

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO. 434 OF 2009

TILE WORLD LTD

SANYU BETTY

NESTER BYAMUGISHA::: PLAINTIFFS

VERSUS

THE COMMISSIONER CUSTOMS::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

The 1st Plaintiff Tile World Limited carrying on business of importation and sale of ceramic, floor and sanitary tiles, plumbing fittings, their accessories and other related products with Sanyu Betty herein referred to as the 2nd Plaintiff a director of the 1st Plaintiff together with the 3rd Plaintiff Nester Byamugisha the Company Secretary to the 1st Plaintiff instituted this suit against the Commissioner Customs herein referred to as the Defendant for special, general, exemplary, punitive, and/or aggravated damages, interest and costs.

The 1st Plaintiff is an importer, supplier and fixer of ceramic and sanitary tiles. It was requested by Emerald Hotel Ltd herein referred to as Emerald to import and fix ceramic tiles in the Hotel. The two entered into an agreement on the 15th September 2005 wherein the 1st Plaintiff would import a consignment of floor and wall tiles on behalf of Emerald, **Exh P3**. On the strength of this agreement the 1st Plaintiff applied for and obtained letters of credit from their bankers Centenary Rural Development Bank. It was their request that the invoices be in the names of Emerald Hotel Ltd.

The Plaintiffs on the 27th September 2005 made an order for seven containers of ceramic and floor tiles herein called the Consignment worth US \$ 28,218.25 all based on an irrevocable

letter of credit worth US \$ 46,880.74 which the 1st Plaintiff had applied for from its bankers Centenary Rural Development Bank Ltd.

On the 24th January 2006 when the Consignment was on the high seas, the 1st Plaintiff was shocked to learn that Emerald was no longer interested in the contract. This troubled the 1st Plaintiff very much because it had also imported 12 other containers for Arkright Housing Projects herein called Arkright whose clearance it had based reliance on the money they would obtain from Emerald. To avoid being landed with a Consignment without buyers and also being saddled with the cost of clearing the 2nd Consignment for Arkright they sold the 1st Consignment to Kepp Resort Ltd, **Exh P19**. Kepp Resort Ltd was a hotel in Kasese which was beneficiary of the tax exemption facility, **Exh P2**. This was later to raise technical issues because the Consignment was in the names of Emerald and only Emerald by its authorized manager/directors or persons holding their power of attorney could pass title to a third party.

The Consignment arrived in Kampala and Kepp Resort instructed the clearing agent Berteen Business Systems Ltd to clear it but was turned away by the Defendant. Kepp Resort Ltd on 12th September 2006 wrote to the Defendant through Tashobya, Byarugaba & Co. Advocates demanding release of the containers, **Exh P30**. It wrote in part;

“Our client is undergoing considerable inconvenience due to the continued detention of its imported goods by the Commissioner of Customs and Excise Department without any lawful cause. There is an Agreement to the effect that our client bought the said goods (as per Bill of Lading No. 0458 –KAMJ) 007 as per the Commercial Invoice NO.869 618-05 dated 01/12/2005 from BETTY SANYU acting for EMERALD HOTEL LTD. A copy of the Agreement is attached as Annexure “A.”

The Defendant replied contending that the goods did not belong to them, **Exh P32**. It wrote;

“We have noted the contents of your letter and we would like to inform you that we do not have any goods in our custody in the names of M/S Kepp Resort Hotel.”

A few days before this rejection of Kepp Resort the Defendant had come up with a report concerning ownership of the Consignment in which it reported that in substance Betty Sanyu was the owner of the goods but that since the goods had been imported by the 2nd Plaintiff in the names of Emerald, the latter held the legal title.

That being the case a change of owner was necessary and the Defendant recommended that the 2nd Plaintiff could only legalize her title of ownership after swearing a statutory

declaration and that having done so she would be required to pay taxes after which the 7 containers which were in the Defendant's control would be released directly into home use, **Exh P31**.

On the 27th September 2006 Kepp Resort Hotel through their advocates wrote to the Defendant conceding that a change of name as to ownership of the goods had not been executed and that they were ready to go through all the steps and procedures required to execute the change of name, **Exh P33**.

In a surprise twist of events Kepp Resort Ltd on the 23rd January 2007 wrote to the Defendant abandoning the claim of ownership saying the whole contract was froth with illegalities and fraud. It said it had found out that the 2nd Plaintiff who purportedly sold the Consignment to it had imported them fraudulently using Emerald Hotel as a cover and misrepresented herself as a director. Distancing itself from the contract it wrote;

“Accordingly Kepp Resort Hotel Ltd was duped into buying and cheated. It protests and condemns, in the strongest terms possible, this kind of fraud and disassociates itself from the same and from any claims whatsoever for the goods. It also regrets any inconveniences its insistence for the goods may have caused URA. Kepp Resort Hotel now instructs its Lawyers foresaid to straight away initiate civil and criminal proceedings against the culprit to among other things recover its money.”

