

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

H.C.C.S. NO 155 OF 2011

JAMES PARK}..... PLAINTIFF

VERSUS

EAST AFRICAN EDUCATIONAL PUBLISHERS LIMITED}DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The Plaintiffs case against the defendant is for an account of royalties due from the publication and sale of the plaintiff's Adventure Series Books by the defendant pursuant to various publishing contracts. The plaintiff seeks orders for payment of all sums due and general damages together with interest from the date royalties were due to payment in full at commercial rate. Additionally the plaintiff claims interest from the date of judgement till payment in full and for costs.

The plaintiff is the author and owner of copyrighted works in adventure series books namely "Adventure in Nakuru", Adventure in Nairobi, Adventure in Mombasa written under the pen name "Juma Bustani". In 1998 the plaintiff and Messieurs Heinemann Kenya Ltd which later became the defendant executed three separate agreements pursuant to which the defendant was to publish, advertise and sell the plaintiffs books. The defendant agreed to pay the plaintiff royalties at 10% on Kenya published price on sales in Kenya and elsewhere. Since 2004 the defendant never made payments to the plaintiff. It is contended that the defendant continues to publish, reprint, advertise and sell the plaintiffs copyrighted works worldwide and continues to make profits from the sales without declaring the proceeds of sale as well as payment of royalties due to the plaintiff.

Despite several reminders to account for and remit the plaintiffs unpaid royalties since 2004 the defendant neglected, refused or declined to do so and continues to breach the contract through non-payment of royalties. The defendant's conduct occasioned loss to the plaintiff.

The defendant simply denied the claims without asserting any facts. The plaintiff was represented by Counsel Isaac Walukagga while the defendant was represented by Counsel Francis Buwule.

In the joint scheduling memorandum of the parties and signed on 5 February 2013 it was agreed as follows. In 1998 under memoranda of agreements the plaintiff and the defendant agreed for the defendant to publish the plaintiffs book as pleaded in the plaint for which the defendant would pay the plaintiffs royalties at 10% on the sales. Between 2004 to date the defendant paid to the plaintiff Kenya shillings 255,915.22.

Agreed issues:

1. *Whether the defendant owes the plaintiff any outstanding money in royalties?*
2. *If so, how much?*
3. *What remedies are available to the parties?*

The testimony in chief of the witnesses was through written witness statements. The plaintiff testified in person and the defendant called one witness. The witnesses were cross examined after being sworn.

Counsels for the parties subsequently addressed the court in written submissions. The plaintiff's case is that he entered into a contract with the defendant and the contracts were admitted in evidence as exhibit P1 and P2 in respect of three books/adventure series. The defendant was to publish, print and sell the books and give the plaintiff a consideration of royalty at 10% on the Kenya published price. The payment was before any deduction. The defendant accordingly sold the plaintiffs works after publications from 1988 to date. The defendant issued statements on sales from 1998 to 2003 and promptly made payments. From 2004 to date no statements have been issued by the defendant and payments have not been made as is consistent with the previous payments.

On the first issue of whether the defendant owes the plaintiff any outstanding monies in royalties? Counsel submitted that PW1 proved the case. The contracts exhibit P1 and P2 for publication and sale of the books were not in dispute. The defendant promptly paid the royalties until 2004 when for unexplained reasons it ceased to do so. The agreements are not in dispute. Upon filing the suit in 2011 the defendant made a payment to the plaintiff of Kenya shillings 255,915.20. The payment as reflected in the statement issued by the defendant and exhibited as P12 covered the period 1st of May 2010 to 31st October 2010. Previously the defendant had not issued statements. The plaintiff testified that his books were on sale at all material times. In support of the statement he adduced in evidence online printouts exhibit P4 to exhibit P11. PW1 met several times with the defendant's representatives and was offered Uganda shillings 2,000,000/= which he rejected initially but later agreed to take on account of his financial constraints. PW1 also misplaced some of the statements issued prior to 1997. The statements in this possession were marked as exhibit P3. From the sales for the period 1988 to 1993 it was clear that there were increasing sales of the plaintiff's books. From 1993 the average earnings from his contract with the defendant was Uganda shillings 7,000,000/= per annum.

