

5 **THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[COMMERCIAL DIVISION]**

**CIVIL SUIT No. 305 OF 2014**

**SPEDAG INTERFRIEGHT UGANDA LIMITED :::::::::::::::::::: PLAINTIFF**

10 **VERUSUS**

**SUGAR AND ALLIED INDUSTRIES LIMITED :::::::::::::::::::: DEFENDANTS**

**BEFORE: HON. MR. JUSTICE B. KAINAMURA**

**JUDGMENT**

The plaintiff instituted this suit under O 36 r 3 CPR seeking a liquidated sum of USD  
15 456,593.0 and UGX 13,409,316/= from the defendant for breach of contract. The defendant  
was subsequently granted unconditional leave to appear and defend the suit. It filed its  
WSD.

The brief facts of the case as set out in the plaint are that the defendant bought from India,  
equipment, and machinery for its sugar factory at Kalilo Uganda. The defendant then  
20 contracted the plaintiff at a consideration of USD I,629,789.23 to transport, deliver and  
offload the cargo from Mombasa to Kampala. The plaintiff performed the contract and  
transported the containers as agreed.

The defendant made some payments on the account but left a liquidated outstanding sum of  
USD 456,593.0 and UGX 13,409,316/= unpaid. The defendant acknowledged the debt and  
25 has made several promises to make payments.

The plaintiff avers that it has sent several demand letters/ notices to the defendant who  
responded with promises of payment of a known debt, issued undated bank cheques but  
still reneged on its own undertakings/ promises.

The plaintiff avers that it dutifully performed its part of the contract by rendering services  
30 to the defendant as agreed but the defendant has unjustly refused to pay the clear liquidated  
sums on the account.

In its WSD the defendant denies the claim contending that they paid the entire contract sum of USD 456,593 and UGX 13,409,316/= claimed by the plaintiff.

The defendant further avers that the 17 undated USD cheques and the Cheque of UGX 13,409,316/= were given as mere security and on condition that the plaintiff would address the defendant's concerns on the amount claimed and the services provided by the plaintiff, which requests have been continually ignored by the plaintiff.

During scheduling, the following are the agreed issues for determination;

**Issue one:** *whether the defendant is liable to pay accrued demurrage and container repair charges of USD 397,339.0.*

10 **Issue two:** *whether the defendant is liable to pay local customs clearing charges of USD 59,211.60/=.*

**Issue three:** *whether the defendant is liable to pay storage charges and local shunting (transport) charges of Uganda UGX 13,409,317/=.*

15 I have carefully read the pleadings of the parties, and considered the submission of counsel and the evidence on record.

**Issue one:** *Whether the defendant is liable to pay accrued demurrage and container repair charges of USD 397,339.00.*

20 The plaintiff contended that the demurrage and the responsible party to pay were set out in the suit contract (PEX 1) as well as the standard terms of the shipping lines contained on the bill of lading. That the bill of lading and terms thereon constitute the contract between the shipping line and the merchant or consignee or defendant therein.

25 That according to the suit contract (PEX 1) it was an agreed term that the defendant will avail the plaintiff listed documents for purposes of clearing the cargo in Mombasa/Uganda. That the listed documents were required in the plaintiff's Mombasa office at least 7 days before the vessel docked in the port. That it was further agreed that in the event of delays in receiving these documents, all additional container demurrage, and late documentation charges would be met by the defendant. That had the defendant honored the contract and availed these documents in time, the penalty of undue detention of the containers would never have arisen at all.

Florence Namuyanja Magambo a Project Manager of the plaintiff company (PW1) testified that the defendant delayed in availing the original documents for purposes of customs clearing and when the cargo arrived here in Uganda it was stuck at Jinja. That this led to great frustration and resulted in demurrage accruing on the detained shipping line  
5 containers.

Counsel relied on the emails (PEX 3) from the plaintiff to the defendant where they wrote to the plaintiff persistently and consistently asking the defendant to avail the original documents needed for customs clearing of cargo in Uganda.

On the other hand, Counsel for the defendant submitted that the parties were governed by a  
10 contract. That while clause 7 provided for the documents to be availed by the defendant, it, however, did not provide for the time frame in which the documents were to be availed.

