

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[COMMERCIAL DIVISION]**

**CIVIL SUIT NUMBER 229 OF 2009**

**SUN AIR LTD)..... PLAINTIFF**

**VS**

**NANAM TRANSPET CO LTD)..... DEFENDANT**

**BEFORE HON. MR JUSTICE CHRISTOPHER MADRAMA**

**RULING**

The plaintiff's suit against the defendants jointly and severally is for recovery of **USD 300,000** the contract value of maize supplied to the Government of Southern Sudan, general damages, interest and costs.

The plaintiff avers that the plaintiff on 26<sup>th</sup> August 2008 executed an international transportation of goods by road contract from Kampala to Torit- Southern Sudan with the defendants by which the plaintiff contracted the defendant to transport 40 tonnes of maize. The maize was loaded on the defendant's trucks and duly delivered to the beneficiary company; Bilpam Pharmaceutical Ltd and the defendants purported to be agents of the plaintiff and were paid the purchase price of the said maize amounting to USD 300,000 but the defendants refused/neglected to deliver the payment to the plaintiff and converted the money to their own use.

The WSD of the defendants denies the allegations in the plaintiff and pleads that the defendants had never been or purported to be agents of the plaintiff for purposes of receiving the said money from Bilpam Pharmaceutical Ltd and that they have never received the said money at all. Furthermore, that there has never been any agreement between the parties for the defendant to deliver the said money to the plaintiff.

On the 2<sup>nd</sup> of February 2012 when the matter came for a scheduling conference/pre-trial hearing, the plaintiff was represented by Counsel Ngobi Anthony while the defendant was represented by Counsels David Nyote and Robert Piwang. The defendant's counsels intimated that they would raise a preliminary objection to the suit and the court allowed counsels to address court in written submissions on their objection to the suit.

Counsel for the defendant in his written submissions, submitted that the plaint offends O.7 r 1 (e) and (f) of the Civil Procedure Rules. His written submissions are that under O.7 r 1 (e), it is a mandatory requirement that a plaint contains particulars constituting the cause of action and when it arose. The plaintiff's plaint does not state who actually paid the claimed USD 300,000 to the defendants, how it was paid, where it was paid from and when, and who of the defendants received the money. Counsel submitted that because of failure to state the aforesaid, the plaint fails to disclose a cause of action as well as when it arose as required by the rules. Furthermore the plaint does not raise any legal grievance against the defendants, it does not state whether the defendants breached any contract with the plaintiff or committed any tort, and that one would assume that the intention of the plaint was to show that the defendants committed conversion, but money cannot be goods or chattels so as to be a subject of the tort of conversion. Counsel for the defendant prayed that the plaint be rejected under O. 7 r 11 (a) of the Rules. Counsel further submitted that the plaint offends O. 6 r 30 of the Civil Procedure Rules for failure to disclose a reasonable cause of action, and prayed that the plaint be struck out with costs.

The second objection is that the plaint offends O.7 of the Civil Procedure Rules, due to the fact that it does not state the facts showing that the court has jurisdiction to try the suit. Counsel submitted that in paragraph 2 of the plaint, the plaint describes the defendant as Sudanese and that the 1<sup>st</sup> defendant is registered and carries on Business in Sudan. Furthermore, that in paragraph 4 (c), the plaint alleges that the defendants were paid the suit money, without stating who paid them and from where; and that in paragraph 8, the plaint states that the cause of action arose within the jurisdiction of this honourable court. Counsel for the defendant submitted that the aforesaid facts do not confer jurisdiction on

this court nor do they show that this court has the jurisdiction. Counsel relied on the case of **Assanand and Sons (Uganda) Ltd V. East African Records Ltd** (1959) EA 360.

