THE REPUBLIC OF UGANDA

IN THE HIGH COUR TOF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

H.C.C.S. NO. 777 OF 2004

KRYSTALLINE SALT LIMITED::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

KAMO ENTERPRISES::DEFENDANT

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff filed this case against the defendant on 14th October 2004 seeking, inter alia, for the recovery of **USD 105,601** allegedly arising from the failure by the defendant to pay for goods ordered from and supplied by the plaintiff to it, interest and costs of the suit. The plaint was subsequently amended on 25th October 2005 to include particulars of special damages and claim for breach of contract as well as general damages.

The plaintiff's case is that at various times between the years 2002 to 2003 it carried on business in salt with the defendant pursuant to which the defendant expressly or impliedly by way of local purchase order, email, letter and verbally ordered for various consignments of iodized salt from the plaintiff who duly supplied and delivered them. It is alleged that the defendant paid for some consignments of salt and refused, failed or neglected to pay for the rest of the outstanding dues from the salt supplied hence the suit.

The defendant in its written statement of defence (WSD) filed on 8th December 2004 denied the claim but contended that as from 2000 to 2003, it dealt with the plaintiff in the business of purchase of assorted salt on advance payment terms as indicated in the plaintiff's "INVOICE". The defendant asserted that it used to first pay the plaintiff for the salt products and thereafter the plaintiff would deliver the

salt to Uganda (Jinja or Kampala) by rail and some salt that were paid for were never delivered. The defendant initially counterclaimed **US$ 5000** being the amount paid on 04/07/2003 for salt which was never delivered by the plaintiff.

However, on 1st November 2007 when the suit came up for scheduling conference before my senior brother Hon. Justice Lameck Mukasa, the defendant's counsel sought leave of court to amend the amount in the counterclaim. Counsel for the plaintiff did not object to the application for leave so the defendant was allowed and it accordingly amended the amount in the counterclaim thereby substituting **US$ 5000** with **US$ 375,960**. The basis of that amendment is an agreement dated 9/11/02 under which the defendant contends it paid for salt products to the tune of **US$ 257,900** but the plaintiff has not supplied the same. In addition, it is alleged that the plaintiff's officer in another transaction, received **US$ 118,000** on 31st October 2002 from the defendant's office in Jinja for salt products which the plaintiff has not also delivered. It is the defendant's case that it stopped dealing with the plaintiff due to non-delivery of the salt products it paid for and in annoyance the plaintiff filed this framed up and speculative case of ever changing amounts claiming that it was advanced credit.

Agreed facts:

At the scheduling conference Mr. Noah Mwesigwa represented the plaintiff while Mr. Okalang Robert represented the defendant. Four brief facts were agreed upon as indicated below.

1. Service of Notice of Intention to sue.
2. The existence of contractual dealings between the parties.
3. The defendant has made payments and transfer of funds to the plaintiffs in the past.
4. The goods delivered were delivered by rail

Agreed Issues

The following three issues for trial were agreed upon:

1. What were the terms of the contract between the parties?
2. Whether there was a breach of the Contract by any of the parties.
3. What remedies are available to the respective parties?

At the trial, the plaintiff called three witnesses while the defendant called four witnesses. I must however observe at this point that the defendant brought on board a second counsel Mr. Joseph Oging after DW1 had concluded his evidence. The circumstances that led to that decision will not be highlighted in this judgment but it is on court record. After close of evidence both counsel were directed by this court to file written submissions which was done. Strangely, the defendant's counsel chose to frame his own new issues which were different from the ones agreed upon and went ahead to submit on them arguing that they were well covered in evidence during the trial so there would be no prejudice to either party.

The plaintiff's counsel protested to this in his reply to the defendant's submissions. The issues as framed by the defendant's counsel are:

1. Whether there was a contract or term of credit sale to the defendant;
2. If there was such contract of credit supply, then whether the defendant breached the same;
3. Whether the defendant is entitled to the counterclaim;
4. Whether the parties are entitled to their respective remedies

This court takes exception to that approach because it was not necessary. First of all, it is clear from the agreed facts that the existence of a contract between the parties is not in dispute. What the parties dispute is the terms of that contract and more specifically the payment terms. This is well covered by the 1st agreed issue. Secondly, breach by either party which also takes care of the counterclaim is covered by the 2nd agreed issue which counsel for the plaintiff rightfully submitted on under two sub-headings. It is therefore, my well considered view that the dispute between the parties are adequately covered by the agreed issues and so there was no need to digress to new issues that were not agreed upon.

Most importantly, scheduling conference is intended to do away with the archaic trial by ambush which some shrewd litigants and their lawyers would take advantage of with the result that the interest of justice would not always be fully served. With the recent reforms, issues and documents among other things are placed on the table for all the concerned parties to see and prepare their respective cases. If at all there is need for amendment whether of issues or list of documents/

witnesses the rules give this court discretion to allow the party who seeks leave to do so upon hearing the opposite party as well. It cannot be unilaterally done like counsel for the defendant did in this case.

