

THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 300 - 2005

MULTIPLE INDUSTRIES LTD ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ALAM CONSTRUCTION EA LTD ::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The Plaintiff company brought this suit against the Defendant to recover the sum of Shs.24,570,000/= due on account of goods supplied to the Defendant but were not paid for.

The case for the Plaintiff is that on different dates in June 2003 the Plaintiff supplied the Defendant with various PVC pipes at their request and instance using one Anthony Byaruhanga an employee of the Defendant.

The Defendant company in their defence deny that they are indebted to the Plaintiff. They also deny any knowledge of Anthony Byaruhanga or that the Defendant in any way authorized him to make the said orders. The Defendant avers that the Plaintiffs were negligent in accepting orders made by Anthony Byaruhanga purportedly on their behalf. The Defendant then also filed a

counter-claim against both the Plaintiff (now first Defendant to the counter-claim) and Anthony Byaruhanga (second Defendant to the counter-claim) alleging fraud and forgery of the Defendant/Counter-claimants company documents.

There is no evidence on court record however that the second counter Defendant was served and indeed Mr. Byaruhanga did not appear at the trial.

The parties agreed to the following issues for trial;

- 1) Whether or not the Plaintiff supplied the Defendant with PVC pipes worth Shs.24,570,000/= at the Defendant's instance and request.
- 2) Whether or not the Defendants paid for the PVC pipes.
- 3) Whether or not the Plaintiff acted fraudulently in the supply of the PVC pipes to the Defendant.
- 4) Whether or not the Plaintiff was negligent in the supply of PVC pipes to the Defendant?
- 5) What remedies are available to the parties.

Mr. M. Kabega appeared for the Plaintiff/first counter Defendant while Mr. Ali Siraje appeared for the Defendant/Counter-Defendant. The Plaintiff called witnesses namely; Mr. Pajiv Dadabean Praratathi (PW1) the General Manager of the Plaintiff company, Mr. Mohammed Navid Salim the Sales and Marketing Manager of the Plaintiff (PW2) Mr. William Karamagi a manager in the delivery Section of the Plaintiff company (PW3) while the Defendants called Mr. Khalid Alam (DW1) the Managing Director of the Defendant.

Issue No. 1: Whether or not the Plaintiff supplied the Defendant with PVC pipes worth Shs.24,570,000/= at the Defendant's instance and request?

Counsel for the Plaintiff submitted that the Plaintiffs had been supplying the Defendant with PVC pipes since 2001.

Mr. Praratathi testified that the methodology used between the parties was fairly standard. The Defendant would place orders with the Plaintiff using Local Purchase Orders (LPOs). Some of LPOs were delivered to the Plaintiffs physically while others were faxed. The LPOs would

indicate the details of the purchase, to whom the goods would be delivered and the payment terms. The Plaintiffs would then make deliveries against delivery notes. Counsel for the Plaintiff submitted that the witnesses for the Plaintiff had shown that Anthony Byaruhanga was the person who used to place the orders for materials from the Plaintiff on the authority Defendant and that he would also negotiate credit on behalf of the Defendant. Counsel for the Plaintiff submitted that out of seven orders placed by the Defendants to the Plaintiffs which supplies the Plaintiff honoured (against delivery notes), three orders (namely; LPO No. 107 of the 7th June 2003, LPO No. 108 of the 14th June 2003) were not paid for amounting to Shs.24,570,000/=.

Counsel for the Defendant on the other hand submitted that the Managing Director of the Defendant company Mr. Khalid Alam testified that Mr. Byaruhanga was not authorized by the company to make the orders in dispute. He testified that Byaruhanga was an independent contractor not an employee or agent of the Defendant company. Furthermore, even the disputed orders were irregular in that they were not accompanied by postdated cheques as was the practice by the Defendant company. Mr. Khalid Alam testified that the Defendant company never paid cash for its orders and that the signatures on the LPOs were forged. Mr. Khalid testified that the disputed orders were part of a scam whereby the said orders were diverted to Mr. Byaruhanga's shop in Katwe and not the offices of the Defendant company. In this regard, Mr. Byaruhanga was arrested by the police.

