

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL COURT DIVISION**

**HCT-00-CC-CS-0345-2003**

FRED KITAYIMBWA SALONGO .....PLAINTIFF

**VERSUS**

PEGGY GARMENTS LIMITED .....DEFENDANT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

**JUDGMENT:**

The plaintiff, Fred Kitayimbwa Salongo, filed this suit against the defendant, Peggy Garment Ltd, claiming for special damages of Ugshs7,774,000/=, general damages for breach of contract, interest and costs. The plaintiff's case is briefly, that on 9<sup>th</sup> February 2004, he sub-contracted the Defendant company to carry out automatic screen printing and heat pressing services on an assortment of Ndere Troupe Foundation Garments and Caps.

The contract was for designing and printing Ndere Troupe Foundation Logo, at a consideration of Ughs 1,754,500/= on 50 caps, 20 polo T/Shirts and 315 round neck T/Shirts provided by the plaintiff. The Plaintiff contends that he worked together with the defendant to create the logo and agreed on a master sample which was approved by Ndere Troupe Foundation. The defendant produced for the plaintiff's approval samples of the garments and caps printed with the logo. Having approved the samples the plaintiff delivered to the defendant the garments and caps to be worked on. That when the garments and caps were delivered by the defendant it was found that the logo printed on the round neck T-shirts did not match the approved logo and the logo was unproportionately placed thereon. The round neck T-shirts were rejected. The plaintiff accepted the 50 caps and 20 Polo T/shirts and made a total payment of shs360,000. The plaintiff contends that in breach of the contract the defendant has failed to produce the 315 round neck T/shirts conforming to the approved sample and generally to produce a professionally done job.

The defendant contends that the plaintiff was shown samples of the work to be printed prior to the final printing as per their custom and usage. That it was only after the plaintiff had approved the master/prototype samples that the garments were produced. That the plaintiff failed to raise money and pay for all the T-shirts and caps. The defendant counter-claims Shs1,343,500/= being unpaid money for work done. The defendant also counter-claims for general damages interest and costs.

At the scheduling conference the following facts were agreed upon:-

1. The plaintiff contracted the defendant company to carry out services of embroidering, heat pressing and screen printing on an assortment of garments.
2. The parties agreed on the samples of the works that were to be carried out.
3. The plaintiff delivered to the defendant 50 caps, 20 polo T/shirts and 315 round necked T-shirts.
4. The parties agreed to a cost of Shs1,754,500 out of which the plaintiff made an initial cash payment of Shs225,000/= and later another payment of Shs135,000/= totaling to Shs360,000/=.
5. The plaintiff undertook to pay the balance upon delivery of the products.

6. The parties agreed on a master sample prior to the commencement of the work.
7. The defendant is still in possession of some of the garments and the plaintiff has not paid the balance of the contract sum in the total sum of Shs1,343,500/=

The parties agreed on the following issues:

1. Whether any of the parties was in the circumstances in breach of the contract.
2. Remedies available to either of the parties.

**ISSUE NO: 1 - WHETHER ANY OF THE PARTIES WAS, IN THE CIRCUMSTANCES, IN BREACH OF THE CONTRACT.**

This issue can be broken down into the following:-

- (i) Whether the contract was by sample.
- (ii) If so, what was the sample.
- (iii) Whether the defendant's products matched the sample.
- (iv) Which party breached the contract.
- (v) Whether or not the plaintiff rescinded the contract.

On **whether the contract was by sample** it is an agreed fact that the parties agreed on the samples of the works that were to be carried out. Further that the parties agreed on a master sample prior to the commencement of the work. It is also trite law that parties are bound by their pleadings. In paragraph 5 of the plaint it is pleaded that the plaintiff worked closely with the defendant to create the logo until a sample was finally approved and further that the defendant produced for the plaintiff's approval samples of the logo printed on the garments which were approved. In paragraphs 7, 8 and 9 of the Amended Written Statement of the defence it is pleaded that garments on which the logo was put matched the sample agreed on by the plaintiff. That the plaintiff was shown samples on which the work to be printed prior to the final printing and it was only after the plaintiff had approved the master/prototype samples that the garments were produced, in accordance with the defendant's custom and usage. In the counter-claim, paragraph 16 (iii) the defendant contends that the plaintiff approved the sample

logo in the manner, character and style produced by the defendant whereupon the plaintiff placed an order for the screen, printing, embroidering and heat pressing the said logo on 315 T-shirts, 20 polo shirts and 50 Caps

The plaintiff was represented by Ms Luswata Kawuma, while the defendant was represented by Mr. David Sempala. Both Counsel concede that the contract was by sample. Considering all the above I also find that the contract was by sample.

This leads me to the next point for consideration - what was the sample. Counsel for the defendant contends that the plaintiff was purporting to use a different sample which he referred to as the paper sample produced on computer at designing and approval level as opposed to the final sample which was on a textile piece. The work on caps and the polo shirts is not in dispute, so I will consider this point particularly in reference to the round necked T-shirts. The plaintiff testified that when he placed the order for the works the defendant issued him with an invoice dated 12<sup>th</sup> February 2004 and received in evidence as exhibit P1. Thereon the works with respect to the 315 round neck T/shirts are particularized as herebelow:-

<b>Quantity</b>	<b>Particulars</b>	<b>Rate</b>	<b>Shs</b>
315 Pieces	Round Neck T-shirts “The 6 <sup>th</sup> UDTA HARVEST FESTIVAL 2004” Embroidery	1,800	567,000
10 pieces	Graphics (Art Work) Screens	10,000	100,000
215 Pieces	Names at the Back in screen Print	15,000	322,500

This Tax Invoice is indicated as “Final” and issued to “Ndere Troupe C/o Mr. Salongo”

The plaintiff testified that prior to placing this order with the defendant he had been contracted by Ndere Troupe Foundation to supply them an assortment of garments which included round neck T-shirts, Polo T-shirts and caps bearing a logo approved by Ndere Troupe Foundation. The

garments and caps were to be used for Ndere Troupe's Annual Festival called the Annual Harvest Festival. The Logo had to show the good Uganda – Australia Drama and Theatre relationship. The plaintiffs instructions from Ndere Troupe were that the following important features had to appear in the logo:-

- Uganda flag and Australia flag combined.
- Symbol of Ndere Troupe which is a bird with a flute (the Ndere) and the symbolic stones at Ndere Troupe Centre.

