THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 0399 - 2010

SIMON MUKWANA & ANOTHER :::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

CHRISTOPHER KAZIBWE & ANOTHER :::::::::::::::::::: DEFENDANTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

The Plaintiff Simon Mukwana and Bright Future Transporters Kampala Limited sued the Defendants, Christopher Kazibwe a Court Bailiff and Dynasty Africa Ltd, a limited liability company carrying on the business of money lending. The 1st Plaintiff is the Managing Director and majority shareholder of the 2nd Plaintiff which carries on transport business. The Plaintiff's claim for Ugx. 80,000,000/= being the value of a Fiat Iveco Registration No. 901 UAB and motor vehicle trailer

Bartoletti Reg. 727 UBE both vehicles having been attached by the 1st Defendant following a suit filed by Dynasty Africa Ltd against one Ali Hussein Sebunya.

The Plaintiffs also claim loss of income totaling to Ugx. 520,800,000/= which could have been earned by use of the attached vehicles covering a period from 19th November 2008 to 5th November 2010 at Ugx. 4,200,000/= per week.

The background to this suit is derived from the pleadings as follows. On the 27th March 2007, the 1st Plaintiff purchased the vehicles aforementioned from Ali Hussein Sebunya.

The two parties are said to have entered into an agreement sale dated 27th March 2007 stating the price of purchase of both vehicles at Ugx.80,000,000/=. The said agreement was attached as Annexture "A" to the plaint. After this transaction, the 1st Plaintiff transferred his rights to the 2nd Plaintiff, a company in which he was a majority shareholder. Thereafter, the registered owner of the vehicles, one MM Hamid of Pan Afrique Commodities Ltd who had originally sold the vehicle to Ali Hussein Sebunya but had not yet effected a transfer, signed transfer application forms in favour of Bright Future Transporters Ltd.

In January 2009, the 2nd Defendant who believed that the vehicles belonged to Ali Hussein Sebunya and had obtained judgment against him for the recovery of Ugx. 15,000,000/= loan applied to the Court and had both vehicles attached in execution thereof.

The 2nd Defendant claimed that the vehicles had been used as security of the loan and therefore was justified to attach them. They also claimed that the log books

had been surrendered to them but were returned to Ali Hussein Sebunya for purposes of processing road licences.

The 1st and 2nd Plaintiff, contending that the attachment of their vehicles was unlawful in as much as they were neither a party to the loan facility agreement nor the Court proceedings between Ali Sebunya and the 2nd Defendant, brought this action against the Defendants.

The issues for determination by this Court as agreed by the parties were;

1. Whether the 2nd Defendant is culpable in the circumstances?
2. Whether the 1st Defendant's sale of the motor vehicles was fraudulent?
3. Remedies.

Issue 1: Whether the 2nd Defendant is culpable in the circumstances?

In her evidence DW1 told Court that the agreement between he 2nd Defendant and Ali Hussein Sebunya to offer the two vehicles as security was verbal.

Further that the security of the sports car already offered by Sebunya was not sufficient for the amount he intended to borrow which is why the trucks were added as security.

To counter the above, PW1 told Court that he only offered a yellow sports car UAA 660D as security and never the trucks. Further that he mortgaged the sports car and even paid in time to avoid these complications, and that there was no way he could have mortgaged a trailer of Ugx.80,000,000/= to cover a debt of Ugx. 15,000,000/=.

In her evidence DW1 told Court that PW1 requested for the logbooks of the trucks which had been left with the 2nd Defendant for purposes of renewing their road licence but she refused to hand them over as he had not yet repaid the debt. That she went with him to Uganda Revenue Authority to get an assessment and left the original copies there where she was sure that they would be safe from Sebunya.

Attached to the WSD was annexture 'D' a letter to the Central Registrar Uganda Revenue Authority which stated that the 2nd Defendant had taken the logbooks to DFCU Bank and that it was from that bank that Sebunya got the logbooks so as to sell off the vehicles.
Annexture 'D' ended with a sentence that; 'The attached are the agreements made between him and the lending company'.

I have combed through the 1st and 2nd Defendant's bundle of documents filed on 6th July 2012. On page 1 is the loan agreement terms. This agreement mentions interest, grace period before banking post dated cheques, penalties for bounced cheques which included a calling of the guarantor and his securities. The fees for the application, passport photograph. The securities that were referred to in this agreement were not named neither were they registered. But both parties are agreed that a sports vehicle Registration No. UAA 660D was surrendered as security.

