THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0292-2006

HAJJI ASADU LUTALE :::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

MICHEAL SSEGAWA :::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's claim against the defendant is for Shs.16,500,000= being money paid for a machine that failed to work plus penalty charge, special and general damages, and costs of the suit.

From the pleadings and evidence, the plaintiff and the defendant signed a sale agreement on 15/01/2004 in respect of a Canon NP 9120 Copier – Printing machine for a total consideration of Shs.15,000,000=. The machine failed to work. The plaintiff has since terminated the contract but the defendant has refused to refund the purchase price. Hence this suit.

It is not disputed that:

1. The defendant sold a printing machine to the plaintiff.
2. The purchase price was Shs.15,000,000=.
3. The sale transaction was reduced to writing.

4. The plaintiff made full payment of the purchase price at the time of the execution of the agreement.

Court is to decide:

1. Whether there was non-performance of the contract by the parties and if so, by who?
2. Whether the plaintiff is entitled to the reliefs sought.

Counsel:

Mr. Herman Galiwango for the plaintiff.

Mr. Moses Kuguminkiriza for the defendant.

I will handle the issues in the same order but before I do so, I consider it necessary to state the general legal principles on some aspects of this case.

1. The burden of proof.

In law 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 issue. 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. The standard of proof is on a balance of probabilities.

Relating the above principle to this case, the plaintiff has alleged that the defendant failed to perform the contract. The burden lies on him to prove that allegation.

2. Conditions and Warranties.

In a contract, some terms are more important than others. The law thus divides

terms into '*conditions*' and *'warranties'*. Whether a term is a condition or a warranty becomes important if something goes wrong, like in the instant case, so that there is a breach of the contract. Needless to say, a condition is the major term and is so important that, if broken, the injured party, may refuse to go on with the contract. A warranty is a less vital term; if broken, the injured party will still have to go on with the contract but he may be compensated for the breach by an award of damages.

3. Breach of a contract.

This is a breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. It also entitles him to treat the contract as discharged if the other party renounces the contract, or makes its performance impossible, or totally or substantially fails to perform his promises. The victim of a breach of a contract will have to decide which of the 3 possible courses is most appropriate: suing for damages; treating the contract as discharged; or seeking a discretionary remedy such as specific performance. I will now turn to the issues and relate the above principles to them.

Issue No. 1: Whether there was non-performance of the contract by the parties and if so, by who?

I consider performance to be the doing of that which is required by a contract or condition. Non-performance is the opposite.

I will only comment on the clauses in the contract document relevant to this case.

Under clause 3, the seller agreed to sell the machine to the buyer at a price of Shs.15,000,000=. The parties agreed that all the consideration be paid immediately upon execution of the contract. There is evidence of compliance by the buyer, the plaintiff herein.

Under clause 4, the buyer agreed to take possession of the machine immediately after signing of the agreement. There is evidence that he did take possession as agreed.

Under clause 5, the seller undertook to install and test the machine in the buyer's chosen premises at his (the seller's) cost. In the context of this case, I would take 'install' to mean setting up and putting the machine in use.

It is a fact that the machine has never been set up and put in use. I have addressed my mind to the defendant's allegation that the plaintiff brought in technicians who made it fail to work. With the greatest respect to him, this allegation is false. He, the defendant, undertook to install and test the machine. Why then would he allow a party who did not claim any superior knowledge of the machine to take over its installation and testing unless he himself had failed to do so? In my view, the allegation lacks logic. It is intended only to deceive Court that the plaintiff was responsible for the machine's failure to work. It is evident to me that he undertook to install and test the machine in the plaintiff's chosen premises, which to-date he has failed to do. He, the defendant, is in clear breach of clause 5 of the Sale Agreement. I so find.

Under clause 8 of the Agreement, the defendant guaranteed to the buyer that the machine was in a good working condition. He also guaranteed to him that in the event of it being found to be faulty, he would refund to him all the consideration in addition to 10% of the consideration as penalty plus all costs that shall have been incurred by the buyer.

