**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**HCT-00-CC-CS-0118-2008**

**COPCOT E.A LTD} :::::::::::::::::::::::::::::::::::: PLAINTIFF/COUNTER-DEFENDANT**

**VERSUS**

1. **GODFREY SENTONGO**
2. **M/S MUDDU-AWULIRA::::::: DEFENDANTS/COUNTERCLAIMANT**
   **ENTERPRISES LTD}**

**BEFORE: HON. LADY JUSTICE HELLEN OBURA**

**JUDGEMENT**

The plaintiff/counter defendant instituted a suit by summary procedure under Order 36 of the Civil Procedure Rules against the defendant/ counterclaimant for a claim of USD 32,000 (an equivalent of UGX 66,000,000/=). This amount was stated in the plaint to be owing and known to the defendant/counterclaimant.

The defendants/ counterclaimant filed an application for leave to appear and defend which was granted by consent. They then filed a written statement of defence (WSD) in which they denied the claim and instead the 2nd defendant made a counterclaim for UGX 304,305,344/=. This amount was alleged to be due to the counterclaimant from the counter-defendant in respect of their unfulfilled contribution to the cotton production support in West Nile Zone for the year 2003/4. The counter-defendant filed a reply to the counterclaim in which the claim was denied.

Subsequently, the plaintiff's/counter defendant's (hereinafter only referred to as the counter defendant) suit against the defendants/counterclaimant (hereinafter only referred to as the counterclaimant) was withdrawn on 7th December 2010 leaving only the counterclaim that proceeded for trial. This judgment is therefore only in respect of the counterclaim.

At the scheduling of the counterclaim the agreed facts were that:-

1. In the season of harvesting cotton of 2003/4 the country was zoned to promote production of cotton. The counter defendant and the counterclaimant were the only authorized ginners buying and ginning cotton in West Nile Zone. The counterclaimant was the lead ginner and the counter defendant the only support ginner.
2. The Uganda Cotton Development Organization (CDO) as the regulator of the cotton sector instituted a programme where participating ginners in each zone were to contribute to a common pool to constitute a cotton production fund in accordance with a budget of the zone drawn by the lead ginner and approved by CDO. The fund was agreed upon by the Uganda Ginners Cotton Exporters Association Limited (UGCEA) of which the plaintiff and defendants were members.
3. In this programme ginners could only buy seed cotton upto the percentage contributed to the common pool fund and thereafter pay a levy for the quantity in excess of its contribution, proportionally to the quantity in excess of its contribution or due share.
4. The agreed crop support budget for West Nile for the year 2003/2004 which was approved by the CDO projected total production of seed cotton to be 25,000 bales or 4,625,000 Kgs was UGX 788,516,000=. The counterclaimant and the counter defendant were to contribute equally to this budget. The actual production for that year exceeded the target and was 27,000 bales or 4,995,000 Kgs.
5. The levy agreed upon by UGCEA in agreement with CDO for West Nile Zone for that year was 55.29 to be paid by any ginner in the zone for any cotton purchased in excess of their proportionate contribution to crop budget support.
6. The counter defendant contributed a total of UGX 165,333,210=, or 21% of the budget and purchased 15,390 bales of cotton or 57% of the production. The counterclaimant purchased only 11,500 bales or 43% of the total production.

Originally four issues were indicated in the joint scheduling memorandum but during scheduling both counsel agreed to delete the 2nd issue because it was an agreed fact. What was originally the 3rd issue was also amended at the instance of both counsel at the scheduling but they still submitted on the original version.

I wish to note that although both counsel agreed to drop the original issue number two and court allowed them to do so, they still went ahead and submitted on it when it was an agreed fact. This court will therefore ignore their submissions on that issue because it would be a waste of time to determine an agreed fact.

At this juncture, I feel it is necessary and important to comment on the lack of seriousness of counsel for both parties in the manner in which they conducted this suit. First of all the content and structure of the joint scheduling memorandum they originally filed was seriously wanting and when court pointed this out they filed a better one. Secondly, it appeared none of them paid close attention during scheduling and that is why they both submitted on issues that were already deleted and amended at their instance. Thirdly, their written submissions more especially that of the counter defendant left a lot to be desired.

There was no sign of any research done. Such shoddy manner of conducting cases should be exposed and discouraged for the good of the legal profession in this country. I will not hesitate to do so whenever it surfaces before me and I hope by raising it in this judgment the concerned counsel will be more serious next time.

