



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. E005 OF 2020

TIB CHEMICALS AG PLAINTIFF

VERSUS

MEDITERRANEAN SHIPPING COMPANY S.A

OCEAN FREIGHT (EA) LIMITED

LYNX LOGISTICS LIMITED.....DEFENDANTS

JUDGMENT

1. On 7th October, 2020 the plaintiff filed a plaint in which it sought several orders. On 1st December, 2020 the plaintiff was granted leave by the court to amend its plaint. An amended plaint was filed on 16th December, 2020. In the said plaint, the plaintiff described itself as a limited liability company incorporated in Germany dealing with production and distribution of paint products in Germany and the all over the world.

2. The plaintiff averred that by a purported contract evidenced by an exchange of emails on 24th April and 14th July, 2020 between itself and what was believed at that time, to be a company by the name of Chemilab Limited, United Kingdom, it agreed to sell to the said company 40,000 kilograms of TIB KAT zirconium octoate at an agreed price of Euros 392,000. That the said company was purportedly represented by one Jack Smith.

3. The plaintiff further averred that pursuant to the contract, it stuffed the said goods into container Nos. FCIU5809209 and BMOU2386039 and shipped them by engaging the 1st defendant to carry them from the Port of Antwerp to the Port of Mombasa, under bill of lading No. MEDUGH406159, wherein the goods were specifically described as 32 IBC's of 1,250 kilogram packages of TIB KAT 824 zirconium octoate HS Code 32110000 net weight 40,000kg, which arrived at the Port of Mombasa where they were lying under the possession and control of the 1st and 2nd defendants.

4. It was further stated in the amended plaint that the plaintiff came to discover that the person posing as Mr. Jack Smith and purporting to be an employee/ representative of Chemilab Limited, UK was not in any manner affiliated with, employed by or connected to the said company but was seeking to defraud the plaintiff by obtaining the goods under false pretences without any intention of paying for them.

5. The plaintiff's prayer is for -

(a) A permanent injunction restraining the 1st and 2nd defendants whether by themselves and/or through their employees, officers, servants or agents from releasing the goods being 32 IBC's of 1,250 kilogram packages of TIB KAT 824 zirconium octoate HS Code 32110000 net weight 40,00kg packed in container Nos. FCIU5809209; and BMOU2386039 to the 3rd defendant or to any other party that is not the plaintiff and/or its appointed agents;

(b) An order allowing the plaintiff to take possession of the goods being 32 IBC's of 1,250 kilogram packages of TIB KAT 824 zirconium octoate HS Code 32110000 net weight 40,000kg packed in container Nos. FCIU5809209; and BMOU2386039 more particularly described in the bill of lading number MEDUGH406159;

(c) Costs of this suit; and

(d) Any other relief which this Honourable Court deems just to grant.

6. Despite summons being served on the 3 defendants, none of them entered appearance. The case proceeded for formal proof. The plaintiff's witness, was Frank Lehmann who testified as PW1. He stated that he was a resident of Mullheimer in Germany where he works for the plaintiff as the Director of catalyst and additives business. He adopted his statement dated 2nd October, 2020 after striking out paragraphs 9 and 10 thereon. He produced the plaintiff's list and bundle of documents.

7. His evidence was that in April, 2020 a man who introduced himself as Jack Smith contacted him and said that he was working for Chemilab Limited, United Kingdom (UK). That the said man said that they were interested in zirconium octoate TIB KAT 824 40,000 tonnes (sic). PW1 indicated that they agreed at a price of Euros 392,000 payable in 30 days upon receipt of the bill of lading.

8. PW1 stated that on 3rd August, 2020 the goods were loaded and the bill of lading was issued on 4th August, 2020. He further stated that the goods were not paid for, by the date the plaintiff and the Jack Smith had agreed on.

9. He further stated that the plaintiff contacted Chemilab Limited, UK and informed them about the purchase of the goods but they told them that they did not have a subsidiary in Uganda known as Chemilab East Africa. They concluded that Jack Smith was a fraudster after Chemilab Limited, UK informed them that they had never done business with the plaintiff.

10. It was the evidence of PW1 that Jack Smith contacted one of the plaintiff's employees through email. A copy of the said email formed part of the plaintiff's bundle of documents. He stated that according to German law, the plaintiff was still the legal owner of the goods described in the bill of lading No. MEDUGH406159. He prayed for reshipment of the goods which were lying at the Port of Mombasa, at the plaintiff's cost.

ANALYSIS AND DETERMINATION

The issues for determination are-

- (i) If the plaintiff is still the rightful owner of the goods in issue;**
- (ii) If the prayers sought should be issued against the 1st and 2nd defendants; and**
- (iii) Who will pay the costs of this suit.**

If the plaintiff is still the owner of the goods in issue.

11. A perusal of the emails in the bundle of documents produced by PW1 indicate that on 24th April, 2020 a man who identified himself as Jack Smith of the procurement offices of Chemilab Limited, UK sent an email to the plaintiff herein and expressed interest in purchasing zirconium octoate. After several email exchanges between him and the plaintiff, he sent a purchase order No. 10525 which was dated 27th May, 2020. The description of the goods ordered for, was outlined thereon and so was the cost which was agreed on.

12. On 3rd June, 2020 the plaintiff issued a confirmation order for Euros 392,000 to Chemilab Limited, UK which is described thereon as the consignee/customer. As per the terms of the agreement, payment was to be made within 30 days after the date of the bill of lading.

