

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)
CIVIL SUIT NO. 71 OF 2020

NITRO CHEMICALS (U) LTD ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

MAKULA CONSTRUCTION LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT

(Before: Hon Justice Patricia Mutesi)

JUDGEMENT

Brief facts

The background to this suit is the plaintiff routinely supplied explosive materials to the defendant, and over time the supplies amounted to a value of USD 58,924. The defendant made payments of USD 41,198 leaving an unpaid balance of USD 17,726 which remains outstanding to date despite repeated demands by the plaintiff. The plaintiff instituted this suit against the defendant seeking recovery of USD 17,726 being the outstanding balance for the supplied explosive materials, plus general damages, interest and costs of the suit.

The defendant did not file a defence notwithstanding being duly served with court summons on the 19th day of February, 2020 as reflected in the affidavit of service sworn by a court process server Ssegabwe Saad which was filed on the court record on the 12th March, 2020. On 5th November 2020, an interlocutory judgement was entered against the defendant under Order 9 rule 8 upon failure to file a defence, and on 19th April 2023 the matter proceeded with a formal proof hearing to enable court to assess the value of the damages claimed.

Representation and hearing.

The plaintiff was represented by Mr. Ham Mugenyi of M/s Mugenyi & Co. Advocates. The plaintiff adduced evidence through two witnesses namely Solomon Okello (**PW1**) a qualified Accountant and Jackson Doleera (**PW2**) who is the plaintiff's Operations

Manager. The two witnesses filed witness statements which they confirmed on oath. Counsel for the plaintiff filed written submissions which I have duly considered. The arising issues for determination by court are;

1. Whether the defendant is indebted to the plaintiff
2. What are the available remedies?

Determination by Court.

Issue 1: Whether the defendant is indebted to the plaintiff?

It is well established principle that a party who does not enter appearance and file a written statement of defence is deemed to have admitted the allegations in the plaint. (See **Smith vs. Auto Electric Services Ltd (1951) 24 KLR 22**) Thus in the case of **Haji Asuman Mutekanga vs. Equator Growers (U) Ltd SCCA No. 07/1995** it was held that *“where an interlocutory judgment has been entered in favour of the Plaintiff, the question of liability of the Defendant is no longer in issue. What is in issue is the assessment of the quantum of damages”*. It is also trite that a plaintiff has a duty to prove his case on a balance of probabilities even where a matter is undefended (See **Section 101 of the Evidence Act Cap 6**). (See **A. Nsubuga V P. N. Kavuma (1978) HCB 307**). The onus is therefore upon the plaintiff to lead evidence which proves the claimed damages.

The plaintiff's evidence

PW1 (Solomon Okello) who is a qualified accountant (CPA) testified that he carried out a fact finding exercise on the accounts of the plaintiff company and established the existence of a liability by the defendant as per the Report attached to his statement (Exhibit **P1**). Further that despite reminders to pay the liabilities as stated in the report, the defendant has refused or failed to pay to date. The Report which is titled **“Limited Scope Review of Receivables from Makula Contractors Engineering & Architectural Design Ltd”** and covers the period of May 2016 to August 2019 was intended to determine the existence, valuation and recoverability of receivables from the defendant company. At page 2 thereof it established that the total amount due from the defendant company in this period is USD 15,404.90 and USD 2,321.98 as per Findings 1 & 2 of the Report, which totaled to USD 17,726.88. It was also established

that the plaintiff had taken the necessary steps to recover the outstanding receivables from the defendant, and that the defendant issued 3 cheques to settle the liability.

Finding 1 of the Report was that on 5/4/2018 the plaintiff invoiced the defendant for USD 15,404.90 for the supply of superpower 25mm, detonating cord 10gms, electronic detonators 3 metres (no.1-20) and ammonium nitrate-France. The defendant issued 3 Housing Finance Bank cheques of UGX 57,075,000 to support payment for the supplies however these were not cleared by the bank. Thus the said amount of **USD 15,404.90** remained outstanding as at 30 April 2019 hence a receivable due from the defendant company. (See page 5 of Report)

Finding 2 of the Report was that between 15/8/2018 – 28/8/2018 the plaintiff invoiced the defendant USD 9,047.41 for the supply of electronic detonators 3 metres (no. 0-20) combidets 15 metres, supremedets STL 3 mts, ammonium nitrate-China, superpower 50mm and instantenbus. Between the same period the defendant made payments totaling to USD 6,725.43 to offset the said USD9,047.41 leaving USD an outstanding sum of **2,321.98** as at 30/8/2018. (See page 6 of Report). Thus the total outstanding unpaid amount due from the defendant was **USD 17,726.88**. It was also determined that the plaintiff sent reminders asking the defendant to clear their outstanding obligations. The reminders were acknowledged by the defendant but no payment was made.

