

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT No. 32 OF 2011**

5 **KALUNGI ESTATES LIMITED ::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

VERSUS

SPEDAG INTERFREIGHT UGANDA LIMITED ::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

JUDGMENT

10 In 2006, the plaintiff imported six containers of tiles from Prospero International Ltd, Hong Kong, and the defendant was the plaintiff's forwarding and customs agent for purposes of the importation. Five containers were cleared by the defendant and received by the plaintiff, but one container No.INBU384866-9, was kept at the defendant's custom bonded ware house.

In May, 2008, apparently in exercise of its right of retention and sale, the defendant sold the tiles
15 that had been left in its possession for UGX 11,300,000/=.

The plaintiff brought this suit against the defendant for recovery of the contents of Container No.INBU384866-9 or its equivalent in cash, general damages and costs of the suit. It was the plaintiff's case in the Plaint that it did not owe the defendant any money and that it had an agreement with the defendant to store the goods until the time when the plaintiff would require
20 them for use. Further, that the goods were valued at UGX 80,040,000/=.

On the other hand, the defendant in its written statement of defence stated that the plaintiff owed the defendant demurrage charges, storage charges and a refund of taxes paid to Uganda Revenue Authority for the goods in issue and that it did not have an agreement with the plaintiff for storage as had been contended in the plaint. Further, that the plaintiffs goods had a CIF Mombasa
25 Value of US\$ 6,597.92/= which at the then exchange rate was at UGX 12,247,796/=.

The defendant in its Written Statement of defence also raised a counter claim that the plaintiff owed it UGX 549,042/= which had not been realized from the sale of the tiles by the defendant in exercise of its right of retention.

The following were the agreed issues for determination:

1. *Whether the defendant breached any of its duties as agent of the plaintiff.*
2. *Whether the plaintiff or the defendant breached any terms of the contract.*
3. *What kind of tiles were in the suit container.*
- 5 4. *What was the value of the tiles in the suit container.*
5. *Whether the parties are entitled to the reliefs sought and if so, the quantum thereof.*

In order to address the counter claim, I shall add the 6th issue; whether the plaintiff is indebted to the defendant in the sum of UGX 549,042/=

Issues 1 and 2 shall be addressed concurrently, followed by issues 3 and 4, and I shall conclude
10 with issues 5 and 6.

At the hearing, the plaintiff was represented by Mr. Charles Obonyo and the defendant was represented by Mr. Aruho Raymond.

ISSUE 1 AND 2: ***Whether the defendant breached any of its duties as agent of the
15 plaintiff.
Whether the plaintiff or the defendant breached any terms of the
contract.***

Moses Kalungi Kirumira (PW2), who was the plaintiff's Managing Director, testified that in the year 2006, the plaintiff ordered for and imported six containers of tiles from Prospero International Ltd, Hong Kong, with the defendant as the forwarding and customs agent for the
20 plaintiff. Further, that the defendant had control over all information and documentation in relation to the transaction in issue and that the plaintiff only received documents the defendant chose to pass on as clearing agent; any errors in the documents could be attributed to the defendant's officers.

He further contended that the defendant got the goods assessed for taxes and consequently paid
25 UGX 6,552,570/= with money advanced to it by plaintiff to Uganda Revenue Authority (URA). In that regard, PW2 contended that the defendant had no lien over the goods in the suit container and that any demands made by the defendant were an afterthought and falsification of facts, there having been no balance that remained unpaid on taxes and due to the defendant. In his view, any

demurrage and storage charges were as a result of the wrongful actions or omissions of the defendant by not transporting the container to the plaintiff's premises.

The defendant on the other hand led two witnesses to show that all its actions were within the confines of the contract and that it was the plaintiff which had breached the terms of the contract.

