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**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**CIVIL APPEAL NO. 13 OF 2020**

**(ARISING FROM NABWERU CHIEF MAGISTRATE’S COURT CIVIL SUIT NO. 169 OF  
2014)**

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**CENTS PUBLICATION LTD..... APPELLANT**

**VERSUS**

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**KIZITO VICENT ..... RESPONDENT**

**BEFORE: HON. LADY JUSTICE SUSAN ABINYO**

**JUDGMENT**

20 This is an appeal from the judgment and orders of the Magistrate Grade 1 Her  
Worship Sanyu Mukasa sitting at Nabweru Chief Magistrate’s court.

**Background**

25 The facts which constitute this appeal are that the Respondent herein sued the  
Appellant for breach of contract of sale of a DST 24 cone baking machine. That  
on the 6<sup>th</sup> day of May, 2014, the Respondent agreed to purchase the said  
machine from the Appellant at a consideration of UGX 13,000,000(Uganda  
Shillings Thirteen Million only) wherein the Respondent made an initial payment of  
UGX 9,500,000 (Uganda Shillings Nine Million Five Hundred Thousand only) and the  
balance of UGX 3,500,000(Uganda Shillings Three Million Five Hundred Thousand  
only) was agreed by the parties to be payable in a period of three months  
30 thereof. That when the balance was due, the Appellant contacted the  
Respondent who claimed that the machine was faulty thus the above suit for  
breach of contract, recovery of the money of the purchase price of the machine,  
special damages, general damages and costs of the suit.

5 The trial court entered judgment in favour of the Respondent and the Appellant being dissatisfied with the judgment, appealed to this honourable court against the whole decision and orders.

The Appellant filed a memorandum of appeal based on five grounds however, during scheduling, the court guided Counsel to streamline the grounds of appeal which Counsel agreed and filed a scheduled memorandum with only two grounds as follows: -

1. That the learned trial magistrate erred in law and fact when she held that the Appellant breached the terms of the contract.
2. That the learned trial magistrate erred in law and fact when she failed to evaluate and appreciate the evidence thereby arriving at a very erroneous decision to the detriment of the Appellant.

### **Representation**

The Appellant was represented by Mr. Lutalo jointly with Mr. Kizito Kamulegeya of Baraka Legal Associated Advocates while the Respondent was represented by Mr. Babu of Sanywa, Wabwire & Legal Consultants.

### **Grounds of Appeal:**

1. That the learned trial magistrate erred in law and fact when she held that the Appellant breached the terms of the contract.
2. That the learned trial magistrate erred in law and fact when she failed to evaluate and appreciate the evidence thereby arriving at a very erroneous decision to the detriment of the Appellant.

Counsel for the Appellant submitted that the two grounds are intertwined and will be resolved jointly and that following the case of **Hon. Mable Bakeine Vs Yuasa Investments Ltd H.C.C.S No. 136 of 2013** which the trial magistrate relied on, the sub issues for consideration on the grounds of appeal above are as follows: -

- i. Whether the Appellant's ice cone machine was fit for the purpose;
- ii. Whether the Respondent fully examined the machine and thus accepted it and,
- iii. Whether the Respondent was entitled to reject the machine under the circumstances or claim damages for loss incurred.

I have taken into account the duty of this court as the first appellate court; to re-evaluate the evidence on record and subject it to fresh scrutiny so as to reach its own conclusion, a proposition well stated in a plethora of cases which include: -

5 ***Fredrick Zaabwe Vs Orient Bank Ltd S.C.Civil Appeal No. 4 of 2006; Baguma Fred Vs Uganda S.C.CR. Appeal No. 7 of 2004; Kifamunte Henry Vs Uganda S.C.CR. Appeal No. 10 of 1997 and Sanyu Lwanga Musoke Vs Sam Galiwango S.C. Civil Appeal No. 48 of 1995.***

10 With due respect to Counsel for the Appellant on the sub issues framed above, the duty of this court as stated above will be guided by the record of appeal and particularly the issues that were determined by the trial court to reach its decision whereupon this appeal is premised and not the authority the trial magistrate followed.

15 From the record of proceedings and the judgment, the main issue on the two grounds of appeal as above revolves around breach of the contract in which the trial magistrate at pg 7 of the judgment puts emphasis as the starting point and states that in order to determine the issue of breach, its necessary to determine the obligations of either party under the contract.

20 The trial magistrate took a step further on pg 8 of the judgment to disregard the law in which Counsel for the Appellant made reference to, in his submissions on the ground that it was not applicable to the matter before court since the contract was executed in 2014 before the Sale of Goods and Supply of Services Act 2017 came into force and I find that the Magistrate was correct.

25 As a result, this appeal will be considered on the provisions of the applicable law at the time; the Sale of Goods Act Cap 82 and the relevant sections thereof are reproduced as hereunder for emphasis.

**Section 12. Breach of condition or warranty.**

30 (1) “Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not a ground for treating the contract as repudiated.

35 (2) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract.

(3) A stipulation may be a condition, though called a warranty in the contract.

