



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. 104 OF 2012

YOSEIF MAHARAI.....PLAINTIFF

VERSUS

INCHAPE SHIPPING SERVICES.....1ST DEFENDANT

KENYA PORT AUTHORITY.....2ND DEFENDANT

JUDGEMENT

Outline

1. On 6th June 2012 by a plaint dated 5th June 2012, the plaintiff, filed the suit and sought judgment against the defendants of the specific sums making an aggregate of US\$ 799,300/=.

2. The prayers were crafted and made out as follows:-

a. The value of cone-crusher- US\$ 789,500/=

b. shipping charges- US\$ 9,800/=

c. Loss of business from cancelled contract- US\$ 30,000,000/=

TOTAL US\$ 30,799,300/=

d. Costs and interest on (a), (b), and (c) above at Courts rate.

e. Any other remedies that the Court may deem fit.

3. The claim was opposed by the 1st Defendant by its Defence dated the 4th December 2012 and filed on 11th December 2012, in which it was conceded that the 1st defendant was an agent of the Vessel /Carrier AN SHUN JIANG/V.145 but liability was denied on the basis that the said cargo was delivered and discharged at the port of Mombasa on the 23rd September 2012 safely and in good condition thereby its agency terminated upon discharge and delivery. The defendant then averred that upon discharge of the consignment at the port of Mombasa the responsibility for the safe custody of all the delivered good at the port shifted upon the 2nd Defendant.

4. The 2nd Defendant also resisted the claim through the Defence dated on the 6th March 2013 and filed on 7th March 2013 which was amended on the 14th August 2013. In it the said defendant pleads that the cargo was never discharged or delivered to it or to its custody and that it was under no obligation to deliver cargo to the plaintiff who had failed to produce authority from the Commissioner General of customs for the release of the goods. It was further pleaded that the said defendant was incapable of being liable in negligence, which was denied in any event, it being added that the plaintiff failed to mitigate on losses.

5. To the 2nd defendants Defence, the plaintiff filed Reply to Amended Defence on the 17th September 2013. The gist of the reply was the reiteration of the pleadings in the plaint with a pointer that the cargo was indeed discharged to the custody of the 2nd defendant and that the cited Sections of the Kenya Ports Authority Act were unconstitutional. There was a Notice of Claim against the 2nd defendant taken out by the 1st defendant but no pursuit seems to have been made over the same.

6. In support of its case, the Plaintiff was the sole witness called to prove the case. The 1st Defendant, on its part, relied on the evidence of its Claims/P&I, Manager **Mr. Mark Mboloi Mathuva** while the 2nd Defendant relied on the evidence of four witnesses namely **Tobias Oluendo, Paul Kiptum Too, Frida Rakamba** and **Peris Githinji**. All the witness relied on and adopted their respective witness statements as evidence in chief and then produced the Bundles of Documents filed as exhibits.

7. Parties then settled issues and a list of some 13 agreed issues was filed by all parties on the 5th August 2016.

Evidence by the Plaintiff

8. To prove its case the plaintiff testified as PW1, introduced his case and went ahead to adopt his witness statement filed in court on the 6th June 2012. He testified that on the 1st August 2011, he imported a cone-crusher from China valued at US\$ 789,500/= and incurred a sum of US\$9,800 being freight charges all bringing the total of his expenditure to US\$ 799,300/=. He produce the bundle of documents and marked same as **PEXH 1(i) to (vi)**. He added that the said cargo was said to have arrived at the port in Mombasa sometime in September 2011 but the same mysteriously disappeared before he took possession of the same. He sought the intervention of the 2nd Defendant but his efforts were in vain as he had by the date of giving evidence not received his machine.

9. On cross-examination by **Mr. Kinyua**, Learned Counsel for the 1st Defendant, the plaintiff stated that he carried on his business in the name of **NEDINE ENGINEERING AND CONSTRUCTION** limited and that he had been in business since the year 2001. To import the cone-rusher, he is said to have paid the supplier by a Telegraphic Transfer from the United States and the payment was made in installments of 30% on order, 30% upon completion of the assembly of the machinery and 40% before shipment and that the shipping line was paid through the supplier.