The Tax Invoice, exhibit P1, shows that, with respect to the Round Neck T/shirts, the plaintiff sub-contracted the defendant to:-

- (1) Screen print logos on 315 T/shirts
- (2) Carry out embroidery on 315 T/shirts.
- (3) Carry out screen graphics on 10 T/shirts and
- (4) Screen print names at the back of 215 T/shirts

The Plaintiff testified that to come up with the logo he worked together with the defendant's workers. That they used computer Graphics to come up with the logo and it was done at the premises of the defendant. They worked through various samples until they came up with the first logo which was printed out on the piece of paper. The paper piece was approved by his client, so he accordingly also approved it. The paper sample was tendered as exhibit P6.

The Logo was then printed on two Pole T/shirts as a sample. That the Pole T/shirt samples were approved by the plaintiff's client and he also accordingly approved the same.

He testified that he was issued with an invoice, paid for the two samples and was issued with a receipt. Both the invoice and receipt dated 9<sup>th</sup> January 2004 were received as exhibit P7 B and P7 A respectively. That following the approval of the samples he placed the order with the defendant and was issued with the Tax Invoice exhibit P1 which is dated 12<sup>th</sup> February 2004.

According to the plaintiff the first sample was a Computer Graphics Paper Sample, exhibit P6. This was transformed to the second sample which were two Polo T/Shirts.

The Founder and Executive director, of Ndere Troupe and Foundation, Steven Rwangyezi, identified exhibit P6 as the final version of the sample approved by him. He did not clearly remember whether a Polo T/shirt sample was brought for his approval. He however stated that he assumed a final product sample was brought for his approval. He argued that he could not have commissioned the work to go ahead without a final sample having been approved by him.

Margaret Rose Odaka, the Managing Director of the defendant company, identified exhibit P1 as the summary of the plaintiff's instructions to the defendant. She testified that the logo was designed by Patrick Kisembo (DW2) working at all stages in conjunction with the plaintiff.

DW2, is the Graphic Designer of the Defendant Company. He holds a Diploma of the Vocational Studies Institute of Teacher Education majoring in Graphic designing. Has a Certificate in Screen Printing from Serical International School Broadstairs Kent U.K. He testified that the plaintiff brought to him a picture of a bird on a piece of paper and a photograph of a site at Ndere Centre. The plaintiff asked the witness to make out a composition binding the bird together with the stone site and come out with a concept incorporating the Uganda flag and the Australia Flag. He narrated the stages he went through, while working in conjunction with the plaintiff, and designed out a logo. That for two days the witness developed a logo on a paper sample which was approved by the plaintiff. The paper sample was to be transposed onto all the end products. After a discussion of the benefits and defects of the various methods of work with the plaintiff, the plaintiff chose the following:-

- Heat transfer system for the Pole T/shirts which were to be used by the Executives, and also for caps.
- Easy Print System to be applied on the Round necked T/shirts which were to be worn by dancers.

He testified that he made out samples on fabric before going into the production of each type of garment. That each fabric sample was approved by the plaintiff and production of each final product done in the presence of the plaintiff.

The defendant's evidence is that the first sample was the computer graphic paper sample, exhibit P6. This was transformed into a fabric sample for each of the three works – i.e. Polo-T/shirts, caps and round necked T/shirts.

The plaintiff tendered in evidence exhibit P9 as one of the final products of the caps produced and exhibit P10 as one of the end products of the round neck T/shirt produced by the defendant. He did not exhibit any Polo T/shirts. DW2 identified exhibit P10 as similar to the fabric sample of the Round neck T/shirts

Counsel for the defendant submitted that the final sample of the round neck T-shirts was on fabric material which was a round neck T-shirt similar to exhibit P10. The plaintiff contends that the only fabric sample produced and approved by him were the two Polo T/shirts. That he based his approval for the work to proceed on the round neck T/shirts basing himself on the Polo T shirt sample which he contends matched well with the paper sample, exhibit P6.

It is an agreed fact at scheduling, that the parties agreed on a master sample prior to the commencement of the work. It is a further agreed fact that the plaintiff approved the two Polo T/shirt samples before the works were to be carried out. The works to be carried, as can be gathered from the basic agreement document exhibit P1, relevant for this case, were as already shown herein above.

The plaintiff's evidence is that the only samples produced on fabric material were the two Polo T/shirts for which he was issued an Invoice, Exh P7B paid for them and was issued a receipt , Exhibit P7A

Both exhibits P7 A and P7 B are dated 9<sup>th</sup> January 2004. It was after the approval of these two fabric samples that the plaintiff proceeded to place the order and was issued with an invoice,

Exh P1 indicated as final and dated 12<sup>th</sup> February 2004. His testimony is that he and his clients approved the works and he proceeded to place the final Order because the two Polo T/shirts conformed to the paper sample, Exh P6. The invoices, exhibit P7B and receipt Exh P7A are not disputed by the defendant. Therefore I find the plaintiff's testimony that he paid for the two Polo T/shirts truthful. The defendant's evidence is that fabric material for samples were produced in respect of the caps and the round neck T/shirts. If any had been produced and supplied to the plaintiff for approval he would have been expected to have paid for them. No evidence is produced by the defendant for any such payment. The final order placed on 12<sup>th</sup> February 2004 includes all the caps, Polo T/shirts and the Round neck T/shirts and it is the plaintiff's testimony that he based his approval for the work to proceed basing himself on the two Polo T-shirts. The two Polo T/shirts were the test product as per the master sample. The defendant's managing director, DW1 identified exhibit P1 as the summary of the plaintiff's instructions to the defendant. It is the testimony of the defendant's Graphic Designer, DW2 that the paper sample was to be transposed onto all the end products, i.e. caps, Polo T/shirts and round neck T-shirts. Considering all the above I find that the sample was the computer graphic paper sample, Exh P6.