5 (4) Where a contract of sale is not severable, and the buyer has not  
accepted the goods, or part of the goods, or where the contract is for  
specific goods, the property in which has passed to the buyer, the  
breach of any conditions to be fulfilled by the seller can only be treated  
10 as a breach of warranty and not as a ground for rejecting the goods  
and treating the contract as repudiated, unless there is a term of the  
contract, express or implied, to that effect.

(5) Nothing in this section shall affect the case of any condition or warranty,  
fulfilment of which is excused by law by reason of impossibility or  
otherwise.”

15 **Section 15. Implied conditions as to quality or fitness.**

“Subject to the provisions of this Act and of any Act in that behalf, there is  
no implied warranty or condition as to quality or fitness for any particular  
purpose of goods supplied under a contract of sale, except as follows-

20 (a) Where the buyer, expressly or by implication, makes known to the seller  
the particular purpose for which the goods are required, so as to show  
that the buyer relies on the seller's skill or judgment, and the goods are  
of a description which it is in the course of the seller's business to supply,  
whether the seller is the manufacturer or not, there is an implied  
25 condition that the goods shall be reasonably fit for the purpose; except  
that in the case a contract for the sale of a specified article under its  
patent or other trade name, there is no implied condition as to its fitness  
for any particular purpose;

30 (b) Where goods are bought by description from a seller who deals in goods  
of that description, whether the seller is the manufacturer or not, there is  
an implied condition that the goods shall be of merchantable quality;  
except that if the buyer has examined the goods, there shall be no  
implied condition as regards defects which the examination ought to  
have revealed;

35 (c) an implied warranty or condition as to quality or fitness for a particular  
purpose may be annexed by the usage of trade.

(d) an implied warranty or condition does not negative a warranty or  
condition implied by this Act unless inconsistent with it.

40 Counsel for the Appellant submitted that it was the Appellant's evidence in chief  
at pg 31 paragraph 4 of the record of proceedings that he visited the Respondent  
at Nabweru and the Respondent took him to the room where the ice cream

5 machines were and showed him how the machine makes cone and that this was inconsistent with the Respondent's claim that the machine was either not working or not fit for the purpose.

Counsel further submitted that there was no communication of any defect and the sale agreement specifically stated that the ice cone machine was brand new  
10 and that the Respondent failed to adduce evidence to rebut that the machine was not fit for the purpose thus there was no breach of contract by the Appellant.

Counsel argued that under section 35 of the Sale of Goods Act Cap 82, the buyer is deemed to have accepted the goods when he or she intimates to the seller that he or she has accepted them or when the goods have been delivered to  
15 him or her and that he or she does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, the buyer retains the goods without indicating to the seller that he or she has rejected them and that the Respondent having dealt with the machine in a manner inconsistent with the ownership of the Appellant i.e. moving the machine to  
20 unknown location and having remained in possession of the same for over 3 months, he was not entitled to reject the machine.

Counsel further argued that since there was no breach of the contract by the Appellant, the Respondent in the circumstances would not be entitled to the return of the machine and damages (special and general) a decision which was  
25 reached at by the trial magistrate by failure to evaluate the evidence and thus an erroneous decision to the detriment of the Appellant.

Counsel for the Respondent in reply relied on the book of a renowned author, Atiyah on the Sale of Goods 12<sup>th</sup> edition at pg 86 para 3 to submit that according to the learned author, the importance of a condition in contracts for the sale of  
30 goods is that its breach if committed by the seller, may give the buyer the right to reject the goods completely and to decline to pay the price, or if he has already paid it, to recover it.

Counsel further submitted that the trial court rightly held that the Appellant was in breach of an implied condition of contract of sale entitling the Respondent to  
35 treat the contract as repudiated and stop payments on the balance owing to the machine on account of section 15 of the Sale of Goods Act Cap 82 whereby, the Respondent communicated to the Appellant the purpose of the machine and relied on the Appellant's skill and judgment because he was in the business of selling those machines but the Appellant breached the implied condition on  
40 fitness for purpose and goods of merchantable quality.

5 **Decision**

I have carefully considered the law applicable, the record of proceedings, judgment of the lower court and the submissions of Counsel for the parties herein and find as follows: -

10 The testimony of the Respondent at pgs. 15 – 24 of the record of proceedings indicates that he made known to the Appellant the purpose for which the machine was required and relied on the Appellant's skill and judgment to purchase the said machine and the operator whom the Appellant had recommended to him.

15 On the other hand, it was the Appellant's evidence in defence at pgs. 30- 33 of the record of proceedings, (the last page was not numbered) that the Respondent took the machine of his choice that was totally sealed to unknown place and left the partially open machine and that the Appellant kept on checking on the Respondent through phone calls and the Respondent informed him that the machine worked and when he visited the site where the machine  
20 was, he found it working.

A close scrutiny of the sale agreement dated 6<sup>th</sup> May, 2014 and marked as exhibit PE1 indicates that the DST 24 machine which is the subject matter in this appeal was new and blue in colour.

25 Breach of a contract occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. **(See *Ewadra Emmanuel versus Spencon Services Limited, Civil Suit No. 0022 of 2015*)**

30 According to paragraph 7 of the plaint at pg 5 of the record of proceedings, the Respondent herein pleaded that there was a misrepresentation by the Appellant that the machine was brand new whereas not and that he concealed facts that the machine was faulty.

