THE REPUBLIC OF UGANDA

IN THE COURT OF APPEALOF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KINIONYOGO, DCJ
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE S.B.K. KAVUMA, JA.

CIVIL APPEAL NO.71 OF 2003

1. TAJDIN HUSSEIN
2. RAINBOW FOODS LTD
3. NIZAR HUSSEIN ……...……..APPELLANTS

VERSUS

HWAN SUNG INDUSTRIES LTD..... RESPONDENTS

[Appeal from the judgment and orders of
the High Court of Uganda at Kampala (Okumu-Wengi, J)
dated 25/09/2003 in HCCS No.276 of 2001]

JUDGMENT OF TWINOMUJLNL JA:

This is an appeal against the judgment of Hon Justice Okumu-Wengi of the High Court of Uganda (Commercial Division) in which he ordered the appellants to pay to the respondent USS8,000 and costs of the suit and dismissed the appellants counter-claim. The facts of the case as found by the learned trial judge were as follows:

> **"The plaintiff is a local manufacturer of Ice Cream. It placed an order with the defendants in December 2000 for Orange Oil Flavour, an ingredient used for spicing the premier brand 'Cool Cool Bar'. A sum of US$8,000 was paid to the defendants as 50% part payment for the consignment ordered after the sample had been provided. The defendant then supplied the goods. However, the plaintiff on examination were not satisfied with the substance supplied and subjected them to**

internal and National Standards Bureau examination. As a result they rejected the goods and demand a refund of US$8,000 so far paid expenses incurred and costs of the suit. The defendant denied liability contending that the goods supplied complied with the samples and the plaintiff on delivery took three days before voicing their complaint. The defendant then counter-claimed for the balance of the contract price namely US$8,000."

At the trial four issues were framed as follows:

1. Whether the goods supplied corresponded with the sample.
2. Whether the goods were of merchantable quality.
3. Whether the defendant is in breach of the contract.
4. Whether the plaintiff is entitled to the reliefs claimed and quantum of damages.

The trail judge upheld the plaintiffs claim with costs and dismissed the defendants counter-claim, hence this appeal.

The Memorandum of Appeal raises six grounds of appeal as follows:

1. The Learned trial judge erred in law and fact when he made a finding that the goods supplied by the appellants/defendants were not fit for the purposes for which the respondent/plaintiff ordered them.

2. The learned trial judge erred in law and fact when he failed to evaluate the evidence in its entirety. In particular, he did not address himself to the nature of the goods, the contradictions of the respondent/plaintiff's witnesses and he misdirected himself as to the cogency of the evidence given by the said witnesses.

3. The learned trial judge erred in law and fact when he failed to make a finding on whether the goods supplied by the appellants/defendants corresponded to the sample previously supplied by them.

4. The learned trial judge erred in law and fact when he failed to make a finding on whether the goods tested by Uganda National Bureau of Standards were the goods supplied by the appellants/defendants.

5. The Learned trial judge erred in law and fact when he held that the respondent/plaintiff was entitled to reject the goods and recover its deposit.

6. The learned trial judge erred in law and fact when he dismissed the appellants/defendants counterclaim for lack of evidence.

At the hearing of the appeal. Ms Deepa, Verma Jivram and Mwesigwa represented the appellants. Mr. Anguria Edward represented the respondent.

Ms Deepa Verma Jivram argued grounds one, five and six separately and grounds two, three and four together. I propose to handle them in the same order.

GROUND ONE

Ms D.V. Jivram submitted that the trial judge was wrong to hold, as he did that the goods which were supplied by the appellant were not fit for the purposes for which the respondent ordered them. She submitted that the trial judge raised the issue of the purpose of the goods on his Own, as it was not one of the agreed issues at the trial. The purpose of the goods was not in issue and the sale agreement was very clear that this was a sale by sample. The goods had to correspond with the sample which was supplied before delivery of goods. In her view, the trial judge contravened Order 18 r 4 of the Civil Procedure Rules to the effect that judgment should be based only on agreed issues. He also failed to comply with sections 91 and 92 which provide that no oral evidence can add or alter or modify the terms of a written contract.

In reply, Mr. Anguria Edward conceded that the impugned contract of sale was indeed a sale by sample. However, before the property in the goods which were supplied passed on to the respondent, the goods were found to be inferior to the sample which was supplied. As a result, the respondent rejected them because they were not fit for the purpose that he had ordered them. In his view, the trial judge who has wide powers on framing of issue was entitled to hold that the goods were not fit for the purpose for which they were ordered.

