THE REPUBLIC OF UGANDA

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

HCCS NO. 492 OF 2004

HAJI MUBARAK KYAKULAGA:: PLAINTIFF

VERSUS

MUTWALIBI TEZITA:: DEFENDANT

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

JUDGMENT:

The Plaintiff is a businessman based in Jinja Town. The Defendant owns a bakery also in Jinja. He has been a customer of the Plaintiff. The Plaintiff brought this suit to recover from the Defendant the sum of Shs.12m, being the price of goods supplied to the Defendant on credit between February - June 2004, general damages for breach of contract interests, and costs of the suit.

According to the plaint filed in this Court on the 16/7/2004, the Defendant obtained goods on credit from the Defendant between February - June 2004 to wit, cooking oil, wheat flour, sugar, food colour, yeast and salt and there is an outstanding amount of Shs.12m which remains unpaid, inspite of repeated demands from the Plaintiff.

The Plaintiff alleges further that after the Defendant had made numerous promises to pay this money, he signed an undertaking on 2/6/2004 promising to pay the money within 2 weeks. In breach of this undertaking, the Defendant has refused/failed/neglected and/or ignored to pay the same, as a result where of the Plaintiff, whose money was for business purposes, has suffered extensive loss and damage. That the Defendant has also not sold this shares in

Kagoma Brand Tea Parkers to the Plaintiff to date, inspite of his understanding to do so, upon failure to raise the money in issue. Consequently, the Plaintiff prays in the alternative that an order of specific performance be issued to the Defendant to transfer to the Plaintiff his shares in Kagoma Brand Tea Ltd as shall be sufficient to realize the outstanding sum, interest thereon, general damages and costs of the suit.

The Defendant denied the claim in toto and contended that the understanding dated 2/6/2004 is a forgery and the suit be dismissed with costs.

The Plaintiff filed a reply to the written statement of defence maintaining his claim and denying the alleged forgery.

The matter failed at mediation. It was set down before me for hearing on the 9/11/2004 at 9.00 a.m. Mr. Muziransa Shaban learned counsel, represented the Plaintiff. The Plaintiff was also present. However, both the Defendant and his lawyers were absent. Mr. Muziransa informed Court that they effected service of the hearing notice on Mr. Lwalinda, learned counsel for the Defendant and that he had received the service but indicated on the hearing notice that he had to attend to an earlier case fixed on the same day namely HCCS 602/02 in the High Court. Mr. Muziransa was of the view that given this situation, it should have been the duty of his learned colleague to communicate his inability to attend Court or at least to send someone to hold brief and to at least to ensure that his client attends Court. His conduct was therefore a contravention of the duty counsel owed to the Court. I agree with Mr. Muziransa and upon checking the Court record, I established that the hearing notice was indeed served on the Defence counsel and he had noted on it thus:

> *"Received in Protest. Counsel handling matter shall be involved in another High Court case already fixed vide High Court Civil Suit No. 602 of 2002 Kakooza —Vs- Kasaala."*

Upon checking the cause list I established that the said matter had not been cause listed for that day, it had instead been cause listed for the following day that is, on Wednesday, 10/11/2004 at 10.00 am. The case is Kakooza Jonathan & Another —Vs-Kasaala Growers Cooperation HCCS No. 602/02. The absence of the Defence counsel was therefore unjustified, in my view, and it was compounded by the absence of the Defendant as well. I therefore allowed the case to proceed exparte under 09 rule 17 (1) (a) of the CPR and S.4 of the Judicature (Amendment) Act, 2002. The relevant part of the section provides as follows:

> *"(2) With regard to its own procedures and those of the Magistrates' Courts, the High Court shall exercise its inherent powers-*
>
> *(a) to prevent abuse of process of the Court by curtailing delays, in trials and delivery of Judgment including the power to limit and discontinue delayed prosecutions;*
>
> *(b) to make orders for expeditious trials;*
>
> *(c) to ensure that substantive justice shall be administered without undue regard to technicalities."*

The following issues were framed:
1. Whether the Plaintiff has locus to institute the suit.
2. Whether the Defendant is indebted to the Plaintiff in the sums claimed.
3. Remedies if any.

The first issue arose out of the Defendant's pleadings in paragraph 5 that he dealt with M/S Kidogo-Kidogo Enterprises and not the Plaintiff, and he duly paid all the monies due to it totaling over Shs.168m. That consequently, the plaint disclosed no cause of action against him and should be rejected. In answer to this contention, the Plaintiff the Statement of

Particular Required pursuant to the registration of a business name in case of a Firm (Exh. P1), the Certificate of Registration of Kidogo Kidogo Enterprises (Exh. P2) and A Notice of Change in Particulars of Registration (Exhibit P3) which explained that he is the sole proprietor of the said Kidogo Kidogo Enterprises with effect from March 1999. I accept that evidence and rule that he does have the locus to sue for this money in his own name, being the sole proprietor.

