

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CV-CS-00221-2004

NORBROOK (U) LTD.....PLAINTIFF

VERSUS

DR. ABDUL KAYIZI..... DEFENDANT

BEFORE HON. MR. JUSTICE LAMECK N. MUKASA

JUDGMENT:

The plaintiff's case against the defendant is that from February 2001 the defendant, Dr Abdul Kayizzi, was employed by the plaintiff, M/s Norbrook (U) Ltd, as a Veterinary Sales Representative in Western, South Western, Eastern and Kampala areas of Uganda. The defendant's work involved soliciting orders, delivering and collecting payments both cash and cheques from customers in his area of operation. On 17th February, 2003 the defendant gave one month's notice of intention to resign. His resignation was accepted on condition that he collects all the money due and owing from the supplies he had made before his termination day was carried out. A verification of accounts was carried out which revealed that the defendant had not remitted all the money paid by the customers. The defendant admitted and made a post dated cheque to make good one of the invoices. Further verification of the accounts revealed the following unremitted amounts:-

Eastern	-	Shs17,151,421
Western	-	Shs13,613,321
South Western	-	Shs13,753,151
Kampala	-	<u>Shs24,094,880</u>
Total		<u>Shs67,431,287</u>

Which sum the plaintiff claims plus interest and costs.

In his Written Statement of defence the defendant admits working for the plaintiff as a Veterinary Sales Representative. He however, denies owing the plaintiff any money. He contends that he worked hard, committedly and miracurately recovered a good part of the plaintiff's debt. That he was frustrated by the plaintiff's haphazard credit policy and lack of proper record keeping. The following issues were flamed for Court's determination:-

1. Whether the defendant is indebted to the plaintiff
2. If so, for how much
3. What reliefs is the plaintiff entitled to?

Representation was first Mr. John Magezi for the plaintiff and later Mr. Joseph Katongole assisted by Ms Nasuna Irene. The defendant was represented by M/s Sengooba and Co Advocates but they later withdrew.

On the hearing date the plaintiff, though dully served, did not attend Court and had no Counsel in Court. Hearing proceeded exparte. The plaintiff called two witnesses Gideon Kisule Musoke, PW1 and Susan Soans PW2.

Issue No 1. Whether the defendant is indebted to the plaintiff?

Gideon Musoke (PW1) was the plaintiff's Company Office Manager. He testified that the defendant was the Company's Veterinary Sales Representative. The witness testified on how the defendant conducted his company duties. The defendant would receive orders from the company's customers, request for supplies from the company on an Internal Order Form.

The form would indicate the customer whose account was to be billed and would indicate the Sales Representative handling the order. The witness would authorise the storekeeper to release the items to the Sales Representative, in the instant case the defendant. He tendered one of such order forms signed by the defendant received as exhibit P1. The goods ordered would be released to the Sales Representative upon a Delivery Note signed by the issuing officer and the receiving Sales Representative. The witness tendered in evidence Delivery Notes No 902 and 903 signed by the defendant in respect of the above order, exhibits P2A and P2B. The goods would be delivered to the customer by the Sales Representative upon an invoice which would be signed by the customer acknowledging receipt of the goods. The witness tendered invoice Nos. 2186, 2187 and 2198 in respect of the above order in the total sum of Shs6,180,840/= - Exhibit P3A, B, C.

In 2003 the defendant brought back the above invoice purportedly signed by a particular customer, MSJ. That when demand was made for payment from that customer they denied receipt of the goods. The witness called for a meeting held on 17th June 2003 which was attended by the defendant as the responsible Sales Representative, the witness and the Regional Sales Manager. A fax copy of the minutes was tendered in evidence as exhibit P4. The minutes were signed on 21st June 2003 by the defendant, the witness and John Mukiibi confirming it was true record of what was discussed. In part, the minutes stated:-

