

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL COURT)

HCCS NO. 406 OF 1998

KABACO (U) LTD ..... PLAINTIFF

VERSUS

ATTORNEY GENERAL ..... DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

JUDGMENT

Defendant raised a formidable point of law to the effect that the plaint in this suit was defective — in as much as it did not plead fraud nor did it particularise fraud as required by law — see 0.6, r.2 of the Civil Procedure Rules (CPR) and **Lubega v. Barclays Bank, Civil Appeal No. 2 of 1992**, as well as ODER JSC in **Kazzora v. Rukuba, SCCA No. 13 of 1993**.

Consequently, argued Defendant, the plaint does not disclose any cause of action; and it should be rejected under 0.7, r.11 of the CPR, **and Hussein Ali Hasmani v National Bank of India, (1937) 4 EACA CA-T** to the effect that where an essential element is not pleaded, there is no cause of action, and the plaint cannot be amended.

Additionally, argued Defendant, the evidence on record does not prove fraud. In this regard, ODER JSC in **Kazzora's** case (*supra*) held that fraud must be strictly proved; and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

Similarly, in **Kampala Bottlers v Damanico, Civil Appeal No. 22 of 1992** WAMBUZI CJ stated that fraud must not only be proved to a degree higher than a mere balance of probabilities, but must be proved against the beneficiary, either directly by actual fraud on the part of the beneficiary or indirectly with his knowledge or consent or participation in some way.

All the above arguments are, as I have stated above, eminently formidable. Nonetheless, Plaintiffs simple response was equally disarming. Plaintiff's response was that it was a misconception on Defendant's part to argue that Plaintiffs case was founded on fraud. It was not. I agree. Plaintiffs claim is founded on restitution or *quasi contract*. It is a claim for refund of money had and received — see **Hodgkin's Law of Contract in East Africa**; see also the case of **Moses v Mcferlen**. Additionally, or alternatively, Plaintiff's claim was founded on breach of contract — in as much as Defendant's servants (the military personnel in Mbarara's NRA/UPDF Training Wing) undertook to remit the withheld taxes to URA, but did not. In this regard paragraph 7 of the plaint is pivotal. It states that by reason of the aforementioned failure or neglect of Mbarara Training Wing to remit withheld money or to properly account for the same, the Plaintiff suffered loss.

Nowhere in the plaint does Plaintiff assert or even allege "fraud" or "deceit" on the part of any party.

In his written submissions, learned counsel for the Plaintiff articulated the basis for Plaintiff's claim expressly and unequivocally — thus:

*"It is not necessary to determine whether there was a breach of contract/agency, a tort of conversion, a breach of trust or a breach of statutory duty. It is enough that there was an express or implied promise on the part of NRA/UPDF to remit withheld funds to URA that this promise was breached and the Plaintiff suffered loss when it was made to pay full tax in disregard of the moneys withheld. The Plaintiff's claim was founded on the law of restitution or what is often called quasi-contract. It is a claim in equity, for refund of moneys had and received, upon a premise that was never fulfilled by the promisor."*

I am fully satisfied that the cause of action in this suit is not at all founded on fraud. Accordingly, the submissions of learned counsel for the Defendant asserting that the plaint is based on fraud and should be struck out for non particularisation of the fraud are unfounded and misconceived.

That brings us to the crux of the dispute at hand. Plaintiff contends that Mbarara Training Wing of the NRA/UPDF used to deduct 2% withholding tax whenever it made payments to Plaintiff for his supplies of various foodstuffs to that military unit. Over the period 22/12/88 to 14/6/93,

the total deductions so withheld amounted to Shs.11, 442,921/- (see Exh. P1 — showing a breakdown of the payments and tax deductions made). See also the two letters (Exh. P2 & P3) from the Ministry of Defence confirming these deductions. However, during the court hearing of this case, PWI was not able to produce evidence to support all of Shs.11, 442,921/-. He could support only Shs.8, 202,481/-.

I am satisfied that the above facts correctly reflect the position in this case. Those facts were neither disputed nor denied by Defendant. URA for its part denies having ever received any of the tax moneys withheld by the Mbarara Training unit. In these circumstances, the burden was thrust on Defendants to prove that the tax was remitted to URA or, alternatively, that there was no obligation to so remit that money. Defendants proved neither. They are directly responsible for the loss resulting from Plaintiffs double payment of this tax (once to the Mbarara military unit, and subsequently to URA).

Plaintiff also pressed for general damages of 10m/- to compensate for the inconvenience, harassment from URA (threats of closure of their business — see Annexure “B” to plaint), expenses of Plaintiff’s attempts to recover his loss, etc. I agree that Plaintiff suffered all of the above. However, I was not fully convinced about the quantum of Plaintiff’s claim of Shs.10m/-. I will award Plaintiff Shs.4m/- in general damages.

Similarly, I find the suggested interest rate of 30% p.a. to be exorbitant. Prevailing bank rates suggest that a rate in the range of 19— 21% p.a. would be a fair rate. I award Plaintiffs an interest rate of 20% p.a.

In the premises Court hereby enters judgment for the Plaintiff:

(a) in the amount of Shs.8,202,481/-;

(b) interest on that decretal amount at the rate of 20% p.a. from 21/04/98 (the date of filing this suit) to today’s date of judgment;

(c) general damages in the amount of Shs.4,000,000/-;

(d) interest at the Court rate on the cumulative amount in (b) and on the general damages in (c) above from 12/07/2002 until payment in full;

(e) the costs of this suit.

Ordered accordingly.

James Ogoola

JUDGE

11/07/02

DELIVERED IN OPEN COURT, BEFORE:

Benson Tusasirwe, Esq. — Counsel for the Plaintiff

Matsiko, SSA — Counsel for the Defendant

J.M. Egetu — Court Clerk

James Ogoola

JUDGE

11/07/02