

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 614 OF 2015**

THE COMMODITY HOUSE LIMITED}PLAINTIFF

VERSUS

SUGAR AND ALLIED INDUSTRIES LIMITED}DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff brought this action against the Defendant for breach of contract and for orders that the Defendant pays the following sums to the Plaintiff namely; a sum of US\$291,035 being the total outstanding balance of the contractual money paid by the Plaintiff to the Defendant or the supply of the equivalent thereof being 485 metric tons of sugar. Secondly, the Plaintiff prays for general damages. Thirdly, the Plaintiff prays for costs of the suit to be provided for.

The brief facts alleged in support of the action are that on 4th September 2014, the Plaintiff entered into a contract with the Defendant for the supply of 3000 metric tons of sugar for a total consideration of US\$1,800,000 at the rate of US\$600 per metric ton. This information can be found in the pro forma invoice number SAIL/0271/2014 dated 3rd of September 2014. The entire loading and performance of the contract was to be completed within seven weeks from 3rd September 2014. In the performance of its contractual obligations, the Plaintiff made payments amounting to a total of US\$1,080,035 to the Defendant for the supply of plantation mill white sugar. The Defendant in default and in breach of contractual terms only supplied sugar equivalent to US\$789,000 leaving an outstanding balance as by 30th of April 2015 of US\$291,035 acknowledged by the Defendant's financial controller. The outstanding balance according to the contract is equivalent to 485 metric tons of sugar. Several reminders by e-mail correspondence and demands were made by the Plaintiff to the Defendant to supply the sugar and the expression of dissatisfaction in the way the Defendant performed the contract but the Defendant inflexibly failed to supply the sugar or refund the Plaintiff's money.

As a consequence the Plaintiff suffered loss of earnings, forex rate losses, expiry of export permit, default on transportation charges and detention charges for which the Defendant is liable.

The Defendants filed a Written Statement of Defence denying the Plaintiff's claim in total and averring that the Defendant delivered the consignment of sugar to the Plaintiff Company in

accordance with the terms of the contract executed inter partes. Secondly the Defendant is not indebted to the Plaintiffs in the sums alleged in the plaint and therefore the Defendant is not in breach of any undertaking to deliver any consignment of sugar to the Plaintiff.

The suit came for a scheduling conference on 19th of September 2016 and was fixed for hearing on 18th January, 2017 as well as with 8th February, 2017. The matter did not proceed and was fixed for 21st of February 2017 for hearing. Hearing notice was served on Messrs Muwema and Company Advocates on 18th January, 2017 according to the return of service duly acknowledged and attached to the affidavit of Matovu Joseph, the court process server. In the affidavit of service it disclosed that hearing notices for 21st February, 2017 were handed over to him for service upon the Counsel of the Defendant. On 18th January 2017 he proceeded to the Chambers of Messieurs Muwema & Company Advocates and introduced himself to the receptionist and tendered copies of the hearing notices. The same was returned to him acknowledged with the stamp of Messieurs Muwema & Company Advocates.

On 21st February, 2017 by 11.10 a.m. the Defendants were not in court when the Plaintiff's Counsel applied to proceed ex parte whereupon the Plaintiff's witness testified and the Plaintiff closed the case. The Plaintiff's Counsel filed written submissions. The record shows that the court directed the parties to file witness statements and only the Plaintiff complied with the direction of court.

The Plaintiff is represented by Peter Nkurunziza of Messieurs Bitangaro & company advocates while the pleadings and representations in court were made by Messieurs Muwema & company advocates for the Defendant. Counsel Kiwunda Matthew holding brief for Counsel Andrew Oluka at one point appeared on behalf of the Defendant when the scheduling conference was conducted. The matter proceeded ex parte on the date of the hearing and the Plaintiff filed written submissions.

The following issues which are the agreed issues in the scheduling memorandum were addressed by the Plaintiff's Counsel namely:

1. Whether the Defendant supplied the amount of sugar paid for and if not so, what was the shortfall?
2. What remedies are available to the parties?

The Plaintiff's Counsel submitted that when the parties were directed to file their respective witness statements, the Plaintiff filed one witness statement but the Defendant submitted no evidence either by way of witness statements, oral testimony or any documents. The matter proceeded ex parte under Order 9 rule 20 (1) (a) of the Civil Procedure Rules on 21 February, 2017.

Whether the Defendant supplied the amount of sugar paid for and if not so, what was the shortfall?

