

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION
HCT-00-CC-CS-0806-2003

MICHAEL MUELLER
..... PLAINTIFF

VERSUS

AHAMED RAJAB
DEFENDANT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

JUDGMENT:

The Plaintiff, Mitchell Mueller, is a Swiss Businessman resident in Switzerland. He filed this suit against the defendant, Ahmed Rajab, a businessman of Arua Municipality, Arua District seeking to recover special damages, general damages, interest and costs of the suit.

The plaintiff's claim is that on 18th December 2002 he consigned to the defendant an assortment of goods in 1,393 packages for sale. It was a term of the agreement that the defendant was to sell the goods until April 2003, receive 15% Commission from the proceeds of the sale after dedicating the expenses like customs, transport and thereafter remit the balance to the plaintiff. No remittance was made and on 1st June 2003 the plaintiff appointed Said Anya, his attorney to pursue the matter. On 30th June 2003 the plaintiff's agent and the defendant concluded an agreement by which the defendant agreed to give the plaintiff 725 pieces of motor vehicle tyres on 21st July 2002 together with Ugshs550,000/= less the defendant's commission of US\$2200. The Defendant did not perform his part of the agreement, thus this suit whereby the plaintiff claims Shs39,875,000/= being the value of 725 tyres at shs55,000/= each and shs550,000 the value of a computer, general damages, interest and costs.

In his Written Statement of Defence the defendant denies any business relationship with the plaintiff. Contends that it is his relative resident in Switzerland, one Averesto Simon Akela, who had consigned the goods to him. The defendant admits entering into an agreement with Said Anya, though not as an agent of the plaintiff but as a person he was advised to deal with by the

said Averesto Simon. He contends that the plaintiff was not a party to the agreement. Further that 142 tyres were taken by Saidi Anya and 210 are available in Arua collectable by Saidi Anya. That 352 tyres are available but Said Anya has refused to take possession of them. He disputes the price of tyres and put it at Shs10,000/= per tyre, being used and worn out tyres. Claims that he is holding on the sum of shs550,000/= the value of the computer because he had not been paid his US\$2200 which he contends was more than the sum of Shs550,000/=

The plaintiff was represented by Mr. Peter Jogo Tabu. The defendant was represented by Mr. Denis Kwizera, who later withdrew from the conduct of the defendant's case. By consent of both parties a partial consent judgment was on 18th January 2006 recorded by this court in the following terms.

1. Out of shs 40,425,000/= partial judgment is entered in favour of the plaintiff in the sum of shs7,500,000/=, being shs6,950,000 the value of 695 tyres at 10,000/= plus shs550,000 the value of the computer.
2. A sum of Shs3,960,000/= hitherto withheld by the defendant on account of the defendant shall be deducted from the partial decretal sum of shs7,500,000 leaving a balance of shs3,540,000 due and payable by defendant to the plaintiff.
3. That the defendant shall within 7days from the date hereof deliver 30 tyres to the plaintiff in Arua Town.
4. That the suit be set down for hearing on the balance of the claim.

Therefore this judgment is in regard to the remainder of the plaintiff's claim. That is the claim for the balance of Shs36,346,000/= as special damages, general damages, interest and costs. The defendant did not attend court on the subsequent hearing dates and hearing proceeded in his absence.

The issues for court's determination were framed as:-

1. Whether or not there was an agreement between the parties
2. If so, what were the terms of the agreement
3. Whether or not the defendant received any consignment of goods from the plaintiff.
4. Whether or not there was any breach of the said agreement.
5. Whether or not the defendant remitted the proceeds from the goods consigned.
6. Whether the plaintiff is entitled to the remedies sought.

I will handle the first two issues together. Whether or not there was an agreement between the parties? If so what were the terms of the agreement?

