



Both businesses are un incorporated.

From the evidence also, there was a business relationship between the plaintiff and the defendant, whereby the plaintiff used to supply/sell baking powder, yeast, sugar, cooking oil, salt, food colour and blue band, among other items, to the defendant on credit. It is the plaintiff's case that the said business relationship came to the end on 31/5/2004 and that at the time it ended, the defendant was indebted to him in the said sum of Shs.12, 000,000-. Three (3) issues were framed for determination:

1. Whether there was any contract between the plaintiff and the defendant.
2. If any, whether the defendant breached it.
3. Whether the plaintiff is entitled to the remedies sought.

Counsel:

Mr. Shaban Muziransa for the plaintiff.

Mr. Musamali for the defendant.

At the close of the case for the defendant, both counsel promised to file written submissions. Mr. Muziransa undertook to do so in a week's time, that is, on or before 21/9/2006 while Mr. Musamali undertook to file a reply in two weeks time, that is, on or before 5/10/2006. As I write this judgment, only counsel for the plaintiff has fulfilled his promise. Mr. Musamali has not done so and no reason has been furnished for the omission. I take it that it was deliberate. I will do the best I can on the strength of the evidence on record.

First, the Burden of Proof:

This being a civil matter, the standard of proof is on a balance of probabilities. A fact is said to be proved when the Court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof, that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. In the instant case, the plaintiff has alleged that the defendant owes him Shs.12m. The burden rests on him to prove that allegation.

Second, the issue of contract:

This means an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be: capacity to contract; intention to contract; consensus ad idem; valuable consideration; legality of purpose; and sufficient certainty of terms. The business relationship between the parties in this case appears to embody all the above factors. It is in my view enforceable at law.

I now turn to the evidence of each party, starting with the plaintiff.

It is the plaintiff's case that on 2/6/2004 the defendant made a written undertaking to pay the said sum of Shs.12m within a period of two weeks. The said undertaking is in the Luganda language and it is on record as P. Exh. V. The translated version reads:

*“I MUTWALIBI TEZITA of Jico Bread do hereby undertake to pay the money of Hajji Mubarak Kyakulaga of Kidogo Kidogo Enterprises Shs.12,000,000- (twelve million) within a period of two weeks. Failure of which I undertake to sell some of my shares in Kagoma Brand Tea Packers Ltd (Kagoma house).*

*Witnesses:*

1. *Bakitte Ismail*
2. *Awali Muwanga*
3. *Buule Rose*
4. *Sowedi Kalema*

*Me the borrower Tezitta Mutwalibi*

*Me the lender Hajji Mubarak Kyakulaga.”*

According to the defendant, he has never executed the above agreement. It has become a subject of controversy between the parties.

It is the plaintiff's case that in the company of one Sowedi he went to the defendant's bakery and found him there in the company of his business colleagues Rose Buule, Awali and Bakitte. That

they talked about the issue of payment and an agreement to pay was reduced in writing. It is the plaintiff's evidence that the defendant personally wrote out the undertaking. His evidence finds support in that of his witness, Sowedi Kalema, PW2. As I have said, the defendant disputes it.

The matter has seen analysis of the impugned agreement by two eminent handwriting experts, Mr. Ezati Samuel and Apollo Mutashwera Ntarirwa. Mr. Ezati's lab. Report is dated 26/8/2005. He looked at Kidogo Kidogo Enterprises Tax Invoice Book bearing questioned handwritten entries and signature of receiving person in Tax Invoice No. 3193 dated 21/5/2004 and 3194 dated 24/5/2004. Both are on record as P. Exh. IV. He also looked at other questioned handwritten entries and signature of the person who received the goods on 25/5/2004 – 30/5/2004. He compared the above documents with the handwritten undertaking in Luganda, P. Exh. V, and found that the handwritings in the listed invoices in Exhibits corresponded very closely to each other and are significantly similar in style of writing and skill. He was of the view that all the entries in the listed invoices were made by one and the same person. He also found significant similarities between the handwriting in the impugned agreement and those of the tax invoices and came to the conclusion that the person who wrote the body writing of P. Exh. V, the impugned agreement, also made entries on the impugned tax invoices. It is significant to note that according to the plaintiff and his witness PW3 Safiati Mutesi, the defendant used to personally make record of all goods he took on credit. I have found this a significant finding of fact on the part of the expert.