10. When shown a copy of a commercial invoice from **SHOW**

MECHANICAL (SHANGAI) FACTORY, invoice No. SM0010 dated 1st August 2011, the total cost of equipment was 789,500/= while the same invoice number from **SHOWIER MACHINERY(SHANGHAI) FACTORY** had a total cost of **US\$ 98,500/=**,the plaintiff denied that the second invoice ever belonged to him and stated that the original commercial invoice was in the custody of his clearing agent Spedag Interfreight(K) Limited.

11. The plaintiff further stated that he was not directly involved with the appointment and payment of freight to the 1st Defendant and he did not know that the bill of lading was not in the name of the 1st Defendant, instead it disclosed the shipping agent as **CHINA SHIPPING AGENCY SHANGHAI** and that the 1st Defendant was not his agent as his agent was Spedag Interfreight (k) limited and paragraph that 4 of the plaint was an oversight on the part of his advocate.

12. The plaintiff added that he sued the 1st defendant being the agent representing the ship owner because they issued him with a delivery order yet the crusher had arrived in Mombasa and disappeared before the delivery order and that he was aware that no cargo could leave the port without a customs entry being passed and he did not sign any custom document just like his agent also did not.

13. On cross-examination by **Mr. Noorani**, Learned Counsel for the 2nd Defendant, the plaintiff stated that the equipment arrived and was discharged at the port of Mombasa. The bill of lading says it had no marks while the HATCH TALLY dated 23rd July 2011 says the crusher which was discharged had marks **cccc FLTCH UGANDA PROJECT** and weighing 20,000 Kilograms. On the manifest it is said that the plaintiff's equipment had no marks and weighed 22,000kgs. Pages 20 and 21 of the defendants bundle do not have a package that matches his machinery.

14. Further, the plaintiff stated that he paid **SHOWIER MACHINERY**

(SHANGHAI) FACTORY for the equipment according to the bill of lading, and not **SHOW MECHANICAL (SHANGHAI) FACTORY** whose commercial invoice is of a lower amount. The commercial invoice that matches his bill of lading is the one from **SHOWIER MACHINERY (Shanghai) FACTORY** but the amount on the invoice is inaccurate.

15. On re-examination by **Mr. Birir**, the Plaintiff testified that he was the consignee on the bill of lading and the cone-crushers going to Uganda did not belong to him.

16. The Court also put questions to the Plaintiff during which he stated that the machinery was from **SHOWIER MACHINERY (Shanghai) FACTORY** and their invoice is US\$98,500/=for the machinery. The plaintiff also confirmed that he did not have any bill of lading showing **SHOW MECHANICAL (SHANGHAI) FACTORY** shipped any equipment to him and that his only title document would be the bill of lading.

Evidence by the 1st Defendants

17. **DW1, Mr. Mark Mboloi Mathuva** adopted his statement filed in court on 15th July 2016. He testified that the 1st defendant was not the shipping agent of the plaintiff as alleged at paragraph 4 of the plaint and confirmed that the 1st Defendant was an agent for the vessel/Cargo Carrier **AN SHUN JIANG/V145** and that the consignment in question arrived at the port of Mombasa and was discharged from the vessel **AN SHUN JIANG/V145** on the 23rd September 2011 as contained on the Hatch Tally No. 194691.

18. His further evidence was that when the vessel arrived, MS. Spedag Interfreight (K) Ltd came to them with original clearance

documentation including the original bill of lading, an introduction letter and a copy of the port pass for one **Seif D. Kalama** their designated Port clerk. The bill of lading in possession of MS. Spedag Interfreight (K) Ltd tallied with the bill of lading in their possession. Therefore, the original bill of lading was retained by the 1st defendant and the plaintiff's agent was issued with a delivery order no. 0142759 reflecting the plaintiff as the consignee and his agent MS. Spedag Interfreight (K) Ltd, was able to process the clearance for the release of the consignment from the port using the delivery order.

