

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**HCT - 00 - CC - CS - 431 – 2006**

**1. MUSTAPHA RAMATHAN**

**T/A Bombo Wholesalers**

**2. OSMAN KASSIM RAMATHAN**

**(Suing as beneficiary to the estate  
of the late Kassim Ramathan)**



.....

**PLAINTIFFS**

**VERSUS**

**CENTURY BOTTLING CO. LTD**

.....

**DEFENDANT**

**BEFORE THE HON. JUSTICE GEOFFREY KIRYABWIRE**

**JUDGMENT**

The first plaintiff Mustapha Ramathan and the second plaintiff, Osman Kassim Ramathan brought this suit against the defendant Century Bottling Company Ltd, seeking damages for breach of agency, special damages for unpaid sums of money, loss of business and profits, interest and costs of the suit.

The brief facts of this case which are agreed to by the parties are that, on the 29<sup>th</sup> of June 1999, the partnership Bombo wholesalers made of three brothers Mustafa Ramathan, Ahmed Ramathan and Kassim Ramathan executed an agency agreement with the defendant Century Bottling Company Ltd for the distribution of the defendants products. That on the 25<sup>th</sup> of April 2005 one of the brothers Kassim Ramathan registered another entity called M/s Top Bombo wholesalers which in the same year executed a Manual Distribution Centre Agreement (MDC) with defendant Century Bottling Company Ltd. It is the first plaintiff's case that the defendant, based on the 1999 agency agreement, had appointed M/s Bombo wholesalers as their sole agents to supply the areas of Wobulenzi, Busula, Bamunika, Kikyusa, Wobusana, Bwizibwera, Kamira,

Nakaseke, and Kapeeka. That the defendant in 2006 wrongfully and in breach of the agency agreement created other agencies in the plaintiff's demarcated areas of operation and further on went ahead to terminate the agency without notice and this resulted into loss for the plaintiffs. It is the plaintiff's case therefore that the defendant is liable to compensate the plaintiff for his unlawful and illegal actions of terminating the agency agreement.

The defendant in its defence however denied ever terminating any of the agreements that they had entered into with M/s Bombo wholesalers and or M/s Top Bombo wholesalers and averred that it was always willing and able to perform its part of the business relationship. It was the defendant's case that it continuously supported the plaintiffs even where they were performing below expectation in order to help boost their business and that they always kept plaintiffs informed of all the defendant's actions including the fact that it considered the business relationship with M/s Top Bombo Wholesalers as still subsisting even after being given notice of intention to sue. The defendant further averred that the partnership formed on 12<sup>th</sup> January 1970 by and between Ahmad Ramathan, Kassim Ramathan and Mustapha Ramathan ceased trading on 8<sup>th</sup> July 2005. That prior to the cessation of the partnership, the first plaintiff Mustapha Ramathan and Kassim Ramathan created another partnership known as Top Bombo Wholesalers, which on 25<sup>th</sup> April 2005 executed an agency agreement with the defendant. It is the defendant's case that under the contract of 25<sup>th</sup> April 2005, the plaintiffs' failed to achieve the agreed stocking, trading standards, requirements and failed to cease trading in competing products with those of the defendant. That when the defendant's officers required the plaintiffs to remedy the breaches on 6<sup>th</sup> June 2006, the plaintiffs on 7<sup>th</sup> June 2006 deposited Ug.Shs.5,520,000/=(five million five hundred twenty thousand Uganda shillings) onto the defendant's trading account and then verbally placed an order for 600 crates of the defendant products on 13<sup>th</sup> June 2006. The defendant therefore averred that when the defendant made a delivery on 15<sup>th</sup> June 2006 the first plaintiff refused to take delivery of the same. As search by their conduct the plaintiffs showed an intention to and did by their conduct terminate the agency by refusing to take the delivery.

The agreed issues were the following:-

1. Whether the defendant terminated the agency agreement dated 19<sup>th</sup> June 1999 with in the terms of the agreement?
2. Whether the defendant appointed other agents and if so whether it was in breach of the agreement dated 19<sup>th</sup> June 1999?

