

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

BYARUHANGA EDISON:..... PLAINTIFF
VERSUS
CO - OP BANK:..... DEFENDANT

JUDGMENT:

- a generator or its value.
- Shs.4, 400,000-.
- general, special and exemplary damages.
- interest.
- costs.

His claim is founded in negligence and fraud. The Defendant denied the claim on the ground that the claim is based on corrupt practices between the Plaintiff and the Defendant's accountant at Hoima branch at that time. The Defendant instead averred that the Plaintiff owned it Shs. 1,145,000- which it counter claimed.

The issues for determination were as follows:

1. Whether the Plaintiff's generator was wrongfully sold by the Defendant.
2. Whether the Plaintiff deposited the sums on his account as claimed in the plaint.
3. Alternatively, whether the contents of Annexure 'E' to the plaint as to deposits and withdrawals are correct.
4. Whether the Defendant acted fraudulently/negligently.
5. Whether it is the Plaintiff or the Defendant who is in breach of contract.
6. Whether the Plaintiff dealt corruptly with the Defendant's Accountant.
7. Reliefs.

Each party called one witness and most of the evidence was documentary.

Mr. Bamwite appeared for the Plaintiff while Ms Enid Edroma defended the Defendant. They filed written submissions. The issues are dealt with in the same order.

Issue No. 1 is whether the Plaintiff's generator was wrongly sold by the Defendant. During his evidence in chief, the Plaintiff testified that:

"The generator mentioned in the letter (referring to Exhibit PS) is mine. The bank sold it in 1995. I did not authorise the bank to sell it. I don't know how they sold it. They sold it on the allegations that I had taken a loan from the bank. The bank got it from Masiga Sam to whom I had given to sell for me and to take a commission of

10%. He was supposed to give the proceeds of the generator to me. It is not true as the bank says that I authorized them to sell my generator.”

Counsel for the Plaintiff invited the Court to find that it is the Bank which wrongly sold the Plaintiff's generator in view of this evidence. That it was wrong of the bank to seize the generator and sell it to recover the alleged loan because the Plaintiff never gave it to the bank as security. That this is supported by the contents of Exhibit P4 which is a letter written by the Defendant's Legal Officer at that time (DW1) in reply to the letter by the Plaintiff's lawyers. The Plaintiff never told Masiga to give the generator to the Defendant as security under Exhibit DL. The Plaintiff also denied signing Exhibit P4 which purported to instruct Masiga to hand over the generator to the bank Manager. The letter was a concoction by the Defendant's Officials. If it was genuine, the Defendant would have called Masiga or the Manager to testify as to its origin in view of the fact that it was denied by the Plaintiff. Counsel invited Court for those reasons to find that the Plaintiff never wrote the letter dated 25/5/94 (Exhibit P8), and that the Bank sold the generator wrongly. Counsel referred to the case of MATIA WASWA —VS- UCB [1982] HCB 38, where it was held that the seizure and sale of the bus to recover an alleged loan was unlawful because the property was not given to the bank as security.

Counsel for the Defendant held the opposite view. He referred to the Plaintiff's testimony where the Plaintiff stated that:

“The bank also attached a letter dated 25th May 1994; exhibit P8 to Masiga from me giving instructions.”

This exhibit (Exhibit P8) was the Plaintiff's exhibit, put in during scheduling conference, when agreed documents were admitted as exhibits. The Plaintiff cannot be allowed to present evidence for the purpose of denying it. The Court must hold that the Plaintiff was lying in order to avoid the piece of evidence that contradicted his case. Indeed exhibit P4 stated in its last paragraph that:

“By 25th May 1994 your client owed the bank Shs.2, 145,000- which fact he knows very well. Attached is a letter addressed to our Accountant and copied to our Manager related to the debt. Consequently your client’s generator was sold at Shs. 1m. Credited to his account towards liquidation of his debt.”

DW1, Ms Margaret Mafabi the author of Exhibit P4, now Chief Magistrate Nakawa testified that at the material time she wrote exhibit P4 in reply to the Plaintiff’s lawyers, she was the Defendant’s Legal Officer. The Plaintiff had complained that his generator had been sold. She was assigned to carry out investigations upon receipt of that complaint. She traveled to Hoima branch and it was during her investigation that she came across Exhibit P8 in which the Plaintiff was instructing Masiga to sell off the generator. The said witness also said during cross - examination concerning exhibit P8 that it was received by the bank and *“even in Hoima branch. I got it at the branch when Masiga came to explain, he also came with it.”*

The witness was then cross - examined on Exhibit D1 which is an agreement between the Plaintiff and Masiga authorizing him to sell the generator for a commission. The Plaintiff had admitted that he is the one who wrote the letter on 23/3/94 and gave Masiga his generator to sell. DW1 also testified during cross - examination she saw the letter at the police station as proof that he had not stolen the generator but that the Plaintiff had authorized him to sell it. That it was Masiga who sold the generator for Shs.1m which he deposited with the bank. That the Plaintiff also lied to the police and to Court when he testified in cross - examination that: *“I reported the same Masiga that he had stolen my generator. His house was searched and a generator was discovered. It was of the same generator as I had given him to se/I. (Because he had sold that one).”*

Counsel for the Defendant invited the Court on that basis to hold that the Plaintiff is not only a liar, but also a dishonest person who gave Masiga a generator to sell but later reported him to the police that he had stolen it. Counsel also invited the Court to accept the only credible evidence of DW1 that it was not the Defendant who sold the generator but that it was Masiga who sold the generator by the authority of the Plaintiff given

both exhibits P8 and D1.