19. **Mr. Mark Mboloi Mathuva** further testified that there is evidence on the Hatch Tally that the plaintiffs consignment landed on the 23rd September 2011 and it is not clear why the plaintiff took all the time between then and 13th January 2012 when his agents finally came to the 1st defendant with the necessary documents to collect the delivery order. A letter dated 15th October 2011 by MS. Mombasa Cargo Tally Organization was said to confirm discharge of the plaintiff's consignment was produced. Therefore, the 1st defendant is not liable at all, be it for the lost value of the consignment or otherwise. The witness added that the plaintiff's claim is defective as it breaches the terms of carriage contained on the reverse of the relevant Bill of Lading.

20. DW1 then relied on the 2nd defendant's list of documents dated 11th July 2017 that the commercial invoice issued by **SHOW MACHINERY (SHANGHAI) FACTORY** in the 2nd defendant list of documents at page 17 is for US\$ 98,500/= and at page 18 there is another commercial invoice by **SHOW MECHANICAL (SHANGHAI) FACTORY** but the word factory is superimposed on the address with a total of US\$ 799,300/=. DW1 stated that he had never seen an invoice in the name of **SHOW MACHINERY (Shanghai) FACTORY for US\$799,300/=** and there is also no evidence of payment of the same as there is no bank statement or cheques produced by the plaintiff.

21. Upon cross-examination by **Mr. Shimaka**, Counsel for the Plaintiff, DW1 stated that the plaintiff's cargo was delivered and upon payment of the requisite charges a delivery order no.0142759 dated 13th January 2012 was released to Spedag Interfreight(K) Ltd and that his statement did not disclose the shipper nor the value of the cargo

22. On cross-examination by **Mr. Noorani**, DW1 stated that cargo can only be stored by the 2nd Defendant if discharged from the vessel and according to the Hatch Tally, three items were discharged from the vessel and the discharged crusher had marks and weighed 20,000kgs. According to the bill of lading, the cargo is described as Package cone-crusher SCC 128 (STD), no marks, and weighed 22,000kgs.

23. DW1 further stated that the particulars given in the bill of lading match with those in the manifest and at page 11 of the 2nd Defendant list of documents. There are cargo containing 5 crushers described as stone crushers and at page 20 of the 2nd Defendant list of document there is the 2nd defendants discharge tally but all the crushers have marks.

24. On re-examination by **Mr. Kinyua**, DW1 testified that when the cargo is landed from the vessel, the consignee has up to 21 days to clear their cargo or else charges accrue after 21 days the cargo is deemed to be at the customs warehouse.

Evidence by the 2nd Defendant

25. The statement of **Ms. Frida Rakamba** and **Ms. Peris Githinji** were adopted by consent of the parties as evidence and without the need for cross-examination of the said witness and the list of documents dated 8th August 2016 was also admitted in evidence as a bundle and marked as D2 EXH1. The evidence of **Ms. Frida Rakamba** was to the effect that on the material day she was on duty and assigned the duty of tallying cargo being discharged from **MV AN SHUN JIANE**. She confirmed having tallied 11 packages and prepared two Berth Tally Sheets No **B039920 and B039921** which showed that no cone-crusher was tallied with the marks and **NUMBER NIL** under bill of lading **NO B003**. For **Ms. Peris Githinji** her evidence was that she was on duty on the material day as Yard Records Clerk at yard No. 1A and prepared the on hand cargo records which had been produced. The records do not identify those witnesses appropriately but for purposes of this judgment I will identify them by names only in order not to confuse the record.

26. DW2, witness for the 2nd defendant, was **Tobias Osuri Oluendo**. He adopted his statement dated 6th March 2013 and filed in court on 21st July 2016. He testified having been on duty on the material day when five out of the nine Bill of lading documents pertaining to the cargo discharged from **MV AN SHUN JIANG** were cleared by Spedag Interfreight (K) limited and delivered in full. He added that the bill of lading 003 concerning **Tiba clearing and forwarding** was being pursued by Spedag Interfreight(K)limited concerning one cone-crusher SCC12 (standard)with nil marks was treated as short landed and registers as outstanding in the 2nd Defendant's Simba system. None of the counsel had any questions for the witness and he was therefore discharged.

