendant performed its duties as per the scope of services communicated by the 2nd plaintiff.

PW1, Mr. Ralph Showalter the 1st plaintiff's business manager stated in his witness statement that the 1st plaintiff through its agent the 2nd plaintiff contracted to purchase quantities of Wolframite Ore from a vendor in Zambia to be shipped to Russia. The Wolframite Ore was to contain not less than 50% (fifty percent) tungsten oxide (WO₃). Furthermore, that the 1st plaintiff through its agent the 2nd plaintiff contracted the defendant to perform sampling, weighing, packing, sealing, certification and loading of the materials. The samples drawn by the defendant was to be assayed by a company in the United Kingdom by the name Alex Stewart Limited.

It is an agreed fact that Jeremy Barnes instructed the defendant to sample, weigh and seal 112, 200.00kgs of materials described as Wolframite Ore. As noted from the evidence of PW1, the defendant was contracted to perform sampling, weighing, packing, sealing, certification and loading of the material.

It was the defendant's case that Jerry Barnes by an e-mail admitted in evidence as ExhD4 changed the original scope of work which included analyzing the samples and instead said they were to be sent to Alex Stewart (Assayer) Limited in the United Kingdom. Basing on these

submissions, the defendant contended that it was not responsible for storage of the goods and procuring of the safe and untroubled journey of the goods to their place of delivery and therefore invited court to find so.

According to the defendant's pleadings, the evidence adduced at the hearing and the submissions, the defendant illustrated that its duty did not extend to analysis of the tungsten trioxide contents of the material since the analysis/assay was specifically to be done by Alex Stewart (Assayers) Limited. PW1 also testified that it was not the duty of SGS to confirm the content of tungsten so it did not carry out the assay.

It was also the defendant's submission that this evidence was not controverted/discredited by the plaintiffs in cross examination or in their submissions. The defendant therefore prayed that this court finds that the above was the scope of service as communicated to it by Mr. Jerry Barnes and the basis upon which the services were provided. Upon analyzing the evidence on record, I agree that what the defendant stated was the scope of service and therefore as I evaluate the evidence of the defendant's performance of its duties I will base them on those services.

As regards the defendant's performance, it was the evidence of PW1 in cross examination that he could not confirm that the defendant performed what it was contracted to do. According to him, certification entailed preservation of the integrity of the materials which he said meant offering some kind of guard services to protect the materials until they were loaded. He however said he did not know whether SGS was paid for any guard services or was contracted to keep the goods. He later explained that the defendant was not to physically guard the goods but it was under a duty to maintain the integrity of the material by sealing the warehouse, drums and containers and ensuring at every step that the seals as earlier put were intact. He stated that the defendant sampled the goods in July 2007 and it was not under any obligation to guard them from July 2007 until March 2008 when the same arrived in Russia.

For the defendant, according to DW1, Dr. Ferdinand Bitanihirwe's witness statement, a detailed account of how the services were executed by the defendant from the date of the sampling to the issuance of a certificate of weighing, sealing and sampling (Exhibit Exh.D34) are explained as follows:

Sampling

In his statement, DW1 states that the defendant's employees travelled to Bujumbura and in the presence of the parties' representatives drew samples from materials found in a warehouse in Bujumbura which samples were sealed with SGS seals and dispatched to Alex Stewart in the UK in accordance with the instructions of Jerry Barnes. The certificate of weighing, sealing and sampling (ExhP2/D6) and copies of the airway bills upon which the samples were dispatched to Alex Stewart (ExhD8) were attached as evidence. According to DW1, the process of sampling was properly done and in line with the instructions of Mr. Jerry Barnes.

In contrast, the plaintiffs made allegations that the samples drawn from the bulk of the material were swapped by the defendant. However, in cross examination PW1 stated that he was not present during the sampling by the defendant and neither did he witness the swapping of the samples sent to Alex Stewart. He also conceded that there was no expert report on record showing that the samples were swapped by the defendant. He further stated that it was his opinion that there was fraud as other samples were swapped with what was in the warehouse. It is therefore clear that there is no evidence in support of the allegation of the swapping of the samples. I will deal with the aspect of fraud under the 2nd issue but for the purposes of this issue, I am satisfied that the defendant did the sampling as per the scope of services communicated to it by the 2nd plaintiff and I so find.