The defendant did admit in his evidence that when the technicians tried to install the machine, it failed to work. PW2 Perpetua Aligawesa examined all components of the machine and she found them to be faulty. She found the power supply unit faulty, diskettes and other components were also faulty and in her view, even if one were to opt for its repair, one would fail because its origin is unknown. In her view, the machine is old and scrap and already written off the market. Without a serial Number which was apparently scrapped off, spares are difficult to get.

PW2 Aligawesa is an Engineer by Profession; a telecommunications and electronic engineer. She holds an advanced Diploma in telecommunications and electronics from England, Degree in Engineering from California, USA, and other certificates on different equipment from a number of countries. She has experience of over 20 years in the field of electronics. Her rich profile in matters of electronics repair dwarfs that of DW3 Mugwanya. He (DW3) appeared to know little about the machine and why it has failed to work to-date. With the greatest respect to him, he did not impress me as a competent technician to work on the impugned machine. The totality of PW2 Aligawesa's evidence is that the impugned machine is a mere piece of scrap, an obsolete machine which had

been written off. Considering the fact that its serial number has been scrapped off, I'm unable to fault her assessment of the machine.

The defendant himself stated that after replacing the batteries, fuses and other spare parts, the machine failed to work, implying that it was not in good working condition as guaranteed by him. He has failed or deliberately refused to avail to Court documents of importation. These documents would give some indication to Court as to the country of origin, the year of manufacture and its year of importation into the country. In my view, even if the attempted repairs had succeeded, the defendant would still have been in breach of the contract given the condition of the machine at the time of the contract. Only that in that event Court would have been willing to treat the breach as that of the warranty rather than a condition.

Under section 15 of the Sale of Goods Act, Cap. 82, where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether the seller is the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for the purpose. It would defeat logic that a person would pay so much money for a machine that needed repairs before it could function.

From the time the plaintiff purchased the machine in January 2004, it has never worked even for a single day. This in my view amounts to breach of the implied

condition of fitness for the purpose on the part of the defendant, entitling the plaintiff to reject the machine and demand for the refund of the price as he has indeed done.

Under section 15 (b) of the Act, there is an implied condition that the machine sold was of merchantable quality. Goods are of un merchantable quality if they are of no use or are not fit for the purpose for which they are acquired. In all these circumstances, I would agree with the submission of learned counsel for the plaintiff that as the machine delivered to the plaintiff's premises failed to perform any of the functions the Canon NP 9120 normally performs, the defendant is in breach of the implied condition that the machine was at the time of the contract and thereafter of merchantable quality. The plaintiff was entitled to reject the same.

The defendant had guaranteed to the plaintiff that in the event of the machine being found faulty, he would refund to him all the consideration in addition to a penalty fee. Despite the many letters to him to refund the same, he has not done the needful. He is in my view in breach of clause 8 as well.

For the reasons stated above, I find that there was non-performance of the contract by the defendant.

Issue No. 2: Reliefs, if any.

The plaintiff's first prayer is for special damages in the sum of Shs.16,500,000= being refund of the purchase price and penalty charge. This being a contractual

obligation on the part of the defendant, the plaintiff has sufficiently proved this claim. The amount is decreed to him.

The plaintiff also claims a sum of Shs.690,000= allegedly incurred on the failed installment of the machine and Shs.372,000= on increasing electric power. None of these expenses is documented. Installing the machine was the responsibility of the defendant in the contract document. He was to do it at his own cost. In any case, the two expenses were never pleaded. I would disallow them for lack of proof.

As regards the claim for rent for the business premises from January 2004 to-date, I note that upon the defendant failing to deliver on his undertaking in the contract, the plaintiff terminated the same and opted to seek damages for breach of contract. The test as to how much money an injured party may recover was laid down in the 19th Century leading case of **Hadley –Vs- Baxendale (1854) 9 EX. 341** as follows:

> "***Now we think that the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may***

reasonably be supposed to have been in contemplation of the parties, at the time they made the contract as the probable result of the breach of it."