For the above reasons, I will ignore the issues framed by counsel for the defendant and proceed to consider the agreed issues as submitted upon by counsel for the plaintiff. I will nonetheless go through the hustle of sorting out the submissions of the defendant's counsel and placing them where they rightfully belong under the agreed issues.

Issue 1: What were the terms of the contract between the parties?

Counsel for the plaintiff in his submission on this issue relied heavily on the testimony of PW1, DW1, PW2 and Exhibits P1, P3(a), (b), (c) & P7. Counsel submitted that PW1 Mr. Virji Kanji Pindoria (Vinu) rightly testified that they commenced business dealings with the defendant and at commencement they never granted credit to the defendant. He testified that the orders for the salt were made by phone or fax and thereafter the plaintiff would prepare the necessary documentations in respect of the order.

Counsel for the defendant on his part submitted that to understand this issue, it is best to take in mind that the plaintiff's case is that it first dealt with the defendant on ***"ADVANCE PAYMENT BASIS"*** and that later on it (plaintiff) started advancing the defendant credit for the goods supplied to it, which credit is denied. He then relied on the authority of ***Nsubuga v Kavuma (1978) H.C.B 307*** and ***Sebuliba v Co-operative Bank Ltd (1982) H.C.B 129***, for the principle that in civil cases, the burden of proof lies on the person who asserts or alleges. Counsel argued that in the instant case the plaintiff who is asserting "credit" has the burden to prove its case on the balance of probabilities and the defendant would only be called to dispute or rebut what has been proven by the plaintiff in line with the above authorities and sections 100 and 102 of the Evidence Act.

Counsel further submitted that in an attempt to prove the credit sale, the plaintiff called two witnesses (PW1 & PW2) and heavily relied on the account statement (Exhibit P7) and the handwriting expert, (PW3). Counsel for the defendant is of the view that the plaintiff miserably failed to prove this issue because PW1and PW2 were very dodgy during cross-examination. According to counsel, the law is that in

every contract or term there must be offer and acceptance and then the terms of that contract must be clear and not ambiguous. Counsel cited ***May and Butcher v R. (1934) & K.B 17*** and ***Bweya Steel Works Ltd v National Insurance Corporation (1985) H.C.B 5*** to support that view.

Counsel therefore submitted that from the evidence it is apparent that there was no offer either from the plaintiff or the defendant for credit transaction in this matter and it is also surprising and defeating that the plaintiff did not produce the alleged instruction document from sales department to accounts and the monthly statement that was allegedly given to the defendant after debiting his account. Counsel argued that if it was the policy of the plaintiff to do business based on advance payment then evidence was not produced by the plaintiff in court to show the change of that policy. He asked whether a sales officer could change a company policy and wondered whether that change was in writing and if so, why the plaintiff did not produce the same in evidence in court. According to counsel, the absence of the above evidence weakens and totally defeats the plaintiff's case or claim.

I have critically analysed the evidence on this issue and considered the submissions of both counsel. I wish to note from the onset that there appears to have been no written contracts between the parties as regards their business relationship save for the agreement dated 9/11/02 upon which the counterclaim is based. I will determine the veracity of that agreement when dealing with the counterclaim. It is the testimony of PW1 and PW2 that the parties had a business relationship that dates back to the year 2000. DW1also confirmed this although he said the business relationship started between 1999-2000 or there about. PW 1 testified that at the beginning the goods were supplied upon advance payment being made but from around June 2000 they started giving credit to the defendant.

The plaintiff produced an account statement (Exhibited P7) with details of the invoice numbers, debits, credits and the outstanding balance. The defendant challenged that statement on many grounds. Firstly, that it was different from the one attached to the plaint as the total sum claimed are not the same. Secondly, that the monthly statements from which it was derived were never sent to the defendant. Thirdly, that the defendant paid in advance for all the goods supplied as these were the terms of payment clearly indicated in the invoices from which they

were derived. Finally, that the plaintiff did not adduce any documentary proof that the terms of payments were changed from “advance” to “credit”.

The defendant argued that the burden of proving that the parties had changed the terms of payment from “advance” to “credit” was upon the plaintiff who alleges so. The plaintiff adduced evidence (Exhibits P3 (a), P3 (b), P3 (c) & P3 (d), P7 and the testimonies of PW1 and PW2) to support its allegation that it supplied goods to the defendant which was not fully paid for. The burden of proof at that point shifted to the defendant to produce proof of payments as alleged by it. That burden does not shift to the plaintiff until such proof is produced by the defendant. The defendant heavily relied on the invoices which according to it clearly stated that the terms of payment was “advance” and argued that it had made advance payments. No other statement of accounts was produced by the defendant to counter Exhibit P7 by indicating the payments made and the supplies received. I would have expected the defendant to give a summary of each of the payments it made to the plaintiff in advance and the corresponding goods it received save for the alleged undelivered goods. It is not enough to merely concentrate on discrediting the plaintiff’s account statement without producing one which the defendant considers more credible and thinks would be more believable to this court.

