THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-OO-CC-CS-348-2005

MEA LTD.....PLAINTIFF

VERSUS

NUWAHA BROWN.....DEFENDANT

BEFORE: HON. MR. JUSTICE M. W. MUSENE

JUDGMENT

The Plaintiff, MEA Ltd, instituted a suit against the Defendant, Nuwaha Brown claiming special and general damages arising out of breach of contract. The facts giving rise to the plaintiff's claim are that sometime in March 2004 the Plaintiff and Defendant entered into a transaction whereby the Plaintiff supplied the Defendant with fertilizers worth US$37,600 on credit. According to the Plaintiff, all the goods were delivered to the Defendant as agreed and invoices requiring payment were made. The Plaintiff's contention is that the Defendant breached his obligations and despite constant reminders, the Defendant has failed, refused and or neglected to pay the Plaintiff. The Plaintiff contends that the said failure constitutes a breach of contract entitling him to special and general damages.

The Defendant on the other hand, maintains that he paid for all the goods/fertilizers supplied and received by him. At the scheduling, the following issues were framed:-

1. Whether the Defendant is indebted to the plaintiff.

2. And if so, by what amount?

3. The remedies available to the parties

The plaintiff was represented by M/s Akampurila and Partners, while the Defendant was represented by M/s Nzige, Jamero and Co Advocates. And both sides filed written submissions. And in their written submission, issues No (1) and (2) were handled together. According to the submissions of counsel for the plaintiff, the dispute between the parties was essentially a question of reconciliation of accounts. And that on 13-6-2011, the parties agreed to submit the accounts of both parties to an Auditor. Counsel for the Plaintiff's submissions was that it was agreed that the Auditor's report would bind both parties.

They further submitted that in pursuance of the above, the parties appointed **Ernest and Young** to examine the accounts, a process done under the provisions of section 27 of the Judicature Act. It was further submitted that the said Auditors furnished a report, in September, 2011 and their conclusions was that the Defendant Nuwaha Brown was pay the plaintiff, MEA Ltd a sum of Kenya Shillings 2,652,521.00.

Counsel for the Plaintiff's submissions were that Court cannot interfere with the final report made the Court's appointed expert Ernest and Young, since the parties agreed to resolve the dispute by way of appointment of those experts.

They quoted the case of **Tight Security Ltd Vs Gold Star Insurance Co Ltd H.C.C.S No 655 of 2002 and H.C.S.S. No 662 of 2002**, where it was held that once the parties have agreed to resolve the dispute by way of a court appointed expert, the final report made by the expert cannot be interfered with except where the rules of Natural Justice have not been observed.

Counsels for the plaintiff concluded that since all the parties were given the opportunity by the Auditors, Ernest and Young to provide all the relevant documents which they did, then there was no failure of Natural Justice and so the Defendant is indebted to the Plaintiff to the tune of KShs.2,652,521/= as established by court's appointed expert.

Counsel for the Defendant on the other hand, submitted that on 30.3.2004, the Defendant executed a sale of goods (Fertilizers) agreement with the Plaintiff, and issued a cheque No 00504 for the amount of US$30,100 .00 drawn on Stanbic Bank Uganda as security in lieu of the credit

supplied, which cheque was not to be presented to the Bank for cashing. It was also submitted that the Defendant received goods worth US$6,400.00 and that the rest of the goods were to be delivered by the Plaintiff as he would continue paying. Counsel for the Defendant's further submissions were that according to Defendant's testimony, he paid US$30,000.00 cash to the Plaintiff at its Eldoret officers/outlet and a further balance of US$5,000 by Telegraphic transfers (TT) dated 20.4.2005 through the then Nile Bank.

It was also submitted that the Defendant did not pay the balance of US$2,600.00 because the plaintiff did not deliver all the goods as agreed, and therefore the Defendant is not indebted to the Plaintiff at all. On the report by Auditors, Counsel for Defendant's submissions were that the same was rejected by the Defendant because it came up with one sided conclusions and lacked the expected, professionalism.

Counsel for the Defendant particularly stated that the cheque alluded to in the Auditors report could not have been logically accepted by the plaintiff as security drawn on a Uganda Bank, as that could not make any business sense. Counsel for the Defendant also submitted that the Plaintiff had not proved the balance due, an indication that there was no balance due. Counsel for the Defendant wondered how a company of plaintiff's repute would have accepted payment by cheque drawn on a bank outside the Jurisdiction of its operations. Finally, counsel for the Defendant submitted that court should not rely on the unprofessionally prepared Audit Report and that the plaintiff has failed to discharge the burden of proof that the Defendant is indebted to it. Reference was made to sections 101 and 102 of the Evidence Act, Cap. 6 laws of Uganda, to the effect that the burden of proof lies on the party who affirms and not upon the party who denies.