That being said and done, the three agreed issues which this court will determine are:

1. How much did the counterclaimant contribute to the common pool fund in West Nile in the year 2003/4?
2. Whether the counter defendant owes the counterclaimant any money under the pro-rata arrangement
3. Remedies.

**Issue 1: How much did the counterclaimant contribute to the common pool fund in West Nile in the year 2004/ 2005?**

The counterclaimant called only one witness Mr. Sentongo Godfrey its Managing Director who filed a witness statement which he confirmed at the hearing and was cross-examined upon. Mr. Charles Kabugo for the counterclaimant in his written submission strongly relied on the evidence of the witness. He contended that in summary the witness had proved that;

- The West Nile Zone approved budget was UGX 788,516,000/= of which the counter-defendant contributed only UGX 165,333,000/= or 21% of the budget.
- The counterclaimant contributed the balance of UGX 623,182,000/= or 79% of the approved budget.
- The counterclaimant's contribution was inclusive of the UGX 600,000,000/= Stanbic Bank facility, Exhibit D1.
- As a result of the counterclaimant's financing of the budget, cotton production in West Nile Zone that year surpassed the target and West Nile Zone was the best performing zone in 2003/2004 through out of the country. This success would not have been possible without the counterclaimant's contribution to the budget of 79%.

It was counsel's submission that the counterclaimant alleged the parties' respective contributions to the budget in paragraph 7 of the counterclaim which was not specifically denied by the counter-defendant in its reply and as such, it is assumed to be admitted. He further submitted that the alleged USD 16,500 (this amount was erroneously written in counsel's submission as USD 165,500) is part of the plaintiff's agreed contribution of UGX 165,333,000/= and is not in issue.

The counter-defendant did not call any witness for the reason that the directors who were acting at the time of that cotton season had left the company and the existing director was unable to give evidence because he was appointed after the performance of the cotton production for the year 2003/ 2004. However, Ms. Evelyn Akello for the counter defendant filed submissions in which she contended that DW1 gave evidence but he did not sufficiently prove that;

- The West Nile approved budget was UGX 788,516,000/= of which the counterclaimant claims to have contributed UGX 623,182,790/= of the budget.

- DW1 testified that he contributed the balance of the budget of UGX 623,182,790/= of the approved budget; inclusive of UGX 600,000,000/= of the loan facility as reflected in Exhibit Dd1 (P. 1).
- The loan facility was made towards the financing of the budget for the cotton production in West Nile Zone thereby it being the reason for the best performing zone in the year 2003/2004 throughout the country.

I wish to observe that counsel for the counter defendant simply stated in her submission that the counterclaimant did not sufficiently prove the above claim. She failed to explain what she meant by sufficient proof. It is a cardinal principle of law that the standard of proof in civil cases is on a balance of probabilities. There are many case law authorities to that effect. See among others **Nsubuga v Kavuma [1978] HCB 307** where it was held that in civil cases the burden lies on the plaintiff to prove his case on the balance of probabilities.

It is the counterclaimant's case that it contributed UGX 623,182,792/= which was 79% of the approved budget. The Managing Director of the counterclaimant company who was sued jointly with the counterclaimant as the 1st defendant stated in paragraph 6 of his witness statement that:-

> ***"Muddu (the counterclaimant) in addition to its own funds upon the failure of the support ginner to substantially contribute towards the budget, contributed Shs. 623,182,790= or 79% inclusive of Shs. 600m/= loan facility from Stanbic Bank to finance the production support budget….)".***

He went ahead to quote the relevant provisions in the letter of offer admitted in evidence as Exhibit D1. Clause 2.2 of that letter is in respect of loan facility of Shs. 600,000,000/= which was referred to as Facility B. Under clause 3.2.1 the purpose of that facility was stated to be: "*… strictly to finance the procurement of farm inputs required by the farmers in your cotton zone and provision of cotton extension services in the manner described in annexture "C""*.

That Exhibit P.1 is a letter of offer of a loan facility by Stanbic Bank which was accepted by the counterclaimant by appending its signature thereto on 18th March 2003. Indeed the period when

the loan was taken is not at variance with the cotton crop season in dispute. It was also an agreed fact that cotton production in West Nile Zone in the year 2003/2004 exceeded the projected output. No evidence was adduced by the counter defendant to disapprove any of the counterclaimant's evidence. Neither was the evidence discredited during cross examination.