The Plaintiff's Counsel submitted that PW1 Yawer Kalyan, the Kenyan citizen and a resident of Mombasa employed as the operations manager of the Plaintiff company testified that he was conversant with the matters relating to the contract for the supply of sugar. With reference to exhibit P1 which is the supply agreement dated 4th September, 2014, the contract was for the supply of 3000 metric tons of Plantation Mill White Sugar packed in bags of 50 kg each. They were to be delivered ex-stock to the Plaintiff at the Defendant's warehouse. The Plaintiffs paid for the sugar as indicated in the general ledger marked exhibit P3 from pages 5 - 9. On 9th September, 2014 the Plaintiff paid US\$179,965. On 12th September, 2014 the Plaintiff paid US\$150,070. On 23rd September, 2014 the Plaintiff paid US\$150,000. On 3rd November, 2014 the Plaintiff paid US\$300,000. Lastly on 23rd December, 2014 the Plaintiff paid US\$300,000. The details of the cheques used in the payments were also given. The amounts paid by the Plaintiff total to US\$1,080,035 paid for the supply of sugar. On various dates, the Defendant supplied to the Plaintiff sugar worth US\$389,000 as indicated in the voucher and variations in exhibit P3.

Supply of sugar was made by the Defendant to the Plaintiff on 11th March, 2015 against sales invoice number 00000363 leaving an amount of US\$291,035 paid for which no sugar was supplied. Sugar was supplied for US\$789,000 leaving an outstanding balance not supplied of the US\$291,035.

PW1 testified that the Defendant issued to the Plaintiff a letter dated 5th May, 2016 entitled balance confirmation as at 30th April, 2015 wherein the credit balance was confirmed by the Defendant as being US\$291,035 and the letter was admitted in evidence as exhibit P5.

The terms of the contract are clearly spelt out in clause 3 of exhibit P1 and indicated that the delivery was to be ex-stock. Clause 3 provided that property in the goods and the risk would pass upon delivery. Clause 3 (i) provided that the agreement had a lifespan of seven weeks from 4th September, 2014 within which period all the deliveries were to be completed.

The Plaintiff's evidence clearly demonstrates that the Defendant did not deliver all the sugar within seven weeks from 4th September, 2014 or at all. It only delivered 1315 metric tons while the Plaintiff had paid for 1800 metric tons. There was 485 metric tons of sugar which had not been delivered by the Defendant costing US\$291,035. The Defendant has not adduced any evidence to contradict the Plaintiff's evidence to prove that it delivered all the consignments as averred in the written statement of defence.

The Plaintiff's Counsel relies on the Cambridge Dictionary for the definition of ex-stock. The terms is used to describe goods that buyers can have immediately because the seller has a supply of them available. Most ex-stock items can be delivered on the following day after the order is

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

placed. These goods are available ex-stock for immediate delivery. This meant that the goods were available as soon as they were paid for and delivery is taken at the warehouse. The evidence shows that there was no delivery in respect of sugar valued at US\$291,035 for which the Plaintiff claims a refund. The sugar at all times remained the property of the Defendant and risk and property did not pass to the Plaintiff and the Plaintiff is entitled to a refund of the money. The Defendant did not supply to the Plaintiff all the sugar that was paid for and the shortfall was 485 metric tons with a value of US\$291,035.

What remedies are available to the parties?

The Plaintiff's Counsel submitted that the Sale of Goods Act cap 82 and section 50 entitles a buyer to the remedy of an action for wrongful non-delivery and damages are the estimated loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract. He submitted that the Plaintiff is a commodity trading enterprise which has built a strong and sound reputation for being able to meet and satisfying its customer's orders in a timely manner according to the testimony of PW1. As a result of the Defendant's breach, the Plaintiff had difficulty in promptly supplying customer's orders for sugar which the Plaintiff purchased from the Defendant for such trading purposes, leading to damage the Plaintiff's hard earned reputation. He submitted that the Plaintiff also lost goodwill and in the premises the Plaintiff prayed for general damages of Uganda shillings 100,000,000/=.

The Plaintiff further prayed for interest on the sum of US\$291,035 at the rate of 6% per annum from March 2015 until payment in full. This was the period for which the Defendant denied the Plaintiff use of its monies. Whereas the general damages sought are in respect of the loss of goodwill and reputation, the interest claimed is for compensation for the deprivation of the use of the money. The Plaintiff has not claimed the loss of profit. Interest is claimed at 6% being the court rate as no specific claim of interest was made in the plaint and as a fair rate for the dollar. Counsel submitted that in the case of **Sentongo vs. Kamuru HCCS No. 906 of 1971**, interest can be awarded under any further or other relief. He further relied on the case of **Ahimbisibwe vs. Akright Projects Ltd HCCS No. 832 of 2007** for the proposition that an award of interest fulfils the fundamental rationale for award of general damages as stipulated in the East African Court of Appeal case of **Dhamrashi vs. Karsan [1974] 1 EA 41** that general damages are awarded to fulfil the common law remedy of *restitutio in integrum* which means that the Plaintiff has to be restored as nearly as possible to a position he would have been had the injury complained of not occurred. The conclusion is that where interest is awarded as compensation for the deprivation of the Plaintiff by keeping him out of his money, ordinarily general damages will not be awarded.