I have considered (PEX 1), the contract between the parties. A clause in the contract provided that the following documents are required for clearing in Mombasa/Uganda;

- Original bill of lading
- 15 ➤ Original suppliers invoice & parking List
- Insurance certificate
- Tax identification number
- Consignee letter appointing Spedag East Africa as the clearing agent in Mombasa.

It further provided that *the above documents will be required in our Mombasa office at  
20 least 7 days before the vessel docks.*

I have also considered PEX3, the emails the plaintiff wrote to the defendant asking him to send original documents. In one of the emails, the plaintiff wrote to the defendant and stated;

*Dear shaik,*

25 *We also urgently await original documents as discussed, note that customs has still refused to accept a declaration of 3 containers at Jinja icd because of lack of original documents.*

She wrote in a further email and stated;

*Dear Shaik*

*We have been asking for the original invoices since 24th April. Attached another reminder on 28th April. Our status reports bear the remark 'pending original documents...*

In another email she stated;

5        *Dear Shaik,*

*Demurrage accrued up to 08.11.12 for particular containers*

*late demurrage will start accruing for other containers.*

*s/l demurrage charges are on account SAIL*

The defendant wrote back and stated,

10    *Dear Florence,*

*Mr, Das is already in the bank getting the documents released. The moment it is received, we will directly take it to your office.*

It's evident that it was a contract term that the defendant avails the original documents as detailed, 7 days before the ship is docked in Mombasa. Therefore counsel for defendant's  
15    averments that the contract did not indicate the time within which the documents were supposed to be availed does not hold water.

From the email correspondences, it is very clear that the defendants did not avail the documents as required under the contract. It is also clear from the emails that the containers were accruing demurrage charges.

20    From the evidence before me, it is evident that demurrage arose solely because the defendant failed to avail the documents in time as required by the contract. It is also clear that the documents were needed for customs clearing at Jinja and thus the delay in availing them consequently lead to accruing demurrage charges.

According to the contract, in the event of delays in receiving these documents, all the  
25    additional container demurrage, late documentation charges would be met by the defendant. In conclusion, therefore, I find that the defendant is in breach of a contractual term and thus is liable to pay the accrued demurrage.

On container repairs,

Counsel for the plaintiff averred that in the suit contract (PEX 1) it was stated that the damages to the container are subject to verification at the time damage is detected and responsible party shall be liable for repair charges.

He relied on the testimony of Jackline Kiryewala Project Coordinator of plaintiff company  
5 PW2 who testified that it is standard international shipping practice that a consignee of cargo is liable to the shipping line for repairs to containers damaged by cargo. She further testified that the defendant's heavy metallic cargo damaged shipping containers and that there was always a joint verification of damages at the time of delivery of cargo at Kaliro.

During the hearing, (PW2) testified that the plaintiff's agent and the defendant's Mr.  
10 Suresh would jointly verify the container damages, note them on the forms and defendants Mr. Surech would sign to confirm such damage. Counsel thus contended that the container damage did occur and was verified at the point of delivery as the contract required.

Counsel further contended that the since the defendants supplier received sound containers, packed them in India and they ended up damaged at point of delivery in Kaliro-Uganda,  
15 with dents and scratches and torn tarpaulins; then in the absence of any other credible explanation offered by the defendant, the natural presumption is that the defendant's cargo damaged the containers. That the defendant is liable for the container repair charges paid by the plaintiff as its agent then the defendant should reimburse.

On the claim for damages, the defendant averred that it was the plaintiff transporting  
20 company liable and not them. That the defendant was neither the transporter nor the party responsible for lashing. That if there were any damages due to improper lashing and transporting on the poor roads or the offloading the cargo, it was the plaintiff that was responsible for the damage.

A perusal through the contract's terms and conditions reveals that damage to containers  
25 was subject to verification at the time damage is detected and the responsible party would be liable for repair charges.

According to PW2, the defendant's heavy metallic cargo damaged shipping containers and that there was always a joint verification of damages at the time of delivery of cargo at Kaliro. During the hearing, PW2 testified that the plaintiff's agent and the defendant's Mr.  
30 Suresh would jointly verify the container damages, note them on the forms and defendants Mr. Surech would sign to confirm such damage.