27. DW4 (sic) DW3, **Paul Kiptum Too** who was attached to the investigations department and he was the one who conducted investigations on the loss of the cone-crusher after a complaint was initiate by Spedag Interfreight (k) ltd. The vessel according to the manifest details had a total number of 1105 packages in various forms for different consignees. According to the manifest the consignments belonged to nine consignees, out of which, 8 consignees, through their agents, except the plaintiff, were able to lodge and process clearance with both KRA and the 2nd defendant and took possession of their cargo.

28. The witness stated that among the nine consignees bills of lading only four were under '*nil shipping mark*' including the one cone-crusher in dispute while others were 90 packages under bill of lading number B004. The package in the tally sheet number 194691 dated 23rd September 2011 of **MS. Mombasa Cargo Tally Organization** purporting to represent the plaintiff cone-crusher was captured as having shipping marks and which belonged to a different consignee and not the plaintiff's which was manifested as bearing nil marks.

29. On cross-examination by **Mr. Shimaka**, the witness stated that according to his investigations the plaintiff cargo was never delivered to the 2nd Defendant. The package indicated in the tally sheet No. 194691 was destined for Uganda and the plaintiff's cargo had no shipping marks.

30. On cross-examination by **Ms. Muya**, the DW4 stated that he could not remember when the motor vessel **AN SHUN JIANG** docked at Mombasa and could not tell how many cone-crushers arrived aboard the said motor vessel. When asked to take a look at page 1 and 16 of the 1st defendant's list of documents he said the same shows that the manifest was for goods destined for Sudan but no custom entry had been lodged as at 4th April 2012.

31. In Re-examination by **Mr. Noorani**, the witness stated that a manifest is a document prepared by the ship to inform the port about the cargo to expect aboard the ship and that he formed an opinion that the cone-crusher did not land in Mombasa. With that evidence, the 2nd defendant closed its case and production of evidence came to a close.

Issues, analysis and determination

32. Having perused the evidence above in line with the pleadings filed, read the submissions offered by both parties and the law cited as well as the agreed issues drawn by the parties, I have isolated the following issues as falling for determination by the court. They are largely as framed by the parties as their agreed issues. However I will redraw the issues into 5 broad issues as follows:-

- 1. Has the plaintiff proved having bought the cone-crusher from china? What was the value of the crusher?**
- 2. Is the plaintiff's claim in general brought in contravention of the terms of the bill of lading and/or KPA Act?**
- 3. Whether the Cone-crusher was delivered at the port of Mombasa?**
- 4. Whether the 1st defendant is liable for the loss or non-delivery of the cone-crusher?**
- 5. What orders should be made as to costs?**

33. Prior to consideration on the isolated issues, it is important to point out that the 2nd defendant pleaded that the plaintiff's suit was bad for failure to comply with sections 62, 65 and 66 of Kenya Ports Authority Act. To the court that pleading questions the propriety and validity of the suit and ought to be dealt with preliminarily and before delving into the merits. Those provisions of the law read as follows:-

62. Compensation

(1) In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.

(2) ...

65. Notice of claim

(1) No person shall be entitled to compensation for non-delivery of the whole of a consignment of goods, or for any separate package forming part of such Consignment, accepted by the Authority for handling or warehousing unless a claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within six months of the date upon which such goods were accepted by the Authority.

(2) No person shall be entitled to compensation for any goods missing from a packed or unpacked consignment of, or for mis-delivery of, or damage to, any goods accepted by the Authority for handling or warehousing unless—

(a) the Managing Director is notified of such fact in writing within four days of the date upon which such goods were delivered to the consignee or person entitled to take delivery thereof; and

(b) a claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within one month of such date.

(3) Where the person claiming compensation proves that it was impracticable for him to notify the Managing Director, or give the Managing Director his claim, as set out in subsections (1) and (2) within the time specified therein and that such notification or claim was made or given in reasonable time nothing in those subsections shall prejudice the right of such person to obtain compensation.

66. Limitation

Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon

the Managing Director by the plaintiff or his agent;

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of continuing injury or damage, within six months next after the cessation thereof.