The next question is **whether the defendant's products matched the sample**. It is an agreed fact that the caps and Polo T/shirts matched the sample and are not in issue. As already indicated in issue are only the round neck T/shirts. The plaintiff tendered in Court exhibit P10 as one of the Round-neck T/shirts produced by the defendant. The defendant did not dispute the exhibit.

The plaintiff testified that he had rejected the 315 round neck T-shirts because they could not answer to the master sample. He summaries the defects as follows:-

1. Colours are inter mixed. Yellow is mixed with red in the Uganda Flag.
2. The Australian flag also had the same problem, White is mixed up with red.
3. Yellow is not the right yellow in the Uganda Flag, it is dirty yellow.
4. The stones do not appear in the logo.
5. The logo is not centered and when the T/shirt is put on the logo will go to one side.



The witness put on the T-shirt and I noticed that the logo was more to the left and not in the centre. The witness stated:-

“The stones on the exhibit P6 came out visibly and the colour of the stones represent the natural colour of the stones while those in the logo on the T-shirt are not. The Natural Flag of Uganda on the paper sample truly represent the colour of the Natural Flag while those in the exhibit P10 are not. Similarly is the Australian Flag. The blue on the exhibits was meant to represent the sky but the blue in the T-shirt is more heavy blue and not sky blue. The colour on exhibit P6 are perfect. Fore example the Natural Flag each colour is perfect and that is what I expected to be done on the T-shirts.”

In cross examination the witness again pointed out the noticeable differences between the logo on the round neck T-shirts, exhibit P10, and the sample, exhibit P6. He maintained that the problem was with the logo on the T-shirts, which he said was the main ingredient of the order and where the colours were emphasized.

PW2, Kanuge John Bosco stated that he was a Lecturer at Makerere University School of Industrial and Fine Art. He holds BA and MA Fine Art of Makerere University. When asked to compare exhibit P6 and P10 the witness stated:-

“The logo on the two exhibits is not the same. The differences are that the blue in exhibit P 10 is the not the same as in exhibit P6. In the reproduction of P10 of the blue is more of a purple than a blue while the blue in exhibit P6 is a clear light blue. The yellow in the reproduction is not the same as the yellow in exhibit P6. The yellow in the reproduction is light it is lemon while the yellow exhibit P6 is golden yellow. The yellow on the frindges in exhibit P10 is contaminated with red while that on exhibit P6 is pure

golden yellow. The red in exhibit P10 tends toward a colour called mengeta while the red in exhibit P6 is scarlet red (warm red). The black in exhibit P10 is not pure black as compared to the black in exhibit P6. The white in exhibit P10 is contaminated by speels of red compared to that in exhibit P6, which is pure white. The image of the hectagon in the centre of the logo does not contrast very well in exhibit P10 as it is in exhibit P6. It does not come out in exhibit P10 while it is clearer in exhibit P6. The brown below the design in exhibit P10 is slightly darker than the brown in exhibit P6. The part which has stone like designs the effect in exhibit P10 their colour is not clear while in exhibit P6 it is clear. The stones do not come out clearly on exhibit P10 and their colour has been changed from natural colour in exhibit P6 to purplewish/ bluewish/ brownish colours. The logo on the sample exhibit P6 was not well represented on exhibit P10 ---“

The witness as another defect pointed out that the image of logo on the T-shirt was slanting to the left. The colours were dirty which meant that they were not pure.

Steven Rwangyezi, PW3, testified that they rejected the round neck T-shirts because the logo was not correct. It was unproportionately placed on the T/shirts. He identified exhibit P10 as one of the T-shirts they rejected. He stated:

“The most serious issue was that the colours of the Ugandan Flag and the Australian Flag were not exactly the same as were approved on the logo. Secondly the colours had bled into each other and would change the image of the National Flags of the countries so we could not accept them. Thirdly the blending of coulors made the logo look dirty. Finally it had been placed on the T-shirts very unproportionately ---“

In his testimony the defendant's Graphic Designer, DW2, admitted that there was a colour mixture in the logo. In cross examination he stated:-

“I agree that the colour mixture that is there is because of the films. I can say there is a colour contamination, which is caused by the film. It was contaminated in the way the yellow was supposed to be plain but there is some red. The white was supposed to be plain but it is contaminated with red. The blue also is contaminated with red. I prefer to use the word contamination. Sample of the product also had similar contaminations. The sample on paper was not contaminated. I do not agree that the logo is not proportionately placed on the T-shirt. It is proportional. --- “

I have already stated that when the plaintiff put on the round T-shirt I noticed that the logo was more to the left and not in the centre. In Hasanali M Sachoo Vs John Kopings O.V.T. (1958) EA 463 Sir Kenneth O' Connor P, while considering trade mark infrigent, quoted Lord Mac Maghten in Hennessy & Co Vs Keating (9) (1908) 25 RPC 361 where he said at page 367:-

“The eye no doubt is generally the best test and you will have to come to a comparison of the works and labels sooner or later. Generally, but not always the comparison is enough.”

I was referred to Lord Maenaghten's statement in Drumond Vs Van Ingen (1887) 12 Appl Case 284 when he stated:

“—the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which owing to the imperfections of language, it may be difficult or impossible to express in words. The sample speaks for itself.”

I have carefully looked at the two exhibits and I have noticed a lot of striking differences between the two logos. All the plaintiff witnesses have testified to various differences and the DW2 concedes to some of the differences. In the premises I find that the Round neck T-shirts produced by the defendant did not match the sample.

