

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL CASE NO..... 123 of 1996

WANANCHI MARINE PRODUCT (T) LTD..... APPLICANT

VERSUS

OWNERS OF MOTOR VESSELS..... RESPONDENT

R U L I N G

KATITI, J.

This suit, has a somewhat chequered background, having been filed on the 8th day of May, 1996, the 18th day of July, 2000, saw it come for mediation, when the defendants, though served made no appearance. Procedurally the defendant's Advocate, failing to appear for the mediation, the Court may enter a default judgment, against the defendants. However, in view of the fact, that large sums of money are prayed for, this Court, with the concurrence of the plaintiff's counsel Mr. El Maamry, stood over such judgment, subject to oral proof of the claim.

In the dutiful attempt, by the plaintiffs to prove the claim, we have oral evidence, by TUNG WU KONG, a Mombasa based resident, there running Mwananchi Marine Products Kenya Ltd., as Chairman and Shareholder, showing that in this Country, (Tanzania), equally established, is the Mwananchi Marine Products (T) Ltd., herein to be called the plaintiffs. It is patently clear, on the evidence, that the plaintiffs, struck a Charter Party, or Charter Agreement, with Tanzania Fisheries Corporation, the 'owners', and hence to be called the defendants, whereby such owners, were to charter and the plaintiffs to hire, their two vehicles Christioned, -1- MAMA TAFICO, and -2- SADANI, to the plaintiffs, at the rate of US D.250 per day, per vessel, for a period of twenty four months. Accordingly therefore in the absence of challenge, I hereby make a finding to that effect. It is apparently defying challenge also, that the period of twenty four months were to, and did commence from 1/6/1993, and ended on 31/5/1995, (Paras 1, 2 and 3 of the Agreement Annexure BAKI), and this attracting no controversy, there is no escape routed, from finding the same as a fact, which I hereby do. It cannot be denied either,

and the Agreement is unequivocal, in the direction, that the defendants contractually undertook to obtain, the Fishing Licences, for the two above mentioned vessels, from the Licensing Authorities, for and on behalf of the plaintiffs. Thus, the said Charter Party Agreement, would be subject to the defendants obtaining fishing licences, or be terminated in the event of the defendants failing, or neglecting to obtain, or to renew licence, for the duration of the Agreement, in which case, the defendants would be liable to compensate the plaintiffs, for loss of income, for period of the Charter Agreement together, the licences were unobtained, with a lump sum compensation of USD 200,000 to cover all expenses incurred by the plaintiffs in servicing the contract - Paras 19.1, 19.2, 19.3 of the Agreement. That appears as clear as day light, and too obvious to be disputed, and I conclude the same, as an undeniable fact.

The plaintiff's claim, that the defendants refused, or neglected to renew, or obtain fishing licences for period from ~~-1-~~ 1/12/1995 to 31/5/1997, and hence their anxiety to invoke paras 19.1, 19.2 and 19.3 of the Agreement, demanding an order for compensation ~~-1-~~ USD 200,000, ~~-2-~~ Loss of income and profits, from 1st day of December, 1995 to 31st day of May, 1997 at \$ 20,000 per month + \$ 20,000 x 18 months = USD 360,000; ~~-3-~~ USD 540,000 being expenditure, at the rate of USD 30,000 per month x 18 months. ~~-4-~~ Interest etc.

Thus via the said Charter Agreement the parties so agreed, but they are now asunder, according to their pleadings, and hence this exparte proof, upon the defendants failure, to enter appearance on a date fixed for mediation. In our sense, proof is proof by evidence, which would induce a reasonable man, reasonably applying his good sense, and prudence to come to the conclusion, that certain fact^s, or circumstances of the case exist; in ^{our case} proof of breach of contract after extention and hence plaintiffs entitlement to the reliefs sought by the plaintiffs. It does not however mean proof to mathematical certainty, nor should it be pedantically arithmetical. And it is trite learning that the burden is that, whoever wants the Court to give him judgment as of right, on the existence of the fact he asserts, he must prove those facts. Therefore, the fact that, this it is an exparte proof, is no reason why, the Court should accept anything uttered, or tendered, untested, as automatic gospel truth, and therefore ipso facto entitle the plaintiffs to judgment.

As I look at the agreement signed by the parties, as juxtaposed with the claims, I am without doubts, as to its interpretative snags, as to duration of contract or extension thereof, renewal, or obtaining fishing licences, nor do I think, that the parties, were in any doubts about it.

