

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 241 OF 2011
SIMBA TELECOMS LTD:.....
PLAINTIFF
VERSUS
TUMWESIGYE K AMBROSE & ANOR:.....
DEFENDANTS

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO

JUDGMENT

1: Background:

Simba Telecom, hereafter referred to as the Plaintiff entered into a contractual relationship with the Defendants, Tumwesigye Ambrose and Tsakom Ltd on the 27th day of June 2008 where the Defendants were appointed to be sub-distributors of MTN products on behalf of the Plaintiff within Kampala region with a monthly sales target of Ug. Shs. 1,500,000,000/= and a

quarterly sales target of Ug. Shs. 4,500,000,000/=. The Defendants were to make periodic payments for the various consignments received by them for the phone products that they would collect from the Plaintiff. This relationship went well until the Plaintiff through its invoice records discovered that the Defendant had not met its obligation amounting to a tune of Ug. Shs. 105, 478,000/=. This amount was due for unpaid phone products. The Plaintiff made demands to the defendants to no avail. The Plaintiff was subsequently forced to file this instant suit seeking to recover special damages of Ug. Shs 105,478,000/=:, general damages for breach of contract, interest and costs.

The Defendant denied liability on the grounds that the Plaintiff was aware of its failure to recover moneys from its “own-Defendants” clients to whom it had supplied the advanced phone products and had become elusive but also that since the Plaintiff was required under the terms of their arrangements to pay the Defendants a commission of 0.5% of the value of the products whose values had been properly accounted for, then the Plaintiff should recover what was due to them from the said

commission since the Defendants had not been paid any commission yet.

Upon this matter came up for hearing, the Defendants absconded from these proceedings and the Plaintiff sought and was granted permission to proceed *ex parte* in order to prove its case against the Defendants. The Plaintiff adduced the evidence of two witnesses and documentary exhibits and all these are all on record and have been taken into account.

2. Issues:

The issues for determination by this court, as agreed by both parties are:

- a. Whether the Defendants owe the Plaintiff Ug. Shs. 105,478,000/=?
- b. What remedies are available to the parties?

3. Disposal of Issue 1: Whether the Defendants owe the Plaintiff Uganda Shs. 105,478,000/=?

Asiimwe Asaph's (PW1) testified in court under oath that the Defendant took stock from the Plaintiff worth Ug. Shs. 125,400,000/= on credit during the period of November 2010.

He further testified that a reconciliation made on the 19th day of November, 2010 established that the Defendant owed the Plaintiff the said amount of money and that the Plaintiff brought this to the attention of the Defendant who acknowledged the debt. A further reconciliation which took into account the commission due to the Defendant reduced the amount found to Ug. Shs. 105,478,000/= and that then this amount was formally demanded. This witness exhibited in court Exhibits P2 and P3; a Stock ledger Account documents showing the balance due and a letter from the Defendant acknowledging indebtedness but seeking a modality from the Plaintiff on how to repay the same, respectively, to corroborate both the fact of indebtedness and measures to be taken for the recovery the sums due. This testimony is similar to that made by Mr. Babu Vara Prasada, who confirmed that being the Accountant of the Plaintiff Company, he was well aware of the indebtedness of the Defendants having raised the necessary accounts documents to the attention of the Defendants. The testimonies of these witnesses and the documents adduced on record clearly show that the Plaintiff did request the Defendant to make good their indebtedness without

accepting the reasons tendered by the Defendant for their inability to repay.

On the other hand, it is apparent that the Defendants acknowledged their indebtedness from the First Defendant's letter where he took responsibility for the whole debt with a request that the Plaintiff be understanding to enable the resolution of the matter. This is what I can gather from the letter written by the First Defendant dated the 19th day of November, 2010 (Exhibit P4), the relevant part of which states that:

“ Therefore me as Ambrose on behalf of Taskom Ltd the outstanding balance of 125,400,000/= which I know very well and eager to pay that money to Simba Telecom in the shortest period, hereby request Simba to understand my problem and work together for the better solution..”