The fourth issue is **which of the parties breached the contract?** In contracts of sale of goods by sample section 16 of the Sale of the Good Act provides:-

“1.A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

2.In the case of a contract for sale by sample there is ---

- a. an implied condition that the bulk shall correspond with the sample in quality.
- b. an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
- c. an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample”

Section 15 of the Act provides that 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 sender’s skill or judgment and the goods are of the description which is in the course of the seller’s business of supply, whether the seller is the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for the purpose, except that in the case of a contract for the sale of the specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. While subsection (b) provides that where goods are bought by description from the seller who deals in goods of that description whether the seller is the manufacturer or not, there is an implied condition that the good shall be of

merchantable quality except that if the buyer has examined the goods there shall be no implied condition as regards defects which the examination ought to have revealed.

I appreciate that the contract before me was not a contract for the sale of goods. It was a contract for the provision of services resulting into the production of specified end products by the services provider, the defendant. So the provisions of the Sale of Goods Act will only provide good guidance to me.

The plaintiff testified that he had been contracted by Ndere Troupe to supply them an assortment of garments which included Round neck T/shirts, Polo T-shirts, and Caps bearing a logo to be approved by his clients. The plaintiff sub contracted the defendant to carry out the printing of the logo and do the embroidery works. It is his evidence that he had sub contracted the defendant because he had dealt with them before and had found them competent. Margaret Rose Odaka, the defendant's Managing Director, testified that before this contract they had done some other work for the plaintiff. Kisembo Patrick, the defendant's Graphic Designer, said he was a qualified professional Graphic Designer. That he was more knowledgeable than the plaintiff. That he had done some work before for the plaintiff and that the plaintiff had confidence in him and depended on him. The plaintiff had dealt with Kisembo throughout the formulation and production of the sample of the logo and during the production of the final products.

The plaintiff testified that he worked with the defendant's workers to come up with the logo. That he emphasized the importance of the logo and the fact that the end products were to match with the sample. That when he finally placed the order the defendant's workers confirmed to him that the end products will conform to the approved logo on the computer generated graphic paper sample – exhibit P6. The defendant's Graphic Designer, DW2, stated that he had gone through the plaintiff's concept with the plaintiff for a full day and came out with final sample on the third day. He stated, in examination, that the logo was very important to the plaintiff. The witness stated:-

“--- By the fact he could not produce the sample by himself I believed I was more knowledgeable than him. He had confidence

in me. We had done some work for him before. The logo was very important to the plaintiff. The plaintiff told me that the logo had to match the final product on all the garments- Caps T- shirts and Polo neck shirts.”

It is the plaintiff’s evidence and that of the defendant’s graphic designer that the logo on the end product of the Round neck T-shirts did not match the sample. There was a colour mixture in the logo. Therefore the end product did not correspond with the sample. In this testimony PW2 gives an account of the systems used in colour separation. He testified about the best colour separation which should have been used to come out with a production. In his opinion a four colour system was used resulting into colours mixing into each other.

The defendant’s Graphic Designer attributed the colour mixture to the films used in colour separation. He admitted that he was knowledgeable with colour separation because it is a process in graphic designing. He, however, testified that at the defendant’s workshop they do not sell films and do not carry out colour separation as they do not have the appropriate machine. That he therefore asked the plaintiff to buy the films and carry out the colour separation from somewhere else. That he advised the plaintiff, as he normally advises their clients, to go to one Moses of Nkurumah Road as the best in colour separation. But that the plaintiff knew someone else who could do it for him. According to him the stage of making films and colour separation is the most important determinant stage of the out put. In his view the films which the plaintiff bought were good for work on paper and not good for work on fabric. That though he advised that the films should be changed the plaintiff insisted on their being used, which he did.

The above evidence shows that the plaintiff expressly made known to the defendant’s graphic designer the logo he wanted and the theme it had to convey. The defendant’s graphic designer was a qualified professional graphic designer who had done satisfactory work before for the plaintiff. The plaintiff had confidence in the graphic designer and relied on his skill. The designer had produced the sample which was approved by the plaintiff’s client and the designer assured the plaintiff that all the end products will match the sample.

The graphic designer attributes the mistake to the plaintiff whom he says bought wrong films and insisted on their being used. He however, contradicts himself when, in cross examination he states:

“---My interest was to do a professional job. I did a job that would not betray my profession and the reputation of Peggy Garments. It is true that I knew that the films which the plaintiff brought would not produce good work. With that knowledge and my professional expertise I went ahead and printed using the films because it was his taste. ---“

The witness also stated:

“When the plaintiff came and instructed us it was his intention that Peggy Garments would do the entire contract for him from production of samples to. colour separation and printing up to the finished product.”

My considered view is that, even if the witness is to be believed that the plaintiff provided the films, with his professional expertise, knowledge and desire to preserve his professional integrity and the reputation of his master, despite the plaintiffs instance if at all, the witness should have declined to use the films. He acted unprofessionally and in betrayal of the trust put in him when he went ahead and used the films not suited for the purpose well knowing that the end product would be defective. Further Tax Invoice, exhibit P1 shows that the defendant was contracted inter alia, to screen print logos on 315 T-shirts. The defendant has not adduced any evidence of an agreement to the effect that part of the process, particularly colour separation, was to be undertaken by the plaintiff. The plaintiff was not cross examined about part of the contract being carried out by a third party. The plaintiff denied that the defendant had guided him on the quality of the materials to use. He stated:

“I am not technical in the products of screen printing and I do not know that the material used affects the product. The defendant did not tell me about any difference due to quality of materials used.  
---“

On an evaluation of all the evidence before me I am inclined to believe the plaintiff. I agree with Counsel for the plaintiff that DW2 was only attempting to exonerate the defendant from their liability. The end product of the round neck T-shirts failed to achieve the purpose for which they were made. The colour contamination, to use the term preferred by the defendant’s graphic designer, demeaned the flags of both Uganda and Australia. So could not achieve the purpose of cementing the relationship between Uganda and Australia with such defective flags See Astington Piggeries Ltd & Christopher Hill (1971) 1 All ER 847

On a balance of probabilities I find that the plaintiff has proved that the defendant breached the agreement when they produced round neck T-shirts with logos which did not match the sample.