I have considered the argument that the invoices clearly stated that the terms of payment was “advance” as well as the explanation given by PW1 and PW2 that much as the invoices indicated the terms of payment as “advance”, the defendant was given goods on credit terms especially after it had gained the reputation of a good customer. In fact during re-examination PW2 explained that the word “advance” that appeared on every invoice was a programme in the computer that remained unchanged even though the defendant’s payment terms had changed from “advance” to “credit”. The explanation does not appear so convincing when taken in isolation but I will look at it vis-a-vis all the evidence on record taking into account the entire circumstances of the transaction.

On the defendant’s part, the invoices were never disputed but it is only the accounts statement derived from them that were questioned as indicated above. During cross examination DW1 testified that he paid for all the invoices in advance on the plaintiff’s bank account in Uganda and sometimes he paid cash to PW1 or

the man who left the plaintiff company. He claimed to have evidence of those payments but he did not produce it in court. When pressed further he stated, "I have the evidence in myself". At one point he even stated that he did not remember whether he paid for the goods by cash or in the bank. I believe this was the suitable time at which the defendant would have produced the evidence of payment to prove his advance payment as he did to prove the counterclaim but he did not do so. In the absence of an independent proof other than the term stated on the invoices, I find difficulty in drawing a conclusion that the defendant made advance payments for the goods before they were supplied. This is because an invoice is not a payment receipt. In my view the defendant's argument based on the invoices is analogous to use of an air waybill marked "PP" which means prepaid as proof of payment. That line of argument was considered in ***British Airways PLC v Fresh Grown Uganda Limited and another HCCS No. 0157 of 2003*** where it was held that:

> *"Conceptually an airway bill is a document that in effect acknowledges receipt of goods by an airline, and contains shipment information as to point of origin, shipper, destination, quantities of the goods, and so on. It is not a receipt. A receipt is an accounting document that acknowledges receipt of a particular item such as cash, and indicates the sum received and mode of payment. An airway bill is no receipt for charges in respect of shipment of goods for which it is issued".*

In ***British Airways PLC v London Fruits & Vegetables Ltd HCCS No. 156 of 2003,*** this court adopted the reasoning in the above case and it is my considered view that the same principle applies in this case.

Black's Law Dictionary 8th Edition defines an invoice as

> *"An itemised list of goods or services furnished by a seller to a buyer, usually specifying the price and terms of sale; a bill of costs."*

It is the firm view of this court that where there is a dispute over payment like in this case, it is not enough to refer to the terms of payment in the invoice or contract but the actual payment has to be proved in addition. The term stated in the invoice is merely a compass that points to the direction and not itself the destination.

I have also studied Exhibits P1 (a)-(f) much as the defendant disputes some of them and I do not find any indication by the defendant's officials that the orders were in respect of payments made in advance. Exhibit P7 also shows a trend where suppliers were not pegged to payments. It instead shows payment on account basis.

In the absence of proof of advance payment, I am more inclined to believe the plaintiff's case that much as the terms of payment was stated in the invoices to be advance, those terms were relaxed by the parties conduct and credit facilities were given to the defendant. I do not agree with the defendant's contention that there was no offer either from the plaintiff or the defendant for a credit transaction in this matter. I am satisfied that the plaintiff has adduced credible evidence and proved on a balance of probabilities that the terms of the contract between the parties were both "advance" and "credit". This answers the 1st issue and leads me to consider the next issue.

Issue 2: Whether there was a breach of the Contract by any of the parties:

I will consider the second issue concurrently with the issue of remedies available to the parties. In view of the fact that the defendant raised a counterclaim, the plaintiff's counsel submitted on this issue under two subheadings and I will consider them in the same manner.

A: Whether there was a breach of contract by the defendant and if so what remedies are available to the plaintiff?

The plaintiff's counsel submitted that the defendant breached the contract between the parties with respect to the purchase, supply and payment for salt ordered from the plaintiff. According to counsel as per the authority of ***Ronald Kasibante v Shell Uganda Limited cited in 2008 ULR 690*** and ***Lilia K. Mwirumbi Vs. Ongeza General Agencies & ors HCCS No.106 of 2011;*** for a party to be said to have breached a contract, there must have been a break in the obligations conferred upon the parties in their contract/ contractual dealings. Counsel submitted that the evidence of PW1 PW2, DW1 and DW2 confirmed that the parties had contractual dealings and the same only ceased upon commencement of demand letters and the court action.

It was therefore counsel's contention that the plaintiff performed his part of the contractual obligation by supplying salt, prepared the freight documents and sent the salt by rail, the plaintiff has now sued for the liquidated sum comprising the value of the salt supplied and unpaid for. Counsel also submitted that the plaintiff having failed to provide any proof of payment is thus in breach of an obligation to pay for the goods received which amount to breach of contract. Counsel relied on ***Dada Cycles Limited v Sofitra S.P.R.L Limited HCCS No. 656 of 2005(unreported).***

Counsel for the defendant argued that since there was no "credit" contract/term between the parties the defendant did not breach the alleged credit transaction. He selectively singled out some responses by PW1 and PW2 in their testimony which he capitalised on to show that indeed there was no "credit" as all the goods were paid for in "advance".