A fact is stated to be proved when court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the question or issue in dispute. See sections 101-103 Evidence Act. In the instant case the plaintiff wants this court to find that there was an agreement between him and the defendant. It is he who would fail if no evidence was produced by either party with regard to the agreement. In civil cases, like the instant, the burden of proof is on a balance of probabilities, not as high as in criminal cases. See Sebuliba Vs Cooperative Bank (1982) HCB 129, Miller Vs Ministry of Pensions (1972) 2 All ER 372. To prove the existence of a contract the plaintiff must show that a contract existed between the parties by showing that there was an offer by one party, an acceptance of such offer by the other party and an existence of consideration for the performance of the contract. To determine the issue court has to consider the documents tendered and the parties' conduct See JK Patel Vs Spear Motors Ltd SCCA No 49 of 1992 (1993) VI KALR 85.

The plaintiff is a Swiss resident in Switzerland. He did not testify in court. His case relied on the evidence of two witnesses, Saidi Anya (PW1) and Kelili Azabo (PW2) and the documents tendered as exhibits. PW1, who described himself as a friend of the plaintiff, testified that he came to know about the agreement between the plaintiff and the defendant when the plaintiff requested him to find out from the defendant about the funds the defendant was supposed to send to the plaintiff in respect of the goods the plaintiff had consigned to the defendant for sale. The plaintiff requested the witness to recover the money from the defendant. The witness testified that he contacted the defendant who gave him the documents relating to the goods. The document was a Bill of Lading which was received in evidence as exhibit P1. Though the defendant denies any business relationship with the plaintiff, the Bill of Lading names Mike Mueller' the plaintiff, as supplier of the goods and the defendant, Ahamed Rajab, as the consignee. That is evidence of a dealing between the plaintiff and the defendant. There is no evidence adduced of any dealing between the defendant and Averestor Simon Aketa named in the defendant's Written Statement of Defence.

The consignment was one container loaded at Antwerp to be discharged at Mombasa. The container contained various items, among them 1374 used tyres and computers. Parties are bound by their pleadings See Nairobi City Councils Vs Thabit Enterprises Ltd (1995-1998) 2 EA 231, Galaxy Paint Co Ltd Vs Falcom Grounds Ltd (2000) EA 385. In his Written Statement of Defence the defendant does not dispute the consignment of goods to him but only contend that the goods were of the said Averestor Simon Aketa.

PW1 testified that when he contacted the defendant for the money he was not given any money to send to the plaintiff. The witness therefore reported the matter to the Business Committee in Arua. This was a Committee chaired by PW2. Both PW1 and PW2 testified that the committee

was set up to settle disputes among the business community in Arua. Before the Committee, an agreement was signed between PW1 and the defendant whereby the defendant agreed to return 725 tyres to PW1 and pay a sum of shs550,000/= for one computer. The witness agreed to pay to the defendant a sum of US\$2200 for his labour from Mombasa to Ariwara. In his Written Statement of Defence the defendant pleads:-

“15. As to shs550,000/= value of the computer, the defendant states that he is holding on the money because he has not been paid his US\$ Dollars 2200 which far exceeds Shs550,000/=.”

Despite the denials in his pleadings the parties in the course of the proceedings entered a consent partial judgment whereby the defendant agreed to pay shs6,950,000 as value of 695 tyres at shs10,000/= each plus shs550,000/= the value of the computer. It was also agreed that the defendant retains the sum of shs3,960,000/= withheld by the defendant as his due. The defendant also agreed to deliver 30 tyres to the plaintiff.

The above evidence shows that a consignment of various goods **were** shipped from the port of Antwerp by the plaintiff to the port of Mombasa consigned to the defendant. The defendant received and took possession of the goods consigned. The proceeds from the sale of goods were to be remitted to the plaintiff by the defendant less the defendants’ expenses and commission. Considering the testimony of PW1 and PW2, the documents tendered and the defendant’s conduct together with his pleadings I find that there was an agreement between the plaintiff and the defendant. The terms of the agreement were that the plaintiff was to ship a consignment of goods to the defendant. Which was done and the goods consigned contained, among other items, tyres and computers. The defendant was to clear the goods and transport them to Arua for sale. The defendant was to remit to the plaintiff the proceeds of the sale less his expenses and commission.

Issue No 3: Whether or not the defendant received any consignment of goods from the plaintiff. The Bill of Lading, Exhibit P1, shows that a container of various goods was consigned by the plaintiff to the defendant. The defendant’s pleadings, the agreement entered into between the defendant and PW1 (exhibit P3) and the consent partial judgment show that the defendant received the consigned goods which included used tyres and computers. So the third issue is resolved in the affirmative.