The following is the sale contract from which this dispute arose:

“AGREEMENT

This agreement is made between Hwan Sung Industries Ltd. P. O. Box 7628, Kampala, Uganda (hereinafter called buyer) and Mr. Tajdin Hussien, Managing Director Rainbow Foods Ltd. P. O. Box 756, Kampala, Uganda (hereinafter called supplier) on the date of 15th December 2000.

1. Buyer needs 2000 Kgs. Orange Oil for his factory use and Supplier agree to supply that quantity.

2. Both parties agree the price US$8.00 per kg.

3. Buyer is ready to pay half of the total amount which is US$8,000 (United States dollar eight thousand only) and balance amount after delivery. But supplier has, to supply as per sample which he has delivered before.

4. Buyer has authority to reject the goods if he found the Oil which supplier has supplied is not the same quality as mentioned the above clause No.3.

5. Supplier has to give the Guarantor’s name who can give the guarantee to supply the goods on behalf of the supplier if he fails to supply the above quantity the guarantor will return to the buyer the same amount with its interest.

Buyer	**Seller**	**Guarantor**
S.H. KIM	**TAJDIN HUSSEIN**	**NIZAR HUSSEIN**
Chairman	**Managing Director”**	

It seems to me that this agreement was specific on a number of things:

(a) The commodity to be supplied.
(b) The price to be paid.
(c) The fact that at the time of the agreement the respondent was already in possession of a sample of the goods to be supplied.

At the trial the first issue which was framed was whether the goods which were supplied corresponded with the sample. The issue was addressed at length by both counsel in their submissions. However throughout his judgment the learned trial judge made no mention of the issue at all.

Instead he stated:

> **"At the trial four issues were framed but in essence the question for discussion of this court is whether the defendant is liable in the circumstances to pay US$8000 to the plaintiff, and whether the defendant should be made to pay for the goods."**

He went ahead to discuss evidence that in his Opinion proved that the goods were not fit for the purpose for which they had been ordered.

There is no doubt that under order 13 rule 5 of the Civil Procedure Rules, a court has powers to frame additional issues and may amend the agreed ones by addition or subtraction there from However, it is trite that where such an amendment has been done, the parties should be called upon to address the issues introduced by the amendment See **Oriental Insurance Brokers Ltd vs Transocean Ltd Civil Appeal No.55 of 1995** where the court affirmed that view. In the instant case, the learned trial judge did not inform the parties that he had framed an additional issue on whether the goods were fit for the purpose for which they were ordered. The contract of sale did not disclose the purpose for which the goods were to be used. The only Condition stipulated therein was that they had to correspond with the sample which was supplied before the agreement was signed. I think the learned judge was wrong to base his entire decision on an issue which was neither framed nor argued before him.

The first ground of appeal should in my judgment succeed

GROUNDS 2, 3 AND 4

On these grounds, learned counsel for the appellants submitted that the trial judge failed to evaluate the evidence before him and as a result:

(a) He failed to make a finding whether the goods supplied by the appellants corresponded with the sample previously supplied by them.

(b) He failed to make a finding whether the goods tested by Uganda National Bureau of Standards were the goods supplied by the appellants.

I have already observed that though it was conceded that this was a contract of sale by sample, the learned trial judge did not even acknowledge that fact in his judgment. There was evidence on record that the respondent insisted on testing a sample before the sale agreement was signed. If the trial judge had evaluated the evidence as he should have, he would have considered whether the goods which were supplied were ever compared with the sample to see whether they corresponded. He did not. In my view, that was a fatal omission given the two nature of the sale agreement. This leg of these grounds of appeal should succeed.