3. Whether the agency relationship between the plaintiffs and defendant was governed by the MDC agreement dated 25<sup>th</sup> April 2005 and if so whether it was breached by either party?
4. What are the remedies available?

Omongole R. Anguria appeared for the plaintiffs while Ernest Kalibbala appeared for the defendant. The plaintiff called three witnesses namely, Mustapha Ramathan(PW1), Mohammed Muzamil (PW2), and Kijjambu M. Fred (PW3) while for the defendant Andrew Kisamba (DW1) testified.

**Issue No. 1:                    Whether the defendant terminated the agency agreement dated 19<sup>th</sup> June 1999 with in the terms of the agreement?**

Counsel for the plaintiffs submitted that three brothers namely, Mustapha Ramathan, Ahmed Ramathan and Kassim Ramathan formed a partnership in 1970 known as M/s Bombo Whole sellers. However in 1994 Ahmed Ramathan passed away. The partnership however continued under the same trade until 1999 when it executed an agency agreement with the defendant Century Bottling Company Ltd to supply the defendant's products. Counsel for the plaintiffs submitted that in 2005 there was an attempt by Kassim Ramathan to create a sole proprietorship under the name M/s Top Bombo wholesalers. M/s Bombo Wholesalers executed a MDC agreement with defendant contrary to the interest of the partnership and that this created confusion in which documentation related to the business transactions as there were three business names namely M/s Bombo Wholesalers, M/s Top Bombo Wholesalers and M/s Bombo Wholesalers limited all of which were used in the business. Mustapha Ramathan testified that after Kassim died in 2005, he took over the management of the partnership business and that Bombo Wholesalers continued to distribute the defendant's products in the area as its agents. Counsel for the plaintiffs submitted that this agreement was not terminated in accordance with any of the provisions stipulated therein. Mustafa however testified that between the period of June 2005, when Kassim passed away, and June 2006 he formed M/s Top Bombo Wholesaler and continued with it up to when he formed Bombo Wholesale Ltd.

Counsel for the defendant in reply submitted that it was the plaintiffs who terminated the 1999 agreement when they breached the contract by rejecting delivery of the defendant's product on 15<sup>th</sup> June 2006. Furthermore Counsel for the defendant submitted that over time two of the

brothers who were partners died and on the 8<sup>th</sup> July 2005 a notice of cessation of business (Exh D1) was filed with The Registrar of business Names by the plaintiffs. He therefore submitted that the defendants could not have been the reason for the termination of the 1999 agency agreement.

I have reviewed the pleadings and evidence placed before Court. I must say that from the onset that the relationship between the plaintiffs and the defendants on the face of it was confusing because of the numerous names used by the defendants in the business. This in a way is not surprising because at the end of the day the Ramathan brothers were involved in all the said business enterprises.

Counsel for the defendant in his submissions raised the matter that this issue was misplaced and should be reframed by Court pursuant to Order 15 rule 5 of the CPR. This is because under the law and in particular **Section 36 of the Partnership Act**, the death of Ahmad Ramathan in 1994 was sufficient to dissolve the 1999 partnership even before the agency agreement was signed using the same partnership in 1999. He further submitted that even if the partnership business remained operational under the doctrine of continuing over because the said dissolution was not publicly known, the same was definitively dissolved when the second brother Kassim Ramathan died in 2005 leaving Mustapha Ramathan as the only surviving partner. It is the case for the defendant that the operative arrangement between the defendant and the plaintiff was the MDC agreement of 2005.