Despite the defects in the logo it is the defendant’s case that the plaintiff took delivery of the Round neck T-shirts but refused to pay for them fully. This brings me to the next question whether the plaintiff rescinded the contract. In the context of this case my view is that the issue regards whether the plaintiff had rescinded the contract for breach thereof. A contract can be rescinded by bringing legal proceedings. Rescission could also be by notice to the other party. It could also be by conduct of the party, say where he takes the goods back to the supplier. However, the right to rescind is barred by the impossibility of restitution. Rescission involves restoration as far as, possible the state of things which existed before the contract. Therefore the buyer who rescinds in order to recover the price must give back the goods to the supplier.

The Plaintiff’s testimony is that the Round neck T shirts, hereafter referred to as T-shirts, were delivered to him in two consignments, the first on 12<sup>th</sup> February 2004 and some on 14<sup>th</sup> February 2004. He testified that on 12<sup>th</sup> February, 2004 he sought delivery of the entire order he had made with the defendant. That Ms Odaka, DW1, refused to release the goods without payment. The plaintiff paid shs225,000/= and Mrs Odaka cleared 60 T-shirts to be released to the plaintiff.



The 60 T-shirts already rapped were given to the plaintiff and he rushed to deliver the same to his client. When delivered to Ndere Troupe and unwrapped the T-shirts were found wanting and were rejected by his clients. It is the plaintiff's contention that he had not had a chance to look at the T-shirts until while at Ndere Troupe because he was in a rash to effect delivery and they had been handed over to him when already rapped. He stated that he contacted the defendant's employees and informed them of the mistake. They promised to rectify the error. He therefore took back the 60 T-shirts to the defendant but the defendant refused to receive them back claiming that the plaintiff had already paid for them. He was stuck with the 60 T-shirts. Unlike exhibit P10, the 60 T-shirts did not have participants' names at the back. The plaintiff has since sold the 60 T-shirts to various people.

The plaintiff further testified that on 14<sup>th</sup> February 2004 the defendant gave him the rest of the items on the order that is the 20 Polo T-shirts, 50 caps and the balance of 255 T-shirts. The goods were released to him upon issuing a cheque in the sum of shs1,529,500/= payable to the defendant drawn on Nile Bank and dated 14<sup>th</sup> February 2004, Exhibit D7. The plaintiff contends that he had issued the cheque with a condition that it should not be cashed until he had finally approved the work. He stated:-

“--- On 14<sup>th</sup> February 2004 when I went to Peggy Garments for the last part of the consignment I was told to pay first. I issued them with the cheque for the payment in the sum of Shs1,529,500/= This was payment for 225 T-shirts 20 Polo shirts and 50 caps. As I had already raised a complaint about the T-shirts they gave me one of their employees called Joseph Lukubi with whom we went to my clients to deliver this last consignment. When we went with Mr. Lukubi the polo T-shirts and caps were accepted by my clients but they rejected the 225 T-shirts. In otherwords my clients confirmed my rejection. I returned the T-shirts to the defendant. I had already rejected the T-shirts at the defendant's on the 14<sup>th</sup> February 2004 and that is when they gave me Lukubi to go

together to my client who also rejected the T-shirts because the logo was not perfect. ---“

The plaintiff testified further that when he returned the 225 T-shirts the defendant again worked on them in a bid to make them acceptable. After working on them the defendant gave him two of the T-shirts, one of which is exhibit P10, claiming that they were now okay. He stated in cross examination:-

“--- in the afternoon after doing some work on the T-shirt the defendant gave me two T-shirts which they claimed were now okay and asked me to take them to my clients and convince them to receive the T-shirts but they still rejected them. It was me to convince my clients. I was not convinced with the T-shirts. Though I was not satisfied with the two T-shirts on their persuasion I thought that probably my clients will be satisfied with the improvements made on them so I decided to go with the two T-shirts to find out from my client. Exhibit P10 was one of those two T-shirts given to me as rectified. When I looked at the two T-shirts they did not have any difference from the earlier products. I wanted my client also to confirm whether there was any improvement and whether he was satisfied. If I had managed to convince my clients and they accepted the two T-shirts I would have picked the remainder and delivered to my clients since they were the final consumers---“

The plaintiff further testified that when he rejected the T-shirts he on 16<sup>th</sup> February 2004 stopped payment of the cheque exhibit P7 and paid cash for the 20 polo shirts and 50 caps. His lawyers Ms Joseph Kiryowa and Co Advocates wrote the letter dated 24<sup>th</sup> February 2004, exhibit D2 demanding refund of payment for the T-shirts and compensation for loss of income.

On the other hand DW1, Margaret Rose Odaka, testified that the plaintiff's order was delivered in one consignment of 315 T-shirts, the Polo shirts and the caps on the 14<sup>th</sup> February 2004. She contends that the goods were packed in polythene bags in the presence of the plaintiff and that the plaintiff had had an opportunity to see all the goods as he had been present throughout the production process.

She testified that it was not her company's policy to give credit to small customers. It appears she classified the plaintiff as a small customer. So when on 14<sup>th</sup> February 2004 the plaintiff asked to be given the goods before payment, she entrusted the consignment to a company's employee one Joseph Rukubi, with instructions to go with the plaintiff to collect the money and handover the goods or deliver back the goods if not paid. It is her testimony that Rukubi did not come back with the money but returned with the goods and handed them to another company employee called Wandera George.

