THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

HCCS NO. 405 OF 2016

KENLLOYD LOGISTICS (U) LTD:::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

KENFREIGHT (U) LTD::DEFENDANT

BEFORE: HON JUSTICE DAVID WANGUTUSI

JUDGMENT

Kenlloyd Logistics Ltd herein after called the Plaintiff, sued Kenfreight Uganda Ltd referred to as the Defendant for recovery of USD 30,292,000 being loss of a container and demurrage, general damages, interest at 25% and costs.

The brief facts to the suit are that the Defendant operates a customs bonded and empty container Depot at Bweyogerere. Its business includes storage of empty containers belonging to various companies before they are taken back to Mombasa.

On the 6th December 2010 the Plaintiff who was a partner to D.B. Schenker Ltd (Kenya) received a container from the Kenyan partner. It contained items belonging to Uganda Electricity Transmission Company Limited.

The Plaintiff sent the container to the Defendant for temporary storage pending customs clearance.

On receipt of the container the Defendant acknowledged under receipt No.10559 dated 6th December 2010 Exhibit P1.

Exhibit P2 which is a verification report belonging to the Defendant indicates that on 21st December 2010 the said container was stripped and the Plaintiff avers that the empty container as in the past was left with the Defendant pending return to Mombasa.

On 28th February 2011 the Plaintiff sought to know how many of such containers were with the Defendant so as to reconcile their stock.
To this effect, the Plaintiff sent an email, dated 28th February 2011 Exhibit P3, it reads in part;

> *"Kindly assist and advice on current stocks empty position to enable us reconcile our records."*

As to whether the Defendant had this particular container in her possession, she denied and replied by Exhibit P4, dated August 16, 2013, the Defendant wrote in part,

> *"As earlier advised, empty container is not reflected anywhere in our records that is why we requested for proof in form of interchange receipt that the same was left with Kenfreight.*
> *As Kenfreight Uganda, we are not responsible for this container which we never transported neither received in any of our empty container stock."*

On 21st August 2013 the Defendant admitted that the container had indeed been received at her premises but taken away;

> *"According to our Barrier Register the empty container MSCU 595091) left ICD on 04.01.2011 on truck 542-UDU agent Kenlloyd."*

A research by the Plaintiffs revealed that truck No. 542 UDU was a mini-van, which could not carry a container. So they concluded that the container remained with the Defendant.

On 17th July 2013 the Plaintiff's Kenyan partners sought information about the container. Peter Odedo the Senior Operations Manager of DB Schenker wrote;

> *"the container was taken to Kenfreight Uganda yard in full carrying shipment for Uganda Electricity in 2010 as attached and up to now the said container has not been brought back to Mombasa or dropped at MSC Uganda Yard."*

The Defendant replied a month later on 16th August 2013 and denied possessing the container;

> *"As Kenfreight Uganda, we are not responsible for this container which we never transported neither received in any of our empty container stocks."*

Interestingly although the Defendant denied ever receiving it, five days after the denial, she wrote stating that the container had indeed been in their possession but was taken away on the 4th January 2011.

In her defence the Defendant admitted that the Plaintiff had indeed delivered the container with her. That the Plaintiff was expected to collect the container after stripping but did not do so.

That since the Plaintiff did not pay any monetary consideration, it was not the Defendant's responsibility to look after the container. That it took the Plaintiff four years before she went back to look for the container.

That in any case having paid no money for the storage of the container, the Plaintiffs were in breach of contract.

As for demurrage, the Defendant averred that she was not responsible since it was not her responsibility to deliver the container to the depot of the shipping line.

By way of counter claim the Defendant Counter Claimant sought USD 4,488 being money for storage of the container from date of delivery to 6th June 2014.

Briefly the counter claimant's claim was based on the following;
That on 6th December 2010 the Plaintiff/Counter Defendant delivered a container to the counter claimant for storage.
That having delivered it there, the Plaintiff did not demand for it for almost three years.

That because of that, the Counter Defendant was liable to pay storage charges of USD 4,488 on account of the unpaid charges. The Counter Claimant also sought general damages, interest at 24% from date of cause of action and costs.

In reply to the counter claim the Plaintiff-Counter Defendant denied liability contending she never abandoned the container because she asked for it in vain.

Furthermore that the Defendant had never invoiced her for storage nor availed the container to the Plaintiff.

The issues for resolution as agreed by the parties are;

1. Whether the Defendant is liable for demurrage of USD 24,892.
2. Whether the Plaintiff is liable to pay storage charges.

The Plaintiff claimed that because of the Defendant's failure to hand over the container, she was found liable to pay USD 30,292,000 being costs for replacement of the container and demurrage costs.

As the evidence shows in Exhibit P1, P2 and the testimony of DW1 the Defendant indeed received the container.

It is clear from Exhibit P3 that the Plaintiff asked for the container but received no reply from the Defendants.

It is also clear that later in 2013, the Defendant conceded and admitted receiving the container but lost it to unauthorized people.

The Defendant however contended that it was the Plaintiff's fault because she abandoned the container for almost three years.

Record however shows that the Plaintiff did not abandon the container because as early as 28th February 2011 she wrote to the Plaintiff demanding for it.

Moreover at the time the Defendant did not even know where the container was because it had lost it to persons she claims as "unauthorized people."

The losses attendant to Plaintiff's failure to deliver the container back to Mombasa can only be saddled by the Defendants. The Defendant being a dealer in clearing, forwarding, shipping and storage of containers knew that penalties and demurrage would arise if the Plaintiff failed to return the container to Mombasa.