34. I propose to deal with the three provisions separately and seriatim. Section 62 of the act has been repeatedly and consistently interpreted by the Court of Appeal to command an alternative dispute resolution away from court and said to suspend the jurisdiction of the court. The latest of such decision was rendered as late as 29th September 2017 in **Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR** when the court said:-

Section 62 aforesaid only provides a simpler, faster and cost-effective avenue of disputes resolution. The parties, must in the first place, themselves explore a settlement on the quantum of compensation, failing which the Chief Justice is required to appoint a single arbitrator to determine the quantum. The award of the single arbitrator is subject to the High Court's supervisory jurisdiction or to an appeal. In other words court adjudication is treated in this instance as the final stage in the dispute resolution process...

In our view, that remains the law and the earlier decisions including *Kenya Ports Authority V Kuston (Kenya) Limited (supra)* remain good law. We say, finally that where the Constitution or statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute. This has, time without number been stated by courts. We cite only two cases to demonstrate our point. *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille, Civil Appeal No. 202 of 2015, where this Court said;*

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

Before ***Secretary, County Public Service Board & another v Hulbhai Gedi Abdille***, (supra) was decided the Court made a similar determination in ***Speaker of the National Assembly v James Njenga Karume***, Civil Application No Nai 92 of 1992 (Nai 40/92 Ur), saying:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”

35. It follows and goes without saying that this court's jurisdiction has been postponed and it is not open to it to have entertained the suit. This was indeed a matter that with some diligence on counsel for the 2nd defendant ought to have taken and urged in *limine*. The failure by counsel notwithstanding, the law must remain the law. It says the suit does not lie against the 2nd defendant and is thus dismissed.

36. On Section 65, this court in ***Bob Thompson Dickens Ngobi v Kenya Ports Authority & others [2017] eKLR***, considered the provision and held as follows:-

“A statutory corporation, unless the creating statute says otherwise, is not an appendage or department of the Government as contemplated under the Government Proceedings Act. One need not invite the application of the Government Proceedings Act when parliament in its own wisdom has spent time and public resources to enact a statute to regulate the body so desired to be created. I also consider the provisions of section 65 of the Kenya Ports of Authority to be in *Pari materia* to sections 13A Cap 40 and 3(2) of Cap 469. That being so the interpretation which the superior courts have given to section 13A, and 3(2) Cap 469 must apply to section 65 of Cap 391. Being fully persuaded by the decisions of the High Court and fully bound by the findings of the Court of Appeal, I cannot escape from but hold that Section 65 Cap 391 is in violation of Article 48 and to that extent unconstitutional. For that reason, the two limbs in the two Notices of Preliminary Objection cannot stand but must fail and are dismissed.”

37. I still hold the same views and reasoning in the above decision and I hereby hold that Section 65 Cap 391 is in violation of Article 48 and to that extent unconstitutional. Consequently, the objections on a point of law in the 2nd defendant's Defence must fail and are dismissed. I do consider that the same reasoning applies to Section 66 (a) and the same fate must befall the 2nd defendant's objection on it. Section 66(b) however, sets the timelines within which a suit must be brought and when applied to the facts here, I do find, it being common ground that the cargo allegedly landed and was allegedly discharged on the 23.09.2011, that the suit was filed within time. That limb equally fails and is thus dismissed. This finding however does not revive the claim against the 2nd defendant which stands dismissed on account of jurisdiction. Having done so I will now proceed on the basis that the suit now remains against the 1st defendant only.

Whether the Cone-crusher was delivered at the port of Mombasa?

38. At paragraph 3 of the 1st defendant's Defence, it is sated that it was an agent of the of the Vessel carrier AN SHUN JIANG/V.145 and that the items were delivered and discharged at the port of Mombasa on the 23rd September 2011 safely and in good condition. It is also DW1's testimony that the cone-crusher arrived at the port of Mombasa and was discharged from the vessel AN SHUN JIANG V.145 on the 23rd September 2011 and the same is evidenced on the Hatch Tally for discharging No. 194691 produced as **Dexhibit 4**. DW1 also averred that the Plaintiffs agent MS/ Spedag Interfreight (k) ltd went to the 1st defendant with original documentation involving the Cone-crusher for

clearance and it is only after they confirmed the authenticity of the Bill of lading, an introduction letter and a copy of the passport for one **Seif D. Kalama**, their designated Port Clerk and a copy of the consignee's passport from Spedag Interfreight (K) limited, that a delivery order No. 0142759 was issued to the said plaintiffs' agent.