Packing

After the sampling was done it is the testimony of DW1 in his witness statement that the bulk of the material was then packed into polypropylene bags by use of spades and exactly 100kg of the material was transferred into each bag. A total of 1,122 bags each with 100kg net weight of material were packed and this exercise was completed on 1st August 2007. In proof of this DW1 submitted the certificate of weighing, sealing and sampling (ExhD34) and the tally sheets and weight notes for the 1122 bags (ExhD14).

PW2 also confirmed that the materials were in drums sealed by SGS. PW1 in his evidence did not contest the fact that the defendant packed the materials as per the contract. In effect, the packing of the materials was not disputed by the plaintiffs. I therefore find that the defendant performed its duty of packing the materials as per the contract.

Sealing

It was DW1's testimony in his witness statement that Jerry Barnes asked the defendant to put its seal on the warehouse where the material were being kept- a request which was outside the scope of service that had been agreed upon. This prompted him to contact the head office in Geneva Switzerland which advised that SGS seals should not be put on the warehouse but rather, the customer could put its own seals and upon SGS's return, they would report on the visual status of these seals on a remote basis. This was communicated to Jerry Barnes who had no objection. DW1 stated that the customer's seals were placed on the warehouse and upon SGS's return there at the next intervention they were verified and found intact. DW1 tendered in evidence the seals verification report (ExhD13) as well as the sampling report, (ExhD6) in support of this testimony. I note that the plaintiffs also acknowledged that fact in their plaint.

DW1 explained the reason for the adoption of this procedure in cross examination when he stated thus;

“Based on other SGS services which we offer we have standard procedure on how each service is supposed to be rendered. The service which requires locking and sealing warehouses is a different service and is not included in the scope of the inspection service which the plaintiffs requested for. ...the defendant's scope of work did not extend to providing security guard services. Sealing a warehouse usually arises in a collateral management service between 3 parties. They did not pay for that.”

Based on the above evidence, it is the finding of this court that the defendant performed its duties as regards sealing in line with the scope of service communicated by the 2nd plaintiff.

Loading

The defendants further submitted that after sampling the SGS inspector waited to load the material into containers but the materials could not be loaded at the time since trucks had not been secured. The delay had not been anticipated and was not of the defendant's making.

DW1 testified that from 16th August 2007 to 19th August 2007, SGS attended the warehouse where the materials were being kept and after verifying that the customer's seal on the warehouse were still intact, the materials earlier packed in the 1,122 polypropylene bags was

reweighted to confirm previous weights obtained and then transferred and packed into 286 used metallic drums which were weighed and sealed with two SGS seals per drum. This was supported by the tally sheets and weight notes for the 286 drums (ExhD15) as well as the certificate of weighing, sealing and sampling (ExhD34) all of which were not contested by the plaintiffs.

DW1 further testified that after provision of the service as described above, the defendant at this stage raised an invoice for the sum of US\$ 9,767 for sampling, weighing, sealing and packing supervision (ExhD35).

DW1 in his witness statement stated that due to new contract for transport with Maersk, Jerry Barnes by email (ExhD17) informed the defendant that the services now required of the defendant were to provide a list of drum number and seal number loaded in each of the six containers and to verify and identify the Maersk container number. A quotation (ExhD2) for these new proposed services was then sent to Jerry Barnes. DW1 further stated in his witness statement that the defendant's inspector consequently attended Bujumbura to carry out the proposed services but were unable to as the parties were not yet in position to have the goods loaded into containers. The defendant accordingly raised an invoice for the idle days (ExhD36). Jerry Barnes at this point apologized to the defendant for the change in plan and stated that there had been a few "curve balls" by the banks not handling the transfer of funds smoothly (ExhD19).

DW1 further testified that thereafter the defendant was by email (ExhD20) informed by Jerry Barnes that a dispute had arisen amongst the sellers and that he wanted the defendant's services to verify the seals earlier placed on the drums and to that end he asked the defendant to return to Bujumbura, confirm the seals have not been tampered with and therefore conclude that the contents have not been compromised because the drums remained as sealed. He testified further that by another email (ExhD21), Jerry Barnes further changed the scope of services and informed the defendant that the goods were now at Bujumbura port and that the defendant was now to supervise loading of 6 containers from the Bujumbura port and to put SGS seals on the containers as opposed to verification of Maersk seals.