The supporting documents annexed to the Report included the following; Letters of transfer of explosives from the plaintiff to defendant (D & D1), Tax invoices (E, E1 & E2), proforma invoices (E3, E4 & E5) delivery Notes (G), the three cheques issued by the defendant (A1, A2, A3) and the plaintiff's bank statement.

PW2 Jackson Doleera the plaintiff's Operations Manager testified that the plaintiff had supplied the defendant with explosive materials in the period of May 2016 to August 2019 as evidenced in the Accountant's Report. That the plaintiff had a running account with the defendant company which resulted in negative balance as they failed to pay an outstanding balance of USD 17,726.88 which remains outstanding to date.

I have considered the above witness testimony and the supporting documentation and I find that the plaintiff has proved on a balance of probabilities that the defendant is indebted to the plaintiff in the sum of USD 17,726 being the outstanding balance for the supplied explosive materials.

Issue No. 2: What are the available remedies?

From the foregoing I enter judgment for the plaintiff against the defendant in the sum of USD 17,726 as the outstanding balance for supply of explosive materials.

The plaintiff also claimed for general damages and interest on the outstanding sum at the rate of 23% per annum from the date of filing suit until full payment.

General damages

In order to be eligible for an award of general damages, the party should have suffered loss or inconvenience to justify the award of damage” (See **Musisi Edward vs. Babihuga Hilda [2007] HCB 84**). PW2 testified that the plaintiff made several demands to the defendant to pay the outstanding balance, which were not heeded and instead the Defendant issued various cheques which were not honoured. To date the defendant has refused or failed to pay the amount due for goods supplied, which caused the plaintiff inconvenience. The plaintiff is therefore entitled to general damages.

It is trite law that ‘damages are determined according to the assessment of a reasonable man and do not represent a person’s financial or material asset’. (See **Haji Assuman Mutekanga vs. Equator Growers (U) Ltd**) (*Supra*). I accordingly award the plaintiff general damages of Shs. 15,000,000/- (Uganda Shillings Fifteen million only) which amount I deem to be reasonable in the circumstances.

Interest

The plaintiff prayed for interest of 23% per annum on the outstanding amount from the date of filing suit until full payment. Under **Section 26 (2)** of the **Civil Procedure Act Cap 71** courts have discretionary powers in so far as there is a decree is for the payment of money, to order interest at such rate as the court deems reasonable to be paid on the principal sum. The basis of an award of interest is that the plaintiff has been kept out of his money (See **Ecobank Uganda Ltd V LB Construction & Others; HCCS No. 574 of 2012**)

Since the plaintiff has been kept out of the outstanding sum from 2018 to date, it is entitled to interest on the said amount. However the rate of 23% claimed by the

plaintiff is too high, and instead I would award interest at the rate of 18% per annum on the decretal sum from the date of filing this suit until payment in full.

I also award the plaintiff interest on the general damages at the rate of 6% per annum from the date of judgment until full payment.

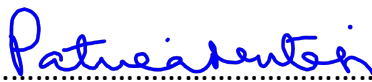
Costs

Under Section 27 of the Civil Procedure Act Cap 71, a successful party is entitled to costs unless Court for good cause orders otherwise, and accordingly the plaintiff being the successful party is awarded costs of the suit.

In the result, judgment is accordingly entered for the plaintiff in the following terms;

- a) The defendant shall pay the plaintiff a sum of USD 17,726 (United States Dollars Seventeen thousand, seven hundred and twenty six only) being the outstanding balance for supply of explosive materials.
- b) Interest is awarded on (a) above at the rate of 18 % per annum from the date of filing this suit until payment in full
- c) The plaintiff is awarded general damages of UGX 15,000,000/= (Uganda Shillings Fifteen Million).
- d) Interest is awarded on (c) above at the rate of 6% per annum from the date of judgment until payment in full.
- e) The plaintiff is awarded costs of the suit.

Delivered via E-mail this 28th day of April 2023


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Patricia Mutesi

JUDGE

(28/04/2023)