To my mind the relationship between the plaintiffs and defendant is a question of fact. A review of the business documentation adduced in evidence by the defendant show that the tax invoices from the defendant to the plaintiffs (Exhibit D11) were in the names of M/s Top Bombo Wholesalers, Gulu road, Wobulenzi, 9999 Wobulenzi Uganda. A review of the documents adduced by the plaintiffs in their bundle to the pre trial scheduling memorandum (pages 38-143) all show the invoices to the plaintiffs in the names of M/s Top Bombo Wholesalers. To that extent there are similar documents on both sides. The deposit slips for payment for the defendant's products by the plaintiff in Wobulenzi are sometimes in the names M/s Bombo Wholesalers and other times in the name of M/s Top Bombo wholesalers. The majority of deposit slips however are in the names of M/s Top Bombo wholesalers. The MDC agreement in clause 7.15 provides

*“...This agreement supersedes any prior agreement between the parties whether written or oral and any such prior agreements are cancelled at the commencement date but without prejudice to any rights which have already accrued to CDC (the defendant) under any prior agreement...”*  
(Additions mine)

This in my view means that any prior agreement involving the late Kassim Ramathan with the defendants by this clause was cancelled and this would include the 1999 agency agreement.

It is my finding therefore that the business transactions with the defendant was by M/s Top Bombo wholesalers on behalf of the plaintiffs and therefore at the time of this dispute the 1999 agency agreement was not operational between the parties and therefore its status in this dispute is irrelevant. If there was any agreement that was terminated it certainly was not the agency agreement of 1999. I therefore answer first issue in the negative the defendant did not terminate the agency agreement dated 19<sup>th</sup> June 1999.

**Issue No. 2:                    Whether the defendant appointed other agents and if so whether it was in breach of the agreement dated 19<sup>th</sup> June 1999?**

In light of my finding above that this dispute has nothing to do with the 1999 agreement I also answer this issue in the negative.

**Issue No. 3:                    Whether the agency relationship between the plaintiffs and defendant was governed by the MDC agreement dated 25<sup>th</sup> April 2005 and if so whether it was breached by either party?**

I have already found that the relationship between the parties was governed by the MDC agreement of 25<sup>th</sup> April 2005. In this regard the submission that the said MDC agreement was not properly executed because an officer of the defendant signed on behalf of the Managing Director does stand in light of the business dealings between the parties. The reference to the case of **Fredrick Zaabwe V Orient Bank & Five ors CA No 04 of 2006 (SC)** is distinguishable as that related to sections 147 and 148 of The Registration of Titles Act which this case is not about. In such a situation the Court will rely on the maxim *omnia praesumuntur legitime facta donec probetur in contrarium* (All things are presumed to have been legitimately done until the contrary is proved). In this case both parties treated the signature on behalf of the Managing Director as

binding the defendant. Furthermore the late Kassim Ramathan signed the MDC agreement and in the absence of vitiating circumstances like fraud such an agreement would be bind on him and his business (per **Lord Denning** in **Solle V Butcher** [1950] 1 KB 671 followed).

Again whether there was a breach of the MDC agreement is a question of fact.

It was the submission of counsel for the plaintiffs that the plaintiffs were approved as the sole agent/wholesaler of the defendants products in the demarcated areas of Wobulenzi Busula Bamunika kikyusa Wobusana Bwizibwera Kamira Nakaseke and Kapeeka for a period of 7 years though this was not specifically outlined in the agreement. The testimony of Mohammed Muzamil also confirmed these routes of operation. Mohammed Muzamil further testified that the defendant kept reducing the established area of operation with time and that when he asked the manager and account developer for the reason no answer was ever given. He testified that in Semuto Mr. Kayondo was appointed as the new Manual Distributorship Centre, In Nakaseke Adam was appointed, in Kapeeka Christine in Kikyusa kimeza Fred and in Wobulenzi New Bulemezi Hotel took over. Counsel for the plaintiff also relied on the evidence of Andrew Kisamba (the marketing Manager of the defendant) who testified that new agencies in Kapeeka, Wobulenzi and other areas were created towards the end of 2005.