All that the counter defendant did by way of defence was to attach two unauthenticated documents to the joint scheduling memorandum which were marked as Exibits P.1 and P.2 at the scheduling. No witness was called to testify on them and they were not even referred to in the submission. In effect they served no purpose as far as the defence of this counterclaim is concerned.

In the absence of any evidence to challenge the counterclaimant's testimony, it is my considered opinion that the counterclaimant has proved on a balance of probabilities what it contributed. In any event, as submitted by counsel for the counterclaimant there was even no specific denial of the contributions as alleged in paragraph 7 of the counterclaim. **Order 6 rule 8** of the Civil Procedure Rules provides that;

> ***"It shall not be sufficient for a defendant in his written statement of defence to deny generally the grounds alleged by the statement of claim, or for the plaintiff in his written statement in reply to deny generally the grounds alleged in the defence by a counter claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth except damages."***

In the circumstances, I find that the counterclaimant contributed UGX 623,182,790/= or 79% common pool fund in West Nile Zone in the year 2003/2004. This contribution was neither denied in the reply to the counterclaim nor challenged by adducing evidence to the contrary.

**Issue 2: Whether the counter-defendant owes the counterclaimant any money under the pro-rata arrangement.**

Counsel for the counterclaimant submitted that the ginners were to buy cotton in equal shares where they made equal contributions to the budget but where the amount contributed was not equal they were to purchase on a pro rata basis according to their respective contributions. On the actual quantities purchased by the parties, the evidence of the counterclaimant's Managing Director's as per paragraph 9 of the witness statement was that:-

> ***"At marketing Copcot purchased seed cotton equivalent to 15,500 Lint bales or 58.08% instead of 5,605 or 21% of its contribution towards the budget as in paragraph 5 above, thus had to pay a levy to the lead ginner of UGX 55.28/= on each of the extra purchased 5, 343,300 Kg of seed cotton or UGX 295,377,624/= to Muddu who had purchased seed cotton equivalent to 11,500 lint bales or 43% instead of 21,084 or 79% being the equivalent of Muddu's contribution towards the production support budget, Copcot refused to do so contrary to the agreed position as in paragraphs 3,4 and 6 above, which led to Muddu's incurring huge losses to which we hold Copcot liable as indicated in the counter claim."***

Upon cross examination, he did not change his earlier position. He explained that the understanding was that if one buys more than he contributed to the budget, he was supposed to reimburse the other party's contributions towards the budget in form of a levy per kilogram of lint/seed cotton exported in excess of what one was supposed to export. According to him, Copcot ended up buying 15,500 bales which was more than it was to purchase by 10,000 bales. He further explained that he arrived at the counterclaimant's claim of UGX 304,305,344/= by comparing the counter-defendant's and the counterclaimant's contributions to the budget against the cotton each party purchased respectively. His calculations were as follows;

> Each kilogram of lint is equivalent to 3 kilograms of seed cotton
> On each kilogram of seed cotton the levy was UGX 55.28/=
> To get the levy payable on 1 kilogram of lint you multiply UGX 55.28/= x 3 =UGX 165.84/=. According to him a bale has 185 kilograms of lint.

Then he multiplied as follows;

165.84 x 185kgs x 10000 = 306,804, 000/=

The counter defendant did not adduce any evidence to contradict the counterclaimant's formula and calculation. I therefore take it that it was the agreed formula. It is quite interesting that counsel for the counter defendant in her submission conceded that her client purchased more than what it had contributed and the excess quantity purchased was to attract a levy of Shs. 55.28/= on each kilogramme of seed cotton purchased.

I wish to observe that the amount arrived at in that calculation is not what was pleaded in the counterclaim. The counterclaimant claimed UGX 304, 305, 344/=. In his submission, counsel for the counterclaimant multiplied 165.84 x 185kgs x 9886 bales to get the claim of UGX 303,306,434/= still not the amount pleaded. The figure of 9886 is not in line with the explanation of the counterclaimant's witness that the bales bought in excess by Copcot were 10,000. I therefore wonder where counsel got the 9886 bales yet this was not pleaded.