In another the letter dated the 13th day of December, 2010, (Exhibit P5), the First Defendant further informs the Plaintiff of the Plaintiff's obligation to pay a commission to the Defendants which the Defendants deemed due and as such would reduce the outstanding amount to Ug. Shs. 105,478,000/=. This is

indeed the exact amount due and claimed by the Plaintiff. The First Defendant wrote and I quote:

“...and after I went and reconciled with finance, all my commissions and on net commission and allowances for sim pack were deducted on the previous balance and the balance that was left is Ug. Shs. 105,478,000/= of which I wanted to be allowed to make a down payment...”

In their defence, however, the Defendants seemed to have forgotten these correspondences as they went on to deny any knowledge of the debt in question as can be seen by their pleadings in paragraph 4(d) of the Defendants’ Written Statement of Defence whose contents I reproduce here:

“That the Defendants do not owe the Plaintiff’s 105,478,000/= since the Plaintiff was supposed to them a commission of 0.5% of the value of the invoices handed over to them and which amount has not been paid yet.”

I find it unbelievable that a defendant who purposely wrote such documents acknowledging a debt would turn around to deny the same yet the records were clear as to what it owed. I would find that the purpose of this kind of this defense simply a waste of time and not worthy on as the testimonies of the Plaintiff's witnesses were very clear on this point and in my view very believable for being truthful as theses said witnesses had nothing to gain when they clearly produced the documents which the defendants themselves wrote on top of stating that they had very cordial relationship with the Defendants before the happenings and their major aim was to recover what was due to the Plaintiff. Even more suspicious is the conduct of the defendants who decided to questionable manner abscond these proceedings. Their so called defence were, in my view more for buying time than genuine than offer any real defence.

Even when the period in which this matter has been in court is taken into account, that is, a period of four years plus, I do not see any movement on the side of the Defendants to try and ameliorate their indebtedness. No effort at all has even been made to either reduce it or totally pay what is due to the Plaintiff. This in my view is characteristic of the elusiveness of the Defendants

who appear to have no real intention to meet its part of the bargain yet they benefited from the relationship with the Plaintiff. In my view this is merely buying time and the Defendants must certainly be brought to account for their own inaction.

From my findings above I would hold that the Defendants are indeed indebted to the Plaintiff for the undisputed amount of Ug. Shs 105,478,000/= which the Plaintiff is entitled to recover from them.

I would therefore resolve this issue in the favour of the Plaintiff.

3. Disposal of Issue 2: Remedies available to the parties:

The Plaintiff sought interest on the above sum at a market rate from the date of the breach until payment in full. **Section 26(2) of the Civil Procedure Act** empowers court to award interest on a decretal sum as court deems reasonable. In the case of **MTN (U) Ltd versus Uganda Telecom Ltd, S.C.C.A 13/2004**, Kanyeihamba, J.S.C (as he then was), held that “**it is the date when the invoice is received that becomes the due date and it is the same date when interest on the**

principal sum begins to accrue”. I would relate this holding to the instant matter and state that since the defendants enjoyed the privilege of an interest free product loan, they ought to make good the loss which they occasioned for the Plaintiff when they purposely refused to repay what was due irrespective of the circumstances they were in.

The Defendants did keep the Plaintiff from the use of its money since November, 2010 obviously affected the Plaintiff's business operations and ought to make good the loss which the Plaintiff must have incurred as a result.

I take note of the fact that the Defendants kept for this long period and put to their use money which was not theirs in the first place it is apparent that they did profit from the same and as such I would deem that an award of 19% interest from the date of breach till payment in full would be reasonable.

Further and since the Defendants also caused the Plaintiff to incur unnecessary expenses in prosecuting this matter which, they should have resolved amicably when called upon, I would also order the Defendant to meet the costs of this suit.

4. Orders:

I therefore enter judgment in the favour of the Plaintiff against the Defendant as follows;

1. The Defendant is ordered to pay to the Plaintiff Uganda Shillings 105,478,000/=,
2. Interest on (1) above at 19% per annum from the date of breach till payment in full.
3. The defendant to pay the costs of this suit.

I do so order accordingly.

HENRY PETER ADONYO

JUDGE

1ST OCTOBER, 2014