

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

HCT - 00 - CC- CS - 280 - 2005

JAS PROJECTS LTD. .... PLAINTIFF

VERSUS

EMIRU ANGOSE ..... DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

## **J U D G M E N T**

The plaintiff JAS Projects Ltd filed this suit against the defendant Emiru Angose for recovery of the sum of USD 302,435, general damages, interest and costs.

The case for the plaintiff company is that the parties executed a memorandum of understanding (M.O.U) on 1<sup>st</sup> August 1997, by which the plaintiff appointed the defendant as its agent and the defendant agreed to run the plaintiff's business of dealing in various merchandise at the plaintiff's branch at Goma in the Democratic Republic of Congo (DRC), in consideration for which the defendant would earn a commission of 20% of the profits of the merchandise sold.

The plaintiff avers that the M.O.U provided that the plaintiff would provide all the merchandise to be sold at the said premises in Goma DRC but retain ownership thereof, and that the defendant would on receipt of the goods at the said premises, sell them and remit the proceeds to the plaintiff at the Kampala offices to enable the plaintiff to secure more goods and to account for the said goods received. The plaintiff avers that from September 1997 to December 2001, the plaintiff supplied

various goods to the defendant in Goma but the defendant failed to remit back to the plaintiff company monies amounting to USD 302,435.

The plaintiff also avers that upon request for the said monies from the defendant, the defendant allegedly claimed that goods worth USD 176,405 had been looted from the plaintiff's Goma stores following a volcano eruption on the 17<sup>th</sup> January 2002 and the defendant filed a report with the Goma police which the plaintiff claims was false.

Furthermore, that following the defendant's failure to pay the said monies, the plaintiff reported a case of breach of trust to the Uganda Police and the defendant was arrested, but the defendant provided an accountability indicating that the plaintiff's managing director had received certain monies amounting to USD 126,030, which according to the plaintiff was false.

The defendant in reply denied the allegations in the plaint and contended that the defendant does not owe the sum of USD 302,435 to the plaintiff, and that there is no evidence by the plaintiff to support this claim. The defendant further avers that the defendant earned his 20% commission based on the profits of the sales of the plaintiff's goods but the plaintiff refused to pay the same. Furthermore, that at all material time, the defendant received proceeds of the sale of goods from Goma, and accounted for them all and that all the records are with the plaintiff. The defendant further contended that the police reports from the National Police Station of Goma to the contrary were made long after Idunga Basindila an employee of the plaintiff company reported the incidents of looting to the same police in Goma. Furthermore, that Muhamed Abubaker the plaintiff's director was supervising the plaintiff's transactions of sale at the plaintiff's stores on Plot 19/5 Goma DRC full time, was aware of all of this.

The defendant further averred that the Ugandan Police discharged the defendant of the criminal allegations made against him, and that the plaintiff's managing director Muhamed Abubaker Mohamed, was using these allegations to avoid paying the defendant his 20% commission, which amounted to USD 45,176, based on an audit report which provided an accountability of the transactions for the period ended 31<sup>st</sup> December 2002.

The defendant also counterclaimed against the plaintiff the sum of USD 45,176 being the commission payable by the plaintiff to the defendant at a rate of 20% of the profits on the goods sold, pursuant to the M.O.U. the defendant averred that this sum was ascertained from the audit report for the period ended 31<sup>st</sup> December 2002. The defendant averred that the plaintiff has at all material times refused to pay the said sum.

In reply to the counterclaim, the plaintiff contended that the defendant expended user money amounting to USD 355,643.9 on himself which was not authorised the equivalent of 20.4% of the total goods is sold was over the agreed commission. Furthermore, that the defendant was not authorised to expend on expenses other than taxes as they together with the personal expenses were chargeable on the agreed commission.

The issues raised for trial were:

1. Whether the report made by Idunga of looting goods worth USD 176,045 was false.
2. Whether Mohamed Abubaker Mohamed's signatures for USD 141,030 were forged.
3. Whether the defendant is liable to pay the sum claimed by the plaintiff.
4. Whether the defendant is entitled to the counter-claim.

5. What remedies are available to the parties?

At the trial, the plaintiff was represented by Mr. N. Byamugisha, while the defendant was represented by Mr. Kanyunyuzi. The plaintiff called five witnesses; Mr. Kadume Byambu (PW1) a businessman, Mr. Kolombo Abdullah (PW2), a businessman, Mr. Mohamed Abubaker Mohamed (PW3), the Managing Director of the plaintiff, Mr. Apollo Ntarirwa(PW4) a government analyst and Detective Corporal Wabwenyo Cornelius Isaac (PW5) a Police Officer attached to Kira Police Station, working with the CID. The defendant called three witnesses; Mr. Emiru Angose Gida, the defendant (DW1), Mr. Orach Walter (DW2) an auditor, and Eugene Ngarambe (DW3) the cashier of the defendant.

