

5

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL APPEAL NO. 14 OF 2014

[ARISING FROM CIVIL SUIT NO. 511 OF 2013]

10

BAJABER MILLERS LIMITED ::: APPELLANT

VERSUS

15

BAKERS WORLD LIMITED ::: RESPONDENT

(Appeal from the decree/decision of Her Worship Sylvia Nabaggala at Nakawa Chief Magistrate's Court delivered on the 27th May 2014 in Civil Suit No. 511 of 2011)

20

BEFORE: HON. JUSTICE DR. HENRY PETER ADONYO

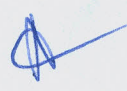
JUDGMENT ON APPEAL:

1. Background:

25

The Appellant sued the Respondent for the recovery of special damages of Ug. Shs. 22,950,000/= for non-payment of wheat flour supplied to it.

1

 Hon. Justice Dr. H. P. Adonyo

5 In the months of February and April 2013, the Appellant is said to have delivered
some quantities of flour to the Respondent against which the latter was then
effect payment onto the Plaintiff's bank account. Specifically, the Appellant
demanded for payment for two deliveries of wheat flour upon which the
Respondent issued to it two cheques one numbered 000012 dated 27th April
10 2013 in the amount of Ug. Shs. 20,000,000/= and another numbered 000125
dated 27th April 2013 in the amount of Ushs 18,800,000/=, all of which were
drawn on Fina Bank. Both were dishonoured.

The Respondent was informed of the dishonoured cheques and attempted to
effect some payments in installments eventually leaving a balance of Ug. Shs.
15 19,685,000/= as outstanding amount by the time the head suit was filed.

The Respondent did not file any defence. The lower court then required the
Appellant to formally prove its case wherein the issues framed for determination
were;

- i. Whether or not the parties had any business dealings.
- 20 ii. Whether the outstanding sum of Ushs 19,685,000/= is due and owing
to the Plaintiff.
- iii. What are the remedies available for the parties.

In her finding on the first issue, the trial magistrate noted that from 2012 several
dealings occurred between the Appellant and Respondent for which the
25 Appellant would supply flour to the Respondent and the Respondent would
thereafter make payments against invoices issued by the Appellant. From the

5 existence of these transactions the learned trial magistrate concluded that there existed a business relationship between the two parties.

On the second issue, the learned trial magistrate found that all transactions between the Appellant and Respondent company were captured in a ledger book with invoices allegedly issued for each transaction thereafter but noted that
10 invoice was tendered into court for the date of 01.01.2013 on which the Appellant claimed to have supplied 400 bags to the Respondent making an outstanding balance of Ushs 19,685,000/=. On the basis of this failure to supply in court invoices as evidence of supply of flour the learned trial magistrate held that no
15 proof had been made on the balance claimed by the Appellant and thus declined to grant the reliefs sought from by the Appellant hence this appeal.

The grounds of appeal were that;

1. The trial magistrate erred in law and fact when she failed to properly evaluate the uncontroverted evidence of the Appellant on court record.
2. The trial magistrate erred in law and fact when she failed to appreciate
20 that no defense had been filed by the respondent and thus the evidence on record was not challenged.
3. The trial magistrate erred in law and fact when she refused to award the Appellant special damages of Ushs 19,685,000/=.

25

 Hon. Justice Dr. H. P. Adonyo

5 2. Representation:


Mr. Kanya Francis and Mr. Yesero Mugenyi appeared for the Appellant. The Respondent's representatives did not appear in court and neither were they represented by counsel.

3. Submissions:

10 The Appellants' counsel argued all grounds of appeal concurrently. Counsels' first argument was that failure to file a defence was tantamount to admission of all the allegations made in the plaint and that since the Respondent did not file any defence it implied that it did not challenge the claim made against it by the Appellant with the court only required to prove damages yet the trial magistrate
15 put the Appellant's case for formal proof rather than first entering judgment *ex parte*.

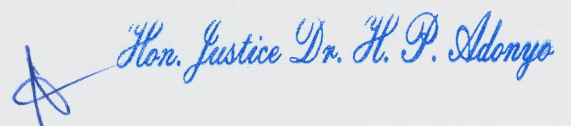
Counsel also submitted that the trial magistrate did not properly evaluate the evidence on record yet the Appellant had shown that the Respondent had issued two checks, that is cheque No. 000012 for the sum of Ug. Shs. 20,000,000/= and Cheque No. 000125 for the sum of Ushs 18,800,000/= which were
20 dishonored and that upon the said cheques being dishonoured, the Respondent made payments of Ug. Shs. 12,275,000/= and another Ushs 3,260,000/= leaving an outstanding balance of Ug. Shs. 19,685,000/= yet the trial magistrate found that there was no outstanding balance owed.