In ***Ronald Kasibante v Shell Uganda Ltd (Supra) Bamwine J*** (as he then was) stated that:

> *"Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other Party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract discharged or seeking a discretionary remedy."*

In the instant case, it was an agreed fact that the parties had contractual dealings as was confirmed by PW1, PW2, DW1 and DW2. The terms of the contractual relationship have been ascertained in the previous issue. It was the evidence of PW1 and PW2 that they received orders from the defendant, processed the same, prepared invoices and railways documents, loaded the salt and dispatched it. Indeed Exhibits P3(a)-(d) contain export invoices and accompanying railway documents in respect of the goods ordered and sent for exportation to the defendant. These documents have not been challenged at all. It was an agreed fact that the goods were delivered by rail. On the other hand it was an agreed fact that the defendant has made payments and transfer of funds to the plaintiffs in the past.

During cross examination, DW1 testified that their dealings were never on credit because invoices indicated that it was on advance payment. I have already determined that the evidence adduced shows that the payment terms were both “advance” and “credit”. The plaintiff has produced an account statement to show what was paid and what is still outstanding. For the defendant, DW1 maintained that he had evidence of payment for the invoices issued by the plaintiff but never produced them at the hearing to prove his assertions. As stated under the 1st issue, DW1 was not even sure if he paid by cash or by bank.

I must observe at this juncture that I found DW1 to be a very untruthful witness. For instance, it was his evidence that the plaintiff company has never had a sales manager. However, this contention was contradicted by the evidence of DW2 who in her witness statement clearly spelt out the management team of the plaintiff company inclusive of a sales manager. Another incident is when DW1 categorically stated that the letter head on which PID2 was written does not belong to the plaintiff company because the address is stated as P.O. Box 18233 Kayunga when the company office is situated in Jinja. This was a pack of lies because all the correspondences of the plaintiff company inclusive of the payment voucher marked Exhibit D6 indicate the plaintiff’s address as P.O. Box 18233 Kayunga. In view of those obvious lies I have treated the evidence of PW1 with a lot of caution.

Taking the evidence on record in their totality, I am more inclined to believe the plaintiff’s case in determining whether the defendant breached the contract. The evidence of PW1that the plaintiff delivered all the salt to the defendant is confirmed by Exhibit P5 written in reply to the plaintiff’s inquiry as to whether the salt consignments were delivered to the defendant’s warehouse. Exhibit P7 shows that the defendant made some payments and reduced its balance as testified by PW2 but the outstanding balance built up over time in respect of subsequent supplies. It was the evidence of PW1 and PW2 that they have never received payment of the sum of USD 105,601 which is due and outstanding from the supply of salt on credit. I have noted the argument on the disparity in the figures as stated in Exhibits D1, D2, P7 and the account statement attached to the plaint but I am convinced by the explanation of PW2 that the final figure claimed was arrived at after some reconciliation were done and a credit note of US$12,400 dollars was captured.

In the absence of proof of payment by the defendant to settle the credit of US$ 105,601, I am inclined to agree with the plaintiff that the defendant received the salt ordered for but neglected to pay for the same on the pretext that there was an advance payment which has not been proved at all. I find that the plaintiff has proved its case on the balance of probabilities that the defendant breached the contract when it neglected to pay of US$105,601 for salt ordered for and delivered to its warehouse. The plaintiff is therefore entitled to recover that sum from the defendant with interest of 8% per annum. I would decline to award general damages for breach of contract because the interest would take care of any loss suffered by the plaintiff as a result of the breach. This answers the 1st leg of the 2nd and 3rd issues in the affirmative and I now turn to consider the 2nd leg of the 2nd and 3rd issues.

B: Whether there was a breach of the contract by the plaintiff and if so what remedies are available to the defendant?

The defendant counterclaims against the plaintiff the sum of US$ 375,960 being the value of the goods allegedly ordered and paid for in advance but were never supplied. The plaintiff‘s counsel submitted that the defendant’s counterclaim is trumped up, a sham, and an afterthought designed to defeat the plaintiff’s valid claim and should be dismissed.