PEX 12, the container damage verification documents reveal that some containers came with dents in the floor where the cargo was stacked, some came with scratches and dents, cuts on the tarpaulins and others with scratches.

The bill of lading page 33, clause 11.4 of the bill of lading terms reads as follows;

5            *The shipper shall inspect containers before packing them and the use of containers shall be prima facie evidence of there being sound and suitable for use.*

Clause 15.5 states thus,

10            *Containers released into the care of the merchant for packing, unpacking or any other purpose whatsoever are at the sole risk of the merchant until redelivered to the carrier. The merchant shall indemnify the carrier for all loss of and/ or damage and/or delay to such containers.*

This clearly shows that the merchant (the defendant) is duty bound to indemnify the shipping line for any damages found after the use of a container.

15            I agree with counsel for the plaintiff that the plaintiff's role was simply to pick the containers from Mombasa and transport them to Kampala. There is no evidence that they tampered with the containers especially since they were sealed.

20            Since the contract provided that the responsible party would be liable to pay for any damages, the plaintiff having paid for them and the bill of lading terms confer a duty to the defendant to indemnify the carrier for the damages, I find that the defendant is liable to pay for container repairs.

In the result issue one is answered in the affirmative

***Issue Two:                    Whether the defendant is liable to pay local customs clearing charges of USD 59,211.60***

25            Counsel for the plaintiff avers that the contract provided that destination clearance in Uganda (per truck) was agreed at USD 350.0 + VAT. That the customs entries (PEX 15) show that the plaintiff was the customs declarant for the defendant's cargo.

Counsel's contention is that the plaintiff rendered clearing services but was not paid.

On the other hand, counsel for the defendant averred that the lump sum agreed contract price was USD 1,629,789.23 except if there was a change in volume. That the sum was

inclusive of payment of customs duties in addition to freight and local transportation. That the customs clearance was inclusive of that. That the customs clearance was covered in that price.

The contract provided for freight and charges ex CFR up to Mombasa, freight and charges ex Vessel on full Liner Out terms and Destination clearance in Uganda. The contractual sum was USD 1,629,789.23. However, there was a contractual term that the lump sum amount for the entire project was subject to change based on the actual volume.

DEX 5 which was the freight statement clearly shows that the freight payments were USD 1, 782,918. This is above the set contract sum of USD 1,629,789.23. This, therefore, shows that there was an increase in volumes which accounts for the new figure of USD 1, 782, 918. In my view the custom clearance services were not paid. Since the parties had agreed that customs clearance was one of the services to be rendered at USD 350.0 + 18% VAT (per truck) and the plaintiff having rendered the service and invoiced the plaintiff per PEX 18, I find that the defendant is liable to pay the customs clearance service. In the result issue one is answered in the affirmative. The total invoice amount is USD 59211.60. In the result issue two is answered in the affirmative.

***Issue Three: Whether the defendant is liable to pay storage charges and local shunting (transport) charges to Uganda UGX 13,409,317/=***

Counsel for the plaintiff contended that the contract did not provide for storage charges. However, these arose because of the defendant's delay in availing the original documents that were needed to clear the cargo in Uganda at Jinja.

He relied on the testimony of PW1 who stated that some of the defendant's cargo was routed to a customs bonded warehouse in Jinja called CPS Freight Services Ltd for temporary storage pending customs clearance and onward delivery to Kaliro.

Counsel avers that CPC Freight Services Ltd billed the plaintiff for the temporary storage and the plaintiff paid. In turn, the plaintiff invoiced the defendant for the storage charges in the sum of UGX 9,086,000/=. The defendant has never paid off those charges. Counsel thus contended that the plaintiff is liable to pay those charges to the plaintiff as a reimbursement.

On the other hand, Counsel for the defendant contended that the claim for storage charges by the plaintiff was not justified because it was not a contractual sum and the plaintiff is

attempting to provide a service that was not agreed by the parties. Counsel further averred that there were no delays in availing the documents.