39. Looking at the bill of lading produced by the DW1 as its Exhibit no. 1, I note the same is a copy of the original bill of lading. It has been stamped at the back by Spedag Interfreight (K) Ltd and it confirms DW1's averments that the same was handed to it by the plaintiff agent when it was initiating the clearing process. From the bill of lading I note that the shipping company is called Cosco Shipping Company Limited, the vessel is AN SHUN JIAG, the number of package is 1Cone-crusher (SCC128STANDARD) and weighing 22,000kgs.

40. On cross-examination, the plaintiff states that the Hatch Tally dated 23rd September 2011 produced by the 1st Defendant had a stone crusher marked cccc FHCC UGANDA PROJECT CARGO a crusher weighing 20,000kgs and the 2nd defendant stream tallies No. **B039920** and **B039921** contained at pages 20 and 21 of its list of document did not correspond with the description and weight on the bill of lading as there is no cone-crusher matching the description of the copy of the original bill of lading.

41. The 2nd defendant's witness testimony via **MS. Frida Rakamba** and **Peris Githinji** was adopted by consent of the parties and without the need to cross-examine the said witness and the list of documents dated 8th August 2016 was also admitted in evidence as a bundle and marked as D2 EXH1. In the said statement **Ms. Frida Rakamba**, a Berth Tally Clerk, testified that she did not tally any cone-crusher with the marks and number nil under bill of lading No. B003 from motor vessel AN SHUN JIAN at berth III during the 1st shift on the 23rd September 2011.

42. I have analyzed the 1st defendant's copy of the original Hatch tally sheet no. 194691 produced as Defence exhibit 4. The same is dated the 23rd September 2011, the agreed date of discharge of the cone-crusher. The last item is listed as a crusher and it weighs a total of 20,000kgs yet on the bill of lading the 1st defendant produced as **Dexhibit 1**, the cone-crusher weighs 22,000kgs. This leads me to a conclusion that the crusher referred to as discharged as per the Hatch tally sheet 194691 and by letter dated 15th October 2011 from M.C.T.O addressed to the 1st defendant is not the same and does not correspond with the cone-crusher that is contained in the bill of lading produced by the 1st defendant. It must at all times be remembered that a bill of lading is the title to the goods and the description on it must be given the deserved weight when compared to any other document.

43. The plaintiff in his evidence asserts that the cone-crushers arrived at the port of Mombasa sometimes in September 2011 but the same mysteriously disappeared before he took possession of the same. With such assertion the burden was squarely upon him to prove that the 1st Defendant discharged /delivered cone-crusher at the port of Mombasa on a balance of probabilities. There was no evidence offered by the plaintiff to demonstrate there having been a discharged by the 1st defendant to the 2nd defendant port at Mombasa.

44. It is trite law that in civil claims the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmation of the issues and who would fail if no evidence at all is laid. This principle is codified in Sections 107 and 108 of the Evidence Act, Cap 80 which provides:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

“108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

45. Furthermore, the evidential burden is cast by the provisions of sections 109 which provides:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In addition Section 112 of the same Act provides:

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

46. This burden upon the plaintiff was never discharged at all. From the evidence on record and the testimony of the 1st Defendants witness, I find that there is no proof on a balance of probability that the Plaintiff's cone-crusher (scc128 (standard)) was discharged from the vessel MV. AN SHUN JIANG VOYAGE NO. 145. Consequently, even on the merit and gratis, the claim of negligence on the part of the 2nd Defendant had not crystalized. Therefore the 2nd defendant could not, even on the merits, be liable for the loss or non-delivery of the plaintiff's cone-crusher.