Before delving into this issue, I wish to first deal with the point of law raised by the plaintiff’s counsel that counsel for the defendant applied to amend the counterclaim by enhancing the amount claimed from **US$ 5,000** to **US$ 375,960** and the same was allowed by court but no filing fee was paid with respect to the enhanced amount contrary to rule 6 of the Judicature (Court Fees, Fines and Deposits) Rules SI 13-3. He urged this court to disregard the amendment since failure to pay fees was not due to mistake or inadvertence, where court would allow late payment. Counsel referred court to the authority of ***UNTA Export Ltd v Customs [1970] EA 645.***

In response, counsel for the defendant submitted that the plaintiff’s objection at this stage when the counterclaim has already been proceeded upon is desperation. The defendant’s counsel argued that fees had been paid for the initial counter-claim so the counter-claim itself was properly before court at the time of

amendment. It was counsel's contention that since at the time of amendment, either by mistake or inadvertence, the issue of additional fees was never thought about and the case proceeded rule 6 provides that in such a situation, the court may order for the payment of such fees and such document shall be valid as if proper fees had been paid in the first instance. Counsel also cited S. 97 of the Civil Procedure Act and the authority of ***Daka Nganwa v Rukyema H.C.C.S No. 8/2000*** to support his argument that if court finds it necessary, the fees can be paid at any stage, including at the state of judgment or even execution.

Section 97 of the Civil Procedure Act provides:

> *"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom the fee is payable to pay the whole or part, as the case may be, of that court fee; and upon the payment the document, in respect of which the fee is payable, shall have the same force and effect as if the fee had been paid in the first instance."*

In ***Daka Nganwa v. Rukyema (Supra)*** Bashaija J. noted that the clear import of rule 6 is that court is seized with wide discretion to order for the payment at any stage of the proceedings where it finds that fees were not paid, and if fees are paid the document and/or proceedings relating thereto shall be as valid as if the proper fees had been paid in the first instance.

In the instant case, it is conceded that court fees for the enhanced counterclaim were never paid either due to inadvertence or mistake of counsel for the counterclaimant. Having reviewed the authorities and the submissions on this point as above, I am convinced that court fees can be paid at any stage of the proceedings. However, I do have a bit of difficulty when the matter is raised in the final submissions that would dispose off the whole suit by way of judgment like in this case. It is my firm view that counsel would have assisted this court more by raising the issue before or during the trial. Be that as it may, for this court to consider the counterclaim as amended, I would uphold the objection and exercise my discretion to order that fees for the enhanced counterclaim be paid by the

defendant after the same is properly assessed and determined by the cashier. The receipt should be filed in court upon payment of the requisite fees.

Part of the counterclaim, that is, US$ 257,900 allegedly arises from the agreement marked by both parties as Exhibit P6 and D4. The other part, that is, US$ 118,060 allegedly arises from the payment voucher marked Exhibit D6 and the receipt marked Exhibit D7 (iv).

It is the plaintiff's submission that although the counterclaimant purported to insert several receipts tendered as Exhibits D7(iv)-(vi), the counterclaim was never amended to add such sums to the said total claimed and no evidence other than the copies of the samples submitted to the defendant's handwriting expert was adduced in respect thereto. Counsel therefore submitted that a party is bound by its pleadings and the court should not labour itself when considering Exhibits D7 (iv) and (vi) as part of the financial sum claimed by the defendant.

Counsel further submitted on the claims specifically as follows:

i. Claim for US$ 257,900

As regards this claim, he submitted based on the evidence of PW1 that Exhibit P6/D4 was written on the letterhead of the plaintiff and addressed to URA on the subject "Sale Agreement" and signed by the representatives of the defendant and the plaintiff upon the request of the defendant. He pointed out based on the evidence of PW1 that the said document was issued to URA to assist the defendant obtain an import licence and was akin to a proforma invoice that would also indicate price for that purpose. He alluded to the testimony of PW1 that the plaintiff never received any payment in that respect and never expected any.

Counsel submitted further that the evidence of DW1 that he paid the defendant a total of US$ 275,900 for salt to be supplied in three weeks was suspect and unsatisfactory because under cross examination he testified that: he had not declared the above sums to Kenyan Airport Authorities nor does he have evidence of the source or purpose as indicated in the Kenyan Customs, Currency & Airport Tax Regulations; he was allegedly travelling with such a huge sum of money; he had no evidence of having withdrawn the same from a bank; he allegedly received the sum from his customers whom he did not name and neither were any financial

books presented to prove that such income formed part of the money or income of the defendant or that it existed at all Counsel pointed out that it was put to DW1that he was telling lies and he alleged that he had evidence of receipt which he did not have.

Counsel the plaintiff also submitted that after the testimony of DW1 counsel for the defendant purported to introduce and put onto the court record a receipt which was admitted and marked Exhibit D9 under his protest. He argued that that document was an afterthought, conjured up as a result of the cross examination and the gaping holes in the evidence of DW1 on his claim of the said amount of money. Moreover according to counsel, this receipt was not submitted to the handwriting expert when the parties agreed at the commencement of the suit to submit documents to the handwriting expert. Counsel then prayed that court be pleased to dismiss the defendant's claim for this sum because the defendant being the counterclaimant had a burden to prove the validity and authenticity of its claim. Counsel referred court to section 101 of the Evidence Act and the authority of ***Dada Cycles*** (Supra).