In reply, counsel for the plaintiff submitted that the plaint discloses a cause of action jointly and severally against the defendants as it satisfies the three essential elements to support a cause of action as set out in the case of **Auto Garage vs. Motokov** [1971] EA 514. Counsel for the plaintiff referred to paragraphs 3 and 4 of the plaint, and submitted that the reason why the plaintiff employed the services of the defendant is that the second defendant assured the plaintiff that it would deliver the said maize and secure payment for the same as the second defendant is a director in the first defendant company and an official in the army of Southern Sudan. Furthermore, that the said maize was to be delivered at the premises of a company known as Bilpam Pharmaceutical Ltd, which was contracted by the Government of Sudan to receive the said consignment on its behalf and indeed the defendants delivered the said maize to the company and purportedly acted as agents of the plaintiff to secure and receive the full payment on behalf of the plaintiff. Counsel for the plaintiff submitted that the defendants do not dispute that they were contracted to deliver the said maize but only deny having received the said purchase price, which raises triable issues, which the court ought to decide upon. Furthermore, that the invoice was raised by the plaintiff and delivered to the Government of South Sudan by the defendants who received the payment of USD 300,000 from the Government of South Sudan through Bilpam Pharmaceutical Ltd, and to date, they are retaining the same without justifiable reason. Counsel for the plaintiff further submitted that paragraph 6 of the plaint clearly states that the defendants were duly paid money to transport the said maize and no sum remains owing to the plaintiff but as a result of dubious character of the second defendant, the said purchase price was paid to the first defendant and to date the same remains in their custody to the detriment of the plaintiff.

Counsel for the plaintiff cited O.7 r 1 of the CPR and submitted that the plaint raises legal grievances jointly and severally against the defendants as stated in paragraphs 3, 4 (a), (b) and (c) of the plaint which fulfils the requirements of O.7 r

1(e) of the CPR. Counsel submitted that the plaintiff entered into a contract with the defendants while in Kampala within the jurisdiction of this honourable court as averred in Paragraphs 4(a) and 8 of the plaint, and it is this contract that created a contractual relationship between the plaintiff and the defendants. Furthermore, that the plaintiff does not need to adduce evidence at this stage on how money was paid to the defendants, but the same shall be adduced through witnesses. The plaintiff prayed that the objection be overruled.

In rejoinder Counsel for the defendant submitted that the plaintiff seems to rely on the agreement attached to the plaint as “A” to confer jurisdiction upon this court but the said agreement was for transportation only. Furthermore, that it does not purport to appoint the defendants as the plaintiff’s agents for purposes of receiving money on behalf of the plaintiff from any person. Counsel for the defendants submitted that as indicated by the submissions of the plaintiff, paragraph 1, page 2, in which it was stated that the defendants “purportedly acted as agents of the plaintiff to secure and receive full payment on behalf of the plaintiff”, this indicates that the defendants have never been agents of the plaintiff under the said agreement. Counsel for the defendant submitted that it was incumbent upon the plaintiff to plead those facts in the plaint which give court the said jurisdiction, and because this was not done, the plaint is incurably defective.

I will start by considering whether the plaintiff’s plaint discloses a cause of action against the defendants.

### **Whether the plaint discloses a cause of action against the defendant**

I have carefully considered the submissions of both parties and the plaint together with the attachments thereto. The record shows that summons to file a defence were issued by court on 19<sup>th</sup> of June 2009 to the defendants. On 17<sup>th</sup> of July 2009 the plaintiff obtained judgment in default of the defence for a sum of United **States dollars 300,000** against the defendant. The default judgment was set aside by honourable Mr Justice Lameck Mukasa, Judge of the High Court, and Commercial Division on 12 November 2010 upon application of the defendants in Commercial Court High Court in Miscellaneous Application No. 0722 of 2009.

The question of whether the plaint discloses a cause of action is determined upon perusal of the plaint alone and any attachments thereto. In the case of **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998** Wambuzi CJ as he then was held at page 3 of his judgment that in determining whether a plaint discloses a cause of action under Order 7 rule 11 or a reasonable cause of action under order 6 rule 30 only the plaint can be perused. He said:

“I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 only the plaint can be looked at...”

In the case of **Attorney General vs. Oluoch (1972) EA page 392** it was held that the question of whether a plaint discloses a cause of action is determined upon perusal of the plaint and attachments thereto with an assumption that the facts pleaded or implied therein are true. I agree with the authorities cited by counsels for both parties and the law is well-settled and not in dispute. I will proceed to examine the plaint to determine whether it discloses a cause of action.

Paragraph 3 of the plaint is a claim for the contract value of maize supplied to the Government of South Sudan amounting to **US\$300,000**. Under paragraph 4 of the plaint, the facts giving rise to the claim is that the plaintiff had a contract for the transportation of goods to South Sudan. The plaintiff was contracted by the defendants to transport maize which maize was duly delivered. The plaintiff's only grievance is that the defendants acting on the pretext that they were agents of the plaintiffs were paid a sum of United States dollars 300,000 for the goods but did not convey the said sum to the plaintiff. The facts show that the plaintiff was supposed to be paid at a rate of United States dollars 180 per tonne of maize transported to the beneficiary. The contract document annexed to the plaint describes the beneficiary as Bilpam Pharmaceutical Company Ltd. I agree with the defendant's Counsel that the contract does not specify anywhere that the plaintiff is to receive money through the defendants from the beneficiary. The contract provides for delivery of the goods by the defendants to the beneficiary in South Sudan. Specifically article 3 of the contract provides that the value of the contract

is United States dollars 180 per ton of maize transported. The submissions of the plaintiff's counsel that the defendants assured the plaintiff that they would deliver the goods and secure payment for the same are statements from the bar and inadmissible.