Joseph Lukubi, DW2, testified that on 14<sup>th</sup> February, 2004 his boss entrusted him with already packed goods with the instructions to accompany the plaintiff to Ndere Troupe, collect a sum of shs2,529,000/= issue a receipt and handover the goods. That at Ndere Troupe the plaintiff left him and the goods in the car and went somewhere within the Ndere Troupe complex to collect the money. The plaintiff came back and told the witness that he had not got the money. He came back and he handed the goods to the storekeeper one George Wandera.

Ms Odaka testified that when the whole consignment was returned, the plaintiff requested to be given part of the consignment, issued a cheque as security promising to pay cash on Monday and have the rest of the consignment released. That the plaintiff's request was accepted, he issued the cheque exhibit D7 and was given all the polo T-shirts, all the caps and about 85 of the T-shirts out of the 315 T-shirts. She stated:-

“---The plaintiff begged that he leaves me his cheque which I should not bank. That he would come back on Monday. The plaintiff requested me to authorise him to be given all caps, all pole neck shirts and the different assorted T-shirts. I accepted the

request and gave him the caps, polo-neck shirts and about 85 Round Neck T-shirts and he left me with the cheque. -

---- I do not usually take cheques from small customers as they usually bounce. The cheque was received as security for payment on Monday. On Monday the plaintiff came back and paid cash shs135,000. I issued a receipt exhibit P4. On Saturdays we close at around 3:30 p.m. That Saturday after he had issued the cheque and taken some of the goods the plaintiff did not return until Monday 16<sup>th</sup> February, 2004. On Monday the plaintiff did not come back with any T-shirts and he never informed me that the T-shirts had been rejected. The plaintiff only requested me not to worry and not to bank the cheque, that he would pay the balance as soon as possible. I accepted the request of not banking the cheque. On 24<sup>th</sup> February 2004 I received a letter from the plaintiff's lawyers saying that I did not do what I was contracted to do. The letter is this one exhibit D1. I rang my lawyers to handle the matter. They advised me to bank the cheque which I did on 25<sup>th</sup> February 2004. The cheque was not paid. The plaintiff had not prior to his lawyers letter complained to me about the work done. None of the 85 T-shirts was returned to us. ---“

Steven Rweggyenzi, PW3 in his testimony, stated that the plaintiff had delivered to them the first bunch of T shirts on Thursday which they rejected. That on Saturday in the afternoon and in the company of another younger man the plaintiff delivered a consignment of Polo shirts, caps and T-shirts. The T-shirts looked bad and they rejected the T-shirts. That the plaintiff appeared to blame the younger man in his company for the defects.

The defendant's evidence shows that there was no delivery of the full order made to the plaintiff. When the defendant entrusted the goods with Joseph Rukubi the goods remained in constructive possession of the defendant, only to be delivered to the plaintiff when payment was made to him. Payment was not made and Rukubi did not effect delivery of the goods to the plaintiff. He

returned them to the defendant. There was only delivery of the part of the consignment after the plaintiff had issued the defendant with the cheque when all the polo shirts and all the caps but only some the 315 Round neck T-shirts were delivered to the plaintiff.

The evidence of the both the plaintiff and the defendant shows that the polo shirts, the caps and the part of the Round neck T-shirts delivered to the plaintiff have never been returned to the defendant. In his submission Counsel for the plaintiff argued that the plaintiff communicated to the defendant's agents his rejection of the 60 T-shirts without delay and his attempts to return the T-shirts was repulsed for the reason that they were already accepted and paid for. However, the plaintiff testified that when the defendants refused to receive the 60 T-shirts back he sold them to various people. In cross examination he stated:-

“---I have 60 T shirts counted on me. The two T- shirts, which I received on 14<sup>th</sup> February 2004, exhibit P10 inclusive, are counted on the defendant. I say so because I did not pay for the two T-shirts, they still belong to the defendant ---”

The above evidence shows the plaintiff's inability to reinstate the 60 T-shirts. Restoration is impossible in circumstances which bar the plaintiff's right to rescind the contract. The law on rejection is that a party rejecting cannot do anything contrary to the supplier's interest in the goods. Section 35 of the Sale of Goods Act provides:

“The buyer is deemed to have accepted the goods when the or she intimates to the seller that he or she accepted them or when the goods have been delivered to him or her and he or she does any act in relation to them which is inconsistent with ownership of the seller or when after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that he or she rejects them---“ (*underlining is mine*)

In *Mohamed Anwar Vs Manjarid & another Civil Appeal No 5 of 1973*, (cited in Law of Contract in East Africa by R. W Hoddgin at page 180) the Appellant had purchased eleven second hand tractors and spares from the Respondent. When the appellant went to collect the tractors two were missing and others had been stripped of their spare parts. Nevertheless the Appellant removed the tractors on an understanding that what was missing would be replaced. This was not done and the appellant stopped the payment. When sued for the price he alleged that he had repudiated the contract and that the consideration had totally failed. The Court of Appeal upheld the decision of the High Court that the Appellant's behaviour showed that the property in the goods had passed to him and therefore could not repudiate the contract but only availed with damages.

I therefore agree with the submission of Counsel for the defendant that if the plaintiff had rejected the 60 T-shirts he should not have kept them since he had an intention to claim for them. By his conduct he made restitution of the 60 T-shirts impossible.

As regards the balance of 225 T-shirt, counsel for the plaintiff submitted that before the plaintiff received them he raised his objection to the erratic logo. That he was, however, prepared to receive the T-shirts and taken them to Ndere so his rejection thereof would be confirmed by Ndere Troupe as the end user. That DW3 had accompanied him to Ndere Troupe premises for confirmation of the rejection by Ndere Troupe and not to collect payment.

In the plaintiff's Counsel's letter, exhibit D1, dated 24<sup>th</sup> February 2004 and addressed to the defendant it is stated:

“--- That the products which you gave him were rejected by his clients – on account of the fact that there was a mix up of the colours in the final “logo” on the T-shirts, thereby constituting a fundamental breach of contract on your part. The purpose hereof is to draw to your attention the fact that our client demands a refund of the total purchase price he paid for the said T-shirts and

compensation for loss of income (profits which would otherwise have accrued if the deal had not aborted.