Regarding whether the goods which were tested by Uganda National Bureau of Standards (UNBS) were the goods supplied by the appellants, it is true that the trial judge did not make a specific finding to that effect. E-{e appears to have assumed that the goods tested by UNBS were the ones supplied by the appellants. The evidence before him was that the contract was for the supply of 200 kg. of Orange Oil. The appellants supplied a sample before 15th December 2000 the date the sale agreement was signed. The sample as examined by PW3 Tenywa Moses who was employed by the respondent as a Quality Controller. Re recommended that the sample was good. In February 2001 when the goods were delivered, he did not witness the delivery nor was he called upon to compare the goods with the sample he had earlier received. He only examined the goods he was shown and formed the opinion that they could not be used. He could not tell positively that those were the goods delivered by the appellants. Whereas the contract and DWI, who is the third appellant, say it was Orange Oil which was the subject matter of the contract, PW3 said he examined samples of Orange Oil flavour which the appellants say they did not supply. PWI and PW2 were the experts from the Uganda National Bureau of Standards who examined samples of goods they call Orange flavour. They also did not know who delivered them to the respondent. Their instructions were to examine the quality of the samples. They were never asked to compare those samples with the sample of the goods supplied to the respondent by the appellants before the contract of sale was signed. From their evidence, it is impossible to -

tell whether the goods they examined were the ones supplied by the appellants. As I have already stated, the trial judge simply assumed that the goods were those supplied by the appellants. Yet the evidence before him did not support that assumption. In my view, the assumption he made on the goods was not justified. The chain of the goods which were examined by the Uganda National Bureau of Standards did not connect them to the appellants. The matter is made worse by the fact that they examined Orange flavour, whereas the contract of sale talks of Orange Oil and DWI, the third appellant, says he supplied Orange Oil and not orange flavour, DW1 was emphatic that Orange Oil and Orange Flavour were two different things.

In these circumstances, I find that the trial judge failed to evaluate the evidence properly as a result of which he failed to determine whether the goods examined by Uganda Bureau of Standards witnesses (PW1 & PW2) were the goods which were supplied by the appellants. These grounds of appeal could succeed.

GROUNDS 5 AND 6

In light of my holding on the first four grounds of appeal, I find it convenient to dispose of the remaining two grounds together. These are:

3. The learned trial judge erred in law and fact when he failed to make a finding on whether the goods supplied by the appellants/defendants corresponded to the sample previously supplied by them.

4. The learned trial judge erred in Law and fact when he failed to make a finding on whether the goods tested by Uganda National Bureau of Standards were the goods supplied by the appellants/defendants.

I have held that the appellants supplied a sample of goods as per sale agreement dated 15th December 2000. In February 2001 they delivered goods which were accepted by the respondent. Evidence shows that both internally and externally the goods were never compared with the sample which had earlier been supplied. It is by no means established that the goods which were examined by PWI and PW2 were part of the goods supplied by the appellants. If the respondent had wanted to establish that, they could have called the evidence of their storekeeper who

received the goods and who, a month later, allowed PWI, & PW2 to take samples of the goods for their examination. It did not. It was therefore, wrong for the learned trial judge to hold that the respondent was entitled to reject the goods which were supplied by the appellants. In the same vain the trial judge was wrong to reject the appellant counter-claim for lack of evidence when the contract of sale provided that the respondent had to pay a balance of US$8000 on full delivery of the contract goods. These two grounds of appeal would also succeed.

In the result, I would allow this appeal, set aside the judgment and orders of the High Court and substitute an order that the respondent pays US$8000 (of the counter-claim) with interest at 6% from the date of delivery till payment in full and the costs of the suit here and in the High Court.

JUDGMENT OF THE HON. DEPUTY CHIEF JUSTICE L.E.M. MUKASA-KIKONYOGO

I have had the benefit of reading in draft the judgment delivered by Twinomujuni. JA and I agree with the reason he gave for allowing the appeal. I also agree that the appeal be allowed with the orders proposed by him.

As Kavuma JA also agrees with the judgment of Twinomujuni JA. the judgment and orders of the High Court are set aside and substituted with an order requiring the respondent to pay U.S.D 8000= (of the counterclaim) with interest at 6% from the date of delivery till payment in full. The appellant is also awarded costs of the suit in this Court and in the High Court.

JUDGMENT OF HON. S.B.K. KAVUMA. JA.

I have had the benefit of reading in draft the judgment prepared by A. Twinomujuni. JA. I agree with the reasoning in it and the orders proposed therein and have nothing to add.

Dated at Kampala this 12th day of September 2006.

Hon. Justice Amos Twinomujuni
JUSTICE OF APPEAL

L.E.M. Mukasa-Kikonyogo
HON. DEPUTY CHIEF JUSTICE

S.B.K Kavuma
JUSTICE OF APPEAL