Indeed DB Schenker did demand of the Plaintiff as exhibited, a demurrage charge of USD 24,892 and a container replacement charge of USD 5,400.

The foregoing were all foreseeable in the line of the Defendant's business. The charge being a direct result of the Defendant's omissions, the same must be borne by the Defendant herself.

While the plaint originally stated 30,292 USD, on the 6th July 2017 counsel for the Defendant submitted fresh credit notes and invoices. These suggested that there had been waivers and reductions in the sums that the Plaintiff paid. The Plaintiff's advocate did not object to them and they were admitted as Exhibit D2.

Exhibit D2 shows that USD 3,977.50 was paid towards replacement of the container. It also shows that USD 17,119.20 was paid towards Demurrage. This brought a total sum paid to USD 21,096.7. It is this sum that I find the Defendant liable to pay.

The Plaintiff also claimed general damages.

The rationale for these is well outlined in ***Dharamshi vs. Karsam 1974 EA***, that such damages are awarded to fulfill the common law remedy of *restituto in integrum* namely that the Plaintiff should be put nearly as

possible to a position he or she would have been had the breach complained of not occurred.

General damages are intended to make good to the aggrieved party as far as money can do for the losses he or she has suffered as a natural result of the wrong done to him or her, ***Okello James versus Attorney General HCCS No. 574/2003***.

When considering general damages the Court must take into account factors such as malice or arrogance on the part of the Defendant and the injury suffered by the Plaintiff, ***Obong vs. Kisumu Council [1971] EA 91***.

In case the dealings were of a commercial nature, court will consider the impact to the Plaintiff's business such as reputation and exposing it to loss of trust.

In the instant case, the Defendant received the container and without any care that it was attracting demurrage, denied possession. She tried to shift the responsibility on the Plaintiff while keeping the owners out of the use of the container for close to 3 years.

The reputation of the Plaintiff must have been lowered in the eyes of her partner DB Schenker. Such conduct as that of the Defendant certainly attract award of damages.

Having considered the trouble the Plaintiffs went through both socially and economically, I find an award of 20,000,000/= appropriate as general damages.

The Plaintiff also prayed for interest at 25%p.a.

Interest is at the discretion of court, ***Uganda Revenue Authority vs. Steven Mabosi SCCA 16 of 1995***. Like all discretions it must be exercised judiciously taking into account all circumstances of the case ***Superior Construction Ltd vs. Notary Engineering Ltd HCCS 24 of 1992***.

In this case considering the length of time the Defendant misled the Plaintiffs as to whereabouts of the container, caused the Plaintiff to exert their time checking with the Defendant for a long time which was costly not only in time but financially as well. Considering that this was a business venture, but a claim in US dollars, I find the rate of 10% p.a as appropriate.

The special damages will therefore attract interest at 10%p.a.

The costs of the suit shall be paid by the Defendant.

In reply to the Plaintiff's claim, the Defendant filed a counter claim demanding storage charges of USD 4,488.

To justify this claim, it was upon the Defendant/Counter Claimant to prove that she kept the container.
Exhibit P1 shows that the container was delivered to the Defendants on 6th December 2010. The container was stripped on the 21st December 2010 Exhibit P2. DW1 in his evidence agrees. So on the 28th February 2011 the Plaintiff made inquiries from the Defendant about the containers Exhibit P3.

This inquiry was made by the Plaintiff two months after the container was stripped.

The Defendant did not take action. Infact from her letter of August 16th, 2013 it is clear that she had already lost the container. It was not in her yard. She wrote in part;

> *"As Kenfreight Uganda, we are not responsible for this container which we never transported neither received in any of our container stocks."*

The Defendant must have written the foregoing because the container was not in their yard.

While Exhibit P1 and P2 together with evidence of DW1 show that the Defendant received it, Exhibit P4 shows that it was no longer with the Defendants. Infact DW1 stated that it was taken by unauthorized persons. DW1 did not however tell court when it was taken. There is no evidence to show that they even stored it beyond the period of stripping. In her letter Exhibit P4-8 the Defendant writes;

> *"As earlier advised, empty container is not reflected anywhere in our records that is why we requested for proof in form of interchange receipt that same was left with Kenfreight."*

He adds;

> *"As far as we are concerned the agent who shipped the container is in the best position to advise on the whereabouts of the empty since it is not anywhere in the yard."*

This letter is dated 16th August 2013 but the words "as earlier advised" means the loss of the container was much earlier.

The foregoing means that the Defendants did not even store the container because they had earlier lost the same.

On the 10th March 2014 when they realized they could not anymore deny the loss of the container, they addressed an invoice addressed to the Plaintiff claiming USD 4,488 storage charges. This claim cannot however stand because as I said earlier, the Defendants failed to guard the container and it was stolen. Since the container was not there, no storage charges had been proved. The claim is therefore unsustainable and ought to be dismissed.

The sum total is that judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

a) The Defendant to pay the Plaintiff USD 21,096.7.
b) The Defendant to pay the Plaintiff general damages of UGX 20,000,000/=.
c) Interest on (a) at 10%p.a from 28th January 2011 till payment in full and on (b) at 6%p.a from date of judgment till payment in full.
d) The Defendant's counter claim is dismissed with costs.
e) The Defendant to pay costs of the suit.

Dated at Kampala this....17th.....day of .....Sept.....2021.

HON. JUSTICE DAVID WANGUTUSI

JUDGE