13. On 14th July, 2020 the said Jack Smith wrote to the plaintiff informing it that the consignee would be Chemilab's East African branch, known as Chemilab East Africa Limited, Plot 560 Kampala – Gulu Highway Luwero, Uganda. The Notify Party was their UK branch Chemilab Limited, 103 North Approach, Watford, Hertfordshire WD 25 0EL.

14. The exhibits produced by PW1 demonstrate that on 12th September, 2020 Chemilab Limited, UK wrote to the plaintiff that it had received a statement from them for an outstanding invoice. The author of the email Girish Mehta, the Managing Director of the said company said that they had no trading history with the plaintiff but were aware of a company which was using their details fraudulently, who may be a client of the plaintiff. They declined any liability for the said invoice.

15. On receipt of the above email it came to light that the order made from the plaintiff had been made by fraudsters. The plaintiff then moved to this court and obtained interim orders restraining the 1st and 2nd defendants from releasing the goods, which had by then reached the Port of Mombasa.

16. Lexis Navigator Dictionary states as follows in regard to bills of lading-

“A Bill of lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of the contract of carriage under which the goods have been delivered to and received by the ship. The signed bill of lading is handed over to the shipper, who may either hold onto it or transfer it to a third person. During the voyage and transit, the bill of lading under the law merchant is considered the symbol of the goods described in it, and the endorsement and delivery of the bill of lading operates as a symbolic delivery of the goods. This person named in the Bill of lading as the person to whom the delivery of goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of lading, he is usually known as the holder or endorsee of the Bill of lading. The holder of the bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the

goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner's lien for freight. A bill of lading issued by the ship owner's agent in the absence of any contract of carriage is a nullity."

17. The bill of lading in this case, bore the name of the consignee as Chemilab East Africa Limited. The order for the consignment had been made with fraudulent intentions by a fraudster known as Jack Smith, who was not an employee of Chemilab Limited, UK, which was described as a branch of Chemilab East Africa Limited based in Uganda. As a result of the said circumstances, the latter did not have a good title to the goods.

18. The invoice which was sent by the plaintiff to Chemilab Limited, UK was rejected as it had not placed an order for the goods described thereon. The said company further denied liability for the amount due in the invoice. That being so, the title in the goods remains with the plaintiff, whom I hold to be the rightful owner of the consignment in issue.

If the orders sought in paragraph 14(a) and (b) of the amended plaint should be granted against the defendants.

19. The defendants herein did not enter appearance and therefore no defence was offered. The plaintiff through PW1 proved that it still has good title to the goods which were stuffed in container Nos. FCIU5809209 and BMOU2386039. The said consignment was shipped and carried by the 1st defendant from the Port of Antwerp to the Port of Mombasa under bill of lading No. MEDUGH4061959. The said goods are said to be in the custody of the 1st and 2nd defendants after the plaintiff realized that a fraudster going by the name Jack Smith had placed the order for the consignment. The plaintiff has proved that the said faceless person by ordering for the goods tried to obtain the said goods under false pretences by hiding behind Chemilab Limited, UK as the purchaser.

20. The said Jack Smith misled the plaintiff into believing that the goods were actually required for Chemilab East Africa Limited and that is why the 2 containers were shipped to the Port of Mombasa, awaiting onward transport to Uganda. It is apparent from the evidence of PW1 that the said Jack Smith had no intention of paying for the goods but hoped to take possession of the goods somehow, after they had reached the Port of Mombasa using the bill of lading he had in his possession. Chemilab Limited, UK however on receipt of the invoice from the plaintiff, denied having any knowledge of someone by the name Jack Smith and stated that it had not ordered for the consignment. Going by the said evidence and the circumstances surrounding this case, I am satisfied that the plaintiff has proved on a balance of probability that it is entitled to the prayers sought in paragraphs 14(a) and (b) of the amended plaint.

21. I therefore grant the plaintiff the following orders:-

(a) A permanent injunction is hereby issued restraining the 1st and 2nd defendants whether by themselves and/or through their employees, officers, servants or agents from releasing the goods being 32 IBC's of 1,250 kilogram packages of TIB KAT 824 zirconium octoate HS Code 32110000 net weight 40,00Kg packed in container Nos. FCIU5809209; and BMOU2386039 to the 3rd defendant or to any other party that is not the plaintiff and/or its appointed agents.

(b) The Plaintiff shall take possession of the goods being 32 IBC's of 1,250 kilogram packages of TIB KAT 824 zirconium octoate HS Code 32100000 net weight 40,000Kg packed in container Nos. FCIU5809209; and BMOU2386039 more particularly described in the bill of lading No. MEDUGH406159.

22. On the issue of costs, although they ordinarily follow the event, in this case, the defendants cannot be ordered to bear the cost of this case. In the decision in **Party of Independent Candidate of Kenya and Another v Mutula Kilonzo and 2 Others** [2013] eKLR, the court adopted the holding in **Levben Products v Alexander Films (SA) (PTY) Ltd.** 1957 (4) SA 225 (SR) at 227, where it was stated thus-

"It is clear from the authorities that the fundamental principle underlying the award of costs is two fold. In the first place the award of costs is a matter in which the trial Judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

23. In this case, the defendants did not engage in any wrong doing. The 1st defendant was contracted to ship the subject consignment. The 2nd defendant is described as a clearing and forwarding agent and the 3rd defendant is described as a transporter of the goods. For the said reason, the exception to the rule that costs follow the event applies in this case. The plaintiff shall bear the costs of this suit.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 22nd day of January, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of -

Mr. Kinuthia for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

No appearance for the 3rd defendant

Mr. Oliver Musundi - Court Assistant.