Article 8 provides:

"The parties have agreed to perform their obligations under this contract in accordance with the terms of the contract."

The specific obligation of the defendant was to deliver the goods as agreed. The defendant was liable for any losses sustained during transportation of the goods. The obligations of the plaintiff are provided for under article 10 of the relevant contract:

"10.1 The first Party guarantees that the goods consigned for transportation shall conform to the quality agreed between them and the beneficiary of the goods in Torit.

10.2 The first party undertakes to pay the second party according to the terms of this contract."

I have endeavoured to analyse the plaint and attachments there to. Paragraph 3 of the plaint shows that the plaintiffs claim is for recovery of the price of the goods transported being a sum of **United States dollars 300,000**. On the other hand paragraph 4 of the plaint which are pleadings of the facts giving rise to the cause of action show that the plaintiff and the defendant's executed a contract for the transportation of goods. Paragraph 4 (c) furthermore pleads that the maize was duly delivered to the beneficiary and money was allegedly received by the defendants purporting to be agents of the plaintiff. The beneficiary is defined as a company and its name is as stated above. I agree with the defendant's submission to the extent that no particulars are given in the plaint as to how the defendant received this money. It is also not indicated from whom the money was received. This must be juxtaposed against the background in paragraph 3 of the plaint that United States 300,000 is for maize supplied to the Government of Southern Sudan. The contract executed by the parties is for the transportation of

maize and the obligation of the plaintiff under the contract was to pay the defendant for every tonne of maize transported to the Southern Sudan and delivered to the beneficiary Bilpam Pharmaceuticals Ltd.

There are no facts pleaded which connect the defendants to the sum of United States dollars 300,000 claimed in paragraph 3 of the plaint. The plaint does not specifically show the connection between the Government of South Sudan and the beneficiary named in the contract executed between the parties which contract is annexure "A" to the plaint. Paragraph 4 shows that the plaintiff contracted the defendants to transport maize to South Sudan. Under the contract it is the plaintiff who is supposed to pay the defendant. The plaintiff avers that it duly paid the defendants. Additionally the plaintiff relies on photocopied export invoices attached to the plaint collectively and marked annexure "B". Annexure "B" are export invoices issued by the plaintiff to BILPAM PHARMACEUTICAL LTD/NANAM TRANSPET LTD. JUBA, SOUTHERN SUDAN GOVT (GOSS) each invoice gives the drivers telephone number and name, the vehicle number, the quantity of maize. Export invoice number 5008 dated 25<sup>th</sup> September 2008 shows that it is for the supply of 1000 bags of maize each containing 50 kg according to the contract/Letter of Credit dated 5<sup>th</sup> of September 2008 from Kenya Commercial Bank (KCB). Each bag costs US\$29. The copies of the export invoices attached also show that they are the original bank copies. A reference of a letter of credit is also given for each export invoice duly endorsed by KCB. There are 10 export invoices in total. All of them have letter of credit reference: LCUG.86017087442C. Assuming the facts pleaded are true as required by the procedure for determining whether the plaint discloses a cause of action, the goods were supplied against letters of credit according to the invoices attached. No particulars in the plaint show the terms on which the goods were supplied to the beneficiary whether Bilpam Pharmaceutical Company Ltd or the Government of South Sudan. There is no indication as to whether the bank honoured the LC issued if not why not. It is a fundamental rule for establishing whether the plaint discloses a cause of action to assume that that the facts pleaded are true. It is therefore proper to assume from the pleadings and attachments that the plaintiff supplied goods to the beneficiary against letters of credit issued by Kenya Commercial Bank. It is also

proper to assume that the plaintiff is entitled to present its requirement for payment to Kenya Commercial Bank, Kampala Uganda. The original copy of Annexure “B” was issued by KCB Uganda Ltd, Kampala head office. It would therefore be a necessary fact to plead why the letters of credit were not useful to the plaintiff for purposes of obtaining payment for the goods supplied to the beneficiary. The kind of documentary credit or the terms of the letters of credit are not pleaded if at all they are to be relied upon.