Counsel made submissions on the aspect of misrepresentation but from the judgment of the trial court, I find that this concern was not addressed by the trial Magistrate.

35 I will again emphasise the duty of this court as an appellate court; which is to re-evaluate the evidence on record and subject it to fresh scrutiny so as to reach its own conclusion and find that it was the Respondent's evidence at pg 16 of the record of proceedings that according to the agreement, the machine is DST 24

- 5 Ice Corn Baking Machine and new and, he was advised by the Appellant when he was taking the machine to wait for the engineer to come and set it so that it could work and that on 9<sup>th</sup> of May, 2015, he was informed by Andy the engineer that there is a fault and the machine was not able to start because the wire known as the thermal cable was eaten by rats.
- 10 That he then informed Mr. Semanda who told him that the spare part is there and agreed that since he had an outstanding balance of UGX 3,500,000(Uganda Shillings Three Million Five Hundred Thousand only), he could give Andy to go and buy the spare part which he did and obtained a receipt from Andy but when Andy installed the spare part, the machine failed to start.
- 15 PW2 at pg 26 of the record of proceedings confirmed that when he was called to restart the machine, the machine failed to operate and on the outside, the machine looked new yet it was faulty and could not produce the actual product as intended.

According to **Atiyah, Adams & Macqueen on the Sale of Goods 11<sup>th</sup> edition pg 174 at pg 175** the phrase 'fit for purpose' emanates from the statutory definition of merchantable quality under section 14(6) of the 1973 Act which attempted the definition of that term and had as its main element, the requirement that the goods should be reasonably fit for the purpose or purposes for which the goods of that kind were commonly bought and that under the present provisions, the quality of the goods includes their state and condition and that among other things which are aspects of the quality of goods is their fitness for all the purposes for which goods of the kind in question are commonly supplied.(Emphasis supplied)

Following the analysis of the law on the sale of goods in respect of the definition and meaning of the phrase 'merchantable quality' in the case of **Hon. Mable Bakeine Vs Yuasa Investments Ltd H.C.C.S No. 136 of 2013 [2014] UGCOMMC 114 (22 August 2014)**, in which I entirely agree with Madrama. J (as he then was) that there is no exhaustive definition of the phrase 'merchantable quality' and that case law suggests that the purpose for which a good is to be put, should guide the court in deciding whether the goods are of merchantable quality or fit for the purpose.

The provision of the law under section 15 above on implied conditions as to quality or fitness and in particular paragraph (b) thereof provides that where goods are bought by description from a seller who deals in goods of that description, whether the seller is the manufacturer or not, there is an implied condition that

5 the goods shall be of merchantable quality; except that if the buyer has examined the goods, there shall be no implied condition as regards defects which the examination ought to have revealed. (Emphasis added)

In the instant matter, the Respondent examined the machine that was on display and decided to take the machine that was sealed. This implies that the Respondent was satisfied with the state and condition of the machine at the time that he examined the machine on display and the exception above that if the buyer has examined the goods, there shall be no implied condition as regards defects which the examination ought to have revealed, exonerates the Appellant from liability on such defects.

15 Accordingly, I find that although the Respondent relied on the Appellant's skill and judgment to purchase the DST 24 Cone machine that was faulty, the said defects were not from the manufacturer but due to the storage conditions where the machine was placed by the Appellant and the Appellant cannot be faulted on this on grounds that he declined to disclose the defects to the Respondent since the machine was sealed.

The term misrepresentation is a statement made prior to a contract which may either be false or misleading (**See Avon Insurance Plc vs Swire Fraser Ltd [2000] 1 ALL ER (comm) 573**) and **Nottingham Patent Brick & Tile Co. Vs Butler (1886) 16 QBD 778**) and that the claimant has to show that he or she was induced by the misrepresentation to enter the contract (**see Smith vs Chadwick (1884) 9 App Case 187**)

From the evidence evaluated above, I find that there was no misrepresentation in whatever form by the Appellant to the Respondent on the quality of the machine and fitness for purpose.

30 I find that there is merit on the grounds of appeal.

For the reasons above, I find that the Appellant did not breach the implied condition on fitness for purpose and goods of merchantable quality.

Accordingly, the trial magistrate erred when she failed to evaluate the evidence and the law, and arrived at a wrong decision that the Appellant breached an implied condition of the contract and the Respondent was entitled to treat the contract as repudiated.

In the result, this appeal is allowed and court makes the following orders: -

1. The decision and orders of the trial Magistrate are set aside.



- 5           2. The Appellant is entitled to the balance of UGX 3,500,000(Uganda Shillings Three Million Five Hundred Thousand only) on the purchase price of the machine less what the Respondent spent on, to replace the parts of the machine that were damaged during storage.
3. Costs of this appeal and the lower court are awarded to the Appellant.

10 I so order.

Judgment delivered by email this 2<sup>nd</sup> day of August, 2021.



SUSAN ABINYO

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**JUDGE**

**2/08/2021**