Coming into the arena, it does seem, that the claim in prayer (B) of the Plaint (8/5/1996), covers period divisible into two parts, - the first one covering part of the first twenty months, - supposed to commence by 1/6/1996 and 31/5/1995, covering 1st December, 1994 to 31/5/1995 i.e. six months. It appears, to be an unchallenged position, that for this period of six months before the end of the first two years term, the defendants never renewed the fishing licences. I have not the slightest doubt, that such a position happening, during the charter period of twenty four months, does obviously yield to the general invocation of the Agreement Paras 19.2 and 19.3, entitling the plaintiffs to -1- US \$ 200,000, and -2- Loss of income for the duration of the charter period for our purposes here, the period being six months. What then, would the loss of income be? According to prayer (B) in the plaint, the monthly income would be US \$ 20,000 that for our purposes, a period of six months, would amount to US 120,000. Mr. TUNG WU KONG testified, as coming to such figure by comparisons of previous year's returns. When all is considered in the desirable perspective, it does seem persuasive to treat vagaries of fishing industry, as pertaining fishing incomes, as steady as like production, on formulae basis. But as the figure stand, and remain undisputed even though the vagaries of weather would make fish yields fluctuate from time to time, I am tempted to uphold and therefore grant the same, which I hereby do, and consequently allow and award US \$ 320,000 to the plaintiffs.

I shall now come, to the second period, that cover 1st June, 1995 to 31st May, 1997 which ~~time~~, should have been covered, by the extension clause scheme see Para 22.1 which runs as follows:

" The Charterers have option of extending the period of hiring, for a further two (2) years, which option the Charterers, may exercise, by giving the Owners, not less than three months, prior to the expiration of the hire-term, hereby created, written notice of its

intention to renew the hire-term. The OWNERS upon receipt of the said notice, shall notify the Charters in writing, not less than thirty days, of its acceptance, to renew the hire period."

The above Agreement clause does, not in my view demand extra interpretative energies at all. In my humble view, reasonably looked at, it, stands unquestioned, and actually defying challenge, that the plaintiffs vide the Agreement gave the plaintiffs option, for extension of hiring term, for a further two years, provided, -1- the plaintiffs gave written notice to the defendants, three months prior the expiration of the first hiring term -2- of intention to renew the hire-term, and -3- being notified in writing by the defendants, not less than thirty days, of accepting to renew proposed hire period. To me, it appears, that in classical terminology, the above appears to need, that the parties for an extended period of duration, would not be bound by Agreement, until they are in agreement, which requires an offer for extension of time by the plaintiffs, and acceptance by the defendants, as per terms above, all in writing within specified period of time. And a part from showing the meeting of the minds, on the subject matter of the contract, the rules of offer and acceptance are used as a mechanism, for determining when the contractual obligations would arise - see HISPANKA de PETROLEOS SA VS. VENEDORA OCEANICA NAVIGATION, THE KAPERL MARIKOS NL (no.2) 1987 2 Lloyds Rep. 321 at 331.

Now I purposefully ask, was there such extension? I pose this question because both Mr. El Maany and Mr. TUNG WU KONG gave me an obvious impression, that such extension of charter agreement there had been. In the obvious arena of this case, I get an undoubted impression from the plaintiffs, that, there was, such contractual extension of the second two years term. Was there such exercise of option, as per para 22.1 of the Charter Agreement, I ask? Was there an offer on the one hand by plaintiffs, and acceptance on the other hand, by the defendants? Now our positive retreat, has target to see, whether there ever was, an extension in terms of Para 22.1, the breach of which would attach, contractual liability, of course as deductible from the evidence, given on behalf of plaintiffs? MR. KUNG, was ~~assertive~~ there was such extension. I would not, have cultivated the anticipation, to doubt his credibility. The plaint para 3 asserts, the plaintiffs exercised the option of renewal, after expiration

of period 1/6/1993 to May, 31st 1995 via "BAKI" of Charter Party Agreement. The defendants, deny such renewal in their Written Statement of Defence. But with respect, the so called BAKI is a Charter Agreement dated 15/5/1993, and the extension would have started at about on 31st May, 1995 and end on 31st May, 1997. So that with respect, although BAKI, provided for option for extension the procedural mechanism for the same, is provided by Para 22.1. We are, with respect, therefore searching, how compliance therewith, if at all, was done, MR. TUNG WU KONG could, be said to have conveniently avoided touching the same, and yet it is a nagging pain, in the case. The search therefore continues, it cannot be abandoned unsatisfied, because the proof is exparte.

But, if the offer was made, by the plaintiffs, as it does from the record appear was actually made, the answer thereto, would seem to relevantly read, as follows:-

TAF/3/5/9/Vol.II/51

29/5/1995

The Managing Director,
Wananchi Marine Products (T) Ltd,
P.O. Box 63252,
DAR ES SALAAM.