I have perused the evidence adduced in court and the submissions of both Counsel. The crux of this issue is whether the Defendant can be said to have made the disputed orders and therefore be held liable for pay for them. A review of the four undisputed orders made by the Defendant to the Plaintiff that were honoured and paid for can throw some light on the matter. A review of LPO No. 487 of the 19th November 2001 (Exh. P.4) shows an order for materials worth Shs.276,400/= which materials were to be issued to "Anthony B" (I take to mean Anthony Byaruhanga") against cheque No. 103865. These supplies were made by the Plaintiff and paid for by the Defendant. There is also LPO No. 003 of the 26th September 2002 (Exh.P.8) which shows an order for materials worth Shs.940,000/= which materials were to be issued to "Anthony B" but no cheque number is shown. The supplies were made by the Plaintiff and paid for by the Defendant using a Barclays Bank cheque (Exh. P.11) dated 31st January 2003 (four months after the LPO and delivery note Exh. P.9). Then there is LPO No. 676 of the 5th April 2003 which interestingly was made on an LPO from

M/s Casements (Africa) Ltd (a sister company of the Defendant) with a provision for immediate delivery. This format of LPO unlike the others from the Defendant does not show to whom the materials are to be given, the price of the goods and does not indicate against which cheque the order is made. The delivery note (Exh. P.13) however shows that delivery was actually made to the Defendant company and invoice in the sum of Shs.423,300/= made. Payment was made by a Barclays Bank cheque dated 17th May 2003 (one and half months later). In this case the direct reference to Mr. Byaruhanga is not made. None the less this transaction was paid for.

As regards the disputed orders in LPOs No. 107, 108 and 500 all of them were made on the Defendant company LPO format. They all show that materials were to be issued to “Anthony B” but no cheque number is indicated. Instead on LPO is handwritten “payment after one month by cash”. When one compares these disputed orders with the undisputed order No. 003 of the 26th September 2002 one sees very little difference between the two save hand written reference to payment after one month by cash.

That in my considered view is not significant as both LPOs are based on some form of credit being provided by the Plaintiff company. Indeed the credit period under the uncontested order (No. 003) even though eventually paid by cheque, was for a longer period of four months whereas the disputed orders are all for one month each. Reference has been made that the disputed orders are larger in amount than the undisputed orders and this makes them suspect. I am unable to see how this is material given the method of work of the parties. In this regard I agree with Counsel for the Plaintiff that on an objective basis how could the Defendant company be seen to pay LPO No. 003 and yet reject LPOs Nos. 107, 108 and 500? Counsel for the Defendant made the point that Anthony Byaruhanga was not authorized to make these orders as he was an independent contractor not employed by the Defendant company. I am not persuaded by the argument that in order for to act as an agent of the Defendant, that person must per se’ be employed by the Defendant. I agree with Counsel for the Plaintiff when he submitted that an agent can be defined as

“a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is represented is called the Principal...”

In other words agency can arise out of employment and or representation as such.

In the case of **Freeman & Lockyer V Buckhurst Park Properties (Mangal) Ltd** [1964] 2 QB 480 **Lord Diplock** held that a person who allowed another to believe that a state of affairs exists with the result that there is reliance upon such a belief cannot afterwards be allowed to say that the state of affairs was different if to do so would involve the other person to suffer some kind of detriment.

In this case both the disputed and undisputed orders show that the materials from the Plaintiff are to be issued to the Defendant through Anthony Byaruhanga. That makes Byaruhanga an agent and the Defendant company his principal. Surely it can not be said to be beyond the scope of Byaruhanga's agency to place the order if in the order itself it is written that the materials are to be issued to him.

As to the issue of fraud this matter was well discussed by **Justice Stella Arach-Amoko** in **Active Automobile Spares Ltd V Pearl Merchantile Co. Ltd** HCCS No. 693 of 2000.

In that case she held that a principal can be liable for the fraud of his/her agent committed in the course of the agent's ostensible authority. In this situation a principal will be liable for the fraud of his agent committed in the course of his agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not [**Lloyds V Grace Smith & Co.** [1912] AC 716 at 731 followed] Mr. Khalid Alam called the disputed orders part of a scam by Anthony Byaruhanga and others within the Plaintiff company. That may be so but would that in itself absolve the Defendant company of liability under principle of agency? I find not. Based on the evidence before court and in answer to the first issue, I find that the Plaintiff supplied the Defendant with PVC pipes worth Shs.24,570,000/= at the Defendants instance and request.