**Issue One: Whether the report made by Idunga of looting goods worth USD 176,045 was false.**

The background to this issue is that during the period in contention the business which was the subject of the MOU in this case was affected by events that followed the eruption of a volcano on the 17<sup>th</sup> January 2002 in the Goma area. In particular the shop which was run by the defendant on behalf of the plaintiff company was completely looted following the said volcano eruption. It was therefore not possible for the defendant to continue the business as envisaged by the MOU and therefore remit monies from sales to the plaintiff company which is subject of this suit. It is the case for the defendant that the store accountant Mr. Idunga Basindila made a “pro-justitia” (a statement which is an agreed document for purposes of this trial) at the National Police Station of Goma dated 7<sup>th</sup> March 2002 where he reported the looting of the shop and the loss of merchandise worth USD 176,405.

The plaintiffs dispute this allegation of looting of the shop. Counsel for the plaintiff submitted that the evidence of Kolombo Abdulla (PW2), Mohammed Abdullah Mohammed (PW3) and the report from the secretary of the Governor of Nord-Kivu was to the effect that that there was no looting in the premises of JAS Projects.

Kolombo Abdulla, a business man residing in Goma town about 20 meters from the JAS premises testified that there was no looting from the stores of JAS Projects. Abdulla testified that the premises were secure even after the volcano eruption and that the defendant and his son returned to Goma after the said eruption and ferried the goods away in Lorries. Furthermore, that it was the first time that Mr. Kolombo had seen the defendant carrying the goods away, in the course of his business.

Mohammed Abdullah Mohammed (PW3), the Managing Director of plaintiff testified that when the volcano eruption occurred the defendant called him and informed him that they were leaving the shops closed. After two days the defendant called and informed him they had returned to Goma and that the defendant had checked the store and there was no problem with it although a lot of property and shops had been destroyed by the volcano. Mr. Mohammed further testified that he met the defendant after one week and 2 days of this report, in Kisenyi- Kampala but he never saw him again. Furthermore, that Mr. Mohammed went to Goma himself in 2005 and made a complaint to the criminal investigation office Nord Kivu in Goma which investigated the alleged looting and found that none occurred at all. A copy of that report from the criminal investigation Officer Mr Kababa Kizungu dated 23rd June 2005 to that effect was also accepted in evidence as an agreed document by the parties.

Mr. Mohammed testified that Mr. Kolombo informed him that the defendant and his son (nephew) had taken away the goods with lorries and closed the shop.

Mr. Mohammed testified that he saw the defendant much later again in Kampala on Wilson Road, where the defendant has an office with computers and he filed a complaint against the defendant at the Central Police Station in Kampala. Furthermore, that Mr. Mohammed went to the Governor's office in Goma to find out if there had been any looting at the plaintiff's company or if any complaint had been made in relation to the alleged looting, but he was informed that there was no looting in the town of Goma. In this regard Mr Mohammed obtained a letter (which was an agreed document by the parties) dated 23<sup>rd</sup> June 2005 from the Secretary to The Governor Province of Nord Kivu which indicated that no looting took place in Goma after the volcanic eruption in 2002.

On the other hand, Mr. Ngarambe Eugene, the cashier of the defendant, who was appointed by the defendant to be in charge of sales, testified that after the volcano, he returned to Goma with the son of the defendant to check on the plaintiff's store and found that all the goods had been stolen. Furthermore, that Mr. Ngarambe was called by Mr. Idunga to go and report the matter to Police.

I have considered the evidence and the submissions of both counsels in relation to this issue for which I am grateful.

The evidence around this issue is problematic. Whereas the MOU was made in Uganda it related to business to be carried out in another country namely the DRC. Secondly none of the persons who authored the official documents from Goma in the DRC came to testify in Court. It was also not possible to compel them to come to testify in Uganda.

The Pro- justitia or statement which was made pursuant to the complaint of the alleged looting by Mr. Idunga (Exhibit 2) shows that he Mr. Idunga Basindila, on 27<sup>th</sup> March 2002 reported the incident of looting that occurred on the night of Thursday

7<sup>th</sup> to Friday 18<sup>th</sup> Jan 2002. This was about two months after the volcano erupted. In the said statement the police found as follows:-

*"...We left our offices at 10O'clock am on foot and reached the place at 10.30 am accompanied by (or escorted by) the policeman named Bushake together with Mr. Idunga Basindila.*

#### REVELATION (FINDING)

*We found an empty store with a broken padlock. There was nothing inside."*

On the other hand the pro- justitia or statement, which was made three years later on the 27<sup>th</sup> June 2005 by criminal investigation officer in Nord Kivu after Mr. Mohammed had made a complaint to the Congo Police states that:-