---“

Counsel for the defendant argued that it was clearly put in this letter that it was Ndere Troupe that rejected the goods and not the plaintiff.

This letter was written on 24<sup>th</sup> February 2004, after the plaintiff had on Monday, 16<sup>th</sup> February 2004, come back to the defendant, paid cash for and only picked the Polo t-shirts and caps. It is the evidence of both parties that delivery was always upon payment. It is the defendant's evidence that when there was failed payment the goods were returned to them by their employee.

Both parties' evidence is that the cheque was issued as security only for payment to be done on 16<sup>th</sup> February 2004. Though the cheque issued was in the sum of Shs1,529,500/= which covered the Polo T-shirts, caps and the remaining 255 T-shirts, the cash payment on 16<sup>th</sup> February 2004 only covered the Polo shirts and caps and delivery of which the plaintiff took. The 255 T-shirts remained and are still in possession of the defendant. Instead of collecting the T-shirts the plaintiff on that day, 16<sup>th</sup> February 2004, stopped payment of the cheque and on 24<sup>th</sup> February 2004 wrote the letter exhibit D1 notify the defendant of the breach and seeking compensation for the breach.

Right from the time the defendant was contracted by the plaintiff the defendant was made aware that the end user was Ndere Troupe. This is evidenced in the Invoices and Receipts issued by the defendant which were made in favour of Ndere Troupe. That is exhibit D5, D6, P1, P3 and P4.

Even at the level of samples the plaintiff would always, before final approval, seek the approval of his client and the defendant's staff were aware. So it was not out of practice which had been adopted in the execution of this agreement that the plaintiff had to resort to his client before making a final decision, whether to accept or reject the products. It is in light of that that the plaintiff communicated the rejection by his client as clarification of the reasons for his rejection of the products. Further to the written notice, on 31<sup>st</sup> May 2004 the plaintiff filled this suit

whereby he claims that the defendant was in breach of the contract for failing to produce a consignment that conformed to the approved sample and generally to produce a professional job. The plaintiff claims damages for the breach. All in all the plaintiff had thereby rescinded the contract and I so find.

The last issue is that of remedies are available to the parties. The plaintiff prayed for special damages in the sum of shs7.774,000/=, general damages, costs of the suit and interest on all aforementioned at the court rate from date of filing until payment in full.

The defendant counter claimed and prayed for a declaration that the plaintiff is in breach of the contract, order for special damages in the sum of shs 1,343,500/=, general damages and interest at the Commercial rate from the date of breach till full payment.

I have already held that the defendant had breached the agreement. By taking delivery and retaining part of the defective products the plaintiff thereby treated the defendant's breach of the agreement as not of a fundamental nature. Section 52 of the Sale Goods Act provides.

(1)“ Where there is a breach of warranty by the seller, or where the buyer elects or compelled to treat any breach of a condition on the part of the seller as a warranty, the buyer is not by reason only of the breach of warranty entitled to reject the goods but he or she may –

- (a) set up against the seller a breach of warranty in diminution or extinction of the price; or
  - (b) maintain an action against the seller for damages for the breach of warranty.
- (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.



- (3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
- (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him or her from maintaining an action for the same breach of warranty if he or she has suffered further damages.”

The general rule is that whenever there is a breach of contract by the party the other is entitled to bring an action for damages. The basic principle is that the injured party should be placed in the same financial position as if the contract had been performed. Even a party who rescinds for breach can also claim damages for breach of contract. In Surrey County Council & Anor Vs Bredero Homes Ltd (1993) 3 All ER 705 Steyn LJ held that an award of compensation serves three interests, that is compensation for the loss of expectation interest to put the aggrieved part in the same financial position as if the contract had been fully performed, the party is also compensated in respect of his losses due to reliance on the contract and lastly to deprive the defendant of the benefit gained by breach of contract.

By way of special damages the plaintiff claims:-

1. Cost of 315 T-shirts - shs 1,632,000/=
2. Printing charges (less caps and polo shirts) - Shs 1,619,500/=
3. Loss of earnings/profits on the main contract-Shs 4,532,000/=

It is trite law that special damages must not only be specifically pleaded but also strictly proved.

It is an agreed fact that the 315 T shirts were provided by the Plaintiff. The Plaintiff testified that he had brought the 315 T-shirts from Sun – apprels (U) Ltd. He tendered in evidence Receipt No 71 dated 6<sup>th</sup> February 2004, exhibit P12. The receipt shows that he paid

shs1,632,500/= and remained with a balance of Shs100,000/=. The Plaintiff had not yet paid that balance. Of the 315 T-shirts the plaintiff had taken delivery of 60 T-shirts on 12<sup>th</sup> February 2004 and another 2 T-shirts on 14<sup>th</sup> February 2004. The plaintiff was to earn back the cost of the T-shirts when paid by his client for the order. As a result of the defendant's breach the plaintiff's client rejected the T-shirts. The plaintiff must have paid Shs5182/50 for each of the T-shirts. The plaintiff was not challenged on the cost of the T-shirts. The plaintiff did not inform court how much he got from the sale of the 60 T-shirts. So court cannot establish whether the proceeds from the sale covered the cost for the 60 T-shirts. If it did not the onus was on the plaintiff' to adduce evidence to that effect which he did not do. The plaintiff has not earned any money from the two T-shirts which he still has and from the 253 T-shirts which are still with the defendant. He has therefore not recovered the cost of the 255 T-shirts. At shs5182/50 each for the 255 T-shirts the plaintiff has lost a total of shs 1,321,537/50. There is no evidence adduced of a claim for the balance of shs100,000 by the plaintiff's supplier of the T-shirts.