The testimony of DW1 is that the plaintiff's books were not on sale for the period in question. However DW1 was not able to know whether there were any sales out of Uganda because his brief was limited to Uganda. He admitted that the defendant had before 2011 when the only payment was made to the plaintiff met with the plaintiff and offered to pay him for his royalties. He could not establish in court how many copies were sold for the material time in question.

Exhibit P3 and particularly statements of 1992 and 1993 for the three books show that the plaintiff earned 4,140/= Kenya shillings for Adventure in Mombasa, Kenya shillings 3830/= for Adventure in Nakuru, and Kenya shillings 6,325/= for Adventure in Nairobi. The payments reflect a total sum of 14,295/= for the last quarter statements received in 1993. Exhibit P12 proves that between the 1st of May 2010 and 31 October 2012 a period of six months, the plaintiff was paid 255,915.20/= Kenya shillings. This is the equivalent of about Uganda shillings 7,677,450/= at the current rate of Uganda shillings 30 per Kenya shilling. When this figure is doubled it amounts to about Uganda shillings 15,354,900/= annually. The plaintiff was last paid in 2004 and no statements were issued for the period 2004 to 1st of May 2010 and also for the period beginning that 1st October 2010 to date. The plaintiff is claiming a modest sum of Uganda shillings 7,000,000/= per annum for a period of eight years that is from 2004 up to the year 2012 amounting to Uganda shillings 56,000,000/= less the amount of 7,677,450/= already paid. This leaves a claim of Uganda shillings 48,322,550/= as the dues of the plaintiff. The plaintiff's counsel prayed that this amount is awarded to the plaintiff. Because the defendant agreed during the scheduling conference that it was indebted to the plaintiff, the only issue left is what the quantum of the indebtedness was.

In reply the defendants counsel submitted that it was not in contention that the defendant owes the plaintiff money in outstanding royalties from the sale of books published by the defendant according to the memorandum of agreement court exhibit P1 and P2. The defendant only owes the plaintiff the amount contained in the statement of account exhibit D1 dated 15th of September 2011 and what is yet to be computed for the year 2012. What the defendant owes the plaintiff is a matter of fact and its calculation is based on the percentage agreed upon in the agreement on the basis of books published and sold by the defendant. This is a matter of fact and cannot be speculated. There is no documentary proof that the plaintiff was earning Uganda shillings 7,000,000/= before 2004. The various statements for the period 1988 to 1993 show a total sum from sale of books averaging Kenya shillings 72,403.15 which works out to be Uganda shillings 2,174,092/= in a period of five years. There is therefore no evidence on record that the plaintiff used to earn Uganda shillings 7,000,000/=. As far as exhibit P12 is concerned and the figure of Kenya shillings 255,915.20, exhibit P12 shows the first figure in the first column of Kenya shillings 212,504.4 to be an amount brought forward to the period 1st of May to the date of 31 October 2010. Consequently counsel for the defence submitted that the figure was for amounts prior to the 1st of May 2010.

For the period 1st of May 2010 to the 31st of October 2010 the only royalties and are in the column "Royalty KES" totalling Kenya shillings 54,263.50 less withholding tax giving a net

royalty of Kenya shillings 43,410.80. Added to the previous figure of Kenya shillings 212,504.4 to brought forward the total becomes Kenya shillings 255,915.22 and the actual royalties for the period is only Kenya shillings 43,410/=.

Exhibit D1 which is the statement dated 15 September 2011 as Kenya shillings 255,950.22 in the brought forward column and indicates that the figure comes from a previous period similar to exhibit P12. The royalties in exhibit D1 are for the period 1 November 2010 30 April 2011 and its Kenya shillings 42,138. When the withholding tax is subtracted it comes to a net value of Kenya shillings 33,710.40 which is still outstanding. Kenya shillings 255,915.20 is indicated as paid out in the appropriate column.