On the other hand, counsel for the defendant submitted on this leg of the counterclaim that the defendant clearly told court that he executed a sale agreement with the plaintiff for purchase and supply of various salt items and DW1 produced a sale agreement to that effect. He submitted that DW1 told court that he paid the money but the salt products have never been delivered because PW1 used to say that as a big consignment they were waiting for materials to come from abroad.

Counsel for the defendant submitted that it is a matter of assessment of evidence to see who actually is lying, whether PW1or DW1. This was in response to counsel for the plaintiff's submission that the defendant's claim has no merit and that the plaintiff never received any money on that agreement as it was intended not to be an agreement but a document for DW1 to use in URA for import licence and that because DW1 did not disclose the source of his money he allegedly paid, then such a contract did not take place. According to counsel, the evidence of DW1 was direct to the point that he executed a sale agreement (P6/D4) dated 9/1/2002 and has not received the goods. He told court that the original remained with the plaintiff and he took the photocopy which indeed he produced in court. Counsel further submitted that in cross-examination PW1 was asked a direct and specific

question whether he signed that document and after several attempts, he eventually accepted that he signed much as in examination in chief, he had said that he does not know that document. Counsel also stated that when asked whether he received the money mentioned in the agreement, he first denied then later said: “some money was received and some was not received”

According to counsel, upon evaluating the two witnesses it is obvious that PW1 was lying on that document as the agreement in issue was drawn by the plaintiff and the format is immaterial and as such insertion of URA does not vitiate the agreement. He argued that if it was intended to be for import licence, it should have said so but it did not and oral evidence cannot be used to add or to vary a written agreement as agreed by the parties. In any case according to counsel, at that time the defendant was already doing the import business of salt and the plaintiff knew him and had even acknowledged him as one of its good importers of salt.

Counsel submitted further that the question whether DW1 had withdrawn money from a bank or not is immaterial as it is not mandatory in law that all business persons should have bank accounts or should only use money from a bank for their business and whether DW1 declared the dollars in Kenya or not is also immaterial and does not vitiate a sale agreement executed by the parties as the law does not say so or even make it criminal. Counsel held the view that the defendant discharged its burden to show that a sale agreement was executed, which the plaintiff accepts and it was the duty of the plaintiff to show that it delivered the goods but it failed to do so and the amount stated in the agreement is due and owing to the defendant from the plaintiff.

On counsel for the plaintiff’s submission that Exhibit D 9 was an afterthought conjured up after cross-examination and that it was presented belatedly, counsel replied that Exhibit “D9” is not the basis of the defendant’s claim for US $ 257,900 as this claim is based on Exhibit P6/D4. He based this on an observation made by the then trial judge which according to counsel is in line with Order7 rule 14 of the Civil Procedure Rules (CPR) to the effect where a plaintiff sues “upon a document” in his possession, he/she shall produce it at the time the plaint is presented. He noted that reference to the plaintiff in that rule includes the counterclaimant and submitted that the defendant is suing upon the sale agreement which was produced at the time of amendment. According to him, the rest is

evidence and indeed in cross-examination DW1 said he had a receipt of payment and DW2 as the person who keeps the records, including receipts produced the said receipt of US $ 257,900 in evidence and the same was exhibited as D9. He argued that it would have been a different situation if DW1 had denied its existence in his evidence and then DW2 came up in her evidence with it.

On the submission of counsel for the counter-defendant that the said receipt is suspicious and fake and the date was tampered with, counsel for the counterclaimant submitted that it is not true because counsel for the counter-defendant did not cross-examine on that at all and he cannot adduce evidence from the bar. According to counsel, the said receipt is genuine as it bore the signature of PW1 and stamp of the plaintiff and is evidence but not the basis of the claim.

Moreover according to counsel, even without the said receipt, the agreement itself is enough to prove his client's claim, coupled with the evidence of PW1 acknowledging the said agreement and even accepting having received some payment on that agreement and admitting partial supply of goods, though the defendant contends that the plaintiff did not supply any goods.

I have carefully considered this claim and the agreement (Exhibit P6/D4) upon which it is based. Exhibit P6/D4 which is addressed to URA is written on the counter-defendant's letter head. It states in part as follows:

> *"Our Ref: KSL/M/02/01/54*
>
> *UGANDA REVENUE AUTHORITY*
>
> *KAMPALA*
>
> ***SALE AGREEMENT***
>
> *An agreement is entered today the 9th January, 02 between the supplier – KRYSTALLINE SALT LTD BOX 80856 MOMBASA, KENYA and the purchaser KAMO ENTERPRISES BOX 18233 KAYUNGA UGANDA.....We have given special discount because he buys in bulk and also is our old customer."*

At the bottom of the document the agreement was signed by the representatives of the parties to this suit.

PW1 conceded to signing this document but explained that it is a letter requested for by the defendant for purposes of import licence and that is why it is addressed to URA. As earlier noted in this judgment, the contract of supply of goods between the parties was an oral one. This is the only isolated incident in which a written document is adduced to prove a contractual relationship under which payment was made for goods not supplied. I have also observed with keen interest how the counterclaimant initially claimed for US$5000 based on payment allegedly made on 04/07/2003 for salt which was never delivered by the plaintiff. No mention of an agreement was made in that original counterclaim. To my mind this raises a number of questions but the most obvious one is; could it be that the counterclaimant had forgotten that he had an agreement under which colossal sums of money was paid and no delivery made? Is that believable?