This court has carefully internalized the submissions by the Advocates on either side as far as the first and second issues are concerned. The Evidence of PW2, Joseph Waweru, who works with the Plaintiffs Company, MEA LTD was that between 2003 and 2004, they had several transactions with the Defendant, Nuwaha Brown. That the defendant used to collect fertilizers from Nairobi and initially it was on cash basis.

PW2, however, added that later on, they allowed the Defendant to take the Fertilizers on credit and pay later. PW2 testified that the Defendant would collect Dia Ammonium phosphate

fertilizer packed in 50Kg and bring in Uganda for sale. And that in mind 2004, the Defendant Defaulted and has not been to Nairobi nor has he pay the amount which owing. PW2 testimony was that the amount owing from the Defendant to the plaintiff has remained unpaid and that as a result, the plaintiff has suffered additional Bank interest, transport costs to and from Nairobi, loss of sales and customers. Consequently, they prayed for an award of special damages, interest on the outstanding amount and payment of the principal amount.

At the end of that testimony, PW2 was not asked any single question by Defendant's Counsel either to contradict or dislodge the information given. This court further finds that the in line with the above testimony, there was a sale agreement, executed between the plaintiff and the Defendant exhibited as exhibit D26. According to the Agreement the fertilizers were sold at a cost US$37,600.00 and the Defendant issued cheque No 00504 for the amount of US$30,100.00 drawn on Stanbic Bank Uganda which was security in lieu of the credit Advanced to him by the plaintiff. According to the submissions by Counsel for the Defendant, the Defendant received goods worth US$6,400.00 and the rest of the goods were to be delivered to him as he would continue paying. It was also further submitted that the Defendant paid to the plaintiff US$30,000.00 cash at its Eldoret officers and paid the balance of US$5,000.00 by Telegraphic Transfers (TT) dated 20.4.2005 and 2. 5. 2005. And that the reason for nonpayment of the balance of US$ 4,600.00 was because the plaintiff did not deliver the goods.

Whereas the payment of US$5,000.00 by Telegraphic Transfers (TT) may be a problem, this court finds that in the first instance the Defendant acknowledges the balance US$2,600.00 which he admits he has not paid to the plaintiff. And the excuse he gives for non-payment of the same is that because the plaintiff did not deliver the goods. However, and as pointed out by Counsel for the plaintiff, those submissions constitute a departure from the pleadings.

The attention of this court was drawn to the Written Statement of Defence filed by the Defendant on 13.5.2005. There is nowhere in the Written Statement of Defence where Defendant alleges non-delivery of the goods by the plaintiff. Instead under paragraph 4 (d) and (e) of the W.S.D. it is stated:-

"(d) that the defendant is still worthy customer of the plaintiff"

(e) **That no demand note has ever been made and / or delivered**

to the Defendant.

I therefore find that the idea of non delivery of goods is indeed an after throught and is greatly doubted by this court and contrary to O.6 r 7 of the Civil Procedure Rules. It provides:

> **"No pleading shall, not being a petition or application experts by way of amendment raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."**

So to the extent that the above submissions by the Defendant are a Departure from the pleading s cannot therefore confirm that the Defendant is not indebted to the plaintiff. And when PW2 testified, no question was put to him for the purposes of raising the issue of Non delivery of all the goods.

The second pertinent issue which casts a lot of doubt in the Defendant's case is the Defendant's submissions that he paid US$30.000 (Thirty Thousand United States Dollars) cash to the plaintiff at its Eldoret office. Whereas during the examination in chief as DW1 he stated positively that when he paid US$30,000 in Eldoret he was given a receipt, during cross examination by counsel for the plaintiff, Defendant turned around to state he did not have the receipt because he misplaced it.

According to this court, either the Defendant was telling lies or is very careless to the extent of misplacing a receipt worth US$30,000.00 and such carelessness, therefore will cost him heavily. Be that as it may failure to produce the receipt or any other acknowledgment of the US$30,000.00 lead to the conclusion that no such payment was made to the plaintiff and therefore the defendant is indebted to the plaintiff in respect thereof. The other aspect, of the defendant's case which makes this court doubt its Defence is the fact that upon signing of the Agreement of sale, the Defendant issued a cheque as security of payment. And having done so, he turns around to submit that the plaintiff ought to have known that the said cheque would not be cashed.