The submission that the plaintiff would have earned Uganda shillings 48,322,550/= does not have any basis. For the six months period indicated in exhibit P12 that is the period between the 1st May to 31st October 2010 the plaintiff earned Kenya shillings 43,410.80. This gives an average of Kenya shillings 7,235 per month and an average of Kenya shillings 86,820/= per annum. This further gives a figure of Kenya shillings 694,460/= in eight years less 255,950/= which the plaintiff received leaving a net income of Kenya shillings 438,645/=.

The defendants counsel concluded that by 30th of April 2011 the defendant owed the plaintiff Kenya shillings 289,625.62 according to exhibit D1. The defendant paid the plaintiff a sum of Kenya shillings 255,915.20 leaving an outstanding balance of Kenya shillings 33,710.40 due to the plaintiff. If the plaintiff disputes the calculations he would be entitled to an examination of the audited books of accounts of the defendant to determine what is actually due to him and not to engage in speculation and conjecture.

Judgment

In this suit, the primary issue is whether the defendant owes the plaintiff some money. It has been agreed that a contractual relationship between the parties is embodied in several contracts executed between the plaintiff and the defendant (the defendant's predecessor in title). It is an agreed fact that the defendant owes the plaintiff some money. The material question to be determined is therefore the quantum as far as the claim of owing money is concerned.

The plaintiff filed a witness statement and was cross examined. The gist of the statement at paragraph 9 thereof is that the defendant duly paid royalties to the plaintiff until 2004 when for some unexplained reasons they ceased making payments to the plaintiff. Paragraph 10 of the witness statement proves that between the period 1 November 1988 to 1 November 1992 the plaintiff was regularly paid for the adventure series entitled "Adventure in Mombasa", "Adventure in Nakuru" and "Adventure in Nairobi". This evidence has not been disputed by the defendant's witness. The tabular representation of the above periods shows the number of books which were being sold for the period. The minimum number was 449 while the maximum number was 1265 for Adventure in Nairobi per each period of six months. For "Adventure in Mombasa" the minimum number sold for a period of six months was 456 while the maximum

number was 1185. For "Adventure in Nakuru" the minimum sales was 553 books while the maximum was 1033. There were eight periods of six months each for the duration 1 November 1988 to 1st May 1992. It can be deduced that for that period for each series in a period of six months the defendant would sell an average of over 600 books per series. The plaintiff acknowledges payment for the period 2004 and 2011 but there was no payment for the period 2005 to 2012. The plaintiff's contention is that the defendant continued to publish, reprint, advertise and sell the adventure series and likewise continued to make profits from the sales without declaring the proceeds of the sale as well as payment of royalties due to the plaintiff. The plaintiff further asserts that both payments made in the year 2004 and the next payment made in the year 2011 was made after his legal representatives had exerted pressure on the defendant to settle its indebtedness to him. The plaintiff further asserts that there was an increase in the trend of sales for all the three books over the years to date and average sales were in excess of Kenya shillings 200,000/= annually. For the years 2005, 2006, 2007, 2008, 2009, 2010 and 2012 the defendant has neglected, refused or declined to pay the plaintiff in breach of the written contract.

The defendant's witness David Sembusi who is the Sales and Marketing representative of the defendant admitted in his witness statement that the plaintiff authored the books the subject matter of the claim in the suit. The defendant also admits the memorandum of agreement between the plaintiff and the defendant for the defendant to publish the plaintiff's books as exhibited in the trial bundle. The defendant did not comply fully with the publishing contracts with the plaintiff until 2004. Because in 2004 the defendant underwent major internal reorganisation in its top management and board of directors there was a period of three years when the plaintiff's books were out of stock. Upon resuming the publishing of the books contracted, the defendant's market share for supplementary reading materials had been taken up by other competing publishers and there was a reduction in the sales of the plaintiff's books. The plaintiff was paid Kenya shillings 255,915.22 that was due and owing. Furthermore the defendant is committed to continuing its obligations to the plaintiff. However the witness asserts that the defendant does not owe the plaintiff any money other than what is contained in the statement of accounts and save for the year 2012 which has not yet been computed.