Counsel for the plaintiff submitted that the defendant appointed the plaintiffs as its sole agent during their course of business and demarcated these areas as their area of operation. Counsel for the plaintiff also submitted that it is the plaintiffs' argument that the defendant breached the agency agreement by way of creating the other agencies without first notifying the plaintiffs of its intention of doing so. Counsel for the plaintiffs further submitted that though the agreement provided that the defendant would continue to deliver its products to its cooler owned customers, in the plaintiffs' demarcated area, the said provision did not give the defendant the power to create other agencies.

Counsel for the plaintiffs referred Court to clause 1.16 of the MDC agreement which defined the termination notice period to mean 7 calendar days. He further referred court to clause 7.5 which provided that notice has to be in writing. It was counsel for the plaintiffs' submission that none of these was complied with. Counsel for the plaintiffs submitted that when the defendant said the plaintiffs breached the requirement of minimum stock the plaintiffs attempted to remedy the same by making an order of 600 crates. However the order was messed up by conflicting

information from representatives from the defendant that the agency had been shut down and yet at the same time a truck of products was dispatched to the plaintiffs.

Counsel for the defendant in reply submitted that clause 2.3.6 of the MDC agreement clearly shows that the defendant had the right to expand or subdivide the territory of the plaintiffs. As to the question of notice period for termination as seven days it was counsel for the defendant's submission that it was effectively the measure of damages if it is found that the defendant breached this particular clause but even then this would only apply where termination of the 2005 agreement was through notice.

Counsel for the defendant further submitted that clause 6.37 of the MDC agreement allowed for termination if plaintiffs breached the 2005 agreement. He submitted that the term requiring adequate stocking by the plaintiffs was breached and it was not remedied because the plaintiffs refused to take delivery of a consignment they had paid for and this position continued until 20<sup>th</sup> June 2006 when the defendant collected its property.

I have addressed myself to the submissions of both Counsels and the evidence before court on this matter. There is no doubt that the relationship between the parties has come to an end. The events that led to the end based on the evidence before Court were between the 6<sup>th</sup> and 20<sup>th</sup> June 2006. The defendant in their defence averred in paragraph 9

*"...The defendant shall aver that when its officers required the plaintiff's to remedy the breaches on the 6<sup>th</sup> June 2006, the plaintiffs, on the 7<sup>th</sup> June 2006 deposited U Shs 5,520,000/= onto the Defendant's trading account and then verbally placed an order for 600 crates of the defendant's products on the 13<sup>th</sup> June 2006. When the defendant made a delivery on the 15<sup>th</sup> June 2006, the plaintiff's refused to take delivery of the same. As such, by their conduct, the plaintiffs evinced an intention to and did by their conduct terminate the agency by refusing to take delivery and by bringing this suit..."*

The testimony on behalf of the defence however did not exactly follow this chronology of events. The closest narration of these events is contained in a Report from the manager of the plaintiffs Muzamil Mohammad to Mustapha Ramathan dated 15<sup>th</sup> June 2006 (Exhibit D 5 page 17 of the scheduling bundle). It states that on 6<sup>th</sup> June 2006 Mr. Andrew Kisamba the Marketing Manager of the defendant and Mr. Saleh the area Manager went to the plaintiff's depot and found

only 128 crates of soda which was too little in their view. They then announced to Mohammad that the depot had been closed as the stock should have been about 600 crates of soda. On the 7<sup>th</sup> June 2006 Mohammad was able to bank Shs 5,520,000/= on the defendant's account for 600 crates of soda. However no soda was delivered immediately; well not until 15<sup>th</sup> June 2006 a week later by which time it appears that a stalemate was in place. Whatever truly transpired may never be known. It could well be that the death of Mr. Kassim Ramathan around this time may have caused some degree of business disruption for the plaintiffs. However what is uncontested is that on the 20<sup>th</sup> June 2006 the defendant through their agent Mr. Julius Okurut collected their property which was on business loan to the plaintiffs. This to my mind is the clearest evidence of termination of the relationship. I am not convinced based on the evidence before me that the defendants could make an order of over Shs 5,000,000/= and just abandon it. It is clear that the plaintiffs were under some degree of pressure by the defendants to improve their performance or face closure. It is this threat that ultimately led to the breakdown of the relationship between the parties. This could also explain the delay by the defendants to supply the 600 crates of soda that was paid for. I am not convinced with the argument that the defendant was just waiting to get enough stock to send a truck to Wobulenzi after all they were pressuring the plaintiff to restock. I therefore find it did de facto terminate the MDC agreement with the plaintiffs and furthermore this was not done in writing contrary to the provisions of the MDC agreement.