5 DW1; Joram Nyanzi, the Managing Director of the defendant testified that upon the contract between the plaintiff and the defendant being sealed where the defendant was to handle freight services on behalf of the plaintiff, the plaintiff availed the defendant with importation documents that included the invoice, commercial invoice and packaging list authored by the supplier. Further, that upon the goods arriving in Uganda, five containers were cleared and thereafter
10 taken by the plaintiff, leaving one container No. INBU 384866-9. It was his testimony that the plaintiff owed the defendant a sum of US\$5,281.80 and UGX 2,043,751/= as indicated on the statements of account (EXH D5 and EXH D6). Further, that the plaintiff made several demands to the plaintiff for payment of dues but the plaintiff refused to pay. On 14th April, 2008, the defendant wrote to the plaintiff demanding for its dues and notified the plaintiff of the intended
15 sale of the tiles (EXH D7) that had remained in its possession, but still the plaintiff declined to pay or to contact the defendant for clarification.

DW1 further testified that in mitigation of its losses, the defendant opted to retain the goods. Further, that in the whole transaction the defendant acted in good faith and performed its part of the contract by rendering services to the plaintiff. It was his testimony that the defendant had
20 never had any agreement with the plaintiff to keep its goods until they would be needed as had been alleged in the pleadings.

DW2, Siva Kumar, who was a Finance Manager with the defendant testified that on the 29th September, 2006, the defendant invoiced the plaintiff US\$ 1,306.80 for container demurrage charges with effect from 3rd, August, 2006 to 9th August, 2006, and UGX 955,800/= being
25 Agency fees, terminal handling charges, ex warehousing charges and storage charges. On 19th January, 2007, the defendant invoiced the plaintiff for a sum of US\$ 2,079.0 being container demurrage charges with effect from 7th October, 2006, to 19th January, 2007, and UGX 660,800 being storage charges with effect from 30th January, 2006 to 19th January, 2007. Further, that on 25th December, 2007, the defendant invoiced the plaintiff for the sum of UGX

6,554.570/= being taxes paid by the defendant on behalf of the plaintiff for the suit container. It was DW2's testimony that as at 14th April, 2008, the plaintiff owed the defendant US\$5,281.80/= and UGX 2,043,570/=.

DW2 further testified that in all its dealings, the plaintiff would avail the defendant with money for tax clearance of its imports but as regards container No.INBU384866-9, the plaintiff failed to avail the funds in time which resulted in container demurrage charges and storage charges being levied and that the defendant asked the plaintiff to clear its dues and avail funds for tax clearance which it did not. That on 2nd May, 2008, the defendant accepted a payment of UGX 11,300,000/= from Ms. Florence Makada who purchased the suit tiles and this was used to reduce the plaintiff's debt, leaving a deficit of UGX 549,042/= due to the defendant.

DW3, Frank Baijako, who was a courier employed by the defendant testified that on the 15th April, 2008, he was instructed by DW1 to deliver a notification for disposal of the suit tiles to the plaintiff. It was his testimony that he delivered a copy of the said letter to the plaintiff's then Advocates, Ms. Byenkya, Kihika & Co Advocates and the letter was received by the receptionist who acknowledged receipt by signing the delivery sheet. He then proceeded to the plaintiff's offices at Kalungi Plaza and the receptionist received the letter and signed the delivery sheet.

Counsel on either side filed written submissions in support of and against the claim respectively.

Counsel for the plaintiff submitted that the defendant had the duty to clear and forward all the six containers but failed to deliver one container which it had cleared, and that the plaintiff had paid upfront and fully. It was counsel's contention that the defendant wrongfully introduced the idea of lien on the plaintiff's good. Counsel relied on *Tappenden (trading as English & American Autos) Vs Artus & Anor [1963] 3 ALL ER 213* and *Rahima Nagita & Ors Vs Richard Bukenya High Court Civil Suit No. 389 of 2010*, to support the above submission.

In reply, Counsel for the defendant made reference to the pleadings and submitted that there was an existing contract between the plaintiff and the defendant, where in exchange for the defendant's services in clearing and forwarding, the plaintiff had the obligation of making corresponding payments to satisfy the defendant's invoices raised.

Counsel invited Court to consider the evidence of DW1 that the defendant, as customs agent for the plaintiff, had paid taxes amounting to UGX 6,552,570/= by way of customs entry (EXH D11) and tax payment receipt (EXH D13). Further that the defendant had been invoiced for demurrage charges after the three days shipping line grace period had lapsed. Counsel submitted
5 that even after taxes had been paid, the suit cargo stayed in the shipping line container pending the plaintiff paying the dues so that the cargo could be delivered to the plaintiff. Counsel further submitted that while the defendant alleged that several payments had been made by the plaintiff and that there was no balance owing to the defendant, the plaintiff did not tender in Court any receipt or proof of such payments.