Of course I am alive to the fact that about three years after the original counterclaim was filed an amendment was sought and allowed which enhanced it from US$5000 to US$ 375,960 based on an agreement executed on 9th January 2002! Does that not instead support the plaintiff's case that the counterclaim is an afterthought? If at all the counterclaimant paid for the goods on the very day the agreement was executed, could it have waited to claim for the money five years later? Does that make any economic sense given the amount of money involved?

With the above questions in mind, I have evaluated the evidence given by both parties on this claim and I find PW1's testimony in relation to Exhibit P6/D4 more credible than that of DW1. This is because the agreement is on a letterhead of the counter-defendant and it is addressed to Uganda Revenue Authority. I have also taken note of the last sentence in the document which in my view would have not been necessary if the document was for the benefit of the parties. The only explanation given by DW1 is that at the time of making this agreement the counterclaimant was already doing the import business of salt. He was careful not to state that the counterclaimant already had the import license. If at all it did have the licence, it should have been produced in evidence to rebut the contention that the agreement was for purposes of assisting the defendant to obtain an import licence. In fact DW1 conceded that the document was addressed to URA but wants this court to treat it as a trivial matter.

For the above reason, it is my well considered view that the plaintiff has proved to the satisfaction of this court on a balance of probabilities that Exhibit P6/D4 was executed for the purpose of enabling the counterclaimant process import license. It is not a sale agreement under which any payments and deliveries was expected. I therefore find the defendant's claim that it paid money under that agreement and goods were not delivered unbelievable and it is accordingly rejected.

DW1 also alleged that he paid cash in Mombasa and Exhibit D9 was produced by DW2 as proof of that payment. I must observe that the first time this receipt was mentioned was during cross-examination of DW1. He then promised to produce the receipt in court and for sure DW2 filed an additional witness statement to include this receipt which was tendered under protest by the counter-defendant's counsel. I assured counsel that I would evaluate the veracity of the receipt along with the other evidence on record. The immediate question that comes to mind is why the counterclaimant left out this very vital evidence in proving its claim and had to produce the same after its Managing Director was challenged in cross examination to do so. If at all this receipt existed at the time of filing the counterclaimant's claim, why was it not included among the documents the counterclaimant sent to the handwriting expert for examination?

To my mind this state of affairs casts doubt on the authenticity of the receipt. No wonder PW1 who is alleged to have signed and issued this receipt along with two others that were presented to him when he was testifying vehemently denied signing and issuing them. He clearly pointed out that all their receipts are self carbonated unlike the ones produced by the counterclaimant to support its claim. This court actually verified this contention and found it to be true.

I also wish to point out that I have carefully looked at all the payments made to the plaintiff by the defendant that are on record and observed that all the undisputed payments were either by bank transfer or direct deposit on the plaintiff's account. I did not see any receipt to confirm cash payments by the defendant apart from those disputed by the plaintiff. In addition, I have noted that the amount paid in a single deposit or transfer has never exceeded US$25,000. Given that trend, it is quite unconvincing that the defendant would choose to pay a sum of US$ 257,900 in cash as it is not in consonance with the trade practice between it and the plaintiff.

For the above reasons, I do not find any payment made to the counter-defendant in respect of Exhibit P6/D4 as none was expected and none has been proved. As such the claim for US$ 257,900 fails.

ii. Claim for USD 118,060.

This counterclaim is based on Exhibits D6, D7 (iv) and D5. It was submitted for the counter-defendant that a review of the evidence with respect to this claim shows that when PW1 was shown Exhibit D6 he testified that he had neither seen nor signed it nor received any money allegedly indicated thereon. Counsel submitted that the witness was steadfast in this regard even under cross-examination. On Exhibit 7(iv), counsel submitted that PW1 testified under cross-examination that indeed that was a receipt from the plaintiff as the document was different in colour, logo, font and serial numbers.

Counsel for the counter-defendant submitted that based on the evidence of PW1 in cross-examination, the court requested for all the original receipt books to be produced and the same were produced and tendered as Exhibit P8. He noted that the witness further testified that Exhibit P7 (iv) is a forgery because in their receipt books in Exhibit P8 (a), the serial number 2017 belongs to a sale to one Juma Kobello dated the 2/12/2005 and the year the said receipt was presumably made the plaintiff's accounts and serial numbers in the receipt books had not reached that serial number until three years later, that is, in 2005. Counsel submitted that even the testimony of PW2 corroborated and emphasized the fact that Exhibits D7 (iv), D7 (v) and D6 were all forged.