The situation seemed to turn to an unpleasant situation because the Consignment that had been imported in what seemed to be a normal business dealing had now turned into a criminal proceeding dragging the 2nd Plaintiff into police to make police statements.

The parties then entered into a Memorandum of Understanding on the 26th of April 2007 wherein the 1st Plaintiff admitted indebtedness to the Defendant of UGX 33,755,892/= whose break down was UGX 130,168,875/= as principal and UGX 2,587,017/= as interest being customs dues on the imported consignment. The Plaintiff would immediately take delivery of the three containers of the goods on the execution of the Memorandum of Understanding herein called the MOU and the Defendant would cause the remaining four containers to be removed to the customs warehouse at Nakawa.

Furthermore, that the 1st Plaintiff would issue post dated cheques totaling the amount due to act as security of the liability. This MOU also constituted an irrevocable power of attorney

appointing the Defendant as its unlimited attorney empowering it to sell, auction, pledge and transfer to a third party of the 1st Plaintiff's four containers that it held as a lien.

The Plaintiffs contend that this MOU was not voluntarily entered. They also contend that the actions of the Defendant were unlawful and a means to use its privileged position to oppress the Plaintiffs by refusing to release the consignments well knowing that the transactions were of a commercial nature and that the Plaintiffs utilized funds from a number of financial institutions and were rendered unable to service these facilities.

They further contend that the delays in releasing the goods to them, the payments they made on the goods that were exempt from taxes occasioned damages to which the Defendant must be held liable. The Plaintiffs further contend that the Defendant acted high handedly in seizing and retaining consignments that they shouldn't have and they should be penalized in aggravated and/exemplary and /punitive damages. They also pray for interest on both special and general damages and costs.

In its defence the Defendant denied liability and contended that the 2nd Plaintiff attempted to use the 1st Plaintiff in a tax evasion scheme by use of genuine tax exempted hotels to import goods tax free and sell them on the Ugandan market.

The issues for determination by the Court as agreed by the parties are;

- 1. Whether the detention of seven containers of ceramic tiles by the Defendant before the release to the 1st Plaintiff was unlawful?**
- 2. Whether the Memorandum of Understanding had any effect on detention of the goods?**
- 3. Whether the Defendant committed any tort towards the 2nd and 3rd Plaintiffs?**
- 4. What are the remedies available to the parties?**

In regard to the first issue as to whether the detention of seven containers of ceramic tiles by the Defendant before the release to the 1st Plaintiff was unlawful the Plaintiffs contended that the seizure was illegal because notice of seizure was not given.

The need for notice is provided for under section 214 of the East African Community Customs Management Act which deals with procedure on seizure. Section 214 provides that notice should be given to the owner unless the owner is present at time of seizure. This provision presupposes that, that owner is known.

There are instances when consignments are seized without a clear owner being known. In such an instance an exception to the requirements comes into play and such a situation is provided for under section 214(1) (d), it provides;

“Where a person coming within such definition of owner is not known then it shall not be necessary for the officer effecting the seizure to give notice to any person.”

In the instant case it was not clear whether the Consignment belonged to Emerald Hotel, Kepp Resort Ltd, Tile World or the 2nd Plaintiff. In fact the Defendant had to investigate the ownership before it found the 2nd Plaintiff to be the substantial owner and Emerald Hotel Ltd as the holder of the legal title. In fact for the 2nd Plaintiff to hold the legal title it was necessary for her to swear a statutory declaration. Paragraph 7 of **Exh P31** a letter from the Defendant to the Ministry in regard to the investigations conducted showed that;

*“Consequent to (1, 3, 4, 5 & 6) above, Betty Sanyu is found to, in substance be the owner of the goods under customs control though legal title is in the names of Emerald Hotel Ltd. In addition Betty Sanyu was found to have tendered forged documents to customs which she used during declaration and clearance of the consignments. This contravenes section 203 of the EACCMA, 2004. **Under these circumstances, it was recommended that Betty Sanyu should swear a statutory declaration to legalize title of ownership.....”***

In any case, this was not a seizure because the consignments were brought in on behalf of Emerald which Emerald then denied them thus leaving the Consignment open to taxation. They were therefore goods which were already in the hands of customs with the full knowledge of all the parties.

Taking into consideration the uncertainty of the owner of the Consignment, created a situation which fell under the exceptions envisaged by section 214(1) (d). That being the case its court’s finding that the Defendant did not breach the conditions of the East African Community Customs Management Act when it failed to give notice of detention of the Consignment to the Plaintiffs.

On the issue of whether the goods were wrongfully detained, it is not in dispute that the goods were imported in the names of Emerald. It is also not in dispute that Emerald denied ownership of these goods. Evidence is also abundant that the 2nd Plaintiff shrouding herself with a title that was not hers namely director of Emerald attempted to sell to Kepp Resort Ltd.

Her holding out as director of Emerald on its own, an act which she did not dispute was enough to cause an investigation as to the ownership of the Consignment.

