



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.E410 OF 2018

ROTEM KIMYEVI MADDELER SANAYI ve TICARET A.S.....PLAINTIFF

VERSUS

SUNLAND CHEMICALS UGANDA LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff through a plaint dated 3rd December 2018 sued the defendant seeking the following:-

- a) A declaration that the defendant has no right to the consignment of 6 X 20 FCL DCP and 6 X 20 FCL MCP the subject of Bill of Lading MEDUGF 170211 and that the consignment is lawfully the property of the plaintiff.
- b) An injunction to prevent the defendant taking possession of the consignment of 6 X 20 FCL DCP and 6 X 20 FCL MCP the subject of Bill of Lading MEDUGF 170211.
- c) Such further or other order as the Court may deem fit.

2. The plaint was filed together with a Notice of Motion dated 3rd December 2018 together with list of witnesses and list of documents all dated on the same day. That by order issued on 5th December 2018 court issued injunction orders detaining and/or preserving the plaintiff's consignment shipped to the port of Mombasa under the bill of lading number MEDUGF170211 namely 6 X 20 FCL DCP and 6 X 20 FCL MCP which had arrived at the port of Mombasa on 23rd November 2018 by Mediterranean Shipping Company SA and Kenya Ports Authority pending the hearing and determination of the application *inter-partes* on 17th January 2019.

3. On 17th January 2019 when the matter came up for *inter-partes* hearing, the defendant though duly served as per affidavit of service dated 3rd January 2019 did not appear nor filed any grounds of opposition or Replying affidavit, consequently the interim orders issued on 5th December 2018 were extended till the hearing and determination of the suit.

4. The defendant was served with hearing notice as per affidavit of service dated 7th February 2019 and filed on 14th February 2019. On 18th February when the matter came up for hearing there was no appearance for the defendant nor was there defence on record.

5. Mr. Fraser, learned Advocate, appearing for the plaintiff urged that there was no appearance for the defendant though service had been effected as ordered by the court and referred to the affidavit of service filed on 14th February 2019. He prayed that the affidavit evidence of the plaintiff served upon the defendant dated 4th February 2019 be accepted as the plaintiff's evidence under the provision of **order 19 Rule 1 of Civil Procedure Rules** which provides:-

"Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable."

6. I have considered the reasons advanced by the plaintiff's counsel for seeking that the plaintiff's suit against the Defendant be proved by affidavit, as the plaintiff is a resident of Turkey, residing in Istanbul in Turkey. That the defendant has not participated in these proceedings and costs of bringing the witness will be very high, to be sufficient reason for making an order that the facts of this suit be proved by affidavit. I am alive also to the overriding objectives as set out under **section 1 A of Civil Procedure Act** which is, to facilitate the just, expeditious, proportionate and affordable resolution. Further under **section 1 B of the Civil Procedure Act**, the court is under obligation to attain the just determination, of the proceedings, the efficient disposal of business of the court, the efficient use of available judicial and administrative resources and ensue timely disposal of the proceedings at a cost affordable by the respective parties. In view of the above-mentioned provisions, I find in the best interest of all the parties in this matter, that there shall be no prejudice to any party in proceeding to

allow that the plaintiff to prove the facts in this suit by way of the affidavit.

7. From the contents of the affidavit of Nilufer Ergul, it is averred that the plaintiff received a request for a pro forma invoice for the supply of calcium phosphate which request the plaintiff believed came from Sunland Chemicals of Los Angeles, **USA** for supply to the defendant in Uganda which was stated to be the subsidiary of Sunland Chemicals, **USA**. The plaintiff in compliance issued a pro forma invoice on 5th of October 2018 and entered into further correspondence by e-mail with what the plaintiff believed to be Sunland chemicals, **USA** (see at page 1 of exhibit copies of e-mails pages 2 to 5 of the exhibit).

8. The plaintiff upon obtaining a credit approval from Sunland, USA, it issued a 28/10/2018 a commercial invoice to Sunland USA for the consignment of 6 X 20 FCL DCP and 6 X 20 FCL MCP in the sum of US\$ 163,428.00 (see copy of the commercial invoice at pages 6 to 9 of the exhibit). On 28/10/2018 the plaintiff delivered the consignment to Mediterranean Shipping Company SA for shipment to Mombasa and released the Bill of Lading MEDUGF 170211 and documents to title to the consignment to the defendant against the credit of Sunland, USA (see a copy of the Bill of Lading at page 10 of the exhibit).

9. The vessels carrying the consignment arrived at Mombasa on 23/11/2018 and the consignment was accordingly cleared by the defendant. However Sunland, **USA**, by two e-mails dated 29/11/2018 informed the plaintiff that Sunland, **USA** did not place the order with the plaintiff and that it had no connection with the defendant and that Sunland, **USA** will not make payment for the shipment (see copies of e-mails from Sunland Chemicals USA at pages 11-12 of the exhibits).

10. It is the plaintiff averment, that it had released the consignment for shipment to the defendant in belief that payment was to be made by the Sunland, **USA**, which had credit approval. It is further the plaintiff's contention, that it had not sold the consignment to the defendant and that the defendant has obtained the documents of title to the consignment by fraud and as such the defendant has no right or title to the consignment; which consignment was on 5th December 2018 detained and/or preserved by Mediterranean Shipping Company SA and Kenya Port Authority, following an order of this court on 5th December 2018, which order was served and complied with.

11. Having considered the plaintiff's affidavit evidence, which has not been challenged or controverted by the defendant, who though duly served did not bother to appear, I find that the plaintiff has proved its claim on balance of probability as required by law. I have no reason why I cannot find for the plaintiff in view of there being no appearance and defence to the plaintiff's claim, which has not been rebutted in any way.

12. The upshot is that I am satisfied the plaintiff is entitled to prayers sought and I accordingly enter judgment in favour of the plaintiff as follows:-

- a) A declaration be and is HEREBY made to the effect that the defendant has no right to the consignment of 6 X 20 FCL DCP and 6 X 20 FCL MCP constituting the subject matter of Bill of Lading MEDUGF 170211 and that the consignment is lawfully the property of the plaintiff.**
- b) An order of injunction be and is HEREBY issued preventing the defendant from taking possession of the consignment of 6 X 20 FCL DCP and 6 X 20 FCL MCP constituting the subject matter of Bill of Lading MEDUGF 170211.**
- c) An order be and is HEREBY made directing Mediterranean Shipping Company and Kenya Ports Authority to release the consignment to the plaintiff upon payment of charges due (if any).**
- d) Charges that the plaintiff shall pay under (c) above for release of the consignment as storage and any related charges be recoverable from the defendant as part of costs.**
- e) Costs of the suit and attorney fees is awarded to the plaintiff against the defendant.**

Dated, signed and delivered at Nairobi this 7th day of March, 2019.

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J .A. MAKAU

JUDGE