*"...during the investigations, Mr. Kolombo Abdul who resides opposite JAS PROJECTS Enterprises informed us that these stores were never looted, at the time of the volcanic eruption, Mr. EMIRU ANGOSE fled to Rwanda for two days, after which he returned to Congo and removed all the merchandise from JAS PROJECTS Enterprises stores.*

*According to the information from other people living near JAS PROJECTS Enterprises whose anonymity is preserved for security reasons, told us that Mr. EMIRU removed all the merchandise from JAS PROJECTS Enterprises stores and transported it to Rwanda after the volcanic eruption.*

*After the crime, the later went to Uganda where he is engaged in other commercial activities, abandoning the JAS PROJECTS building at Goma and without even informing his boss... "*

There is also a communication from Mr. Charles Kabunga, the Secretary to the Governor, province of Nord-Kivu made on 23<sup>rd</sup> June 2005 to the effect that,

*“...this regards the allegations made by certain persons with bad intentions and to clear all controversy following the volcanic eruption that occurred in the town of Goma on the 17<sup>th</sup> January 2002. Apart from the effects of the lava and assets that were washed away by the lava which covered the clearly identified part of the town, no looting took place in the town...”*

One wonders why it took the plaintiffs three years to investigate the alleged looting of merchandise worth that amount of money. Since the head suit was filed in March 2005 it appears that these investigations took place only after the filing of this case.

Even though the authors of these documents could not come to Court because their evidence could not be procured without unreasonable delay or expense section 30 (b) of the Evidence Act provides that the statements made there in are relevant facts though they are in contradiction to each other.

The truth may never be fully ascertained in these circumstances. This notwithstanding Mr. Kolombo, whose testimony was relied upon to write the statement of 2005 that no looting took place, came to testify in Court. Mr Indunga on the other hand who made the report of the looting did not testify. This gives greater credibility to the later reports of 2005.

The burden of proof in civil matters lies on the plaintiff to prove his case on the balance of probabilities as held in the case of **SEBULIBA V COOPERATIVE BANK** [1982] HCB 129. The plaintiff has done a better job at discharging this burden and I find that the evidence to support the alleged looting is insufficient. On a balance of probabilities I find that the report made by Idunga of looting goods worth USD 176,045 as unreliable.



**Issue Two: Whether Mohamed Abubaker Mohamed's signatures for USD 141,030 were forged.**

The basis for this issue is a manually recorded splendid book which showed money sent by the defendant to the plaintiff's Director Mr. Mohammed against which he would sign as acknowledgment of receipt of the money indicated therein. Both parties accept this book and the methodology used to record the money shown therein as their method of accountability.

Mr. Mohammed however denies 7 entries between 16<sup>th</sup> August 1999 and 29<sup>th</sup> November 1999 therein amounting to USD 141,030 as signed by him because his signature was forged. This is because the loops in his alleged signature in those entries are fewer than what he uses.

The defendant denies any forgeries. Counsel for the defendant submitted that the defendant was charged in a criminal case in Buganda Road court in this regard and the case was dismissed. Furthermore, that even the specimen signatures provided were deliberately different from those on record, because there were about seven loops in the latter while the signatures agreed to by Mr. Mohammed in the splendid book had just about two or three loops. Counsel for the plaintiff also submitted that after sometime, the plaintiff continued signing in the splendid book without complaining about the forged signatures.

Counsel for the plaintiff relied on the evidence of the Government analyst Mr Ntarirwa and Detective Corporal Wabwenyo Cornelius Isaac and maintained that the signatures were forged.

Mr. Mohammad testified that the defendant showed the police at CPS the splendid book and claimed that is where he had been signing for the money. According to the testimony of Mr. Mohammed, some of the signatures in the splendid book (from 16<sup>th</sup>

August 1999 to 29<sup>th</sup> November 1999) were different from his signature. He made a complaint to the Police and the Police took his specimen signatures and investigated the alleged forgeries.

Mr. Apollo Ntarirwa the Government analyst, made a laboratory report on 28<sup>th</sup> October 2008. He testified that he used earlier signatures in the splendid book to compare with the specimen sample because the author had admitted to them as being his. According to the report, he found as follows,

*“...the questioned signatures were observed to be generally written at different speed and to differ from the specimens in a number of characteristics. These include the construction of the middle part, areas of reduced or stressed pen pressure and the slope of the signature.*

*In my opinion there is no evidence to show that the writer of the specimens to have written the questioned signatures in the splendid book Exh K...”*

A look at the all the signatures in the splendid book whether contested or not however show a significant from that in the specimen signature of Muhammad that was supplied to the police for examination. In cross examination, Mr. Ntarirwa explained this difference in the specimen signature as follows;

*“...I took it to be a variation because the writer’s signatures (sic). Some writers use lengthy signatures for certain purposes and then shortened ones for different purposes, and that is how I took it. I took it as both being genuine since I was told that the writer admits both...”*

These assumptions to my mind are not backed by any evidence. I agree with counsel for the defendant that looking at the specimen signatures, there are clearly more loops than those in the admitted signatures in the splendid book and clearly, the

signatures are different. This means that there are three not just two signatures in contention. I am therefore unable based on the evidence before court to agree with the assumption of government analyst that the writer had two signatures, in absence of any evidence to support the same. I also take caution that this splendid book is not a standard accountability document and therefore its interpretation is not that straight forward. It would have been much easier if receipts and bank documents were used in such accountability.