10 Counsel cited section 103 of the Evidence Act, that the burden of proof was upon the plaintiff and that it was not sufficient for it to merely allege payments without receipts and then expect the defendant to disprove the allegations.

Counsel relied on ***United Building Services Vs Yafesi Muzira T/A Quickset Builders and Co. High Court Civil Suit No. 0154 of 2005***, and submitted that the plaintiff's failure to pay the
15 defendant's dues was breach of contract, which discharged the defendant's obligation to transport the suit container to the plaintiff.

With regard to the right of lien, Counsel made reference to the evidence of DW1 that this was part of the contract entered into between the plaintiff and the defendant. Counsel submitted that by virtue of Article 31 of the defendant's general conditions (EXH D15), the defendant had
20 powers to sell the goods in case it did not receive its payment, after giving notice. Counsel also relied on The Law of Carriage of Goods by Inland Transport 4th Edition, at page 407, where it is stated that:

25 *“There is nothing to prevent a carrier from exercising his lien and simultaneously suing the proper person for the money due. If he gets judgment for the amount due, he must hand over the goods when the judgment is satisfied. He need not do so sooner”.*

Counsel was of the view that the defendant rightfully exercised its lien over the suit goods.

In rejoinder, Counsel for the plaintiff submitted that the defendant had no right to sell the goods and that it should instead have brought an action for its alleged unpaid dues.

Court's Consideration:

5 A contract is defined under **Section 10(1) of the Contracts Act, 2010**, as an agreement made with the free consent of parties with capacity to contract, for lawful consideration and with a lawful object, with intention to be legally bound.

In the present case, it is an agreed fact that the plaintiff and the defendant entered into a clearing and forwarding agreement. It is also not in dispute that under the said contract, the plaintiff imported six containers of tiles from Prospero International Ltd, Hong Kong, and the defendant
10 was the clearing and customs agent in the transaction.

What is in dispute between the parties herein is in regard to the performance of their respective obligations under the contract. The plaintiff contends that while the defendant was under the obligation of clearing and forwarding six containers of the imported tiles, the defendant, in breach of contract cleared all the containers but only forwarded five containers. On the other
15 hand, the defendant contends that the plaintiff, while in breach of its duties, it failed to pay the defendant's dues whereupon the defendant exercised its right of retention of the goods and sold the same in order to mitigate its losses.

Black's Law Dictionary 9th Edition page 213, defines breach of contract as violation of a contractual obligation by failing to perform one's own promise, by repudiating it or by
20 interfering with another party's performance.

Davies on Contract 10th Edition at page 287 states that breach of contract occurs where a party fails to perform, or evinces an intention not to perform, one or more of the obligations laid upon him by the contract.

It was stated in the plaintiff's pleadings that the parties had agreed that the defendant would store
25 the goods until the time when the plaintiff would require them for use. However, during cross examination (page 28 of the proceedings) PW2 denied the above contention. In view of the above, it appears to me that there was no arrangement where the defendant was obligated to keep/store the goods until they were required by the plaintiff as was stated in the plaintiff's pleadings.

It was the case for the defendant that the reason why container No.INBU384866-9 was not forwarded to the plaintiff was because the plaintiff had not paid amounts owing to the defendant. The first payment which the defendant claims had remained unpaid to it was the tax paid to Uganda Revenue Authority. It was not in dispute that the defendant had paid UGX 6,552,570/= for purposes of clearing the container in issue from Uganda Revenue Authority. However, the plaintiff contends that it had advanced that money to the defendant for purposes of paying taxes; therefore, the plaintiff did not owe the defendant the above stated amount of money.

During cross examination, PW2, testified that the above payment was made by the plaintiff to the defendant but no receipt or acknowledgment of receipt of the money was issued by the defendant. I do not find this evidence believable. First, the plaintiff tendered in evidence a receipt and acknowledgment receipt issued by the defendant at some point during the transaction (See EXH P1 and EXH P2) which, in my view, is an indicator that the defendant was in the habit of issuing receipts for payments made by the plaintiff. Further, I do not find it believable that considering the nature of business between the plaintiff and the defendant, the plaintiff could make a payment of considerably a large sum of money and then walk away without any proof of such payment having been made.