From the evidence it would seem as if that sports vehicle is still in the custody of the Defendants. While it is clear that the 2nd Defendant participated as a witness at the time of purchase of the trucks which is seen in the agreement of Mohammed Hamid and Ali Hussein Sebunya, there is nothing to show that the trucks were surrendered as security.

The Defendant claims that the logbooks were handed over to them but Clause 5 of the aforementioned agreement shows that at its execution, it's the buyer, Sebunya who was given the agreement.

At the time of hearing, DW1 stated that they took the logbook to Uganda Revenue Authority and yet in Annexture 'D' to the Written Statement of Defence, the Managing Director wrote to Uganda Revenue Authority claiming that Sebunya had removed the logbooks from DFCU Bank. The Defendants gave no explanation for the contradictory evidence nor did they show that the bank and Uganda Revenue Authority were one and the same thing. They did not even call evidence from the person or body where they had allegedly deposited the logbooks to show that they were the ones that were originally in possession of the logbooks as security for the loan to Sebunya.

Because of the foregoing and because the logbooks were in the possession of the Plaintiff, the Defendant falls short of proving that the trucks were surrendered as security. The agreement signed between Sebunya and the Plaintiff clearly indicated that the 1st Plaintiff bought the trucks from Sebunya.

Another piece of evidence that shows that Sebunya sold off the vehicles and that this sale was something the 2nd Defendant was aware of is seen in Annexture 'D' to the Written Statement of Defence (supra) where in the Managing Director of the 2nd Defendant wrote that Sebunya collected the logbooks so that he may sell off the vehicles.

In conclusion therefore, Ali Hussein Sebunya as the owner of the vehicles had the authority to sell and pass on title to the Plaintiff who in turn as majority shareholder of the 2nd Plaintiff was legally in position to assign and or transfer these rights to

the 2nd Plaintiff. It follows therefore that attachment of the aforementioned vehicles which were no longer property of Sebunya to recover money owed by Sebunya to the 2nd Defendant was unlawful.

Issue 2: Whether the 1st Defendant's sale of the motor vehicles was fraudulent?

On the 19th November 2008, Court on the application of the 2nd Defendant issued a warrant of attachment and sale of movable property pursuant to Order 19 Rules 40 and 61 (currently Order 22) of the Civil Procedure Rules. The items for attachment were motor vehicle 727 UBE and 901 UAB for the recovery of Ugx. 22,000,000/=. The learned Magistrate commanded the 1st Defendant who was the bailiff to return the warrant on or before the 19th December 2008 certfying the manner in which it had been executed. The foregoing means the warrant would expire on 19th December 2008. Evidence on record shows in Annexture 'F' which was the agreement of sale of the attached vehicles that they were sold on 31st December 2008. When DW2 testified he told Court that the warrant had been extended after it expired on 19th December 2008 and he produced in Court a warrant of attachment that bore handwritten extension to 19th January 2009 with an attempt to turn the '2008' into '2009'. This was Exhibit D6.

I have carefully looked at the warrant Exhibit D6 and have also studied Exhibit P. 3 which is also found on page 7 – 8 of the Defendant's bundle of documents submitted to Court and have found that Exhibit D6 was merely an attempt by the Defendants to create an extension long after the filing of this suit. I say this because neither Exhibit P.3 nor the warrant of attachment filed in Court by the Defendants on the 6th July 2012 bears the handwritten extension at the bottom of Exhibit D6. Secondly, the warrant and the portion that purports to extend it reads;

"Warrant extended to 19th January 2008"

The warrant itself however shows it was first issued on 19th December 2008. Going by those dates it means the warrant was "extended" almost 11 months before it was issued. It means it was issued retrospectively, something that cannot be supported by the law. The only conclusion is that realizing that the purported sale had been done without a warrant, it having expired, the Defendants then created an extension with the sole purpose of plugging the loopholes in their defence. This explains why they did not produce in Court the learned Magistrate who they claimed had made that extension.

In my view, the purported extension amounts to fraud.

Taking into account all the foregoing, it is this Court's finding that at the time of sale there was no valid warrant of attachment and therefore any sale conducted by the 1st Defendant. The Court also finds that the 1st Defendant executed the sale well aware that he had no valid warrant and should be held liable as much as the 2nd Defendant who caused the attachment and 'sale' of vehicles that did not belong to Ali Hussein Sebunya.

Issue 3: Remedies

The Plaintiff prayed that the Defendants pay to him the value of motor vehicles Fiat Iveco – Heavy Truck Registration No. 901 UAB model 1987 and motor vehicle Trailer Bartoletti Registration No. 727 UBE estimated at Ugx. 80,000,000/=.