While giving his testimony the plaintiff dropped the claim for shs 1,619,500/= for the printing charges and instead claimed shs 225,000 which he had paid as printing cost for the 60 T-shirts. The plaintiff testified that he had paid the sum of shs225,000/= on 12<sup>th</sup> February 2004 when he claims to have taken delivery of the 60 T-shirts. For all cash payment the plaintiff was issued with a receipt. The receipt dated 12<sup>th</sup> February 2004, exhibit P3, is for a payment of Shs 186,000/= When pressed in cross examination the plaintiff stated that the sum of shs 225,000/= was made up of receipts exhibits P2 and P3. The sum of shs 186,000/= paid vide exhibit P3 plus the sum of shs 39,000/= paid vide exhibit P2 make a total sum of Shs 255,500/=. However, exhibit P2 dated 12<sup>th</sup> February 2004 is a receipt not issued by the defendant but by Ms Jescar Enterprises Ltd. The plaintiff did not explain how receipt of payment to the defendant was acknowledged by a third party. Further the 60 T-shirts which the plaintiff claims to have paid for were retained and sold by him. He does not adduce any evidence to show that the proceeds from the sale did not cover his printing expenses in respect of the T-shirts. Unless he adduces evidence to show that he had sold the 60 T-shirts at less than the price agreed with his client which he did not do; the plaintiff cannot be permitted to make double earnings. He had not paid for the 255 T-shirts. Therefore this claim fails.

The plaintiff claims shs4,452,000 in loss of earning or profits from the main contract. The plaintiff testified that the contract for the supply of 315 T-shirts for the 6<sup>th</sup> UDTA harvest festival was to earn him a sum of shs6,142,500/=, that is at shs 19,500 each. He tendered in evidence an invoice dated 6<sup>th</sup> February 2004 in the above sum. As a result of the defendant's breach all the T-shirt were rejected by the plaintiff's client. Therefore the plaintiff did not earn the anticipated income from the supply of the T-shirts to his client in the sum of shs6,142,500/=. The Plaintiff received and sold off 60 T-shirts to alternative buyers. As stated in the Mukisa Biscuits and Manufacturing Co Ltd Vs West End Distributors Ltd (No 2) 1970 EA 469 the burden of proving loss suffered is on the plaintiff. He did not earn any money from the 255 T-shirts. At shs 19500/= he lost the anticipated income of shs4,972,500/=. The sum was inclusive of the cost he had incurred on the purchase of the T-shirts. That is a sum of shs1,321,573,50 which has already been awarded to the plaintiff. Therefore the sum of shs4,972,500/= is scaled down by the sum of shs1,321,537/50 to come to shs3,650,962/50. It is his testimony that he did not pay the printing charges for 255 in the sum of shs1,343,500/= So the plaintiff's claim is scaled further by that sum to come to shs2,307,462/50.

The damages recoverable must be for loss which is connected to the breach. Under the famous rule of Hadley Vs Baxendale (1854) 9 Exch 43, reiterated in Victoria Laundry Ltd Vs Newman Industries Ltd (1949) 2 K. B. 528 the defendant is only liable for such loss as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, so that any plaintiff would be likely to suffer the loss in question.

Clearly the defendant was not a party to the agreement between the plaintiff and Ndere Troupe. However, the plaintiff made it clear to the defendant that the end user of the products was Ndere Troupe and communicated to the defendant the specifications of the contract as given to him by Ndere Troupe. The specifications as to the products agreed upon between the plaintiff and Ndere Troupe were transmitted into the sub contract, now between the plaintiff and the defendant. The breach of the contract between the plaintiff and the defendant, resulted into the plaintiff's breach of the contract between him and his client. Thus entitling the plaintiff's client to reject the goods and the plaintiff to suffer the above damages. The damages suffered followed directly from the

defendant's breach. So the plaintiff is awarded special damages in the total sum of Ugshs3,629,000/=.

The plaintiff also claimed for general damages. General damages for breach of contract are compensatory for the loss suffered and inconveniences caused to the aggrieved party. The plaintiff testified that his money was held up as a result of the breach. His reputation had been affected and he had lost his big client. From the inconveniences and loss of business the plaintiff is awarded general damages in the sum of Ugshs 2,000,000/=

With regard to the defendant's counter-claim I have already found that it was the defendant who had breached the agreement. Breach of a contract entitles an aggrieved party to rescind an agreement. When the plaintiff's client rejected the T-shirts the plaintiff collected only the caps and the round neck T-shirts, which the defendant had produced in conformity to the sample, and paid cash for them.

Section 48 of the Sale of Goods Act provides.

- “(i) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him or her for the price of the goods.
- (I) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay the price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract”

In the present case evidence shows that the delivery of the goods would be upon payment for the goods. The plaintiff did not pick the remaining 223 T-shirts. He rejected the T-shirts and the defendant admits that it still has possession of these T-shirts. The plaintiff instead stopped payment of the cheque. he had issued and filed this suit. The defendant had failed to

substantially perform its part of the contract. There was partial performance for which the defendant was paid. The defendant cannot recover payment for the goods that were defective and not taken by the plaintiff. Non fulfillment by the defendant of the obligation to which the duty of payment arises entitles the plaintiff to suspend payment until the obligation has been performed. The evidence available is that the defendant tried to collect the error but still, failed and the 2 T-shirts given to the plaintiff after the attempt to put them right were also rejected and the plaintiff is still stuck with them. The defendant cannot recover payment for failed performance of its part of the contract. The defendant's counter claim fails and it is accordingly dismissed.

In the final result judgment is entered in favour of the plaintiff in the following terms:-

- (a) Special damages in the sum of Ugshs3,629,000/=
- (b) General damages in the sum of Ugshs2,000,000/=
- (c) Interest on (a) and (b) above at the court rate from the date of judgment until payment in full.
- (d) Cost of this suit.

Hon. Mr. Justice Lameck N. Mukasa

22<sup>nd</sup> May 2009