I accept the submission of Counsel for the defendant that the plaintiff had a burden of proving such payment having been made. In the circumstances of this case, I am not satisfied with the testimony of PW1 that the payment was made without any receipt or acknowledgment being issued by the defendant in that regard.

It was also the case for the defendant that the plaintiff was invoiced for demurrage charges and storage charges after the three days grace period had lapsed, but the same had never been paid. In regard to the above, Counsel for the plaintiff submitted that demurrage could never have come up because the defendant was the shipper, transporter and customs agent. Further, that demurrage charges could not have been incurred if the defendant had already paid taxes.

I do not accept the above contentions that demurrage charges could not be incurred because the defendant was the shipper and customs agent and because taxes had apparently been paid. As stated by the DW2, the goods were kept in the container even after the taxes had been paid considering that the plaintiff had not paid what was due to the defendant in order for the goods to

get delivered and the container to be returned. The evidence on record indicates that the plaintiff was on several occasions invoiced for the above charges (See EXH D2a, 2b, 3a and 3b). It also beats my understanding why the plaintiff would, without any kind of arrangement with the defendant, leave its goods with the defendant without any formal claim to the same. In my view,
5 the above was an indicator that indeed the plaintiff had not satisfied its obligations under the contract which prompted the defendant not to forward the goods.

The plaintiff contended that it had made payments in regard to the above but no receipts were issued by the defendant. I reiterate my finding above that I am not convinced by this evidence.

I find that the plaintiff was in breach of its duty to pay what was due and owing to the defendant
10 for its services.

The next question for determination is whether the defendant was in breach of its obligations in failing to deliver the suit container to the plaintiff and to go ahead and sell the tiles, apparently, while exercising its right of retention.

It is an established principle under common law that a person in possession of chattels/ goods
15 belonging to another may retain them until all his / her claims against the owner of the chattel are satisfied. (*See Harlbury's Laws of England Vol. 24 page 142*). In *Tappenden Vs Artus and Anor, (1963) 2 QB 185*, it was held as follows:

“The common law remedy of a possessory lien, like other primitive remedies such as
20 abatement of nuisance, self-defence or ejection of trespassers to land, is one of self-help. It is a remedy in rem exercisable on the goods, and its exercise requires no intervention by the courts, for it is exercisable only by an artificer who has actual possession of the goods subject to the lien, since, however the remedy is the exercise of a right to continue an existing actual possession of the goods, it necessarily involves a right of possession
25 adverse to the right of the person who, but for the lien, would be entitled to immediate possession of the goods. A common law lien, although not enforceable by action, thus affords a defence to an action for recovery of the goods by a person who, but for the lien, would be entitled to immediate possession.”

It is apparent that the defendant having acted as a forwarding and customs agent for the importation of the goods in issue, the goods were not delivered to the plaintiff and stayed in the possession of the defendant. I have already made a finding above that the plaintiff had not paid the dues owing to the defendant, which apparently was the reason why the goods were retained
5 by the defendant. Article 15 of the defendant's General Conditions (EXH D15) which PW1 admitted knowledge about during cross examination, provided as follows:

“The forwarder shall have a lien on the goods handed over to him or which otherwise come into his possession for the outstanding sums owed to him in respect of all business transactions with the customer.

10 *If payment has not been effected within a time set by the Forwarder with the threat to dispose of the goods, the Forwarder shall be free, without further formalities, to sell the relevant goods at the best obtainable price”*

From the above, it appears to me that the defendant had a right to retain and sell the goods for sums owed to it arising from the contract between the parties. Besides, the defendant also had a
15 right to exercise its general right of lien arising out of common law.

I have carefully considered the evidence of DW3 (Frank Baijaho) and I note that there were a number of contradictions in his evidence during cross examination as to how he served the notice of sale on the plaintiff. However, I find that the contradictions were minor and in my view were not intended to mislead or create an impression other than what was the truth. I am satisfied that
20 the plaintiff was served with the notice for disposal of the goods as shown on the delivery sheet (EXH D18).