The effect of letters of credit was considered in the case of **Power Curber International Ltd v National Bank of Kuwait SAK [1981] 3 All ER 607 per Lord Denning MR** at pages 610 – 611: Held on the effect of a letter of credit:

“The law on the point is clear. I take it first from what I said in *Edward Owen Ltd v Barclays Bank International Ltd [1978] 1 All ER 976 at 981, [1978] QB 159 at 169*:

‘It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit’.”

Lord Denning also referred to the case of **Malas and Another (Trading As Hamzeh Malas and Sons) v British Imex Industries Ltd [1958] 1 All ER 262**. In that case, the plaintiffs agreed to purchase from the defendants a quantity of steel rods to be delivered in two installments. Payment for each installment was to be by two confirmed letters of credit. The buyers duly opened the two credits with the midland Bank Ltd. The sellers delivered the first installment and were paid under the first credit. The buyers then complained that the installment was defective and sought an injunction to restrain the sellers from drawing on the second credit. Donovan J refused to grant the injunction and the buyers appealed against that order. Jenkins LJ held at page 262:

“We were referred to several authorities, and it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the



banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice."

Why was the plaintiff not paid as averred in the plaint? There are no facts pleaded to show what actually happened to the letters of credit referred to in annexure "B" attached to the plaint.

Last but not least no facts are given as to how the defendant received this money, who was responsible for paying the defendant the **US\$300,000**, and whether there was any representation of agency or misrepresentation by the defendants. Misrepresentation is implied. Part of the plaint paragraph 4 (b) reads as follows:

"...and the defendants in the pretext of acting as agents of the plaintiff were paid the said purchase price for the 40 tons delivered amounting to U.S \$ 300,000. On receiving the said sums, the defendants without any colour of right failed to deliver the said sums to the plaintiff and converted the moneys to their own benefits, although the plaintiff had duly paid the defendants the contractual sums for the transportation services provided."

The paragraph makes it clear that the defendants deceived whoever it was who paid the money that there were agents of the plaintiff. The word "pretext" imports in it the meaning of pretence or misrepresentation of facts to whoever was supposed to pay the plaintiff. Paragraph 6 of the plaint furthermore avers

"At the trial, the plaintiff shall further aver, content and adduce evidence to the effect that the defendants duly received its money in respect of the maize delivered and failed and/or refused to pay the plaintiff.

Wherever any misrepresentation is alleged in the plaint, it is mandatory that particulars thereof have to be given. Order 6 rule 3 (formerly order 6 rule 2 before revision) of the Civil Procedure Rules provides:

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings."

This rule has been variously interpreted in several cases where fraud is alleged. The rule applies to cases of misrepresentation, fraud, and breach of trust, wilful default or undue influence. Consequently, the requirements for pleading fraud are the same as the requirements for pleading misrepresentation, breach of trust, wilful default or undue influence. It follows that decisions on how to plead cases of fraud are relevant on how to plead in cases of misrepresentation as well.

In the case of **Kampala Bottlers Ltd versus Damanico (U) Ltd Civil Appeal No. 22 of 1992** Hon. Justice Platt JSC held and I quote at page 5 of his judgment:

"In the first place, I strongly deprecate the manner in which the Respondent alleged fraud in his written statement of defence. Fraud is very serious allegation to make; and it is; as always, *wise to abide by the Civil Procedure Rules Order VI Rule 2 and plead fraud properly giving particulars of the fraud alleged*. Had that been done, and the Appellant had been implicated, then on the Judge's findings that would have been the end of the defence. If, on the other hand, the officials had been implicated, then on the usual interpretation of Section 184 (c) of the Registration of titles Act, that would have been found to be insufficient." (Emphasis added)

Wambuzi CJ

"Normally, *where fraud is pleaded, particulars of the fraud must be given*. It was submitted before us that the particulars of the fraud in this case were the fact that the City Council did not sit since 1990 to give further extension of the lease to the plaintiff. I must confess I am a little at a loss as to who was being alleged to have been fraudulent." (Emphasis added)

The cases show that where a fraud is pleaded, it is necessary to give the particulars of fraud. Additionally, the courts have held that the requirement for pleading particulars of fraud is mandatory. In the case of **Lubega vs. Barclays**