The other expert, Mr. Ntarirwa, analysed the writings on the photocopy of the handwritten note, P. Exh. V and the photo copies of the impugned tax invoices. One wonders why photocopies when the originals were there. Be that as it may, he concentrated on the impugned signatures rather than the writing style and letter character. With all due respect to him, I have not found his report useful on key issues under investigation. As regards the impugned signatures, I accept Mr. Ntarirwa's finding that the signatures of Bakitte, Awali Muwanga and Buule Rose on P. Exh. V differ in material respect from those of the same people on other undisputed documents such as P. Exh. VII, the Form of Annual Return of a company having a share capital. This discrepancy casts doubt on the impugned agreement in as far as those who witnessed it are concerned. It is probable that the author wrote the names of those present and later, upon realising that those people had not signed, someone signed on their behalf. It is also probable

that in anticipation of this case the witnesses made a deliberate distortion of their signatures. In my view, therefore, while Court agrees with Mr. Ezati that the defendant may have had a hand in the authorship of the impugned undertaking, the many unresolved possibilities render the document suspect. Court is unable to accept it as conclusive evidence of the defendant's indebtedness to the plaintiff. I shall therefore move on to the other aspect of the plaintiff's case against the defendant, the issue of the unsettled invoices.

While the defendant's initial stand was that he had never at any particular time dealt with the plaintiff, he later changed his mind and admitted having done so. But as to how the two business men got on with each other, each side has its own version.

According to the plaintiff and his witness Safiati Mutesi, PW3, customers taking goods from the plaintiff's shop on credit did so in an invoice book maintained by the plaintiff for each customer. He has exhibited two such invoice books, one for SUNRISE JMB and the other for MUSANA BAKERY. I have seen no reason to doubt the plaintiff's evidence on this point. It is accepted and a finding made to that effect.

It is the plaintiff's case further that the defendant would personally write out the things he needed on credit and under his own signature take those goods. According to him, the procedure was that the original (in the defendant's own handwriting) and the carbon copy would remain in the shop. That upon the invoice being settled at a later date, each party would then sign on the settled invoice and indicate the date when the payment was made. It is the plaintiff's case that it was then and only then that the defendant would be entitled to have custody of the original invoice as evidence of its settlement. If I have understood his procedure very well, and I hope I have, any unsettled invoice would be in his possession and would bear the defendant's signature inscribed thereon at the time of taking the goods on credit. Such invoice would not necessarily have the plaintiff's signature since he (the plaintiff) would not have prepared the same. The undisputed carbon copies seen by Court especially in the invoice book with Serial Numbers 3551 – 3598 indicating goods taken by the defendant between 5/2/2004 – 31/3/2004 bear him out on this procedure. They bear two signatures of the defendant (evidencing the taking and paying for the goods) and one of the plaintiff or his authorized agent (as evidence of receipt of the

payment).

The defendant disputes the above version. According to him, the plaintiff and/or his shop attendant would record all the items taken on credit in the invoice book, the price and total amount. The plaintiff (or the shop attendant as the case would be) would then sign and the defendant would also sign. He (the defendant) would then take the invoices in their original form and when going to pay and collect more goods, he would go with the very originals and after the payment, the same parties would sign yet again. Assuming the defendant's version to be true, one would then expect the undisputed settled invoices to bear four signatures, two of the plaintiff and or his shop attendant, and two of the defendant. The defendant produced a number of settled and therefore undisputed invoices. They include Invoice Nos 3184 of 11/5/2004; 3186 of 13/5/2004; 3187 of 14/5/2004; 3188 of 15/5/2004; and 3189 of 17/5/2004, to mention but a few. None of them reflects the four signatures he talked about. They reflect the defendant's two signatures inscribed thereon, presumably, at the time of taking the goods, and at the time of payment; and the plaintiff's signature presumably inscribed thereon at the time of receipt of the money. In these circumstances, as between the plaintiff's and defendant's versions, the plaintiff's version is more credible. Court takes the view that the procedure stated by the defendant, with all due respect to him, is highly improbable. It does not make sense to me that a person selling his goods on credit would agree to part with both the goods and the originals of documents evidencing the sale to the favour of the buyer at the same time and only hope to prove his case on carbon copies in the event such as this of the payments being disputed. The stated defendant's procedure lacks any logic this Court can discern. The one stated by the plaintiff is more business like and acceptable.