I therefore cannot find on the evidence before me involving three different signatures that Mr. Mohammad's signatures for the sum of USD 141,030 was forged.

**Issue three; Whether the defendant is liable to pay the sum claimed by the plaintiff.**

Counsel for the plaintiff submitted that under the MOU the defendant was supposed to remit all the profits made in Goma to the plaintiff company and thereafter get a commission of 20% but did not do so. That there was USD 317,435 due to be remitted but this was not done and therefore this is the outstanding money to be paid. Counsel for the defendant did not submit much on this amount.

I must say that given the length of this trial the submissions on this issue were not very helpful. This claim is a special damage and not only must be specifically pleaded but must also be strictly proved. This onus must lie with the plaintiff. Apart from contesting the claim of goods that were looted worth USD 176,045 in Goma and USD 141,030 was allegedly accounted for using forged signatures there is no other independent evidence as to how this USD 317,435 is made up of. The documents presented to court at best are very scanty showing a limited amount of transparency in the business dealings between the parties to the case. Even for the goods allegedly

looted from Goma there was no stock ledger presented to court for that matter. It is unreasonable for the parties to expect the Court to make out their case for them based on very scanty book keeping. In this case USD 302,435 was claimed in the plaint and I find it is not properly particularized or strictly proved as required by law. I accordingly do not uphold the claim and find that the defendant is not liable to pay the claim.

**Issue four; Whether the defendant is entitled to the counter-claim**

The defendant counter claimant seeks to recover USD 45,176 from the plaintiff company in unpaid commissions. The basis for this claim is a report by JR & Associates Certified Public Accountants dated 8<sup>th</sup> September 2005 for the period (1997- 31<sup>st</sup> December 2002).

The defendant testified that the plaintiff did not pay him as agreed in the M.O.U and is demanding about 47,000 dollars, which was the 20% commission from the goods he sold. Mr. Orah Walter, an auditor with JR and Associates testified that he was instructed by the defendant to reconcile transactions between 1997 to 2002. Furthermore, that he made a report and also Kiwanuka and Company the plaintiff's auditors made another report. Mr. Orach testified that the two reports were different so the accountants and both counsel in this matter met and agreed to come up with a joint report but Kiwanuka and Company could not make the opinion because they did not have an appointment letter. JR and Associates prepared a financial statement between 1997 to 2001 and found that the defendant is entitled to \$74,959.6.

On the other hand, counsel for the plaintiff submitted that a counterclaim is substantially a cross suit and should be treated as an independent action for all

intents and purpose. Furthermore, that a counterclaim for special damages must be specifically pleaded and strictly proved.

In his testimony, Mr. Mohammed denied the defendant's claim for commission and stated that all the monies he received from the defendant were after commission had deducted.

I have reviewed the report for the period 1997-2002 31<sup>st</sup> Dec 2002, made by JR and Associates and it shows that the total balance of commission to be paid to the defendant is USD 45,176. This is clearly different from what is pleaded in the counter claim and the testimony of Mr. Orach from the same company who claims the balance is USD 74,959! I also find the said audit report strange because it is stated to be made

*"...on the basis of information provided by Mr. Emiru Angosse (the defendant)..."*

There is absolutely no reference to the source material used in this case as is usual in such audits. Indeed Mr. Orach even testified that he did not even sight documents such as delivery notes. How can such a claim be said to be strictly proved in the above circumstances? Like the claim in the head suit this special damage too has not been proved according to the standard required in law and I shall not award it. I therefore, issue four is answered in the negative.

**Issue five; What remedies are available to the parties?**

As it stands both the monetary claims in the head suit and counter claim are not proved. The other findings do not in themselves allow for any other relief so claimed. I accordingly dismiss the head suit and counter claim. This was a long but weakly put together case regarding evidence on both sides. Given the number of interlocutory

applications that were filed I find that the true substance of the case was lost in too much legal technicalities. In the circumstances I order that each party bear their own costs

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Justice Geoffrey Kiryabwire

**JUDGE**

Date: \_\_\_\_\_

27/02/2012

9:35

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

- Byamugisha for Plaintiff

**In Court**

- Mr. Mohammed for Plaintiff company
- Rose Emeru - Court Clerk

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**Geoffrey Kiryabwire**

**JUDGE**

**Date: 27/02/2012**