In fact, what was pleaded was that the counter defendant purchased in excess of 9,720 bales of cotton. To me this figure makes more sense because it is also arithmetically correct. It was an agreed fact that the contribution made by the counter-defendant represented 21% of the budget. Using the pro rata arrangement, it means that it was supposed to purchase 21% of the cotton produced. It is an agreed fact that the total number of bales produced was 27,000. 21% of 27,000 bales which should have been purchased by the counter-defendant using simple arithmetic would be 5,670 bales. When you deduct that figure from 15,390 bales that were actually purchased by the counter-defendant (an agreed fact) you get a difference of 9,720 bales. This figure represents the actual excess bales purchased by the counter defendant upon which a levy should be charged.

Basing on that, the calculation of the levy due to the counterclaimant would be as follows:-

165.84 x 185kgs x 9720 bales = 298,213,488/=

In the result, it is my finding that the counter defendant owes the defendant/counterclaimant the sum of UGX 298,213,488/=. This answers the 2nd issue in the affirmative.

**Issue 3: Remedies**

The defendant's claim against the plaintiff is for UGX 303,306,434/=, general damages, interests and costs.

On special damages, the principle is that it must be specifically pleaded and strictly proved but need not to be supported by documentary evidence in all cases. See ***Kyambadde –Vs- Mpigi District Adm. [1983] HCB 44***. In the instant case, the defendant has pleaded UGX 304, 305, 344/= but only UGX 298,213,488/= as calculated under the 2nd issue. I therefore find that the counterclaimant is entitled to a refund of that amount from the counter defendant.

As regards general damages, its award is in the discretion of court. See **Benedicto Tejuhikirize v U.E.B Civil Suit No. 51 of 1993.** However, there must be a basis for an award of general damages. Counsel for the counterclaimant did not provide any justification why general damages should be awarded in this case. He merely stated that the counter defendant enjoyed a commercial advantage which it has continued to enjoy for the last ten years. Further that, on the other hand the counterclaimants business has suffered and is faced with court cases. He did not show how the counter-defendant's failure to pay the levy affected the counterclaimant's business.

No evidence was even adduced to show that the counterclaimant demanded for payment of levy from the counter-defendant and it failed and/or refused to pay. Neither was it shown that the counterclaimant suffered any inconveniences or hardships that should be atoned by award of general damages.

I do not find the brief argument of counsel as indicated above a valid reason for awarding general damages and in the circumstances I decline to award any.

On interest, its award is a matter of discretion of court which discretion has to be exercised judiciously. *See* **Superior Construction and Engineering Ltd v Notay Engineering Industries (Ltd) High Court Civil Suit No 702 of 1989**.

The rationale for awarding interest was stated in the case of ***Masembe v Sugar Corporation and Another [2002] EA 434*** where ***Oder JSC*** quoting ***Lord Denning in Hambutt's Plasticine Limited v Wayne Tank and Pump Company Ltd [1970] 1 QB 447*** stated that:-

> ***"It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money, and the defendant has had use of it himself. So he ought to compensate the plaintiff accordingly".***

Similarly, in the case of ***Ruth Aliu and 136 Others v Attorney General, Civil Suit No.1100 of 1998***, ***Tabaro J***, stated that it is apparent that nowadays interest is payable for the deprivation suffered by the person to whom payment should have been made.

In the instant case, as aforementioned there is no indication that the counterclaimant demanded the levy from the counter-defendant and so it cannot be said that it deprived the counterclaimant what was due to it. In my view, it was the counterclaimant who sat on its rights to recover the levy and waited for the counter-defendant to bring a suit against it before it could claim the levy. I will therefore only award interests on the special damages from the date of this judgment at a rate of 10% per annum till payment in full.

Costs are also awarded to the counterclaimant.

In the result, judgment is entered for counterclaimant in the following terms;

1. The plaintiff shall pay the counterclaimant for a sum of UGX 298,213,488/= as special damages.
2. Interest is awarded on the special damages at 10% per annum from the date of this judgment till payment in full.
3. Costs are awarded to the counterclaimant.

I so order.

Dated this 1st day of June 2012

Hellen Obura
**JUDGE**

Judgment delivered in chambers at 4.00 pm in the presence of Mr. Charles Kabugo for the counterclaimant whose Managing Director was also present and Ms. Evelyn Akello for the counter defendant whose officials were absent.

**JUDGE**
01/06/2012