Furthermore, that by the same email (ExhD21) the defendant was informed by Jerry Barnes that under the supervision of their agent, Apostle Mathew Ochepe Hayes (PW2) a few drums had

been opened to enable samples to be drawn to verify that the lot had not been compromised. He stated that this was carried out by PW2 by use of his XRF equipment operated by his own employee in Bujumbura two weeks prior to the email.

It is important to note at this point that PW2 during cross examination also stated that he verified the transaction when he stated in regard to paragraph 9 of his witness statement as follows:

“That’s right that I was instructed to verify the transaction. Yes we opened two of the drums with SGS to verify. Yes we used XRF equipment to verify it. It is equipment like a computer for on the spot analysis of minerals. The reading was consistent with the reading given by Alex Stewart in the UK. I do not recall the date of verification but it is in my diary. It was after SGS had sealed the 286 drums. I did it at the Bujumbura port in the government warehouse.”

PW2 further testified that the defendant supervised the loading of the drums into the trucks after he had verified the content. He however said he did not witness it but he was just told.

DW1 stated in paragraph 38 of his witness statement that after verification of the seals on the drums, tallying of the drums were done in the presence of the defendant’s inspector during the loading of the drums into containers. This shows that the defendant indeed supervised the loading of the drums into the container. I therefore find that this duty was also performed by the defendant as per the contract.

Verification

DW1 testified that the defendant’s inspector went to Bujumbura port and found the drums in an open customs yard and there upon attended to the verification of the seals that it had earlier placed on the drums. This verification was done in the presence of all parties and the defendant confirmed that 284 drums had their pairs of seals intact and that the seal numbers matched those on the list it previously prepared. The defendant submitted a seal verification report (ExhD22) that was signed by among others Mathew Ochepea Hayes, PW2.

The two drums No.19 and 51 which were each missing one seal were resealed in the presence of PW2 and after verification of the seals on the drums, tallying of the drums was done in the presence of the defendant’s inspector during the loading of the drums into containers. DW1

submitted tally sheets and weight notes for all the six containers Exhs. D23, D24, D25, D26, D27 and D28. This evidence was not challenged or controverted at the hearing.

DW1 further testified that it was communicated to Jerry Barnes by email (ExhD29) that after having supervised the loading of the drums in the 6 containers (which were in the custody of Bujumbura customs,) the containers could not be sealed which was attributed to a delay in clearing the goods with customs. In the said email, it is stated that the defendant told Jerry Barnes that they thought the customs procedure had been completed and it was surprising that it would take this long.

It was DW1's testimony that by email (ExhD30), the scope of service was again changed when Jerry Barnes stated that it would not be necessary to provide the additional service of sealing the containers as previously requested. He requested the defendant to confirm the number of drums loaded in each container and that he would rely on the seals applied by Maersk and the seal numbers listed on the Maersk shipping documents and ocean bill of lading.

DW1 testified further that the defendant thereafter prepared a final certificate but made a typographical error in the description of one of the container numbers as PONU \instead of POCU and upon the discovery of that error, the certificate (ExhD33) was cancelled and the defendant prepared another final certificate (ref: F327001/493/07-R) with the correct container number and duly submitted the same to Jerry Barnes. The final certificate was tendered in evidence as Exhibit D34.

Upon analyzing the evidence on record, it is my finding that the defendant also carried out verification of the seals as required by it and two drums were found without seals because the plaintiffs' agent broke them so as to draw samples and test with his XRF Equipment upon the instruction of Mr. Jerry Barnes.

On the whole, the defendant performed its duties as per the scope of services communicated by the 2nd plaintiff. Indeed DW1 in his witness statement stated that by an email (ExhD32), Jerry Barnes fully aware of the manner in which the defendant had provided its services stated that he could not be more pleased with the work the defendant had accomplished under very trying circumstances and passed on compliments for a job well done.

Upon evaluating the evidence as above, this court has no basis for finding otherwise and therefore the first issue is answered in the affirmative.

Issue no. 2

Whether the defendant committed acts of fraud and misrepresentation in the performance of its duties.