I have considered the evidence on record. I agree with counsel for the Defendant. Firstly, the denial by the Plaintiff of exhibit P8 is unacceptable. Exhibit P8 formed part of the documents tendered by the Plaintiff's counsel during scheduling conference when agreed documents were being handled. By its numbering, Exhibit P8 is the Plaintiff's document, not the Defendant's document. The Plaintiff cannot tender a document as exhibit and later on turn round and deny it because it does not support his case. The Plaintiff cannot be allowed to present evidence and then deny it. Even for this reason alone I hold that the Plaintiff was lying to avoid the piece of evidence which contradicted his case. Secondly, DW1 also identified the said letter as the one she referred to in her letter dated 18/5/95 (Exhibit P4). The said letter (Exhibit P8) actually acknowledges that the Plaintiff is indebted to the bank to the sum of Shs.2, 145,000- and that he has kept the said generator with Masiga as security. It says in the last paragraph that:

“So please give the Manager Co-operative Bank the Generator and again give the Manager the agreement we made and the two receipts of that generator without fail.”

DW1 testified that she found the agreement referred to in Hoima branch during the course of her investigations. Exhibit D1 is dated 23/3/94. At least the Plaintiff did not deny it. It says:

“I, Edison Byaruhanga have handed to Mr. Masiga Salira Sam my generator to sell it for me. The make is Honda Model EP 2500 red in colour. We have agreed to sell it at Shs.3, 300,000- (three million three hundred thousand shillings only); of which he will get a commission of 10% which is Shs. 330,000- (three hundred and thirty thousand only).

I Edson Byaruhanga the owner of the machine signed...

I Mr. Masiga Salira Sam have remained with the generator.

Signed...

Witness 1. Mr. Frank ...

Later on during cross - examination the same Plaintiff testified that:

“I reported to police on 20/2/95 that Masiga had stolen my generator. The police searched and found it in his house. It was not the same generator I gave him to sell... Masiga was my neighbour, my friend and also a person who stole a generator from me” (page 38—39).

It is therefore clear that the Plaintiff’s testimony is riddled with lies and is full of contradictions as well. He is a person who cannot be believed. On this issue, I therefore agree with Defence counsel that the Defendant did not sell the generator. The generator was sold by Mr. Masiga the Plaintiff’s neighbour and friend on the instruction of the Plaintiff and the proceeds of Shs.lm deposited in the bank to pay the Plaintiff’s debt owed to the bank. Issue number one is accordingly answered in the negative.

The second issue is whether the Plaintiff deposited the sums claimed in paragraph 5. The said paragraph states that:-

“On the 7/1/94, 14/1/94 and 15/7/94 the Plaintiff deposited the sum of Shs. 1,400,000-, Shs, 2, 000,000- and Shs. 1,000,000- respectively on his account with the bank. The original deposit books upon which the money was deposited were handed over by the Plaintiff to the Security Department of the Bank during investigations and were never returned to the Plaintiff but the Plaintiff shall rely on the bank statements to show deposits on his account and the photocopy of the cheque for Shs.2m together with the photocopy of the Bank slip are annexed here as ‘C’ and ‘D’ respectively.”

The Plaintiff tendered the bank statement as Exhibit P2. It indeed shows the deposits. Although the Plaintiff contradicted himself during the oral testimony, the bank

statement speaks for itself. The entries are clearly indicated and they total to Shs.4.4m. I therefore answer this issue in the affirmative.

The 3rd issue is in the alternative, that is, whether the contents of Annexure E (admitted in evidence as Exhibit P4) as to deposits and withdrawals of the Plaintiff's Account were correct. Counsel for the Defendant relied on this submissions on the second issue. Counsel for the Plaintiff submitted on his part that the contents of Exhibit P4 regarding the withdrawals from the Plaintiff's account were not correct because the Plaintiff denies ever consenting to the questioned withdrawals from his account and there was no evidence to show that the Plaintiff effected withdrawals which were made as follows:

1. On 14/1/94-for Shs.1.4m.
2. On 22/4/94 for Shs. 800,000-.
3. On 24/4/94 for Shs. 1,200,000-.

Unfortunately, Masiga could not be traced. At one time, Court was informed that he had died. Later on DW1 told Court that he was alive and well in Mbale. However, efforts to get him to testify in Court were fruitless.