25 Counsels' argued that indeed the thirteen invoices which were exhibited as exhibits *a to m* totaled to a payment of Ug. Shs. 521,600,000/= which payment

 Hon. Justice Dr. H. P. Adonyo

5 was made by the Respondent to the Appellant leaving a sum of Ug. Shs.
19,685,000/= and that these were referred to in the judgment by the lower trial
court but that instead the trial magistrate taking note of these turned around
and based her decision that specific invoices relating to the balance in question
was never issued meaning that deliveries against those invoices were not made
10 and hence not proved. However, according to counsels for the Appellant the lower
court should have taken note of other evidence to prove that in fact indeed
deliveries were made and that these pieces of evidence included a statement of
accounts as well as two correspondences on the record which were a letter dated
4th March 2013 and 4th April 2013 in which the Respondent acknowledged
15 delivery flour and even then undertook to pay the outstanding sums. In the view
of counsels these pieces of evidence proved that delivery of flour was made to the
Respondent thus proving the Appellant's case wholly and since these facts were
not contested then the Appellant had proved its case in the lower court which
should have found for it accordingly. But that the lower trial court ignored these
20 facts and found otherwise and hence this appeal.

Counsels thus urged this first appellate court to evaluate the evidence adduced
in the lower trial court and find that indeed the Appellant supplied flour to the
Respondent who failed to pay for and thus this appellate court should on the
basis of the evidence which was ignored by the lower trial court find that indeed
25 the Appellant had sufficiently proved its case and should thus reverse the
decision of the lower trial court accordingly.

 Hon. Justice Dr. H. P. Adonyo

5 4. Decision:

I have carefully considered the record of the lower trial court and submissions made by counsels for the Appellant in this appeal. I will thus proceed to resolve this appeal as below.

5. Duty of the Appellate court:

10 This is the first appeal from the decision of the learned trial magistrate. It was held in **Walubi & Anor V Uganda (Criminal Appeal No. 152 OF 2012) [2016] UGCA 2 (26 May 2016)** that the duty of a first appellate court is to review and re-evaluate the evidence before the trial court and reach its own conclusions taking into account the fact that indeed the appellate court did not have the
15 opportunity to hear and see the witnesses testify. A number of other decided cases support this position and these are; **Pandya vs R [1957] EA 336, Ruwala vs. Re [1957 EA 570, Bogere Moses vs Uganda Cr. App No. 1/97(SC), Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC).**

20 The Supreme Court of Uganda particularly emphasised this duty in the case of **Baguma Fred vs Uganda SCC Appeal No. 7 of 2004** where it held that;

*First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor
25 heard the witnesses, to come to its own conclusion on that evidence.*

5 **Secondly in so doing it must consider the evidence on any issue in
its totality and not any piece in isolation. It is only through such re-
evaluation that it can reach its own conclusion, as distinct from
merely endorsing the conclusion of the trial courts.**

Other cases which emphasise this duty are **Banco Arab Espanol versus Bank
10 of Uganda, Supreme Court Civil Appeal No. 8 of 1998** and **Byaruhanga
Yozefu vs Kahemura Patrick HCCS No. 19 of 2016**. I will thus do so
accordingly as pointed above.

6. Power of the appellate court:

In respect to this court Section 80 (i) of the Civil Procedure Act Cap. 71 grants
15 this court such appellate powers to determine a case to its finality as restated
below;

Section 80 (i) of the Civil Procedure Act:

Power of appellate court.

***(1) Subject to such conditions and limitations as may be prescribed, an
20 appellate court shall have power—***

to determine a case finally;

Hon. Justice Dr. H. P. Adonyo

5 **(2) Subject to subsection (1) the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted in it.**

10 Additionally, Section 101 of the Evidence Act Cap. 6 places the burden of proof on the party who asserts some facts as it provides that **'whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.'**

15 And as was held by my learned sister Lady Justice Flavia Senoga Anglin in High Court Civil Suit No. 787 of 2014 HSGS Impex Uganda Ltd vs. Bakama Enterprises Ltd & Christopher Henry Batureine, in civil matters, it is the duty of the party who asserts certain facts to prove those facts on a balance of probability.