It was resolved in issue one that there was ample evidence to show that the defendant delayed to avail documents that were needed to clear the cargo. It is also clear that these  
5 delays forced the plaintiff to remove the defendant's containers from the 3rd party trucks to avoid truck detention charges. According to PW1, the trucks had to be stored at CPC Freight Services, an ICD in Jinja until the defendant availed the documents.

PEX 6, invoiced from CPC invoices shows that the plaintiff was billed, it paid and is, in turn, seeks to be reimbursed. Since the storage charges arose because of the delays in  
10 availing the document, which was a contractual term, i find that the defendant is liable to reimburse the plaintiff.

The plaintiff also claimed local transport charges of UGX 4,248,000/=. According to counsel for the plaintiff, PW1 in her testimony testified that the defendant declined to pay the invoice of the local transport charges for three containers.

15 On the other hand, counsel for the defendant contended that the plaintiff adduced no evidence to prove what type of containers, whether they were 20ft or 40ft containers in gauge. That the plaintiff has not proved this claim.

The plaintiff invoiced the defendant for the services rendered. One of the invoices was PEX7, the invoice for onward delivery of 3 trucks at UGX 1,2000,000/= each including  
20 VAT gave a total sum of UGX 4,248,000.00/=. The defendant did not pay this particular invoice.

The defendant issued a cheque of UGX 13,098,000/= (PEX 11) being both storage and transport charges. The defendant further issued to the plaintiff 17 undated US dollar cheques totalling USD 163,678.0[PEX 10]. The plaintiff averred that these cheques were  
25 issued in a bid to pay part of his known debt. According to PW1, the defendant asked them not to bank the cheques so they never banked them.

The defendant never paid them and thus the suit. This was corroborated by an email from the defendant PEX 3 where sheik Mohideen wrote to the plaintiff saying,

30 *Dear Lydia,*



*Further to the talk with you this morning, we are processing a payment of USD 20,000 from sugar account. We will forward you the TT copy shortly. Meantime, we are coming up with a solid payment plan to settle the balance payment. And please don't present any cheques further...thanking you in advance.*

- 5 The defendant never banked the cheques on this promise. The defendant has not paid the money due, the plaintiff brought this claim seeking the money due.

In the case of *Naris Byarugaba Vs Shivam M.K.D Limited [1997] HCB 71* it was held that;

10 *“a bill of exchange constituted prima facie evidence of the sum of money printed on it and due to the person in whose favour it is drawn with such a debt only being discharged when the bill of exchange is honoured”*

In the instant case, the defendants after issuing the cheques, they asked the plaintiff not to bank them. In fact, counsel for the defendant averred that the cheques were issued as security to pay as evidence that the defendant had no intention to default.

- 15 In the case of *Katecha Vs Mohammed (2002) 1 EA 112*, it was held that a bill of exchange is treated as cash which entitles the holder in an ordinary way to judgment.

In the premise, I find that since the defendant issued cheques to the plaintiff that were not honored because they asked the plaintiff not to bank them, the plaintiff is entitled to the local transport charges and indeed the entire suit sum.

- 20 In the result issue three is answered in the affirmative.

The defendant avers that they paid the contract sum. However, considering the evidence on record, the plaintiff has proved that the defendant delayed to avail documents which occasioned delays to clear the goods in Jinja and that led to accumulating demurrage and storage costs. The plaintiff has also proved that the containers were damaged and the bill of lading imposes on the defendant a duty to pay the container damages. The plaintiff having  
25 paid them are entitled to be reimbursed by the defendant. The plaintiff has further proved that they provided custom clearance services and were not paid by the defendant. The plaintiff has also proved that they incurred local transport charges.

In conclusion therefore, I find that the plaintiff is entitled to the following remedies;

1. Demurrage and Container repairs charges in the sum of USD 397,339.0
2. Local customs clearing charges of USD 59,211.60
3. Storage and local transport charges of UGX 13,409,316/=
4. Interest on the above sum at the rate of 20% per annum form the date of judgement
- 5 till full payment.
5. Costs of the suit.

Accordingly judgment is entered for the plaintiff against the defendant in the above terms.

10 **B. Kainamura**

**Judge**

**30.08.2018**