The language that was used by the director of Kepp Resort Ltd branding the whole transaction a fraud on its own necessitated the Defendant to keep hold of the Consignment as investigation of its ownership and the criminality of the transaction proceeded. Kepp Resort Ltd which had asked for the goods was not the owner. There had been no execution of change of ownership as provided for under the Act. Even the 2nd Plaintiff who purportedly imported the Consignment on behalf of Emerald did not have the legal capacity to pass title without executing a change of owner.

Under those circumstances, the only prudent thing was for the Defendant to hold onto the goods. Furthermore, after Emerald had disowned the transaction and Kepp Resort Ltd had distanced itself from what it called a fraud, the facility of tax exemption under which the Consignment had been imported took a back seat and the Defendant was legally obligated to demand for tax and hold goods as lien where taxes had not been paid as provided for in the East African Community Customs Management Act. The detention of the Consignment was therefore lawful.

Turning to whether the Memorandum of Understanding had any effect on detention of the goods it is the 2nd Plaintiff's claim that the MOU was entered under duress. The Plaintiffs contended that because their bankers were moving against them as a result of insufficient servicing of loans, they were forced to sign the MOU. And that since it was done under duress it should be ignored in as far as admission of tax was concerned.

Duress was considered in detail in **Pao On vs Lau [1979] 3 ALL ER 65 at 78;**

*“Duress, whatever form it takes, is a coercion of will so as to vitiate consent... There must be present some factor which could in law be regarded as a coercion of this will so as to vitiate consent. In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; whether after entering the contract he took steps to avoid it. All matters are, as recognized in **Maskell v Home [1915] 3 KB 106**, relevant in determining whether he acted voluntarily or not.”*

From the foregoing, the person who alleges duress must show that he protested during the time he was being coerced and prove that he had no alternative course to take, like going to court and seeking relief.

The origin of the MOU can be traced from the consent judgment dated 17th January 2007 where both parties agreed that HCMA No.823 of 2006 and HCCS No.548 of 2006 would be withdrawn and that the seven containers would be cleared through customs through the normal procedures in the names of the 1st Plaintiff and the Defendant, **Exh P74**.

The MOU contained clauses stating that the 1st Plaintiff had agreed to withdraw HCCS No.548 of 2006, acknowledged its indebtedness to the Defendant to a tune of UGX 33,755,892/=, to deliver three containers of the goods on execution of the MOU and cause to be moved the remaining four containers to the Customs Warehouse that were to be held as lien for the unpaid taxes on the Consignment.

Therefore it can be said that the purpose of the MOU was to enable the 1st Plaintiff benefit from installment tax payment, **Exh P75**. Furthermore, the 1st Plaintiff's failure to pay the required taxes would empower the Defendant to exercise its rights under clause 7 of the MOU to sell, auction, pledge and transfer to a third party any of the 1st Plaintiff's 4 containers held as lien in recovery of the tax liability in case of default and to fully put into effect the terms of the agreement.

Where a Plaintiff is forced to sign a document under duress and is therefore put in a serious disadvantage justice will require that the payment or entering into such a MOU does not deprive him of the right to assert his rights on a balanced plane. In **The Sibeon and The Sibotre [1976]1 Lloyd's Report 293** the Court laid down tests to be considered when dealing with duress;

1. Whether the Plaintiff protested at time of demand.
2. Whether the Plaintiff regarded the transaction as closed or he intended to repudiate the Memorandum of Understanding.

In the present case, the Plaintiff did strongly protest and denied being indebted, **Exh P39**. But it would seem that the Plaintiff did not take the opportunity to repudiate the MOU immediately they had an opportunity to do so. The MOU was entered into on the 26th April 2007 and yet it took the Plaintiffs two and a half years to file this suit which was done on 19th November 2009. Furthermore, instead of seeking redress against what the Plaintiffs claimed

was an MOU under duress, they actually applied to the Defendant to allow them to re-export the remaining four containers of the Consignment.

It is only after taking this Consignment to Sudan and not getting the type of returns they wanted that the Plaintiffs now decided to sue raising duress as one of the issues. In my view the Defendant was only exercising its legal duty in asking for payment of tax.

Taking all the circumstances into consideration I do not find any acts of duress by the Defendant. It is court's finding that the Plaintiff signed the MOU fully realizing that with Emerald and Kepp Resort Ltd off the stage, the importation of the Consignment attracted tax.

On whether the Defendant committed any tort towards the 2nd Plaintiff and the 3rd Plaintiff the Court has found that the detention of the Consignment was done lawfully as a lien towards unpaid tax and so they cannot be held liable in tort.

Having found that the detention of the goods was lawfully done and that non issuance of notice of seizure was explainable under section 214(1)(d) court does not find the Defendant liable in any damages whether special, general or exemplary and/aggravated and/ punitive as claimed by the Plaintiffs.

The sum total is that I find this suit unfounded and it is accordingly dismissed with costs.

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David K. Wangutusi

JUDGE

Date: 22nd FEBUARY, 2017