Whether the 1st defendant is liable for the loss or

non-delivery of the cone-crusher

47. Now that this court has made a finding that there was no discharge/delivery of Plaintiff's cone-crusher (scc128 (standard)), can the plaintiff recover the price of the cone-crusher? The plaintiff claims a total sum of USD 799,300 as per the plaint. The claim is particularized and is therefore a claim for special damages for negligence/breach of statutory duty of care. It is trite law that for special damages to be

awarded, they must be specifically pleaded and also strictly proved. In **Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] eKLR** the Court of Appeal held: -

*“We think that the learned Judge was correct to approach the sums claimed as quantified special damages properly pleaded. The problem, however, lay in the fact that the evidence tendered, such as there was, either failed to touch on the specific sums pleaded or was contradictory, inconclusive or speculative. This fell way short of the requirement not only of specific pleading but, also, indeed the more, strict proof. See **BANQUE INDOSUEZ vs. DJ LOWE & CO. LTD** [2006] 2KLR 208. **HAHN vs. SINGH** [1985] KLR 716. That proof having lacked, the learned Judge was perfectly entitled to dismiss the huge claim and to grant only the satisfactorily proven amount of Kshs. 153,000 paid as appraisal fees.”*

48. The plaintiff in his claim against the defendants did not produce any commercial invoice, bank statements, the alleged telegraphic transfers he allegedly paid via installments to the supplier of the Cone-crusher bought in China. In cross-examination of the plaintiff by **Mr. Kinyua** Learned Counsel for the 1st defendant, the plaintiff stated that he paid US\$ 789,500 by telegraphic transfer but he did not have a copy of the said telegraphic transfers in his bundle of documents. When shown copies of two contradicting commercial invoices produced in evidence in the 2nd defendant's bundle of documents on page 17 and 18, he acknowledged the commercial invoices had different amounts on them. The commercial invoice from **SHOW MECHANICAL (SHANGAI) FACTORY** had a total figure of US\$ 789,500, while the commercial invoice from **SHOWIER MACHINERY (SHANGHAI) FACTORY** had a total sum of US\$ 98,500/=. On cross-examination by **MR. Noorani**, the plaintiff stated that according to the bill of lading, the shipper is **SHOWIER MACHINERY (SHANGAI) FACTORY** and that the commercial invoice in the name of the factory in the bill of lading was US\$ 98,500.

49. It is my view that even if the plaintiff had produced a copy of a commercial invoice which was not contradictory as the case is herein, the same would not suffice to prove the claim for special damages, reason being that on cross-examination the plaintiff stated that payment to **SHOWIER MACHINERY (SHANGHAI) FACTORY** was done via Telegraphic Transfer and therefore to prove the particularized special damages the plaintiff was either required to produce copies of the said telegraphic transfer, receipts from **SHOWIER MACHINERY (SHANGHAI) FACTORY** or even his bank statement of that or his alleged company “**NEDINE ENGINEERING AND CONSTRUCTION LTD**” in order to specifically prove special damages.

50. In view of the foregoing, I find that the plaintiff has failed to strictly prove the sum claimed in the plaint of US\$ 799,300/= being the alleged purchase price of the Cone-crusher, due to his failure to produce relevant documentary evidence in support of the same. The plaintiff has failed to prove his claim to the required standard of a balance of probabilities. I hereby dismiss the plaintiff's claim of negligence against the 1st defendant.

51. Even having come to this conclusion, it is unfortunate that the court has been unable to establish the whereabouts of the cargo which is agreed continues to hang in the system as un-discharged. I take the view and hold the opinion that there is some information that was due from the 1st defendant that was withheld from the court. For that reason even though the 1st defendant has succeeded on the failures of the plaintiff, I deem it unjust that the plaintiff be called upon to meet the 1st defendant's costs. As between the plaintiff and the 1st defendant I make an order that each shall bear own costs.

52. As between the plaintiff and the second defendant, I have found that the 2nd defendant failed in its duty to timeously raise a critical point that could have disposed the suit against it early and saved valuable court's time. For that failure, I award to the 2nd defendant half of the costs due.

Dated and delivered at **Mombasa** this **25th** day of **October 2019**.

P.J.O. OTIENO

JUDGE