THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 682 OF 2002

EDIRISA KARENGET MUSIWA..... PLAINTIFF

VERSUS

PAUL MTAMBO..... DEFENDANT

BEFORE: THE HON. LADY JUSTICE M. S. ARACH -AMOKO

JUDGMENT:

THE Plaintiff, Edirisa Karenget Musiwa brought this suit against the Defendant - Paul Mtambo to recover Shs. 10,074,750m as special damages being money loaned by him to the Defendant and costs of the suit. During hearing for formal proof the amount claimed as special damages was reduced to Shs. 3,574,750m.

The facts leading to the cause of action are as follows:
On the 12/ 4/ 02, the Defendant signed a Memorandum of Understanding with the Defendant in which he acknowledged his indebtedness to the Plaintiff to the sum of Shs. 8,574,750m. The Defendant undertook to pay the same by the 15/5/02. As security for the loan, the Defendant agreed to surrender his Sony T.V and motor vehicle a Toyota Corona Registration No. UAB 554R, which was still registered in the names of Patrick Bitature Baguma. It was also agreed that if the Defendant had not paid by the agreed date, that is, by the 15/5/02 then a surcharge of Shs.1,500,000m would be payable in addition to the original amount. The Plaintiff alleges that the Defendant did not pay as agreed. Later in a bid to pay back the loan, the Defendant decided to sell the aforementioned car to the Plaintiff for the price of Shs. 6,500,000m to set off the debt owed. The Plaintiff, therefore, wants to recover the balance of Shs. 3,574,750m outstanding.

The Defendant was served with summons to file a defence but he filed his defence out of time. After an application by the Plaintiff, vide MA 116/2003 the defence was struck off the court record. Interlocutory judgment was entered against the Defendant under 0. 9 r.6 of the CPR. Hearing for formal proof was on 20/5/04.
Mrs. Innocent Ndiko appeared for the Plaintiff. Counsel adduced the evidence of one witness - Mr. Musiwa, the Plaintiff.

The only issue for trial was whether the Plaintiff is entitled to his claim. In his plaint the Plaintiff prayed for:
1. Shs. 10,074,750m as special damages which was reduced to Shs. 3,574,750m
2. General damages for breach of contract and
3. Costs of the suit.

The Plaintiff testified that he lent the Defendant about 8.5m in April 2002 with a surcharge of Shs. 1,500,00m was payable in case of default. He identified Exhibit P1 - the Memorandum of Understanding as the agreement, which they signed. The agreed security was the Defendant's Sony T.V and his car Registration No. UAB 554R, which was not yet registered in the Defendant's names. The car was however, not deposited with him and he could not sell the T.V because the Defendant demanded for its return claiming that it belonged to his (the Defendant's) sister. The Plaintiff, therefore, could not recover his money. Following advice from his lawyers and in order to recover the debt, the Plaintiff signed an agreement with the Defendant in which the Defendant sold his car to the Plaintiff for Shs. 6,500,000m. He identified Exhibit P2 - the Agreement for Sale of Motor Vehicle - as the agreement they signed. The Plaintiff further testified that as a result he wanted the outstanding balance of Shs. 3,574,750m.

Counsel for the Plaintiff argued that the Plaintiff has shown court that he lent the Defendant the money claimed, which was not repaid until he tried to mitigate his losses by purchasing the Defendant's car. Even then the loan was not paid in full. The Plaintiff was, therefore, entitled to the balance of Shs. 3,574,750m.

I have perused the exhibits tendered into court; Exhibit P1 is the Memorandum of Understanding that is dated 12th April 2002 and signed by both parties. Exhibit P2 is an Agreement for Sale of Motor Vehicle that is dated 15th October 2001. Both the parties also signed it.

From the evidence on record, it is clear that the Defendant was indebted to the Plaintiff to the sum of Shs. 8,574,750m. It is also clear that in the event payment was not made as agreed a surcharge of Shs. 1,500,000m would be payable, making the total debt Shs. 10,074,750m. The evidence also clearly shows that the Plaintiff and the Defendant had an agreement in which the Defendant sold his car to the Plaintiff, a Toyota Corona Registration No. UAB 554R. The consideration for the agreement was Shs. 6,500,000m. However, whereas Exhibit P1 - the Memorandum of Understanding (in which indebtedness is acknowledged) is dated 12th April 2002, Exhibit P2 - the Sale Agreement (under which the car was sold) is dated 5th October 2001. This indicates that the motor vehicle was sold to the Plaintiff in the previous year before the Memorandum of Understanding acknowledging indebtedness was made. The Plaintiff testified that the agreement to sell the car was made after the Defendant failed to pay the loan. In his testimony he said,

> *"He didn't pay the money. So I served him with a notice and then filed a suit to recover the money. The total is about Shs. 10m and something on top that I cannot remember. After I filed the suit he told me that we agree on the price of the vehicle and he would sell it to me - we agreed on Shs. 6.5m and we made an agreement. He surrendered the vehicle and the logbook (the Plaintiff was shown a document). This is the sale agreement for the vehicle. . I now have the car."*

The Sale Agreement could not, therefore, have been made as a result of attempts to settle the indebtedness, which arose and was acknowledged in April 2002.