Fraud

It was the plaintiffs' pleading that the defendant presided over and orchestrated a fraud by submitting materials to Alex Stewart that were different from the material it purported to have drawn the samples from. The particulars of fraud are spelt out in the plaint and are largely related to the alleged swapping of samples and producing false certification to conceal a fraud.

However, it was the defendant's contention that no evidence was adduced to prove fraud on the part of the defendant as most of the evidence that the plaintiff sought to rely on was indirect and merely speculative and as such could not sustain a finding of fraud.

Fraud is defined in the **6th Edition of the Black's Law Dictionary Page 660** as

“The intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him/her or to surrender a legal right.”

The plaintiffs submitted that there was fraud on the part of the defendant by swapping the samples that were sent to Alex Stewart. The plaintiffs in their submissions stated that the defendant engaged in a fraud by providing fake samples that tested as acceptable wolfram ore which were not representative of the entire consignment of the materials. The material that was packed and sent to Russia was low grade iron ore with essentially no tungsten content.

The plaintiffs further submitted that the heap of materials was secured by the client seals. When SGS went to pack the drums, the seals were found intact and then sealed with SGS seals and loaded into containers that were equally sealed. The plaintiff then reached a conclusion that the sample drawn was not representative of the entire consignment because the assaying results of

the two were not consistent and therefore the defendant must have been involved in some kind of fraud.

However, the defendant submitted that the evidence on record does not in any way support this contention. DW1's evidence as shown above was that the defendant's employees travelled to Bujumbura and on 28th July, 2007 the defendant in the presence of the parties' representatives drew samples from material found in a warehouse in Bujumbura which samples were sealed with SGS seals and dispatched to Alex Stewart in the UK in accordance with the instructions of Jerry Barnes and that the samples were drawn from the bulk as presented. PW1 Ralph Showalter himself testified that he didn't see SGS swapping the sample sent to Alex Stewart and conceded that there was no expert report on record showing that the samples were swapped by SGS.

In a land mark case of ***Kampala Distract Land Board and Anor vs. National Housing and Construction Corporation (2005) 2 E.A at page 83- 84***, the Supreme Court stated that it is well established law that fraud means actual fraud or some act of dishonesty .

The burden of proof and standard of proof in cases involving fraud was discussed in the case of ***Ratilal Gordhandhai Patel vs. Laljimaknji (1957) EA 314 at page 317***, where the court stated;

*“.....he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard of proof required. **Allegations of fraud must be strictly proved**: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, **something more than mere balance of probabilities is required...**” (emphasis mine).*

In a more recent case of ***Fredrick J.K. Zaabwe v Orient Bank Ltd and 5 Others SCCA No. 4 of 2006 [2007] UGSC 21*** Katureebe, JSC (as he then was but now CJ) had this to say about dealing with allegation of fraud:-

“In my view, an allegation of fraud needs to be fully and carefully inquired into. Fraud is a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others”.

In the context of these authorities, it is only logical that fraud must be specifically pleaded with particulars clearly stated to enable the other party respond to it and at the trial it must be strictly proved so that the court can fully and carefully inquire into it. It is also clear that the burden of proving fraud is higher than in ordinary civil cases although not as high as in criminal cases.

Turning to the instant case, the question is whether the plaintiff has proved the alleged particulars of fraud to the required standard or at all. The plaintiffs have alleged that the defendant swapped the samples it drew and sent a wrong one which did not represent what was in the materials presented to it. As stated under the 1st issue, PW1 said he did not witness the swapping of the samples and his allegation is based on his opinion and not on any expert report.

It must be noted that PW2 who stated in cross examination that he was instructed to verify the transaction did not allude to the alleged swapping of the samples by the defendant. He instead stated that after SGS had sealed the 286 drums he opened two of them with SGS and drew samples therefrom for on the spot analysis with XRF Equipment to verify whether it was consistent with the reading given by Alex Stewart in the UK. It was his evidence that the reading was consistent. To my mind this evidence contradicts the allegation of sample swapping which, in any event, is a mere speculation based on assumption since it is not supported by any evidence. Therefore this court is inclined to agree with the defendant that the allegation of fraud is a mere speculation that has no basis and I so find.