I agree.

In the instant case, the plaintiff hired premises in the City Centre in which to do business. The business line flopped on account of a faulty machine. The flop occurred literally before the ink used in drafting the tenancy agreement dried up. He has allegedly continued to pay rent for the premises. Other than the plaintiff's word and the purported tenancy agreement, no attempt was made through oral evidence or by way of general receipts to prove the alleged payment to Sipi Investments Ltd. If the existence of a contract document perse were to be regarded as conclusive evidence of its due performance, the parties wouldn't be here in Court over this very case where the complaint is non-performance of the contract, its execution notwithstanding. Besides, the expense itself cannot in my view be said to be fairly and reasonably connected to the breach complained of. It cannot reasonably be supposed to have been in contemplation of the parties at the time they made the contract. It is in my view rather remote.

In any case certain factors must be considered before damages can be awarded. One of those factors is the role of the injured party following the breach of the contract: he is expected to do what he can to look after his own interests. He must, so to say, mitigate his loss. In my view, after the plaintiff terminated the

relationship and the defendant stubbornly refused to collect his junk machines in reasonable time or at all, business sense dictated that the same be returned to the seller the same way it was delivered to the buyer. At any rate the room ought to have been cleared of the junk at the earliest opportunity for other business, even if it meant doing so at the seller's anticipated expense. Accordingly, my opinion would have been different if the plaintiff's claim related to the cost of transporting the junk machine back to the seller. I would disallow this claim and I do so.

As regards the claim for general damages, they consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof of it at the trial. Its distinction from special damages was defined by Lord Wright in **Monarch S.S. Co. __-Vs- Karlshanus Oliefabriker [1949] AC 196** at 221 as being:

> "***damages arising naturally (which means in the normal course of things) and cases where there are special and extra ordinary circumstances beyond the reasonable provision of the parties. In the latter event it is laid down that the special fact must be communicated by and between the parties."***

See also: **Haji Asumani Mutekanga –Vs- Equator Growers (U) Ltd SCCA No. 7/95** reproduced in **[1996] 111 KALR 70 at 83.** With regard to proof, general damages in a breach of contract case are what the Court may award when it cannot point out any measure by which they are to be assessed, except

the opinion and judgment of a reasonable tribunal. In the instant case, the defendant having been in breach of the contract is liable to the plaintiff in general damages. At the trial of the suit, the plaintiff's counsel did not suggest any figure to consider as general damages. I take into account the fact that as far back as September 2004 the defendant was invited to collect his machine and he refused. It is to-date in the plaintiff's premises much as his claim for Shs.350,000= per month as rent has been disallowed. Doing the best I can and taking into account the defendant's indifferent attitude towards the plaintiff's concerns, I would award general damages of Shs.5,000,000= (five million only) to the plaintiff.

I do so.

There will be interest on the special damages at the rate of 25% per annum from the date of filing the suit till payment in full and on general damages at the same rate from the date of judgment till payment in full.

For the avoidance of doubts, the defendant shall within ten (10) days from the date of judgment remove the machine from the plaintiff's premises (for whatever its worth) at his own cost or else forfeit it to the plaintiff on top of damages.

In the result, I allow the suit to the extent indicated above summarized as follows:

(i) Special damages: Shs.16,500,000=.
(ii) General damages: Shs.5,000,000=.
(iii) Interest on (i) above at the rate of 25% per annum from the date of filing the suit till payment in full and on (ii) at the same rate from the date of

judgment till payment in full.

Finally, the plaintiff shall have the costs of the suit.

Yorokamu Bamwine
J U D G E

15/02/2008

Order: Judgment shall in my absence be delivered by the Registrar.

Yorokamu Bamwine
J U D G E

15/02/2008