It is not in dispute that the Plaintiff paid Ugx. 80,000,000/= for the trucks as proof of the same is evidenced by Annexture 'A' to the plaint which is an agreement between PW1 and the Plaintiff.

PW1 also testified that he sold the trucks to the Plaintiff at Ugx. 80,000,000/= which was not countered by the Defendants.

I find that the Plaintiff is entitled to be repaid the said Ugx. 80,000,000/= by the Defendant who deprived him of the use of the said motor vehicles. The Plaintiff also prayed for loss of income of Ugx. 520,800,000/= calculated on a six day per week basis at a rate of net income of Ugx. 700,000/= per day; Ugx. 4,200,000/= per week and Ugx. 16,800,000/= per month from 19th November 2008 until lodgment of the suit being a period of 31 months.

The trucks involved were a lorry with a semi trailer. This was a type of vehicle that could easily earn Ugx. 700,000/= per day. But as like any other trade tool, one could not anticipated what would happen to the vehicle and the attendant risks of possibility not being hired on some days. Because of these vicissitudes, I find a figure of Ugx. 500,000/= per day more reasonable.

Despite the fact that the Plaintiff prayed this figure be applied over a period of 31 months, I have looked at the period between 19th November 2008 to 5th November 2010 when the matter was lodged and I am of the view that the period is not more than 2 years therefore 24 months. Thus applying this Ugx. 500,000/= per day x 6 days = Ugx. 3,000,000/= x 4 weeks = Ugx. 12,000,000/= per month. 12,000,000 x 24 months = 288,000,000/=.

The Plaintiff is thus entitled to Ugx. 288,000,000/= as loss of income which is hereby awarded.

The Plaintiff further prayed for general damages. General damages are such as the law will presume to be the direct natural or probable consequence of the act complained of **Stroms V Hutchinson [1905] AC 515**.

The underlying principle is to put the injured party financially as near as possible, into the position they would have been in had the promise been fulfilled. **Addis V Gramaphone Co. Ltd [1909] AC 488**.

Counsel for the Plaintiff submitted that the Plaintiff should be awarded general damages of Ugx. 100,000,000/=.
The nature of general damages is compensation not punishment. **Addis V Gramaphone Co. Ltd (supra)**

In as much as the Defendants behaved in a high handed manner by attaching the trucks which they knew were no longer the property of Ali Hussein Sebunya and even picked them from the Plaintiff's premises and proceed to sell them on an invalid warrant of attachment, the purpose of these damages is to place the Plaintiff, as far as money can do in as good a position that they would have been in had the act complained of not occurred. It is without doubt that the Plaintiffs were greatly inconvenienced by the deprivation of the trucks from 19th November 2008 todate, a period of about 5 years and during which they would have put the trucks to use to further their business.

Considering all the circumstances of the case, I find an award of Ugx. 50,000,000/= for general damages appropriate. The Plaintiff prayed for interest on special damages of loss of income and on general damages at a commercial rate.

Counsel for the Plaintiff submitted a prayer for interest on the award of Ugx. 80,000,000/= from the date the filing of suit till payment in full. This prayer is not reflected in the pleadings and all parties are bound by their pleadings. **Interfreight Forwarders (U) Ltd V East African Development Bank SCCA 33/1993**.

The object of pleadings is to endure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. **Captain Harry Gandy V Caspair Air Charter Ltd (1956) 23 EACA 139** cited with approval in **Uganda Breweries Ltd V Uganda Railways Corporation SCCA 6/2001**.

The prayer for interest on the award of Ugx. 80,000,000/= which is not reflected in the pleadings is accordingly denied.

The Plaintiff prayed for interest at a commercial rate, but did not lead evidence to validate this claim. There is nothing to show that the Plaintiff borrowed money from a financial institution in relation to the matter before Court which would ordinarily attract an interest nor did he present to Court records of his business history to show that the business brought in by trucks of a similar nature would necessitate interest at a commercial rate. The Plaintiff did not assist Court.

I find an interest at Court rate on the general damages and special damages for loss of income reasonable in the circumstances.

The Plaintiffs are entitled to costs of the suit.

In conclusion, judgment is entered in favour of the Plaintiff in the following terms;

a) Ugx. 80,000,000/= be repaid by the Defendants being the value of the motor vehicles Registration Nos. UAB 901 and UBE 727.

b) Ugx. 288,000,000/= being loss of income.

c) Ugx. 50,000,000/= being general damages.

d) Interest on (b) at Court rate from 5th November 2010 till payment in full.

e) Interest on (c) at Court rate from date of judgment till payment in full.

f) Costs of the suit.

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David K. Wangutusi
JUDGE

Date: 21/01/2015