**Bank [1990 - 1994] EA 294** the Supreme Court per Justice Manyindo DCJ at page 303 held that as far as fraud is concerned the requirement is that particulars of the alleged fraud are pleaded:

This principle is included in order 6 rule 2 of the Civil Procedure Rules which reads: "in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence, and in all cases in which particulars may be necessary such particulars with dates should be stated in the pleadings." *The above rule is mandatory. In my mind failure to plead and particularise fraud is a fundamental defect and not an irregularity curable by evidence or otherwise.* Fraud must be pleaded and proved." (Emphasis added)

In **Okello vs. Uganda National Examinations Board CA No. 12/1987 reported in [1993] II KALR 133** at 135 Ag. Lubogo JSC held that order 6 rule 2 of the Civil Procedure Rules is mandatory in that the particulars of fraud and dates regarding the alleged fraud should be given.

The misrepresentation by the defendants that they were agents of the plaintiff for purposes of obtaining payment from whomsoever paid them if at all was a pleading that is regulated by order 6 rule 3 of the Civil Procedure Rules. It is a mandatory requirement that misrepresentation has to be pleaded and particulars given for it to be proved. Failure to give particulars of misrepresentation is fatal. In this case misrepresentation was not only implied but expressly averred by the plaintiff in alleging that the defendants acting under a pretext that they were agents of the plaintiff, received the plaintiff's money. This is the sole foundation of the plaintiff's cause of action against the defendants. However despite the above pleading, no particulars were given as required by the mandatory rule, 3 of order 6 of the Civil Procedure Rules. The cause of action in misrepresentation constitutes the core of the basis of the claim against the defendants.

Again it is a trite rule of pleading that all facts which are necessary to prove the cause of action of the plaintiff are to be averred in the plaintiff. What is not pleaded cannot be proved. The Supreme Court of Uganda considered the requirement for necessary facts to constitute a cause of action in the case of **Attorney General V**

**Major General David Sejusa (formerly known as Tinyefunza) Constitutional appeal No. 1 of 1997 in the Judgment of Wambuzi, C. J Page 18 – 19**

“On the authorities referred to us, I find useful the definition given by Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206. The learned author says:

*A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the plaintiff to prove to enable him to obtain decree. Everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit.” (Emphasis added)*

In the case of **Katarahwire vs. Lwanga [1988 – 1990] H.C.B. 86 Ouma J** Judge of the High Court held that: "if a defendant has to be found liable to pay damages, three things must be proved, namely that the defendant failed to exercise due care; that the defendant owed the plaintiff a duty to exercise due care and that the defendant's failure was cause of the injury to the plaintiff. Unless the facts on which each of the three constituents is founded are disclosed in the plaint, then clearly no cause of action for negligence is disclosed.

Last but not least is the East African Court of Appeal case of **Sullivan vs. Ali Mohammed 1959 E.A 239** where it was held that the plaintiff must allege all the necessary facts that establish the cause of action.

Per Windham JA:

On these grounds I would hold that the plaintiff, by reason of its not having alleged that the defendant's order to the plaintiff's driver was given in circumstances amounting to duress such as compelled obedience to it, failed to make an allegation of fact which, in the light of the other facts alleged, was necessary to success in an action for trespass to goods. The omission of one such material fact makes a claim bad: ... The plaintiff must allege all facts necessary to establish the cause of action. This fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact that was pleaded could not be true."

These rules fulfil the constitutional requirement for notice of the claim and giving an opportunity for the defendant to respond to the actual claim of the plaintiff. Thus the rules are a component of fair trial enshrined in the constitution.

After considering all the authorities and the facts alleged in the plaintiff, it is my conclusion that the plaintiff does not allege the necessary facts to constitute a cause of action against the defendants. Secondly, where a plaintiff does not allege all the necessary facts to constitute a cause of action, it shall be rejected under order 7 rule 11 (a) of the Civil Procedure Rules. The rule that the plaintiff be rejected for not disclosing a cause of action is mandatory. There is no need for me to consider the other points raised by the defendant in objection to the suit. The Plaintiff is accordingly rejected with costs under order 7 rule 11 of the Civil Procedure Rules.

Ruling delivered in open court this 12<sup>th</sup> day of March 2012

Hon. Mr. Justice Christopher Madrama

Judge

Ruling delivered in the presence of:

Mutamwa Yusuf holding brief for Ngobi Tony Counsel for plaintiff,

David Nyote For the first Defendant,

Silver Mukeele representative of first defendant,

Hon. Mr. Justice Christopher