I have taken into consideration the submission of Counsel for the plaintiff that the defendant ought to have brought an action for the unpaid dues rather than retaining and selling the goods. However, I find that whereas the defendant had the above option of suing for the dues owing,
25 that did not take away its contractual right to retain and sell the goods in order to realize the amounts owing to it.

I find that the defendant was not in breach of its obligations under the agreement. By virtue of the amounts owing to it, it had the right to retain and sell the goods in order to realize its dues.

Accordingly, this issue is answered in the negative.

ISSUE 2: What kind of tiles were in the suit container.
What was the value of the tiles in the suit container.

PW2, Moses Kalungi Kirumira, testified that the plaintiff's claim was for UGX 80,000,000/=, being the market value in Kampala, of a container full of 834 cartons of Glazed Ceramic Tiles, of 22 cubic meters weighing 21,000 kilograms. It was his contention that the freight was US\$ 6,900.00 paid to the defendant vide receipt No. 11622 on the 2nd October, 2006 and that the tiles were so large that they could not have been wall tiles.

PW1, Kaggwa Andrew, stated that he was an employee of Paullen General Merchandise, Shop No.MO4, Market Square, Nakasero. It was his testimony that on the 1st July, 2013, Mr. Nasser Kiyemba of Kalungi Estates Ltd who was their client for glazed ceramic tiles wanted an invoice for floor tiles which was issued to him. It was his testimony that the current price for the said tiles was UGX 55,000/= per M2.

On the other hand, DW1 testified that upon the plaintiff sealing the contract for importation of the tiles, it availed the defendant with importation documents that included invoice, commercial invoice and packing list authored by the supplier of the tiles in Hong Kong. It was his evidence that all the above documents indicated that the suit tiles were edging tiles. Further, that the invoice issued by the supplier showed that the edging tiles in the container had a CIF Mombasa value of US\$6,597.50/=. It was his testimony that it was false that the defendant had monopoly over all documents and that in international trade, it was always the supplier who sends documents. Further, that the defendant declared the plaintiffs goods to Uganda Revenue Authority and the sum of UGX 12,247,797/= was established as the value of the suit tiles as at 26th October, 2006.

It was DW1's further testimony that on 7th November, 2006, an official from Uganda Revenue Authority visited the defendant's bond and verified the plaintiff's tiles and she found 834 cartons of edging ceramic wall tiles (EXH D19). Further, that the plaintiff had always known that the suit tiles had a value of UGX 12,247,797/= since it had the import invoices and the URA customs documents indicating the said value.

DW1 testified that basing on the import invoices and the valuation of the goods by Uganda Revenue Authority which was a competent and independent third party entity, the defendant accepted a bid of UGX 11,300,000/= which was short of the invoice and Uganda Revenue Authority value of UGX 12,247,797/= by only UGX 947,797/=.

- 5 Counsel for the plaintiff submitted that the goods were glazed floor tiles and the wrong entries and particulars in some of the documents were attributable to the inconsistencies and errors of servants or agents of the defendant.

It was the further submission of Counsel that if Uganda Revenue Authority could make errors in EXH D11 (URA customs entry) and 12 (URA release order), it could be possible that even EXH
10 D19, which was the examination report, was erroneous or a forgery considering that it was dated 7th November, 2006, yet EXH D11 was dated 26th October, 2006.

In reply, Counsel for the defendant submitted that the invoice, commercial invoice and packaging list were availed to the defendant by the plaintiff where the seller of the goods indicated that the suit container had edging tiles. Further, that the bill of lading also described the
15 goods as edging tiles.

Counsel made reference to the evidence of DW2 that the defendant was not involved in the sourcing of cargo for its clients and that the natural presumption was that the plaintiff availed its importation documents to the defendant as was the normal course of events in all shipping transactions. Counsel relied on **Section 113 of the Evidence Act** which provides that the court
20 may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business.

Counsel was of the view that with all the importation documents identified and confirmed by PW2 as having originated from Prospero International Ltd, and in the absence of documents to the contrary, the plaintiff was estopped from denying the description of the suit tiles as contained
25 in the available documents. It was counsel's further submission that the defendant's mistaken description of the suit cargo (EXH D17) could not amend or alter the true description of the goods as provided by the seller of the goods.