I have carefully assessed the exhibits in support of the plaintiff's case. The plaintiff was indeed paid by cheque dated the 11th of May 2011 exhibit P13 a sum of Kenya shillings 255,915.20. The statement of account exhibit P12 shows that the accounting period started May 2010 and ended 31 October 2010 which is a period of six months. The amount brought forward is Kenya shillings 212,504.42. The period brought forward is not indicated. For the six months period the royalty in Kenya shillings is 54,263.50. Withholding tax on the amount is Kenya shillings 10,852.70 the net value of the royalty is Kenya shillings 43,410.80.

The defendant's statement on the other hand exhibit D1 was printed for the period 1 November 2010 to 30th of April 2011 for all the three books. It shows that the outstanding amount for that period is 33,710.42 Kenya shillings. Consequently the plaintiff has proved that he had not been paid for the period 2005, 2006, 2007, 2008, 2009, 2010 and 2012 a period of about seven years

and six months. The previous sales indicate that the defendant was selling an average of over 600 books per every six months for each of the adventure series (three adventure series). The evidence also shows that sales had been going up. Admitted in evidence are several printouts from the Internet. Exhibit P 11 printed by the Creative Printout Nairobi Kenya shows that the books were reprinted by East African Educational Publishers Ltd for the periods 1990, 1992, 1994, 1995, 1997, 2000, 2001, 2002, 2003, 2004, and 2008. Exhibits P4, P5, P6, P7, P8, P9 and P10 and P 11 which are a computer printout of Internet advertisements of the three adventure series written by the plaintiff demonstrate that the book was being marketed via the Internet globally.

I have considered the Internet printouts against exhibits P1 and P2 which are contracts executed between Heinemann Publishers and the plaintiff. Clause 19 of the agreement which is a replica of the other contract clause 19 provides that the publishers shall render accounts of the work semi-annually by 30th of June and all monies due to the author shall be paid to the author within three months of the said accountancy dates provided.... Secondly clause 20 provides as follows:

"If (a) the publishers failed to fulfil or comply with any of the provisions of this agreement within one month after written notification from the author of such failure or if (b) an order is made or an effective resolution passed for the liquidation of the publishers other than a voluntary liquidation for the purpose of reconstruction only or if (c) after the work is out of print in any edition issued by the publishers or authorised by them they have not within nine months of a written request from the author issued a new edition or impression of at least 500 copies then and in any of these events this agreement shall automatically determine without prejudice to any other claim which the author may have either for monies due and/or damages and/or otherwise, provided that in the case of (c) the author refunds any unearned balance of the advance."

The plaintiff has indicated that despite numerous reminders to the defendants they have not provided him with any accounts for the periods complained about. The testimony of the defendant's witness DW1 that the book was out of print would be in breach of clause 19 of the agreement which prescribes a minimum of semi annual accounts to be furnished to the plaintiff. Secondly failure to reprint the books would be in breach of clause 20 of the agreement. I am however satisfied from the evidence that the defendant has been reprinting the books in accordance with the contract but it neither rendered any accounts to the plaintiff nor paid the plaintiff any monies except as submitted for the year 2010 and 2004. I have further considered clause 11 of the agreement which provides as follows:

"If the publishers shall at the end of three years from the date of publication or any time thereafter give notice to the author that in their opinion the demand for the work ceased or if the publishers shall for six months after the work is out of print decline or after due notice as provided in clause 20 (c) thereof neglected to publish a new edition"

then in either of such cases the said exclusive licence granted to the publishers to produce and publish the work shall terminate and all rights in respect of letters press thereof shall revert to the author. The author shall then be entitled to purchase whatever copies the publishers may have in hand at the cost of production. If the author does not within three months purchase and pay for the said copies the publishers may at any time thereafter dispose of such copies the author receiving in respect of the printed copies the percentage specified in clause 13 (g)".

The defendants have not given any notice to the plaintiff that demand for the works ceased. They cannot therefore testify through DW1 that the work was out of stock for a period of three years. Moreover out of stock does not mean out of print. It may mean that the stocks have been sold out. To be out of print would be in breach of the above provisions of the contract.