20 Looking at the instant Appellant's arguments tendered in its submissions, I note that the main issue for determination is whether or not Appellant is entitled to the claim of Ushs 19,685,000/=. From the evidence on record, Mukhtar Abdul Razak who testified as PW1 informed the lower trial court that on 01.01. 2013, the Appellant supplied the Respondent with 400 bags of wheat flour each weighing 50 kilograms at the price of Ug. Shs. 103,000/= each totaling to Ug.
25 Shs. 41,200,000 and that the payment for the same was to be made within two

5 weeks but the Respondent only paid Ug. Shs. 10,403,000/= leaving an
outstanding balance of Ug. Shs. 30,105,000/=. This same witness testified that
on 01.02.2013 the Appellant supplied another 400 bags of 50 kilograms each of
wheat flour also totaling to Ug. Shs. 41,200,000/= with a payment of Ug. Shs.
36,085,000/= being made by the Respondent leaving an outstanding balance of
10 Ug. Shs. 5,115,000/=. This witness explained in court that with the two supplies
and payments an outstanding balance of Ushs 35,220,000/= was left on the two
transactions and that when the Appellant demanded for payment, the
Respondent obliged by issuing two cheques No. 000012 dated 27/04/2013 in
the amount of Ug. Shs. 20,000,000/= and No. 000125 dated 27.04.2013 in the
15 amount of Ug. Shs. 18,800,000/= all drawn on Fina Bank but that all these
were dishonoured upon presentation and that thereafter the Respondent began
making payments in instalments between the months of April and September
2013 to ameliorate the debt which totaled to Ushs 12,275,000/= leaving an
outstanding balance of Ushs 22,945,000/=. That another final payment of Ug.
20 Shs. 3,360,000/= was paid thus leaving a balance of Ug. Shs. 19,685,000/=
which the Appellant then sought to recover through court process. According
PW1 payments were usually by the Respondent directly to the Appellant's bank
account and then the Appellant would issue a statement of account to the
Respondent with statements of account issued for the dates of 01.03.2013,
25 19.09.2013 and 12.02.2014 showing a closing balance of Ug. Shs. 19,685,000/=
and the statements were shared with the Respondent. That upon the receipt of
the confirmation of accounts, the Managing Director of the Respondent one Capt.

5 Abel Wasswa in a letter dated 4th March 2013 acknowledged receiving the
supplied flour and admitted that the amount of Ug. Shs. 35,025,000/= was due
to the Appellant from the Respondent as per the statement of accounts received.
This witness also stated that the Respondent committed itself to paying Ug. Shs.
2,000,000/= per month starting 19th April 2013 for a period of 17 weeks and a
10 copy of a customer ledger book was exhibited at trial to also show that the
outstanding balance due to the Appellant from the Respondent amounted to Ug.
Shs. 19,685,000/=.

The Appellant's second witness Nalukwago Gladys an accountant with the
Appellant who testified as PW2, confirmed much of what was said by PW1. This
15 witness tendered in court delivery notes as well 13 invoices which were exhibited
as PG 1-13.

In her judgment the trial magistrate while referring to the evidence of PW1 that
that a transaction was made on 01.01.2013 for the supply of 400 bags of flour
to the Defendant company at a cost of Ushs 41,200,000/= questioned the supply
20 of any flour on that date arguing that although several invoices had been
tendered into evidence none invoices existed for that date. In regards to this
query the learned trial magistrate noted and I quote; **'However, the said invoice
was not availed to court. The confirmation of accounts dated 01.03.2013
does not indicate an invoice issued on 01.01.2013. same for an opening
25 balance of 40,508,000/= as debit amount on the defendant's account -
exhibit P.B'**

5 According to the learned trial magistrate the confirmed accounts dated
01.03.2013 clearly indicated the indeed invoices were issued by the Appellant
but none was issued for the date of 01.01.2013 with the said transaction also
not recorded in the customer ledger book among the Respondent's other
transactions. Arising from this omission the learned trial magistrate then found
10 that these omissions greatly contradicted the evidence of PW1 Mukhtar Abdul
that the Appellant supplied the Respondent with 400 bags of wheat on
01.01.2013 and so the learned trial magistrate went on to conclude that there
was no evidence to prove the fact that on 01.02.2013 supply of flour was made
and was fully settled and that the Respondent had only effected payments
15 totaling to Ug. Shs. 51,620,000/= out of an invoice amounting to Ug. Shs.
41,200,000/= and that since the Appellant had failed to prove special damages,
yet this must be specifically proved, the learned trial magistrate went on to rule
that no proof was adduced that the Respondent was still indebted to the
Respondent. She then went on to resolve that this issue in the negative making
20 a finding that the sum of Ug. Shs. 19,685,000/= was not due to the or owing to
the Appellant.