With regard to the value of the tiles, Counsel submitted that the supplier's invoice clearly stated that the tiles had a Mombasa CIF value of US\$ 6,597.50 and the Uganda Revenue Authority customs entry dated 21st October, 2006 (EXH D 11) had the value of the goods at UD\$ 6,597.50 which was equivalent to UGX 12,247,797/=. It was counsel's contention that the above was the value of the goods in Uganda. Counsel indicated that the defendant had sent the EXH D11 to the plaintiff and the plaintiff was aware of the above value and never contested the same.

It was the submission of Counsel that the plaintiff had failed to prove the market value of UGX 80,040,000/= as had been claimed.

I have carefully perused the documents relied upon by the plaintiff and the defendant. While some documents indicate that the suit goods were edging wall tiles, other documents state the tiles as being floor tiles, and all the said documents were among the agreed documents at the scheduling conference. EXH D11 which was the customs entry document and EXH D 12 which was the release order from Uganda Revenue Authority described the goods as glazed ceramic flags and paving, hearth or wall tiles, etc. These are the documents which the plaintiff relied upon to contend that the goods were floor tiles and not edging wall tiles. However, I also note from the above description that the goods are generally described as glazed ceramic tiles, paving or wall tiles. Therefore, the type of tiles could have been either of the types described in the said documents.

The documents which were authored by the supplier, Prospero International Ltd, all described the goods as being edging tiles; the invoice (EXH D 9), the commercial invoice (EXH D10) and the packaging list (EXH D20). The Bill of Lading (EXH D 8), which document is known in international trade as being title to the goods in transit also describes the goods as being edging tiles. I have considered the plaintiff's evidence that the mistakes in the above documents could be attributed to the defendant which apparently handled all the documentation in the transaction. However, all the above documents were authored by the supplier and PW2 admitted that he negotiated the contract of the supply with the supplier. In that regard, I am unable to accept the plaintiff's contention that the description of the tiles in the documents was owing to the mistake of the defendant's servants / agents.

I also accept the submission of Counsel for the defendant that the natural presumption was that the plaintiff availed its importation documents to the defendant being a mere forwarder as was the normal course of events in shipping transactions. It could not have been the defendant which negotiated the contract and dictated on what was to be imported as the plaintiff would want this
5 Court to believe.

I have also looked at EXH D 17 which was an acceptance of the offer to sell the goods to a named buyer by the defendants. The defendants described the goods as being floor tiles. However, I further accept the submission of Counsel for the defendant that the above did not amend or alter the true description of the goods in the shipping documents. Besides, the
10 defendant was not engaged in the trade of tiles in order to be expected to give a proper description of the goods.

I find that the goods in the suit container were edging tiles as was described in the documents issued by the supplier and as stated in the bill of lading.

With regard to the value of the tiles, I have considered the evidence adduced by PW1 but I find
15 that it was not helpful in determining the value of the goods at the time of the sale by the defendant. His testimony was in regard to the current value of glazed ceramic tiles. Besides, his evidence had grave contradictions which rendered it unreliable. In view of the above, I shall disregard his evidence.

The invoice (EXH D 9) from the supplier, Prospero International Ltd stated the total CIF
20 Mombasa value as being US\$ 6,597.50 and the URA customs entry document (EXH D 11) stated the value of US\$ 6,597.50 totaling to UGX 12,247,797/= when converted to Uganda shillings.

The plaintiff did not deny that upon declaring the goods to Uganda Revenue Authority, the defendant availed to the plaintiff the customs entry (EXH D14) where the value of the goods was
25 stated to be UGX 12,247,797. In that regard, it is perceptible that the plaintiff was at all material time aware that the above stated amount was the value of the goods.

In view of the foregoing, I find that the goods in the suit container were edging tiles which were then valued at UGX 12,247,797/=.

any loss caused by the defendant's alleged breach of contract/agency trust so as to warrant an award of general damages.

On the other hand, I award the defendant UGX 549,042/= being the amount still owing to it from the plaintiff and which was not realized from the retention and sale of the goods.

- 5 In view of the above, I, accordingly, dismiss the plaintiff's suit with costs to the defendant.

I so order.

10 **B. Kainamura**
Judge
26.09.2016