Having obtained goods or credit, and then issued a cheque as security, it was in my view up to the Defendant to Honour his obligations. It is an abuse of the courtesy and generosity of the plaintiff to turn around to state that they would have known that the cheque would not be cashed. Why then did the Defendant issue the same is what an onlooker would ask. And as submitted by

counsel for the plaintiff, the plaintiffs are not bankers and neither do they control internal banking policies with regard to cashing of cheques. So whatever the implication of cashing of not cashing the Defendant's security cheque, the interest of the plaintiffs is to recover their money for the goods supplied to the Defendant and not for the Defendant to play around with the law relating to Banking.

And lastly, I now proceed to address the issue of the Auditors report. On 19.11.2012, this case was adjourned to enable Auditor to be recalled for purposes of cross-examination by the defendants Counsel. However, on 28.1.2013, my attention was drawn to the Court proceedings before my predecessor, Justice Irene Mulyagonja as she then was of 23.6.2011. And for avoidance of doubt, I reproduce the relevant portion of the record as follows:-

> **"Court: would you want the court's Assistance after the Auditors presents his report? Will you be summoning the Auditor to court for clarification of his report or anything else."**
>
> **"AKampulira: No we will not summon the Auditor to Court. Like we said last time, the Auditor's report will be final this time. It will be binding on both parties."**
>
> **"Oketcha: That is so, the Auditors report will bind both parties. "**
>
> **"Court: to whom will the Auditors present his report?**
>
> **Both Counsels: to both of us"**
>
> **"Court: This matter is adjourned to 23.8.2011 at 9:00 a.m. for mention, and possibly for entry of Judgment. Counsel should both not that this process is considered to be taking place under the provisions of S.27 of the Judicature Act."**
>
> **Signed**
>
> **Irene Mulyagonja Kakooza**
>
> **Judge**

23/06/2011"

Indeed the proceedings aforementioned indicate very clearly in black and while the consensus reached by the parties as far as the Audit report was concerned. And further for avoidance of doubt, I quote the provisions of S.27 of the Judicature Act.

"**S.27 where in any cause or matter, other than a criminal proceeding**

(a) All the parties interested who are not under disability consent,

(b) The cause or matter requires any prolonged examination of documents or any scientific or legal investigation which cannot, in the opinion of the High Court, conveniently be conducted by the High Court through its ordinary officers or"

(c) The question in dispute consists wholly or partly of accounts, the High Court may at any time, order the whole cause or matter or nay question of fact arising in it to be tried before a special reference or arbitrator agreed to by the parties or before an official referee or an officer of that High Court."

According to Counsel for the Plaintiff the appointed Auditors pursuant to the above provisions of the law furnished a report in September 2011 to the parties. The auditor concluded:-

"**The above statement is based on information availed to us. The end balance represents amount payable by Mr. Nuwaha Brown to Mea Ltd of KShs2,652,521/= (Two million six hundred and fifty two thousand five hundred twenty one Kenya shillings only)"**

Counsel for the plaintiff's submissions were that the position of the law is that court cannot interfere with the final report made by the court's appointed expert **Ernest and Young** and that where the parties agreed on how to resolve the dispute by way of appointment of the said expert, the result are binding unless it is clear that there was a violation of the rules of natural Justice. The submission of Counsel for the Defendant on the other hand was that the Defendant rejected the Auditors report because it lacked the professionalism expected, as it came up with one sided conclusions and so lacked the rules of Natural Justice.

With respect, I am not able to agree with counsel for the Defendant because the matter having been handled under the provisions of S. 27 of the Judicature Act before a competent High Court Judge as reflected in the quoted record, it cannot be said that there was lack of the rules of Natural Justice. To hold otherwise would be total black mail and on abuse of the Court process since whatever, transpired before Justice Irene Mulyagonja Kakooza was like day follows night. Matters areres ipsa loquitor (record speaks for itself).

Secondly, both parties were given an opportunity by the Auditors to submit documents. The submissions that the Defendant gave all the documents that he intended to rely on to his lawyers, although for reasons beyond his control all the document were never submitted to the Auditors is totally unacceptable by this court. Where is the evidence from the Defendant to show that he submitted all his documents to the lawyers but his said lawyers did not give them to the Auditors? What is the basis of that wild allegation" None. **Mind you we are dealing with a defendant who testified that he paid US$30,000.00 cash to the plaintiff in Eldoret, got a receipt but totally failed to produce it or any acknowledgement in this court**. Now the same defendant is at the same game again submitting that he gave all his documents to the Auditor through his lawyers did not submit them. Which court can under such circumstances be hood winked by the Defendant all the time?