“On Monday 16th June 2003, during reconciliation of one of our key Kampala customers account (MSJ) it was discovered that goods on 3 invoices (Invoice No. 2186/7 dated 3rd February 2003 – Shs16,506,840 2198 of 12th February, for shs6,180,840 and invoice 2199 of 12th February 2003 for ushs1,207,200) (totaling Ushs23,894,880) requisitioned for and invoiced by Dr. Abdul Kayizi early February were not delivered to the customer. Instead, the invoices were signed by two individuals whom MSJ disowned. We called Dr. Abdul Kayizi to the office to explain the whereabouts of the goods. We first reviewed the earlier trip as earlier stated. Dr. Abdul Kayizi admitted that he sold the goods elsewhere. He did confirm the fact that he was aware of the seriousness of this action by him. Dr. Abdul Kayizi confirmed that he had applied for a Bank Loan and is also selling his Toyota Hiace van to raise money to enable him pay Norbrook Uganda a total of Ushs34,848,900 (This sum excludes the West and South West, which are yet to be visited and accounts reconciled) he has admitted he owes ----- . He committed to paying the total amount owed by 1st July, 2003-----“

With regards to Eastern Region, the minutes stated:

“-----

Dr. Abdul Kayizi took responsibility for 7 accounts totaling UShs10,954,020 which he has undertaken to settle in person in full by July 1 deadline ---“

Kampala’s Shs23,894,880/= plus Eastern – Shs10,95,020/= totals to Shs34,848,900/= the sum the defendant undertakes to pay by 1st July 2003.

The witness testified that the defendant issued a cheque in favour of the plaintiff dated 24th July 2003 in settlement of the sum of shs23,894,880/=. The cheque was when presented for payment dishonoured and marked “Refer to the drawer”. The dishonoured cheque was

received in evidence as Exhibit P5 the drawer thereon named is Dr. Kayizi Abdul. The witness testified that the defendant had not ever since, paid any money. Following the defendant's failure to pay a reconciliation of all the areas of the defendant's operation was carried out and a letter, Exhibit P7, was written to him indicating the amounts outstanding. It stated:

“--- our record as at 18/08/03, a summary of monies arising out of the invoices you issued to customers in the areas you operated are as follows:-

Eastern Uganda : 18,089,368/=

Western Uganda: 13,613,321/=

S. Western Uganda: 11,633,718/=

Kampala: 24,094,880/=

(The details are attached). You are hereby requested to cross check your records and confirm the above information, not later than Tuesday 26/08/03. Lack of a written response from you shall be deemed to mean that you agree and take full responsibility.

-----“

The defendant did not write back. PW2, the plaintiff company's Country Manager, testified that he had studied the company records and established that the defendant owes the company a sum of Shs65,000,000/=.

It is trite that parties are bound by their pleadings. It is the plaintiff's evidence that the defendant was employed by it as its Veterinary Sales Representative. This fact is admitted by the defendant in his Written Statement of Defence. In paragraph 6 of his Written Statement of defence the defendant states:-

“---He will also prove the company has no proper accounts such that most money is with customers and not the defendant but this cannot be ascertained because of the bankrupt and antiquated accounting practices which the plaintiff refused to change in spite of repeated warnings.”

In paragraph 3 (b) of the plaint the plaintiff pleads:-

“That his work involved soliciting orders, delivering and collecting payments both cash and by cheques from the customers within the areas from which he operated .”

This fact is not specifically denied by the defendant in his pleadings. In HMB Kayondo Vs Samain Amiuriah HCCS 183.94 (1995) IV KALR 78 Justice Berko (as he then was) held:

“In this case it was specifically pleaded in paragraph 5 of the plaint that formal notice of dishonor of the cheque was given to the defendant. That averment was not denied in the WSD either expressly or by implication. As the fact was not denied, it was deemed to have been admitted. A fact that is admitted need not to be proved.”

It is a rule of pleading that an averment not expressly or implicitly traverted is deemed to have been admitted and need not be proved.

The defendant’s admission in paragraph 6 of his WSD shows that there was a contract of employment between the plaintiff and the defendant, as a Veterinary Sales Representative for Western , South Western, Eastern, and Kampala areas. It is also an admitted fact implied by the defendants pleadings and by lack of specific denial, that it was his duty to collect payments from the customers within his areas of operation.

The relationship between the employer and employee is one of trust and confidence so that law implies into a contract of employment the term that every employee shall serve his/her employer faithfully. See **N. M. Selwynu’s Law of Employment**.