Dear Sir,

RE: EXTENSION OF THE CHARTER AGREEMENT

Reference is made to your letter dated 16/1/1995 and our letter Ref. TAF/3/5/9/260 dated 6th February, 1995 in respect of the above mentioned subject.

The issue of extension of the Charter Agreement for a further term of two (2) years, had been submitted to the Board of Directors, at its meeting held on 25th May, 1995.

The Board of Directors after a thorough consideration of the issue, had resolved as follows:-

- (a) That the request by WMP to extend the Charter Agreement for a period of two (2) years be, and is hereby accepted, on condition that WMP shall adhere and abide to the terms, and conditions of the Charter Agreement, which will be in force, during the whole extended period.

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(b) That the extended period, may be determined by either party, terminating the same under the procedure laid down by the Charter Agreement, or by Government Police (Privatisation).

(c) That breaches to the terms and conditions of the Charter Agreement, which were committed by WMP during the two years period expiring on 31/5/1995 such as:-

- (i) Failure to insure the Vessels
- (ii) Failure to pay Charter Fees when it is due, etc.

A draft, of a proposed addendum to existing Charter Agreement, will be sent to you for your perusal. We hope you will cooperate with us, in the finalisation of this matter, for the interests of both parties, and for the extension of our good business relating.

Yours faithfully,

TANZANIA FISHERIES CORPORATION

Sign:

for A. G. DIRECTOR GENERAL

With respect, I am prepared to vouch, that the plaintiffs made the offer, and so, in good time. But the above letter from the defendants, does instil worries, whether there was unqualified acceptance of the offer. In my humble view, there is no way, we can start philosophizing a new, about the rules of acceptance, in contract formation, - it is trite learning I think, that an acceptance, is an unqualified expression of assent to all the terms of an offer, and the same, must appear to have been communicated to the Offeror, in the manner presented, or contemplated by the offeror in offer, considering the correspondences, and negotiations, between the parties as a whole, and their conduct in that regard - See Section 4 and 7 of the Contract Ordinance Cap. 433. But here we have an acceptance subject to conditions attached being fulfilled, and when they were fulfilled, if at all, is shouting for the answer, which is not easily at hand. With respect, MR. TUNG WU KONG, did not disclose how his Principals Offer, was accepted by the defendants, in view of the above letter. What I see, with my naked eye, is a kin to a counter - offer, whose legal effects is well known,

nor is it suggested, that the acceptance of extension, was done orally. But, if human frailty was not failing us, if our memories unfortunately were not betraying us, we would also easily recall, a letter dated 1st April, 1996 Ref. No. TAF/3/5/9/Vol.II/112, to Mr. Saidi H. El Maamry, that is as follows:

Saidi H. El Maamry,
Advocate,
Pamba Road,
P.O. Box 5201,
DAR ES SALAAM

RE: ADDENDUM TO THE CHARTER AGREEMENT

REFERENCE is made to your letter Ref. No. SHE/95/15 WMP dated 27/3/1996.

The extension of the Charter Period for a further period of two years had, been accepted on condition that all clauses to the Agreement, which in one way or another hinder the smooth execution of the Agreement, had to be amended, and replaced by better terms by way of an Addendum effective from 1st June, 1995. This position was put clear to your clients in our letter Ref. No. TAF/3/5/9/Vol.II/51 of 29/5/1995.

On the above stated grounds efforts to negotiate, and amend the Charter Agreement, started since August, 1995, although your Clients have all along been reluctant to negotiate.

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The grounds, for the failure to obtain the fishing licence, are the unfavourable terms, and conditions of the Charter Agreement, as we discussed on the 8th of March, 1996, at your office, as well as the breach of fishing Rules, by your clients.

.....

Awaiting for your good response.

sgd.

GENERAL MANAGER

.....S/.

This letter opens our eyes wide, it is all telling, without capacity for caprice, nor conspiracy, showing that the extension of the Charter Agreement, even three weeks before the institution of the suit, had never been agreed upon, by the parties. Then, when was it after that? It was never at all. From the above, it is my confident view, that the claim based on an allegedly extension of Charter Agreement from 1/6/1995 to 31/12/1997, has not been established, and the claim, is therefore disallowed, and in the same period by extension for the same reason disallowed, is prayer (c) of the plaint i.e. \$ 540,000.

In summary therefore, the plaintiffs shall be entitled to -1- US \$ 200,000 as per para 19.3. -2- Loss of income for period of six months US \$ 120,000, and hence US \$ 320,000, -3- Interest on decretal amount from date of filing suit till judgment, and till payment, but otherwise partly dismissed, with costs.

Delivered this day of November, 2000.



E. W. KATITI

JUDGE