The defendant has denied the handwriting on the impugned invoices being his own. The expert, Mr. Ezati, looked at those invoices and the defendant's own specimen handwriting and came to the conclusion that the defendant was the author of those invoices. The defendant's own expert, DW2 Ntarirwa, was availed only the photocopies of the invoices. He came up with an inconclusive report. He was of the view that because of the nature of the signatures, that is, the same not being clear on the photocopies, the questioned signatures were probably not executed by the defendant. I'm not impressed by that conclusion given that the defence had all the

opportunity to forward to him the disputed signatures in their original form but opted to settle for unclear photo copies. Mr. Ntarirwa did not, so to say, look at the impugned handwriting and signatures and compare them with the defendant's undisputed handwriting and signature specimens to come up with a report helpful to Court. In these circumstances, the evidence of Mr. Ezati carries more weight than that of Mr. Ntarirwa.

It is submitted on behalf of the plaintiff that the disputed invoices have been proved to the required standard as having been executed by the defendant. I accept that submission. In my judgment, sufficient evidence has been given that the impugned invoices are in the defendant's own handwriting.

The plaintiff produced them, implying that at the time of filing the suit, they were in his possession and not that of the defendant. This evidence destroys that of the defendant that he used to take all original invoices, settled or unsettled. The goods are indicated as received by a person whose signature has been sufficiently proved to be that of the defendant. Since the originals are still with the seller, Court accepts his evidence that the goods are yet to be paid for. The duly executed invoices in the defendant's handwriting and signature are, in my view, sufficient proof to Court that the defendant continued taking goods from the plaintiff's shop up to May 31<sup>st</sup>, 2004. I reject his evidence that he stopped doing so on 20/5/2004.

In these circumstances, I would answer the first and second issues in the affirmative and I do so.

As to whether the plaintiff is entitled to the remedies sought, his first prayer is for a sum of Shs.12, 000,000-.

From the records, on Tax Invoice No. 3193 dated 21/5/2004, the amount owing is Shs.1, 862,500-. The others are 3194 dated 24/5/2004 for Shs.2,035,400-; 3201 dated 25/5/2004 for Shs.1,951,400-; 3202 dated 26/5/2004 for Shs.1,951,400-; 3203 dated 27/5/2004 for Shs.1,951,400-; 3204 dated 18/5/2004 for Shs.1,951,400; and 3205 dated 31/5/2004 for Shs.376,00. The total amount is Shs.12, 079,500-. It is the plaintiff's case that on the day the impugned agreement was executed, the plaintiff paid him Shs.79, 500- in cash. His witness Sowedu confirmed it. I have already observed that from Mr. Ezati's evidence, which I found

credible, the defendant had a hand in the execution of that agreement notwithstanding its inconclusiveness. It is evidence that corroborates the 7 invoices. Having decided that the seven invoices are yet to be settled by the defendant, I hold that the plaintiff is entitled to the recovery of Shs.12, 000,000- on the strength of those invoices. This amount is accordingly decreed to the plaintiff.

The second prayer is for general damages for breach of contract. I have considered the prayer. I do not find this case to be a proper one for the award of general damages, given that he has also prayed for interest from the time of breach. I have therefore made no award of general damages.

He has prayed for interest of 30% per annum from the date of breach till payment in full.

Interest is a discretionary remedy in a case of this nature. In equity, interest is awarded whenever a wrong doer deprives the other of money which he needs to use in his business. It is plain herein that the plaintiff should be compensated for the loss thereby occasioned to his business. Mere replacement of the money, years later, is by no means adequate compensation, especially in days of inflation. For this reason, the plaintiff having been denied his claim for general damages shall be compensated by an award of interest. However, I do not consider the rate of 30% in any way justified. I would award interest on the special damages at the rate of 20% per annum from the date of filing the suit till payment in full. I order so.

The plaintiff shall also have the costs of this suit.

In the final result, judgment is entered in favour of the plaintiff against the defendant. The following orders are made:

- iii. Shs.12, 000,000- (twelve million only) as special damages.
- ii. Interest on (i) above at 20% per annum from 16/07/2004 till payment in full.
- iii. Costs of the suit.



Yorokamu Bamwine

**J U D G E**

26/10/2006

26/10/2006

Mr. Shaban Muziransa for the plaintiff.

Plaintiff present.

Defendant present in person.

Mr. Musamali for the defendant absent.

**Court:** Judgment delivered.

Yorokamu Bamwine

**J U D G E**

26/10/2006