Counsel also submitted that PW3 being the handwriting expert testified on behalf of the plaintiff that as per his analysis of the sample specimen signature of PW1 and the documents which the parties had agreed to present to the expert, the questioned signature on Annexture A1 (Exhibit D6) and Annexture A2 (Exhibit P6/D4) were most probably not written by the same person whose sample signatures are on Exhibit "C". Counsel also submitted that the same expert while reviewing the samples B1-B3 stated in his findings that there were differences with the sample signatures.

Counsel therefore concluded that the evidence of the defence on this issue was suspect and unsatisfactory and court should reject the claims of the defendant.

Counsel for the counterclaimant on his part contended that PW1 came to the counterclaimant's offices and he was paid US $ 118,060=. He signed in the visitor's book and payment voucher of the counterclaimant and then later on sent the receipt by Akamba Bus. The photographs taken on that date were exhibited as D8.

According to counsel for the counterclaimant, counsel for the counter-defendant in his submission is arguing completely in the negative but the evidence on the record show the contrary. First of all PW1 accepted in cross-examination at page 53 that on 31/10/02 he went to the defendant's office at Jinja and even wrote down his name on the visitor's book and signed it and took photographs.

As regards the money allegedly paid to PW1, counsel submitted based on the evidence of the handwriting expert that PW1 signed the payment voucher (Exhibit P5) and argued that he also received the money in dispute. He referred to the findings and conclusion of PW3 that "one....Pindorani (VINU) could have written the questioned signatures on exhibit "B1-B3" and pointed out that B1-B3 includes the receipt of US $ 118,060 dated 31/10/2002 marked as "B3".According to counsel, DW2 testified that the receipt of US$ 118,060 bearing the signature of PW1 was sent to them via Akamba Bus, the agreed courier by both parties as per the evidence of DW1 & DW2.

Counsel also referred to the report and evidence of DW3 who examined the original of the receipt of US $ 118,060 dated 9/11/2002 and other receipts against the 2 photocopies of receipts of the plaintiff dated 10/05/02 and 6/05/02, all purportedly signed by PW1 and found that they were all signed by the same person, Mr. VINU. The photocopy receipts as used by DW3 were photocopied from the books of receipts exhibited in court by the plaintiff as his genuine receipt and signatures.

Counsel for the defendant contended that counsel for the plaintiff in his submission dodged the finding of his handwriting expert on that receipt of US $ 118,060 to the effect that the signature on it could have been written by PW1. Counsel thus invited court to find that though both experts had reservations on the issue of photocopies, they both arrived at the same conclusion as to that receipt of US $

118,060 which confirms the defendant's case that the plaintiff received the same. Counsel therefore prayed court to find that PW1 received the US $ 118.060.

I have carefully evaluated the evidence on record as relates to this claim and critically analysed the receipt upon which it is based. As already stated earlier in this judgment, all the counter-defendant's receipts adduced as Exhibits P8 (a)-(c) are self carbonated. Exhibit D7 (iv) is not. I have also carefully examined all the carbon copies of receipts signed by PW1 in Exhibits P8 (a) & (b) and observed something noteworthy. Firstly, in all those receipts there was none that was consistently and carefully written in capital letters the way Exhibit D7 (iv) and even Exhibit D9 which I have already determined was written. Secondly, all the signatures in the carbon copies in Exhibit P8 (a) & (b) do not have the word VINU written under it.

I would therefore be inclined to believe the evidence of PW1that he does not know that receipt as he neither wrote it nor signed it nor sent it to the defendant. He equally denied receiving the money or signing Exhibit D5. I also believe him because the signature on that document appears different even to a lay man's eye. My earlier observation that the mode of payment used by the defendant were consistently bank transfer and direct deposit on the plaintiff's bank account and the amount for single deposits never exceeded US$ 25,000 also applies to this claim. Similarly, this claim appears to have skipped the mind of the defendant's managing director when the initial counterclaim of US$ 5000 was made and it was only remembered three years later! In addition, I have also noted with keen interest that the defendant had deposited some money on the plaintiff's account two days before DW1 allegedly paid the sum of US$ 118,060 in cash to PW1. One wonders why that colossal sum of money was not paid into the plaintiff's account together with the payment of 29th October 2002. These observations strengthen the plaintiff's case that no money was paid to PW1 on 31st October 2002 as alleged.

In the result, it is my finding that the defendant has failed to prove on the balance of probabilities that it paid US$ 118,060 to the plaintiff for salt which was never delivered. Since both claims have not been proved to the satisfaction of this court, the counterclaim is accordingly dismissed and judgment is entered for the plaintiff for a sum of US$105,601. Interest of 8% per annum is awarded on that amount

from the date of filing the suit until payment in full. Costs are awarded to the plaintiff.

I so order.

Dated this 10th day of September 2013.

Hellen Obura

JUDGE

Judgment delivered in chambers at 4.00 pm in the presence of Mr. Noah Mwesigwa for the plaintiff and Ms. Fiona Akulo holding brief for Mr. Robert Okalang for the defendant.

JUDGE

10/09/13