The Plaintiff's Counsel submitted that in this case, the Plaintiff merits an award of general damages as well as interest and costs of the suit.

Judgment

I have carefully considered the pleadings as well as the evidence and submissions of Counsel together with the authorities cited.

The Plaintiff's case in summary is that on 4th September, 2014 it entered into a contract with the Defendant for the supply of 3000 metric tons of sugar for a total consideration of US\$1,800,000 at the rate of US\$600 per metric ton. The Plaintiff paid US\$1,080,035 but the Defendant supplied sugar worth only US\$789,000 leaving US\$291,035 worth of sugar not supplied. While the Defendant filed a written statement of defence, no effort was made to defend the action. The Defendant's Counsel appeared for a scheduling conference in which the court adopted the points of agreement and disagreement drafted by the Plaintiff in the Plaintiff's proposed scheduling memorandum under Order 12 rule 1 of the Civil Procedure Rules.

The agreed facts pursuant to the scheduling conference are as follows: The Plaintiff is a limited liability company duly incorporated in Kenya. On 4th September, 2014, the Plaintiff entered into a contract with the Defendant for the supply of 3000 metric tons of sugar for a total consideration of US\$1,800,000 with a ton of sugar going for US\$600. The evidence for this is also the pro forma invoice number SAIL/0271/2014 dated 3rd of September, 2014. The entire loading and performance of the contract was to be completed within seven weeks from 3rd September, 2014. The Plaintiff paid to the Defendant US\$1,080,035 for the supply of a Plantation Mill White Sugar. The Defendant supplied sugar worth only US\$789,000 leaving an outstanding balance paid to the Defendant by 30th April, 2015 of US\$291,035. This amount was acknowledged by the Defendant's Financial Controller. The outstanding balance is equivalent to 485 metric tons of sugar. The Defendant failed to supply the 485 metric tons of sugar or to refund to the Plaintiff the US\$ 291,035.

While the Defendant disputed the assertion of the Plaintiff that it did not supply the 485 metric tons of sugar, the Defendant did not lead any evidence to support its contention in the written statement of defence that it supplied the Plaintiff with the said amount of sugar. The Plaintiff's case is supported by the testimony of PW1 Mr Yawer Kalyan, the Operations Manager of the Plaintiff. I believe the testimony of PW1 that:

1. On 9th September, 2014 by cheque number BR 000533 the Plaintiff paid to the Defendant US\$179,965.
2. On 12th September, 2014 by cheque number BR 000534 the Plaintiff paid to the Defendant US\$150,070.
3. On 23rd of September, 2014 by cheque number BR 000 547 the Plaintiff paid to the Defendant US\$150,000.

4. On 3rd November, 2014 the Plaintiff paid by cheque number BR 000 620 to the Defendant the sum of US\$300,000.
5. Lastly on 23rd December, 2014 by cheque number BR 000716, the Plaintiff paid to the Defendant a sum of US\$300,000.

The total amount paid by the Plaintiff is US\$1,080,035. On various dates the Defendant supplied to the Plaintiff US\$789,000 worth of sugar according to exhibit P3. The supply of sugar was made by the Defendant to the Plaintiff on 11th March, 2015 against Sales Invoice Number 00000363 leaving sugar worth US\$291,035 not supplied up to date. This credit balance was confirmed by the Defendant in its letter marked exhibit P4.

Exhibit P4 is a letter dated 5th of May, 2015 written to The Finance Manager, The Commodity House Ltd, and Kenya. The letter reads as follows:

“RE: BALANCE CONFIRMATION AS AT 30TH APRIL 2015

Reference is made to the above subject that we are confirming the credit balance as at 30th of Apr 2015 in our books is US Dollar 291,035 (US Dollar Two Hundred Ninety One Thousand Thirty Five Only).

Thanking you

Yours Faithfully,

Manoj Kumar

Financial Controller..."

The letter is on the letterhead of Sugar and Allied Industries Limited, Plot 86/90, 5th Street, Industrial Area, P.O. Box 4641, Kampala, Uganda (The Defendant). It acknowledges that by 30th April, 2015 the Defendant had not supplied to the Plaintiff sugar worth US\$ 291,035 which money had already been paid to the Defendant by the Plaintiff. There is no evidence that the Defendant supplied to the Plaintiff any sugar after the 30th of April 2015. Finally exhibit P1 which is the agreement between the parties dated 4th September, 2014 which stipulates that the subject matter of the agreement is the supply by the manufacturer of 3000 metric tons of Plantation Mill White Sugar packed in 50 kg per bag. The price per metric ton is US\$600 valid only in relation to the agreed 3000 metric tons of sugar. Payment was to be made in advance before loading. The Plaintiff paid in advance.