Misrepresentation

Misrepresentation is defined in the **Dictionary of Law, Third Edition, Oxford University Press, 1994 at Page 254** as follows;

“Misrepresentation; an untrue statement of fact made by one party to the other in the course of negotiating a contract that induces the other party to enter in to the contract A false statement of law, opinion or intention does not constitute a misrepresentation nor does a statement of fact known by the representee to be untrue.”

It was the plaintiff's submission that there was misrepresentation on the part of the defendant by way of "producing/preparing false certificate to conceal a fraud". The plaintiffs stated that in reality, there never was 120MT but low grade iron ore with essentially no tungsten content.

Conversely, the defendant contended that this allegation has not been proved in evidence as the plaintiffs did not point out which part in the certificate was an untrue statement. The defendant argued that its evidence clearly showed that the certificate was prepared in accordance with the services as had diligently been provided by SGS.

It is important to note that for a claim for misrepresentation to succeed, the plaintiff must show the "**untrue statement of fact that was made**" by the defendant as defined in a dictionary of law (supra) which upon perusal of the record was not brought out clearly by the plaintiffs. Consequently, the claim for misrepresentation must also fail owing to such insufficiencies.

Therefore the issue of whether the defendant committed acts of fraud and misrepresentation in the performance of its duties is also determined in the negative as discussed above.

Issue No. 3

Whether the defendant is liable in negligence for loss occasioned to the plaintiff

Negligence as a tort is a breach of a legal duty to take care which results in damages to the claimant. According to the House of Lords in a celebrated case of **Donoghue vs. Stevenson (1932) A.C 562**, negligence is committed where a person has breached a duty of care owed to another thereby causing (him/her) injury

It was submitted for the defendant that as pointed out in **Precedents of Pleadings Bullen and Leak and Jacobs, 12th Edition Sweet and Maxwell at page 684-685**, the right to action lies whenever the plaintiff has suffered damages by reason of the failure to perform or negligent performance of any duty which the defendant either by himself or by his agent acting within the scope of his authority and on the defendant's behalf owes the plaintiff. It was argued that the defendant carried out the services as per the scope communicated by Mr. Jerry Barnes moreover to his pleasure and there was no negligence whatsoever on its part in the performance of the services. It was contended that the plaintiffs have not called any evidence to show that the defendant negligently performed or omitted to perform its duty.

Further, that according to **Precedents of Pleadings** (supra) at page 685, when pleading the plaintiff is required to specifically plead the facts upon which the alleged duty is founded and the duty to the plaintiff the breach of which the defendant is charged. Then should follow an allegation of the precise breach of the duty of which the plaintiff complains, that is, the particulars showing in what respect the defendant was negligent.

It was submitted for the defendant that section 101 of the **Evidence Act Cap. 6** provides as follows:

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

The particulars of negligence pleaded in paragraph 8 of the plaint are:

- a) Poor sampling management as a result of which the materials could have been compromised.
- b) Poor extraction of the samples from the bulk.
- c) Leaving the material in a warehouse without adequate safe guards.

With regard to the first particular of negligence, it was the contention of the defendant that the alleged poor management was not specified as required by the Evidence Act (Supra). And the question of what was poor about the management of the samples was not answered by the plaintiffs in evidence and as such this particular must fail because it is speculative in as far as it states that the “*material could have been comprised*” yet the evidence adduced does not in any way show how the samples were in fact comprised.

With regard to the second particular, “***poor extraction of the sample from the bulk***” it was submitted for the defendant that this statement was vague and the question posed by this particular that needed to be answered in evidence is, what was poor about the extraction of the samples from the bulk?

Counsel for the defendant submitted that the process of the sample extraction was clearly described in ExhD34 as follows:

“Sampling Procedure

Each sub lot was evenly mixed using spades and by conical reduction and quartering, samples were obtained from each of the six sub lots. The increment samples from each sub lot were then mixed together to form one composite sample. This was thoroughly mixed by using spades. During mixing a new set of increment samples were drawn to obtain a gross sample. The obtained representative gross sample was then reduced by conical quartering to finalize 04 samples.”

The defendants submitted further that the plaintiffs did not show in their evidence that there was anything poor about the extraction process of the samples as described above as no action or omission on the part of the defendant has been pointed out by the plaintiffs either in the pleadings or in the evidence to show negligence in the sampling process.