Issue No 4 and 5 whether or not there was any breach of the said agreement and whether or not the defendant remitted the proceeds from the goods consigned will be considered together.

PW1 testified that he was requested by the plaintiff to contact the defendant about the proceeds of the sale. That there were no payments made or sent to the plaintiff. In the effort to get the payment from the defendant the plaintiff reported the matter to the Business Committee in Arua.

Before the committee an agreement, exhibit P3, was executed between the defendant and PW1 whereby the defendant agreed to return the tyres and pay a sum of shs550,000/= for the computer. Out of the 1374 tyres consigned, the defendant by that agreement agreed to return only 725 tyres. Both PW1 and PW2 testified that on the agreed due date the defendant did not deliver the tyres or the money. The above evidence shows that the defendant had failed to fulfill the terms of the agreement between him and the plaintiff. He further failed to satisfy his obligations under the supplementary agreement between him and the plaintiff's agent (PW1), I therefore find that the defendant had breached the agreement between him and the plaintiff and had not remitted the proceeds of the tyres and computer consigned to him.

Issue no 6. Whether the plaintiff is entitled to the remedies sought?

The plaintiff prayed for special damages in the sum of shs40,425,000/= made up as follows:

- (i) Value of 725 tyres at Ughs55,000 per tyre = shs39,875,000/=
- (ii) Value of one computer = shs550,000/=

It is settled law that special damages must not only be pleaded but also must be proved. See *KCC Vs Nakaye (1972) EA 446*. Counsel for the plaintiff submitted that it has been proved that the defendant owes the plaintiff Shs36,465,000 and prayed for the sum to be awarded as special damages.

By consent of both parties a partial consent judgment was entered in favour of the plaintiff in the sum of 6,950,000/= being the value of 695 tyres at shs10,000/= each plus shs550,000 for the computer.

The issue therefore is whether the plaintiff is entitled to an award of special damages in a further sum of shs36,465,000/= in respect of the tyres. In paragraph 14 of his Written Statement of Defence the defendant pleads that the price of shs 55,000/= per tyre is misconceived as the tyres were used and worn out and unsuitable for this country and that this explains why they could not be sold in Congo, Arua and Kampala where the maximum price record was 10,000/= per tyre. The price of Shs55,000/= per tyre is therefore disputed. It has to be strictly proved and the burden lies on the plaintiff.

In the partial consent judgment the defendant agreed to pay for 695 tyres at shs10,000/= each and to return 30 tyres. 695 plus 30 tyres makes 725 tyres. Therefore the figure of 725 tyres is admitted. The defendant admits a value of shs10,000/= per tyre.

By the said consent judgment, recorded on 1st January 2006, the defendant agreed to deliver 30 tyres within 7 days to the plaintiff at Arua town. The 30 tyres were to be delivered in kind. PW1 testified on 17th October 2006. He did not state whether the 30 tyres had yet been delivered or

not. If not yet delivered, that did not call for further judgment. The judgment in respect of the 30 tyres in such event was only subject to execution.

The defendant by the partial consent judgment agreed to pay shs10,000/= per tyre in respect of 695 tyres. If the agreed price for each tyre was shs55,000/= then that, if proved, will entitle the plaintiff to judgment in his favour for a further sum of shs45,000/= per tyre which would amount to a total sum of shs31,275,000/= for the 695 tyres.