In the premises the Plaintiff has proved its case in issue number one agreed to in the scheduling conference and which is **whether the Defendant supplied the amount of sugar paid for and if so what was the shortfall?**

The Plaintiff proved that the Defendant failed to supply 485 metric tons of sugar worth US\$291,035 paid for. Put in other words the Defendant did not supply all the sugar paid for. Secondly, the Defendant acknowledged that it held the Plaintiff's US\$291,035 by the 5th of May, 2015. In the premises the Plaintiff's suit for refund of US\$291,035 succeeds on the basis of the acknowledgement of the Defendant and the Plaintiff is entitled to judgment.

Remedies:

The Plaintiff's Counsel relied on section 50 of the Sale of Goods Act cap 82 laws of Uganda for the proposition that the remedy for wrongful non-delivery is damages

“50. Action for non-delivery

(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

The statutory provision is very clear in that it provides that the buyer may maintain an action against the seller for damages for non-delivery and that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. In paragraph 13 of the written testimony of PW1, it is written that the Plaintiff lost goodwill and business and seeks general damages of Uganda shillings 100,000,000/= only. The question is whether general damages should be awarded in addition to interest claimed at 6% per annum on the US\$291,035 with effect from March 2015 to the date of full payment. Counsel relied on the decision of this court in **Ahimbisibwe vs. Akright Projects Ltd HCCS No. 832 of 2007** where the court applied earlier precedents cited in that judgment that an award of interest fulfils the fundamental rationale for award of general damages which is the principle of *restitutio in integrum*. This common law principle was cited with approval by the East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41**.

In this suit the actual question for consideration is whether damages ought to be awarded in addition to an award of interest.

The previous precedents relied on are the following. In **Tate & Lyle Food and Distribution Ltd vs. Greater London Council and another [1981] 3 All ER 716** Forbes J held at page 722 that interest is not awarded against a Defendant as a punitive measure for having kept the Plaintiff out of his money but:

“I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum. ... I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld.”

The argument that general damages and interest be awarded concurrently as specific heads of compensation was rejected in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** Lord Wright held:

“... the contention is that money awarded as damages for the detention of money is not interest and has not the quality of interest. Evershed J, in his admirable judgment, rejected that distinction. The appellant’s contention is, in any case, artificial and is, in my opinion, erroneous because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. *It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation....* (Emphasis added)”

In other words interest may represent the profit that the Plaintiff would have made if he had the use of the money. One cannot have the money refunded and claim for profit for the loss of goods at the same time since the goods are represented in the money. According to **Halsbury’s Laws of England, 4th Edition Reissue Volume 12 (1)** at paragraph 812, general damages are those damages that arise naturally and in the normal course of events. They are usually but not exclusively non pecuniary which are incapable of precise quantification in monetary terms. They will be presumed to be the natural and probable consequence of the wrong complained of with the result that the Plaintiff is required only to assert that such damage has been suffered. This was applied in **Okello James vs. Attorney General in HCCS No. 574 of 2003** where it was held that general damages are compensatory in nature, and are intended to make good to the sufferer as far as money can do so, the losses he or she suffered as the natural result of the wrong done to him.

The same principle is captured by section 50 (2) of the Sale of Goods Act Cap 82 laws of Uganda. The refund of the money is part of the compensation and any loss flowing from the *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~ *&*\$\$#\$ xtra+ *maximum735securityx 2017 style*

breach can be reflected in interest on the refund or as general damages. Where general damages are awarded, the further interest can be awarded from the date of judgment and still achieve the same result if interest had been awarded as the rate of compensation from the time the case of action accrued. According to **Halsbury's Laws of England, 4th Edition Reissue Volume 12 (1) and Paragraph 848** when damages have been awarded and constitute a judgment, they carry interest until payment. At common law, there is no general right to the award of interest on damages for the period before judgment or prior payment of compensation although in admiralty, interest is awarded on both damages and salvage. In other words interest is awarded from the date of judgment. Where interest is awarded as compensation, it runs till date of judgment and thereafter after date of judgment further interest may be awarded.

In the circumstances of this case the Plaintiff did not adduce evidence of what loss it suffered and therefore interest will be awarded in lieu of general damages from the date of breach of contract by failure to supply sugar paid for. In the premises the following orders issue:

1. The Defendant shall refund to the Plaintiff the sum of **US\$ 291,035**.
2. The sum in item 1 carries interest at 10% per annum from March 2015 till the date of judgment.
3. Further interest is awarded at 6% per annum on the aggregate sum at the date of judgment from the date of judgment till payment in full.
4. The suit succeeds with costs to the Plaintiff

Judgment delivered in open court on the 13th of March 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Tugume Rosette holding brief for Peter Nkurunziza for the Plaintiff

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

Judge

13th March 2017