My analysis of the findings of the lower trial court show that a lot of heavy
reliance and emphasis was placed on the non-existence of an invoice for the
transaction of 01.01.2013 rather than on whether or not there were outstanding
25 amounts due to the Appellant from the Respondent. Although, no documentary
evidence on record that there an invoice issued on that date, I would find that

5 there was sufficient evidence to show that the Respondent did acknowledge receipt of the flour and thus owed the Appellant arising from the transaction for though the statement of accounts did not reflect any transaction for that date but when this information was shared with the Respondent it acknowledged that the sum of Ug. Shs. 35,025,000/= was still due as of 04. 03. 2013 and undertook
10 to pay the same. By this reaction the Respondent acknowledged indebtedness as a result of supply of the flour was not contested by the Respondent. Indeed, the respondent went on to issue two cheques, one for the sum of Ug. Shs. 20,000,000/ = and another for the sum of Ug. Shs. 18,800,800/= to effect the payment though all these cheques were dishonoured though some of the
15 outstanding payments were later cleared in cash leaving a balance of Ushs 19,685,000/=. In my view this was sufficient evidence to establish that respondent acknowledged owing money to the Appellant and that there were still amounts due to the Appellant making the absence of an invoice in court related to supplies made 01.01. 2013 to be not fatal to the Appellant's case which fact
20 the learned trial magistrate should have taken into account as this was adequate proof of the outstanding amounts.

As such I would agree with the grievance of the Appellant that that the trial magistrate erred when she found that there was no evidence to prove that supplies were made on that date yet the Appellant had proved the existence of
25 the debt on a balance of probabilities.

Hon. Justice Dr. H. P. Adongo

5 Further, it has been held in many cases that a party who does appear in court
and file a written statement of defence is deemed to have admitted the allegations
made against him in the plaint as was held in the case of **Mwesigye vs Kiiza**
HCCS No. 320 of 2015 among others. In the present case, the Respondent did
not do either and is deemed to have accepted the claim against it when it failed
10 to appear in court in addition to the fact that the evidence given against it in
court remained uncontroverted in spite of the fact that it was served with a
summons to file a defence on 4th October 2013 but never bothered to do so!

In my assessment of the evidence recorded by the lower trial court, it is clear
that the Respondent/Defendant acknowledged its indebtedness to the Appellant
15 / Plaintiff and even tried to pay for the supplies made to it but did not do so
making the failure to produce an invoice for the particular date *vis-a-vis* the
acknowledgment as seen above not to be fatal thus making the outstanding
amount of Ug. Shs 19,685,000/= to remain due to the Appellant for the supply
made to it. I would thus answer this issue in the affirmative.

20 7. Interest:

The Appellant seeks interest on the bank rate from the date of the cause of
action. Pursuant to section 26 of the Civil Procedure Act, Cap. 71, interest is
awarded at the court's discretion on fixed sums. This position was also
highlighted in the case of **Majid Akuze vs Centenary Rural Development Bank**
25 **Civil Suit No. 87/2015**. Therefore, given the fact that I have found that the

5 Respondent did not make good payments due to the Appellant at the time when it was demanded and taking into account all the circumstances of this, I am inclined to grant an interest of 9% per annum on the special damages of Ug. Shs. 19,685,000/= from the date of default until payment in full.

8. Costs:

10 Section 27 of the Civil Procedure Act provides that costs follow the event and a successful party should only be deprived of costs with good reason. In the case before me, the Appellant is the successful party and proved that indeed the Respondent by its failure to meet its side of the bargain by failing to pay what was due to the Appellant in time rendered the Appellant to incur costs in
15 prosecuting this matter both in this court and the lower court. That being the case I would accordingly award costs to the Appellant in this appeal as well as the lower court.

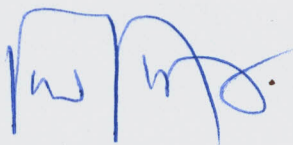
In the result this appeal succeeds and I would issue orders as below.

9. Orders:

- 20 i. The judgment and orders of the lower trial court is set aside and substituted with the judgment and orders of this appellate court.
- ii. An award special damages of Ug. Shs. 19,685,000/= as against the Respondent is awarded to the Appellant.
- iii. Interest on (ii) above at the court rate of 9 % from the date of the cause
25 of action is awarded to the Appellant.

5 iv. The Appellant is awarded costs in this appeal as well the costs in the
lower trial court.

I so order.



Hon. Justice Dr. H. P. Adonyo

.....
HON. DR. JUSTICE HENRY PETER ADONYO

JUDGE

14TH SEPTEMBER 2020

10