PW1 testified that the plaintiff set him a price list dated 28th July 2004. The price list was received in evidence as exhibit P2. It was addressed to the witness and on it the price per tyre was indicated at US\$25. According to the witness the exchange rate per dollar then was shs2000 which put the price per tyre at shs50,000/=. The witness testified that shs5000/= per tyre was profit to be earned by him and agreed upon with the plaintiff. The witness' profit cannot be claimed or recovered by the plaintiff. Therefore the additional shs5,000/= per tyre cannot be recovered. The goods were consigned to the defendant on 18th December 2002 vide the Bill of Lading in exhibit P1. PW1 admitted that exhibit P1 did not indicate the prices for the goods consigned. There was no price list sent to the defendant or any evidence adduced of the prices agreed upon between the plaintiff and the defendant. The price list in exhibit P2 was sent to the witness and not to the defendant and was sent on 28th July 2003. That was about seven months after the date the consignment had been shipped. The agreement between the witness and the defendant, exhibit P3, does not mention the price of the tyres. The plaintiff has failed on a balance of probabilities to prove that the price for each tyre agreed upon between the plaintiff and the defendant was shs55,000/= per tyre. Therefore the plaintiff's claim for additional special damages in the sum of shs36,465,000/= fails.

The plaintiff prayed for general damages for breach of contract. The plaintiff's counsel prayed for an award of general damages of shs36,465,000/= the equivalent to the value of the goods claimed. The ordinary remedy for breach of contract is general damages. See *Hadley Vs Baxendale (1854) 9 Exch. 341* However general damages for breach of contract are compensatory for the loss suffered and inconveniences caused to the aggrieved party. The intention is to put the plaintiff back into the same position as he would have been in had the contract been performed and not a better position. Apart from loss of expected proceeds from the sale of tyres testified to by PW1, the plaintiff did not testify and did not adduce any evidence to show any loss or inconveniences suffered by him as a result of the breach of the contract. It is a settled principal of law that a plaintiff who cannot prove actual damage or loss for breach of contract is only entitled to nominal damages. See *John Kawanga & Anor Vs Stanbic Bank (U) Ltd (2002 – 2004) UCL 262*. The plaintiff must have inevitably been economically affected by the defendant's failure to remit the proceeds from the sales made by him. The plaintiff is awarded general damages of shs3,475,000/= as sufficient compensation.

The plaintiff prayed for interest on the special damages at the rate of 25% per annum from the date of breach till payment in full. Section 26 of the Civil Procedure Act lays down the principles which govern Court in awarding interest. Counsel for the plaintiff cited *Yousuf Abadallah Gulamhusein Vs The French Somaliland Shipping Co Ltd (1959) EA 25*. In that case the prayer was for interest at 6% from the date of filing the suit until the date of payment. Court held that the Court has a discretion to make that order for interest. Court was considering the provisions of section 32 of the Civil Courts Ordinance which was exactly in the same terms as sub-section (2) and (3) of section 26 of the Civil Procedure Act. However, the prayer in the instant case is for interest from the date of breach till payment, which is interest prior to the filing of the suit. Such prayer is covered by sub-sections (1) and (2) of section 26 which provides:

“Where an agreement for the payment of interest is sought to be enforced and the court is of the opinion that the rate agreed to be paid is harsh and **in conscionable** and ought not to be enforced by legal process the court may give judgment for the payment of interest at such rate as it may think just.

(2) Where and in so far as a decree is for payment of money, the court may in the decree order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such a rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

The above two sub-sections read together show that court has the discretion to award interest on the principal sum prior to the filing of the suit but there should have been an agreement on interest between the parties which is sought to be enforced. In the instant case no evidence has been adduced of any agreement on interest therefore the prayer fails.

The plaintiff also prayed for interest at the court rate from the date of judgment till payment in full. Under section 26 of the Civil Procedure Act court has the discretion to award the interest sought. So the plaintiff is awarded interest at the court rate on the sum of shs7,500,000/= from the date of the partial consent judgment until payment in full. The plaintiff is further awarded interest on the general damages at the court rate from the date of this judgment until payment in full.

The plaintiff prayed for costs. Unless otherwise ordered by court costs shall follow the event. See section 27 of the Civil Procedure Act. I have no reason to order otherwise. The plaintiff is

awarded the cost of this suit. Finally judgment is entered in favour of the plaintiff in the following terms:

1. Shs3,475,000 general damages
2. Interest at the court rate on the partial consent judgment decretal sum of shs7,500,000 from the date of the partial consent judgment until payment in full
3. Interest at the court rate on the general damages from the date of this judgment until payment in full.
4. Costs of this suit

Hon. Mr. Justice Lameck N. Mukasa

Judge

26th March 2010