With regard to the third particular, the defendants in their submissions denied that there were no adequate safeguards since the customer’s seals were applied to the warehouse and guard services were not part of the scope of services agreed upon with Jerry Barnes and therefore the defendant owed no duty to the plaintiff to guard the warehouse where the material was kept. Counsel quoted the evidence of DW1 during cross examination that;

“Based on other SGS services which we offer we have standard procedure on how each service is supposed to be rendered. The service which requires locking and sealing warehouse is a different service. That service is not included in the scope of the inspection service which this client had requested for.”

Further still, during re-examination, DW1 stated that;

“The defendant’s scope of work did not extend to providing security guard services. Sealing a warehouse usually arises in a collateral management service between 3 parties. They did not pay for that.”

The above notwithstanding, the defendant submitted that it is not true that there were no adequate safeguards in the warehouse. Basing on the evidence of DW1, it was submitted that there was a delay in loading the goods caused by the plaintiffs since there were no trucks

available and it was communicated to Jerry Barnes that since sealing of the warehouse was outside the scope of services of the defendant, the customer could put its own seals on the warehouse and that upon the return of SGS at the next intervention SGS would report the visual status of these seals on a remote basis. It was further submitted that indeed the customer's seal were thereafter placed on the warehouse and upon SGS's return to the place at the next intervention, the seals on the warehouse were verified and found intact and this was proved by a seal verification report (ExhD13) as well as the sampling report, (ExhD6).

The defendant therefore prayed that this court finds that the 3rd particular of negligence as pleaded has not been proved hence the claim must fail.

The defendants also submitted that evidence was adduced to show that after loading the goods in the six containers and having the containers sealed, the defendant could not be held liable if the goods that got to Russia were different from those that were loaded in the container or had been tampered with since the defendant had no control over the transportation of the goods to Russia.

DW1 in his witness statement testified that in the Alfred H. Knight report that was presented to the court by the plaintiffs and Exhibited as P18, the weights of the 286 drums that were sampled were substantially different from the weights as earlier established by the defendant in Bujumbura. The defendant submitted that they cannot be held responsible for this unexplained difference in the weights as it was not responsible for ensuring the safe and untroubled journey of the goods to Russia.

It was conceded by PW1 in cross examination that the defendant was not under obligation to guard the goods from July 2007 when it sampled, packed them in drums and sealed them to March 2008 when it arrived in Russia just as it was not required to transport them to Russia. In fact PW1 stated that after SGS sealed the container it did not have access to the goods and if anything happened to them thereafter then SGS would not be responsible.

It was the evidence of DW1 during re-examination that there are possibilities of tampering with materials during the process of shipment when he stated that;

“It is possible for a container to be opened and the seal is left intact. We have had incidents like that. The hinges of a container are welded on the door. The

welding is removed and the door is removed then the content is either removed or replaced. The door is welded back and sprayed. Normally it is a criminal activity done by fraudsters.”

This testimony pointed out other possibilities of tampering with the plaintiff's goods at the shipment stage after SGS had sealed them. This is also supported by Mr. Jeremy Barnes himself. In an email sent to Maersk on 14th April 2008 (ExhP7) he stated;

“Of 286 drums in total only two had seals on them- the drums were burnt as if by the welding sparks. All the rest of the drums had only welding seams and wire pieces on the lid opening where SGS seals were supposed to be... I have been advised the Russian customs would not have cleared the containers unless the Maersk seals were according to the numbers on the OBL. I am advised there are no SGS seals on the containers. The above seems to indicate that the containers were opened in Bujumbura after SGS sealed the containers and before being sealed by Maersk.....while the time appears to be very short between the time SGS sealed the containers and Maersk sealed the containers, there must have been enough time for the drums to be switched.”

It was therefore the submission of the defendants that the only plausible conclusion that can be drawn from the above evidence is that the loss, if any, occurred after SGS had sealed the containers and while the materials were not in its possession, custody and control and no blame can be attributed to it. It was also the defendant's submission, which I wholly agree with, that there was no evidence that it did not do its duty or that it did not do it well.