#### **Issue No. 4: What are the remedies available?**

The plaintiffs claims Special damages of 404,720,567/=, general damages: for unlawful termination of the agency agreement, breach of agency agreement, loss of business and profits, mental anguish and suffering caused by the defendants unlawful acts, interest, costs and any other relief court deems fit.

There is however a legal technicality here as to the parties. The first plaintiff Mustapha Ramathan sued under the trading name M/s Bombo wholesalers which I have already found has nothing to do with this current dispute. The Second plaintiff Osman Kassim Ramathan sued as a beneficiary of the estate of the late Kassim Ramathan who was the Managing Director of M/s Top Bomb wholesalers. The reality on the ground is that both brothers were involved in both enterprises. Counsel for the defendants also contested that Osman Kassim Ramathan had got letters of administration for his late father's estate after the suit was filed. I take the view that Kassim is an administrator of the estate of his late father and no prejudice has been occasioned to



the defendant by the timing of the letters of administration so he is a correct party to the suit regarding the enterprise M/s Top Bombo Wholesalers. As to Mustapha the evidence shows he was a major player in M/s Top Bombo Wholesalers as well though he sued under the trade name of M/s Bombo Wholesalers. All these were unincorporated enterprises. **Order 1 rule 9 of the CPR** provides

*“... No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it...”*

I shall therefore proceed to deal with the controversy as far as it affects the parties that appeared before me and in particular the owners of M/s Top Bomb Wholesalers as plaintiffs.

The general rule is that for a plaintiff to succeed on a claim for special damages they must be specifically pleaded and strictly proved. Since the defendant does not deny having received Ug Shs 5,520,000 /= (five million five hundred twenty thousand Uganda shillings) being the money the plaintiffs paid for the 600 crates I order the defendants pay the plaintiffs money as money had and received. Since the plaintiffs have been kept out of this money since June 2006, I also order that the said sum of money attract interest at 21% p.a. from the 7<sup>th</sup> June 2006 until payment in full.

As to the other reliefs, the MDC agreement provides that termination may occur on the provision of notice in writing which is 7 calendar days. Further Clause 6.2 provides

*“...on termination of the agreement, neither party shall be liable to the other for any compensation in respect of any exercise of the right to terminate under this clause...”*

This is not surprising given the short notice period but here no notice was given. In this case the measure of damages can not be expected to be large.

The plaintiff made a claim of shs 404,720,567/= inclusive the refund I have already dealt with. As it is I must agree with the submission of Counsel for the defendant that no evidence was lead by the plaintiffs to support this claim. Even the accounts presented by Mr. Fred Kijjambu were for M/s Bombo wholesalers and not M/s Top Bombo wholesalers and no nexus was made between the two entities in the accounts. I therefore cannot rely on them.

That only leaves the head of general damages for breach of the agency. The quantum of general damages was also not well conversed by the claimants. I would therefore give general damages at Shs 5,000,000/= with interest at 8%p.a. from the date of this Judgment until payment in full.

As a result of the way this case was filed with some confusion as to the plaintiffs I will award the plaintiffs 50% of the taxed cost.

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**Geoffrey Kiryabwire**

**JUDGE**

**Date 25/03/2010**

25/03/2010

9:38

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

- Omongole for Plaintiff
- Mpanga for the Defendant
- Rose Emeru – Court Clerk

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**Geoffrey Kiryabwire**

**JUDGE**

Date: **25/03/2010**