The minutes of the meeting held on 17th June 2003, Exhibit P4 was annexure B to the plaint. It shows that it was signed as confirmed by the defendant on 21st June 2003. The defendant does not specifically deny his attendance of the meeting and confirmation of the minutes therefore the same is deemed admitted. The minutes show that the defendant had delivered goods invoiced for MSJ to other people which fact he admitted. This is evidence of breach of trust. The minutes further shows that the defendant had in the meeting undertaken by 1st July 2003, to pay shs34,848,900/= being Shs23,894,880/= for goods invoiced as supplied to MSJ whereas not in the Kampala area, and Shs10,954,020/= in respect of seven accounts in respect of the Eastern region. The defendant had issued to the plaintiff a cheque dated 24th July 2003 drawn on Centenary Rural Development Bank Ltd in the sum of Shs23,894,880/=. The cheque was dishonoured when presented for payment. PW1 testified that the defendant has since not made any payment to the plaintiff.

The standard of proof in civil matter is on a balance of probabilities. I find that in respect of the first issue the plaintiff has discharged the burden and has proved that the defendant is indebted to the plaintiff.

Issue No 2 if so, for how much. The plaintiff claims a sum of Shs67,431,287/= made of the following alleged unremitted amounts:-

Eastern Region : Shs17,151,421/=

Western Region : Shs13,613,321/=

South Western Region Shs11,633,781/=

Kampala Region: Shs24,094,880/=

Chitty on Contracts 29th ed states

“--an employees is bound to account to his employer for all property entrusted to him by his employer, and for all property received by him from third persons for or on account of his employer.”

The Minutes, exhibit P4 shows that the sum of shs34,848,900/= which the defendant had agreed to pay by 1st July 2003 did not include the unremitted funds for Western and South Western Regions. It was recorded:-

“(This sum excludes the West and South, which are yet to be visited and accounts reconciled).”

It also shows that for Eastern Region accounts of five customers had not yet been reconciled. As for Kampala 12 accounts were still outstanding and expected to be verified within the first week of July 2003. The plaintiffs letter to the defendant, exhibit P7, appears to suggest that the amounts claimed in the letter had been arrived at after a reconciliation of the accounts.

However, the letter shows that the amounts claimed therein were subject to the defendants cross checking of his records and confirmation. There is no evidence of confirmation by the defendant. The letter states:

“The details are attached”

But none was tendered together with the letter. There was no record of the defendants transactions or accounts tendered in court. Section 102 of the Evidence Act provides:-

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

It is the plaintiff who wants this court to find that the defendant is indebted to it in the sum of Shs67,431,287/= The plaintiff has failed to discharge that burden. A claim for special damages must be strictly proved. Exceptionally, however, a fact that is admitted need not be proved. I have already found that the defendant, by his signatures on and for confirmation of the minutes of the meeting held on 17th June 2003, accepts liability for the sum of Shs34,848,900/= which he undertook to pay by 1st July 2003. The cheque he issued in payment of Shd23,894,880/= was dishonoured. No evidence of payment has been adduced by the defendant. I accordingly find that on a balance of probabilities the plaintiff has proved that the defendant is indebted to it in the sum of Shs34,848,900/=

Issue no 3 what reliefs are available to the plaintiffs: the plaintiff prayed for Shs67,231,284/= I have found that the plaintiff has only succeeded to prove that the defendant is indebted to it in the sum of Shs34,848,900/=. The plaintiff is therefore awarded that sum of shs34,848,900/=

The plaintiff also prayed for interest at the rate of 20% per annum from 17th March 2003 till payment in full. There was no justification given why interest should be awarded from 17th March 2003 and no justification has been given for the rate of 20%. By the minutes exhibit P4, the defendant had committed himself to pay the sum of Shs34,848,900/= by 1st July 2003 which he failed to do. So the plaintiff is awarded interest on the decretal sum at the Court rate from 1st July 2003 until payment in full.

Unless Court has reason to order otherwise costs follow the event. I have no reason to order otherwise. The plaintiff is awarded costs of the suit.

Hon. Mr. Justice Lameck N. Mukasa

Judge

23rd April 2010