S. 91 of the Evidence Act Cap 6 states that:

> *"When the terms of a contract... have been reduced to the form of a contract ... no evidence except as mentioned in S. 79, shall be given in proof of the terms of that contract except the document itself or secondary evidence of its contents, in cases in which secondary evidence is admissible under the provisions hereinbefore contained."*

In the case of W. M. KYAMBADDE V. MPIGI DISTRICT ADMINISTRATION [1983] HCB 44, the court held that special damages must be strictly proved but they need not be supported by documentary evidence in all cases. Further in HODGE INDUSTRIAL SECURITIES V. COOPER [1962] 1 W.L.R 209 (cited in Phipson on Evidence 15th Edition) court held that when an original document is produced in court, it must be identified on oath as being what it purports to be.

The witness identified the documents (Exhibits P1 and P2) as the agreements upon which he relies. Furthermore, no other explanation can be given or admitted to explain the fact that the dates on the documents do not correspond with his testimony and the pleadings.

In determining what evidence to rely on when deciding a matter, the court is required to follow the 'best evidence rule'. In OMYCHUND V BARKER 917440 1 Atk. 21,49 (cited in Phipson On Evidence 15th Edition pg. 116, para. 6-22) Lord Hardwicke illustrated this thus,

> *"…the judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will permit."*

Following this rule, it is necessary, therefore, that in a case where there are inconsistencies between oral and documentary evidence, in the absence of any other evidence challenging the authenticity of the documents tendered, the documentary evidence must be given precedence over the oral evidence. However, although in this case the documentary evidence does not prove the facts alleged and the oral evidence, since no evidence was adduced before this court to controvert the assertions of the Plaintiff, I will reluctantly award the Plaintiff the sum of

Shs. 3,574,750m claimed as general damages.

The plaintiff also prayed for damages. He testified that he finally got the car after a long time. Counsel submitted that the plaintiff is a businessman and has been deprived of the use of his money and so was entitled to damages. Counsel proposed the amount of Shs. 1,000,000 as sufficient general damages.

In FULUGENSIO SEMAKO —V- EDIRISA SSEBUGWAWO [1979] HCB 15, Court held that in an action for damages one of the duties of counsel should be to put before the court material which would enable it to arrive at a reasonable figure by way of damages. In this respect counsel owes a duty to their clients as well as to the court to help it arrive at reasonable award.

In this matter, I find that counsel has not put before the court material, which can enable me to arrive at a reasonable award for damages. The material counsel has provided does not prove the claim and as such no damages can be awarded. Moreover counsel for the Plaintiff did write to the court on the 22/10/03 waiving the prayer for general damages contained in the plaint. This letter has not been withdrawn.

With regard to the costs of the suit, the plaintiff testified that he was entitled to costs. Counsel for the plaintiff also argued that the plaintiff had tried to recover the debt and so was entitled to recover the costs of the suit.

Section 27(1) of the CPA states that:

> *"Subject to such conditions and limitations as may be prescribed the costs of and incidental/ to all suits shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the*

purposes aforesaid… provided that costs of any action, cause or other matter shall follow the event unless the court or judge shall for good reason otherwise order."

In this matter, counsel for the plaintiff has presented before court evidence to prove the case. However, the documents exhibited are inconsistent with the pleadings and testimony of the plaintiff. I find that counsel could, after examining the documents sought to be exhibited, have discovered the error and thus the misallegations as to the facts of the case. Therefore, counsel would have prevented court's time from being wasted. In the circumstances I find that this would be a proper case in which counsel should have been ordered to pay costs personally. However, notwithstanding the above, since she was not given an opportunity to defend herself it would be unfair to do so.

In the result, I enter judgment in favour of the Plaintiff against the Defendant as follows:

1. Special damages of Shs. 3, 574,750m.
2. Costs of the suit.

M. S. ARACH - AMOKO
JUDGE
2/6/2004