Issue No. 2: Whether or not the Defendants paid for the PVC pipes.

This is a straight forward issue. The Managing Director of the Defendant company testified that the disputed PVC pipes were not paid for because they were not ordered. I therefore find that the PVC pipes were not paid for by the Defendant.

Issue No. 3: Whether or not the Plaintiff acted fraudulently in the supply of the PVC pipes to the Defendant?

This issue arises from the counter-claim. The witnesses from the Plaintiff company strongly denied the allegation of fraud. In such a situation, I agree with Counsel for the Plaintiff when he submitted that the onus to prove fraud would lie with the Defendants. I also agree with the judgment of **Wambuzi CJ** (as he then was) in

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where he held that fraud must be strictly proved and that the burden is heavier than that of a balance of probabilities generally applied in civil matters.

Mr. Khalid Alam testified that after he learnt of the fraud around June 2003, he went to the Plaintiffs to notify them about it. However, Mr. Praratathi the General Manager of the Plaintiff denies even receiving a notice from the Defendant not to deal with Anthony Byaruhanga at the time of the supplies.

Looking at paragraph 3 (d) of the counter-claim which lists the particulars of fraud, I must say that no evidence of fraud was adduced outside the actual allegation itself. The Defendant/counter-claimant has therefore failed to meet the legal test for proof of fraud and I therefore find that the Plaintiff did not act fraudulently in making the supplies.

Issues No. 4: Whether or not the Plaintiff was negligent in the supply of PVC pipes to the Defendant.

This issue also arises from the counter-claim. The witnesses from the Plaintiff company also strongly deny this allegation.

Again like fraud the onus of proof lies with the Defendant/counter-claimant though this time it is on the balance of probabilities.

Counsel for the Defendant referred court to Black's Law Dictionary 6th Edition which describes negligence as "...the omission to do something which as a reasonable man, guided by those considerations which ordinarily regulate human affairs, would do or the doing of something which a reasonable prudent man would not do..."

In this regard, Counsel for the Defendant faults the Plaintiffs for not verifying Anthony Byaruhanga's agency, extending unauthorized credit and supplying goods when previous orders had not been paid for.

It is not clear what sanction this allegation of negligence should attract if it is proved. Counsel for the Defendant while concluding his submission on negligence stated as follows

"...By failing to point out these clear signs of fraud from the outset the Plaintiff exposed itself to fraud which it could have prevented..." (emphasis mine)

Clearly Counsel now mixes up the allegation of negligence with that of fraud. That notwithstanding based on the particulars of negligence in paragraph 5 of the Defence, I find that if any negligence existed then it can be explained by the Plaintiff relying on the actual and ostensible authority that Anthony Byaruhanga carried. Now that I found that agency did exist, one cannot raise the issue of negligence unless Anthony Byaruhanga exceeded his scope of agency which I have found not to be the case. In my view, it is the Defendant company which was negligent in authorizing in writing Byaruhanga who they called "*an independent contractor*" to collect goods on their behalf when they could have used their own staff.

In any event negligence per se' like fraud would not displace the principal's obligation to make good the actions of its agent within that agents scope of authority. I as a result find that the Plaintiff/Counter-Defendant was not negligent.

Issue No. 5: Remedies.

As to the main claim and based on my findings above, I agree with the Plaintiff company that the Defendant company owes them Shs.24,570,000/= as prayed and I so award it to them.

The Plaintiff prayed for Shs.10,000,000/= as general damages but did not really justify that amount save for stating that they were inconvenienced. Given the facts of this case, I would award nominal damages of Shs.1,000,000/=.

The Plaintiff further prayed for interest at 18% p.a. on both the special and general damages from the date of the cause of action. I will award therefore 18% p.a. on the Shs.24,570,000/= from the date of filing the plaint until payment in full and 8% p.a. on the nominal damages from the date of judgment until payment in full.

I also award the Plaintiff the costs of the suit.

As to the counter-claim, I dismiss the counter-claim against the 1st Defendant/Counter-claimant with costs.

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Geoffrey Kiryabwire

JUDGE

Date: 12/11/09

12/11/09

9:30am

Judgment read and signed in open court in the presence of;

- Katiha for Plaintiff
- R. Iga for Defendant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 12/11/09

JUDGMENT