In the above premises issue number one is answered in the affirmative and the question of quantum will be considered on the issue on remedies available to the parties.

Remedies available to the parties

As far as remedies are concerned, the plaintiff's counsel relied on section 26 (2) of the Civil Procedure Act for the power of the court to award reasonable interest. He also relied on the case of **Milly Masembe versus Sugar Corporation of Lugazi [2002] 2 EA 434** where Oder JSC held that an award of interest is discretionary. The basis of the award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and ought to compensate the plaintiff accordingly. Counsel submitted that the plaintiff was denied royalties by the defendant from 2004 without any justification and is entitled to interest from the date of filing the suit till payment in full.

As far as general damages is concerned the plaintiff's counsel relied on the principle of *restitutio in integrum* as discussed in the cases of **Kamugisha Leonard versus Uganda Revenue Authority HCCS No. 311 of 2011** where the court applied the holding in the East African Court of Appeal case of **Dharamshi vs. Karsan [1974] 1 EA 41**. Counsel submitted that the plaintiff made several desperate efforts to be paid his money but all the efforts were in vain. The plaintiff's financial state was worsened by the indifference of the defendant. The plaintiff could not afford to pay auditors and the court was accordingly notified about the financial position. Consequently the plaintiff suffered gross inconvenience as a result of the defendant's conduct and is entitled to general damages. Counsel submitted that the plaintiff is also entitled to interest on general damages under section 26 of the Civil Procedure Act.

Last but not least counsel relied on section 27 of the civil procedure act for the submission that costs shall follow the event that the court has discretion whether to award costs.

In reply the defendants counsel submitted that the basis of the relationship between the parties is the memorandum of agreement requiring the defendant pay the plaintiff 10% royalties on the

books authored by the plaintiff and sold by the defendant. As the actual amount payable can only be resolved through an examination of the defendants audited books of accounts. The plaintiff is entitled to an order that the defendant fails for inspection of the plaintiff the audited books of accounts reflecting the sale of books in question from 2004 to date and an order that the defendant paid to the plaintiff such amounts as would be ascertainable from such inspection.

As far as general damages are concerned, it would be premature to ask the court to make a finding that the defendant owes the plaintiff money which is over and above what the defendant has declared in exhibit P12 and exhibit D1.

In rejoinder the plaintiff's counsel reiterated submissions that from the evidence the plaintiff was earning about Uganda shillings 15,354,900/= annually. This calculation is based on the plaintiff's conclusion that between the 1st of May 2010 and 31st October 2010, a period of six months, the plaintiff was paid Kenya shillings 255,915.20/=. The plaintiff was therefore making a modest claim of about Uganda shillings 7,000,000/= per annum. Consequently the plaintiff is entitled to a sum of Uganda shillings 48,322,450/= for a period of eight years.

Regarding the submission that the plaintiff should obtain an order for inspection of the defendants audited books of accounts, a lot of effort was made by the plaintiff's counsel to have this matter resolved amicably and the plaintiff requested for audited accounts of the defendant in vain. The plaintiff was left with an option of engaging his own auditors and by reason of his dire financial situation was unable to do so. The defendant admitted being indebted to the plaintiff and what was left was to establish the quantum. Counsel reiterated earlier submissions on the question of quantum of damages.

I have carefully considered the submissions on the question of remedies available to the parties. I agree with learned counsel for the plaintiff that the question of examination of the audited accounts of the defendant cannot be taken at this stage. It was a matter which was addressed by the parties prior to the hearing of the suit for purposes of negotiations. The plaintiff was unable to come up with auditors due to his financial situation and the defendant did not avail audited accounts to the plaintiff. Any quantum based on sales can only be a liquidated demand and therefore cannot be awarded without proof of sales.