I am completely sure that not reasonable tribunal can in the circumstances believe the Defendant's stories. In any case if the lawyers for the Defendant never submitted his documents to the Auditors, who was to blame? The Auditors cannot be blamed and cannot be said to have acted unprofessionally when it was common knowledge that the lawyers were acting for and on behalf of the Defendant. In the event of any negligence on the part of the Defendant's lawyers, the Disciplinary Committee of the Law Council is open to him or in the alternative, the Defendant can file a suit against his lawyers in Court of law. This court will therefore not be derailed by such concoctions by the Defendant particularly where the Defendant and the plaintiff unequivocally accepted to be bound by the Auditors report.

This court cannot in the circumstances disregard the said report. In the case **Tight Security Ltd Vs Gold Star Insurance Co Ltd HCCS No 665 of 2002 and HCCS No 667 of 2002**. Kiryabwire J. as he then was stated:-

> "**Having found that the parties agreed on how to resolve the dispute by way of a court appointed expert, the court cannot interfere with the agreement of the parties and consequently the final report made by the expert, except where there was no observance of the rules of natural justice."**

I entirely agree with the above position of the law and hold that the Defendant is stopped from contesting the report. In the premises and in view of what I have outlined, I find and hold that the Defendant is indebted to the plaintiff in the sum of Kenya Shillings 2,552,521/= as established by the expert report. I now turn to the 3rd issue of the remedies available to the plaintiff. The special damages is the sum of Kshs2,652,521/=

As far as general damages are concerned there is no doubt that the plaintiff has been deprived of the use of his money since 2005, which is now a period of 8 years. He is therefore entitled to general damages. On the basis of the decision in **Ochan Justice Vs Ocen Moris and Another HCCS No 133 of 2003,** Kasule J. (as he then was), Counsel for the plaintiff submitted that in the quoted case, the plaintiff had been deprived of the use his money for a period of 6 years. He added that as the decretal amount was Shs19,488,000 the plaintiff was then awarded Shs5,00,000 as general damages . Counsel for the plaintiff therefore prayed for general damages of shs30,000,000/= in the circumstances of this case.

This court is aware of the frustration and inconveniences suffered by the plaintiff in trying to recover the money due the defendant's dishonest and evasive conduct prior to and throughout the court proceedings. This is born out in the evidence of PW1, Daniel Mwangi Ndegula on record, and more recently of PW2, Joseph Waweru. PW2 testified as follows:-

> "**As a result of that failure to pay, we have suffered a lot, we get supplies from overseas. In the process we fell out with overseas suppliers. We have suffered additional Bank interest, Bank arrangement fees …… This has led to loss of sales, lack of stocks and our customers have gone to our competitors."**

The above passage from the testimony of PW2 summarises the suffering and loss caused to the plaintiff as a result of breach of contract and failure to pay over time by the Defendant. And the plaintiff, as a business entity, have been deprived of the use their money since 2004. The general principle for an award of general damages is to try and place an injured party in as good position as that party would have been had the wrong complained of not occurred.

Taking into account the inflation rates and the pecuniary expenses for air travel and accommodation in Kampala, for its employees, I am inclined to award the sum of Uganda Shillings 25, 000,000/= (Twenty five million shillings) as general damages to the plaintiff.

This court is also in the circumstances inclined to award interest at the rate of 20% on special damages from 2004 till full payment and on general damages from date of judgment till full payment.

Finally, an as was held by the **Supreme Court in Departed Asians Property Custodian Board Vs Jaffer Brothers Ltd, SCCA No. 9 of 1998**, it is a general rule of law and practice that costs normally follow the even in the suit. I am therefore inclined to award costs of the suit to the plaintiff.

In conclusion therefore, judgment is hereby entered in favour of the plaintiff and against the defendant in the sums of:

(a) Kenya shillings2,652,521/= as special damages.

(b) General damages Uganda shillings 25,000,000 Twenty five millions)

(c) Interest at 20% on (a) from 2004 till full payment and on (b) from the date of Judgment till full payment.

(d) Costs of the suit also awarded to the plaintiff

Hon Justice W. M. Musene

Judge

13th/6/2013

Present:

Mr. Micheal Akampulira for Plaintiff

Mr. Nzige for Defendant

Mr. Ojambo Court Clerk

Court: Ruling read in Chambers

Hon Justice W. M. Musene

High Court Judge

13th/6/2013