From the evidence on record however, it is crystal clear that Masiga did effect the said transfers/withdrawals on the Plaintiff's account. DW1 stated in Exhibit P4 that her investigations revealed that the Plaintiff authorized Masiga to transfer Shs.1.4m from his account to account No. 11108. She attached the copy of the branch voucher dated 14/1/94, addressed to the Plaintiff and given to the Plaintiff by Masiga. (Exhibit P5). According to Exhibit P4 *the instructions for transfer was in consideration of Shs. 1. 4m which was credited to Byaruhanga's account by Sam Masiga by cheque No. GL/B076751 account No. 1118 dated 7/1/95 and deposited on the same day on your clients account by Masiga,*"

A copy of the cheque leaf and voucher dated 7/1/94, were tendered by the Plaintiff as Exhibit P3. DW1 stated further in exhibit P4 that:

“Your client drew out all the money on the same day. Your dent gave Sam Masiga a cheque of Shs.2m dated 7/1/94 to be drawn from account No. 10648 for reasons best known to your client Masiga was to reimburse himself from the proceeds of the said cheque after clearance which he did on 14/1/94 as per voucher dated 1 4/1/94 referred to above. At the time of these transactions the relations/ill, between your client and Masiga was more than a banker/customer relationship...

We further inform you that your dent owes the bank Shs. 1,429,666- as per 30/12/94 which debit balance is now more due to interest.

By 25th May, 1994 your client owed the bank Shs.2,145,000- which fact he knows very well. Attached is a letter addressed to our Accountant and copied to our Manager related to the debt. Consequently your clients generator was sold and Shs. 1m credited on his account towards liquidation of the account.”

The letter was produced in Court by the Plaintiff himself as Exhibit P8, together with the rest of the documents mentioned. The same entries are reflected in the bank statement — Exhibit P2. On that basis, I find that the contents of Exhibit P4 are correct. I answer the third issue in the affirmative.

The fourth issue is whether the Defendant acted fraudulently or negligently. Counsel for the Plaintiff submitted that by allowing or permitting withdrawals from the Plaintiff’s account without the Plaintiff’s consent, the Defendant acted negligently and the Defendant is liable in damages.

Regarding fraud, counsel submitted that there was fraud on the part of the Defendant especially when the Defendant came up with documents which were said to have been authorized by the Plaintiff, whereas not; i.e. Exhibit P5; and an unsigned typed letter (Exhibit P8). The fraud is that the Defendant made documents purported to have been executed by the Plaintiff and yet they were not.

I have ruled earlier on that the Exhibit P8 is the Plaintiff’s documents. It is not true that it is unsigned. It bears a signature. As for Exhibit P5 namely the Branch voucher informing the

Plaintiff that Shs.1.4m had been “transferred from your account No. 11131 per your instructions” - the Plaintiff did not produce any evidence before this Court that he complained to the Defendant about this transfer. The voucher is dated 14/1/94. The Plaintiff filed this suit on 19/5/99. Surely, if the Plaintiff had not given instructions to Masiga to effect the said transfer as alleged, he would have complained to the Defendant immediately he received the information.

I also find that the withdrawals were made by Masiga in collaboration with the Plaintiff, *‘his friend and neighbour’* and he cannot turn round now and deny him. I therefore agree with Defence counsel that the Plaintiff has failed to prove negligence or fraud. This issue is accordingly answered in the negative.

The fifth issue is whether the Defendant or the Plaintiff breached the contract. I agree with Defence counsel once more, that the Plaintiff has not proved any breach of contract on the part of the Defendant. He chose to deal with Mr. Masiga in the way he did. If he made any loss, he has only himself to blame.

The sixth issue is whether the Plaintiff dealt corruptly with the Defendant’s Accountant. This point was raised by the Defendant in paragraph 3 of its WSD. Counsel for the Plaintiff submitted that this is a mere conjecture and that there was no proof of such dealings on the part of the Plaintiff. I must say that corruption is a difficult thing to prove. Albeit on the balance of probabilities, which is all that is required in this suit, I agree with Defence counsel that the Plaintiff dealt with Masiga corruptly. According to the testimony of DW1, and particularly Exhibit D4, the relationship between the two had become more than a customer/banker relationship. The Plaintiff not only authorized Masiga to make transfers and withdrawals and deposits from his account, “for reasons best known to your client (“the Plaintiff”) but he gave him his generator to sell for him for a commission and even took him to police to make him pay his debt. This lends credence to the allegation that there was some element of corruption involved. This is confirmed by the Plaintiff’s hapless denials of his relationship with Masiga and his denial of documents he exhibited in Court such as Exhibit P8.

The last issue is the issue of reliefs. Having held as I have on the issues in this case, I find that the Plaintiff has failed to prove his case to the required standard. It is accordingly dismissed with costs to the Defendant. The Defendant adduced no evidence in respect of the counter claim. It is also dismissed with costs to the Plaintiff.

M.S. Arach - Amoko

JUDGE

24/8/2004

Judgment delivered in the presence of:

1. Hon. Kategaya for the Defendant.
2. Mr. Morris Egetu - Court clerk.
3. Absent: Parties.
- Plaintiff's Counsel.

Ct: Matter was cause listed.