Issue number two is whether the Defendant is indebted to the Plaintiff in the sum alleged. All the Plaintiff's witnesses testified that there was a long standing business arrangement between the two parties where the Plaintiff supplied the Defendant with goods for his bakery on credit. That at first, the Defendant started with cash, as usual, then he started asking for the goods on credit, after promising to pay the money. The Plaintiff said he gave the Defendant the goods including sugar, wheat flour, yeast etc in bulk. He always gave the Defendant an invoice on which the Defendant would write down all the items he has received and the amount of money and he (the Defendant) would sign. The Plaintiff said he would only endorse on the invoices after the Defendant had paid. After getting used to the arrangement, the Defendant started accumulating invoices until they accumulated to Shs.12, 079.500- between May and June this year. He asked for the money and the Defendant promised to pay. After sometime, the Plaintiff said he insisted that the Defendant should write down an understanding. He did so on 2/6/04 (Exhibit P5). The Defendant signed, as well as the Plaintiff. There were witnesses namely Bakitte Ismail, Awali Muwanga, Buwule Rose and Sowedi Kalema, the Plaintiff's colleague who took him to the Defendant's factory where the agreement was made. The Defendant undertook to pay the money after two weeks. The Plaintiff said he had wanted the Defendant to pledge his Kibanja or some other valuable security, but the Defendant refused and promised to give him his (Defendant's) shares in Kagoma Tea Brand if he failed to raise the money within the two weeks. The unpaid invoices were tendered as Exhibit P4. They amount to Shs.12, 079.500-. The Plaintiff explained that the Defendant paid him the Shs.79, 500- after signing the undertaking, so he is only demanding Shs.12m as a true and mature Moslem. He told Court that this money remains unpaid to date. That is why he was forced to go to his lawyers to demand the money. The lawyers wrote a demand notice dated 17/6/2004, (Exhibit P6) to the Defendant to pay the money within 7 days, but he never paid.

From this uncontroverted evidence, I accept the Plaintiff's claim that the Shs.12m is due and owing to him by the Defendant. The answer to the second issue is affirmative.

The third issue is, remedies.

The Plaintiff claimed Shs.12m special damages. It is trite law that special damages must be pleaded and strictly proved. Where no evidence is led to prove special damages, the claim must be disallowed. See: **Ereku Enterprises —Vs- Attorney General** [1991] HCB 68. From the evidence on record, I find that the special damages of Shs.12m have been proved by the oral testimony of the Plaintiff and his witness as well as the documentary evidence especially the invoices (Exhibit 4). I award this sum to the Plaintiff.

The Plaintiff alleged breach of contract on the part of the Defendant in failing not only to pay as arranged but after making an understanding (Exhibit P5) to pay within two weeks. He thus breached the contract and should pay him general damages. Counsel for the Plaintiff proposed Shs.3m as adequate compensation for the loss. It is trite law that a breach of contract occurs when one or both parties fail to fulfill their obligations under a contract. See: **Nakawa Trading Co. Ltd —Vs- CMB** Civil Suit No. 137/91. Based on the evidence on Court record, I agree with counsel for the Plaintiff that Defendant in this case therefore breached the contract. The Plaintiff told Court how he suffered trying to claim his money from the Defendant who kept on promising to pay, but didn't keep his promise. He told Court how he had to follow the Defendant to his factory in order to make him write the undertaking (Exhibit P5). He also told Court that his business has suffered and has been suffocated as a result of the Shs.12m. That he has stopped supplying the three other bakeries such as Musana and Sunrise due to lack of money. That even companies like Kengrow which used to supply him with goods on credit now fear him, and have stopped supplying him with goods. I had occasion to see the Plaintiff in Court. He was a truthful witness and so were PW1 and 2. He struck me as someone who could do with the Shs.12m in his business. It is now settled that such inconvenience entitles the Plaintiff to general damages. See: **Robialac Paints (U) Ltd —Vs- K.B. Constructions Ltd** [1976] HCB 45. (Saied, Ag. J).

In the circumstances, and doing the best I can in the situation, I award the Plaintiff another Shs.1.5m general damages for breach of contract.

The Plaintiff also prayed for interest on the Shs.12m. I think he is entitled to it. This money was for his business. He was kept out of it by the Defendant. He could have invested it. See: **Superior Construction And Engineering Ltd —Vs- Notay Engineering Industries (1981) Ltd.** CS No. 702/1989 (Okello J. as he then was). Costs follow the event. See S. 27 CPA.

In the result, Judgment is entered in favour of the Plaintiff as follows:

1. Shs.12m.
2. Shs.1.5m general damages.
3. Interest on (1) at 18% p.a from date of filing till payment in full.
4. Interest on (2) at Court rate from date of Judgment till payment in full.
5. Costs of the suit.

M.S. Arach - Amoko

JUDGE

23/11/2004