In the circumstances the plaintiff can only rely on estimation of lost royalties for failure of the defendant to comply with the provisions of the contract exhibit P1 and P2. Under clause 19 of the contract the plaintiff is entitled to semi-annual accounts of the sales of books from the defendant. It has been established from the evidence that the defendant did not render any accounts for the periods 2005, 2006, 2007, 2008, 2009, 2010 and 2012. Exhibit P12 renders an account for the period 1st of May 2010 to 31 October 2010. The subsequent account is for the period 1 November 2010 to 30 April 2011. The greater part of the period beginning 1st May 2011 to date has not been accounted for. Secondly the period prior to 1st of May 2010 is also not

accounted for. The actions of the defendant are in breach of clause 19 of the contracts concerning the three books.

Secondly PW1 testified that the books were out of stock since 2004. The defendant is contract bound to issue new editions or reprints periodically under clause 20 of the contract. Secondly the defendant is duty bound to notify the plaintiff that in their opinion the demand for the work had ceased. The plaintiff was never notified that there was no demand for the works/published books. The actions of the defendant amount to fundamental breach. Additional evidence establishes that the defendant continued to market the works/books authored by the plaintiff after the year 2004.

I have further examined the basis of the plaintiff's assessment of the loss for the periods when the defendant was not accounting to the plaintiff. For the period of six months contained in exhibit P12 gross royalty was Kenya shillings 54,263.50/=. After withholding tax amounting to 20% of the gross figure, the net amount for the same period was 43,410.80/=. Secondly for the period 1 November 2010 30th of April 2011 the gross amount in royalties was Kenya shillings 42,138/= and the net amount was Kenya shillings 33,710.40/=.

The evidence is that the plaintiff does not have any other alternative source of information about volume of sales. The defendant was not entitled to keep the plaintiff in the dark for such a long period and deny him any earnings from his authored publication contrary to the written agreement between the parties. Secondly, though the burden of proof is on the plaintiff to prove his case on the balance of probabilities, the plaintiff has established that the defendant breached its duty to him to provide periodic accounts in accordance with exhibit P1 and P2 and therefore cannot discharge the burden fully as far as establishing the volume of sales is concerned.

In the premises the plaintiff is entitled to damages for loss of income for the period unaccounted for by the defendant. The court will apply a fair estimate based on the two accounting periods namely exhibit P12 and exhibit D1 to arrive at a fair estimate. As far as loss of income is concerned the plaintiff would be awarded general damages for a period of 7 1/2 years. The mean figure for the period of one year based on the average net income reflected in exhibit P12 and exhibit D1 is Kenya shillings 77,121.2/=.

For a period of 7 1/2 years the plaintiff is awarded Kenya shillings 578,409/= for breach of contract leading to loss of income. Based on the exchange rate at one Kenya shillings to 30 Uganda shillings the above figure amounts to, or is equivalent to Uganda shillings 17,352,270/=. As far as the inconvenience is concerned the plaintiff is awarded general damages for inconveniences suffered of 21% based on the loss of income amounting to Kenya shillings 121,465.89/=. This figure is equivalent to Uganda shillings 3,643,976/=. All in all the plaintiff is awarded general damages in total of Uganda shillings 20,996,246/=.

I agree with the submission on the question of interest under section 26 (2) of the Civil Procedure Act. It provides that where the suit is for the payment of money, the court may in the decree, order interest at such great as the court deems reasonable to be paid on the principal sum

adjudged from the date of the suit the date of the decree in addition to any interest adjudged on such principal sum from any period prior to the institution of the suit. The court may award further interest that such great as the court deems reasonable on the aggregate sum adjudged from the date of the decree to the date of payment or such earlier date as the court thinks fit.

As far as interest is concerned, the plaintiff is awarded interest at the rate of 20% per annum from the date of filing the suit till the date of judgement. Additionally the plaintiff is awarded interest at 20% on the aggregate sum from the date of judgement till payment in full.

I agree with the submission on the question of costs under section 27 (2) of the Civil Procedure Act. Unless there are exceptional grounds to refuse the award of costs to the successful party on reasons to be given by the court, costs shall follow the event. The plaintiff being the successful party is awarded costs of the suit.

Judgment delivered in open court the 26th day of April 2013.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

George Omunyokol holding brief for Francis Buwule for the defendant

Isaac Walukagga for the Plaintiff

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

26th of April 2013