The finding of this court under issue one is that the defendant performed the services that was communicated to it. It is also its finding under this issue that no negligence has been proved against the defendant. The evidence clearly shows that whatever tampering could have been with the materials was way after the defendant had performed its services. In any event, the defendant's role in maintaining the integrity of the materials stopped at putting its seals which it effectively did but not providing guard services as erroneously argued by the plaintiffs. Neither did the defendant have the duty to ensure safe transportation of the goods to its final destination.

It cannot therefore be faulted for any loss that may have occurred during transportation. This answers issue 3 in the negative.

Issue No. 4

Whether the plaintiffs are entitled to the remedies sought.

Having resolved all the issues as above, this issue would also be answered in the negative. Nevertheless, this court is required to determine the damages it would have awarded if the plaintiff had been successful just in case this matter goes on appeal and the plaintiff succeeds. I will therefore evaluate the evidence on record as relates to this issue. The plaintiffs in their amended plaint sought the following remedies:

- a) Special damages of US\$ 1,400,000.00.
- b) General damages.
- c) Costs of the suit.
- d) Interest on (a) above at 25% per annum from 28th December 2007 and on (b) from the date of filing the suit until payment in full.
- e) Such other reliefs as this Honourable court deems fit.

The plaintiff relied on the evidence of its two witnesses to prove the above special damages. Some uncertified copies of bank statements and payment advice were admitted as exhibits to prove the payments that were made but counsel for the defendant insisted that their authenticity would have to be proved at the trial. However, at the hearing both PW1 & PW2 conceded that most of the documents could not show that the payments were made as alleged. For example, as regards the claim for payment of tax PW1 stated in cross examination that none of the documents he referred to in paragraph 11 (b) of his statement showed that US \$ 180,000 was paid in Bujumbura as customs duty. On the other hand, PW2 stated that Exhibits 26 (i) & (ii) was given to them by the seller demanding taxes due but it was not dated and he could not explain why it was written by the Public Prosecutor's Office at Anti-Corruption Court. It was his evidence that he only assumed that there was a court dispute relating to the tax.

It is also imperative to note that while PW1 testified that US\$ 180,000 was paid as customs duty, PW2 contradicted this by stating that US\$ 103,000 was paid as duties and taxes. None of them

produced any receipt to prove payment of the taxes and so it remained a mere allegation that is not proved by evidence.

As regards payment to the buyer, PW1 testified that US \$ 592,000 was paid to Solimac through PW2. However, he said there was no receipt in the plaintiffs' bundle which shows that money was paid to Solimac just as there was no proof that money was sent to PW2. PW2 on his part stated in paragraph 15 (ii) of his witness statement that a total amount payable to the seller Solimac was US \$ 560,000. He then gave a breakdown of the amounts he remitted to Solimac which according to my calculation comes to US \$ 445,278. In paragraph 18 of his statement PW2 stated that some payments to Solimac and other payments including his consultancy fees were paid in cash. No receipt was adduced to prove those payments. PW2 conceded that there were no documents on record to show that US\$ 80,000 was paid to Solimac just as he did not have any documents to prove payment to the shipping company and for the warehouse. He also stated in cross examination that all the exhibits attached to his statement, that is, P24 (i) – P34 are not certified as true copies of the original by the issuing authority. He however, said the originals were in his house in Jos, Nigeria. One wonders how the originals would assist this court when they are in his house instead of being brought to court.

It is a settled principle of law that special damages must not only be specifically pleaded but must be strictly proved. Therefore, judging from the above evidence, it is my firm view that even if this court had found that the plaintiffs are entitled to the special damages sought, it would have still been inclined not to award the same because there was no evidence adduced to satisfy this court on a balance of probabilities that the amounts were incurred as alleged.

Similarly, I would find no basis for awarding general damages since the evidence shows that the alleged loss, if any, could have taken place after the defendant had performed the services as instructed. In conclusion of this issue, this court would have been inclined not to grant the plaintiffs any of the remedies sought because they failed to prove the same.

On the basis of my findings and conclusions on all the issues as discussed above, the plaintiffs' suit lacks merit and it is accordingly dismissed with costs to the defendant.

I so order.

Dated this 21st day of October 2015.

Hellen Obura

JUDGE

Judgment delivered in chambers at 2.30 pm in the presence of Mr. Joseph Luswata for the plaintiff and Mr. Peter Kauma for the defendant. Both parties were absent.

JUDGE

21/10/15