

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 846 OF 2005

KAMAGARA CHARLES ::::::::::::::::::::::::::: APPLICANT/DEFENDANT

VERSUS

UGANDA RAILWAYS CORPORATION ::::::: RESPONDENT/PLAINTIFF

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT:

The Plaintiff, an importer of sugar in Uganda, sued the defendant, a scheduled corporation carrying on business of railway transportation, for a sum of US\$24,392.625, or its equivalent in Uganda currency, being the value of Plaintiff's sugar lost while the defendant was transporting the same from Mwanza, Tanzania, to Kampala, Uganda. The defendant denied the claim.

At the scheduling conference the following facts were taken as agreed upon:-

- (i) The plaintiff contracted the defendant to transport his sugar from Mwanza-Tanzania to Kampala-Uganda.
- (ii) The Plaintiff's sugar was loaded on the defendant's wagons as follows:
 - On 17.06.05 the plaintiff loaded on the defendant's wagon No.C523044, eight hundred (800) bags of sugar at Mwanza-Tanzania and of this, Plaintiff received six hundred and fifteen (615) bags on 29.06.05 in Kampala-Uganda.
 - On 16.08.05 the plaintiff loaded 860 bags on the defendant's wagon No.C52149 at Mwanza – Tanzania Port and the plaintiff received five hundred and twenty three (523) bags in Kampala – Uganda on 01.09.05.
 - On 31.08.05 the Plaintiff loaded eight hundred (800) bags of sugar on the defendant's wagon C521518 at Mwanza – Tanzania Port and plaintiff received of this, four hundred and forty (440) bags in Kampala – Uganda on 15.09.05.

The issues framed for trial are:-

1. Whether or not the defendant lost the plaintiff's sugar as alleged in the plaint.
2. If so, what is the value of the lost sugar; and
3. what are the remedies available;

The plaintiff testified in person and called no witness. The defendant called one witness, Mr. Musana Brogan, a senior marketing officer in charge of verification of Cargo with the defendant in Kampala-Uganda.

In respect of the first issue, plaintiff testified that he imported sugar from Southern Cross Sugar Exports (PTY) Ltd in South Africa in various quantities. He tendered to Court exhibits P7, P8 and P9 being invoices showing the number of bags of sugar, the unit price per bag and the amount payable C & F in Kampala. He asserted, without being challenged by defendant, that he paid for the sugar by telegraphic transfer of money to the account of the seller.

Exhibit P9 is invoice No.0602/3 dated 29.05.03 showing that 800 bags of sugar at US \$ 26.22 per bag totaling US \$ 20,976 C & F, Kampala were sold to the plaintiff.

Exhibit P8 is invoice No.0608/5 dated 14.08.05 showing 800 bags of sugar at US\$28.20 per unit, totaling US \$ 22,560 C & F, Kampala were sold to Plaintiff.

Exhibit P7 is invoice No.0600/5 dated 01.08.05 showing 860 bags of sugar at US\$27.86 per unit, totaling US \$ 23,959.60, C & F, Kampala were sold to Plaintiff.

There was no objection from the defendant to the admissibility of the above exhibits as evidence of the Plaintiff.

The sugar was transported by ship from South Africa to Dar-es-salaam, Tanzania, and then by Tanzania Railways, from Dar-es-salaam to Mwanza Port, Tanzania.

Plaintiff further testified that, through his clearing agent, Messrs Basic Intraregion Ltd, of Dar-es-salaam, he executed the contract with the defendant, of transporting the sugar, from Mwanza port – Tanzania to Port Bell

Kampala Uganda. The contract was executed in Dar-es-salaam, Tanzania through consignment notes, invoices and arrival advices Numbers 33116: Exhibit P4, 33877: Exhibit P5 and 33736: Exhibit P6. One Sekitto, an employee of the defendant, executed the contract on the part of the defendant.

Each of exhibits P4, P5 and P6 shows the plaintiff as the consignee of the Cargo, the number of bags of sugar being transported, its weight, the date of loading, transportation from Mwanza (MZA) to Kampala (KLA), the consignment number, Wagons Number and the amount charged in US dollars according to the weight of the Cargo.

Exhibit P4 was executed on 17.6.05, P5 on 31.08.05 and P6 on 16.08.05. It is the plaintiff's testimony that, pursuant to the executed contract, the defendant transported his sugar to Port Bell, Kampala Uganda; and on the respective days of 29.06.05, 01-09-05 and 15.09.05, was offloaded from wagons C523044, C521499, and C521518 at the defendant's Good-shed; Kampala-Uganda. The offloading was done in the presence of customs officers, the plaintiff and or his representatives, the defendant's officials, the police and the plaintiff's clearing agent. A tally sheet showing the number of wagon, the number of bags loaded and the number of bags offloaded and received by plaintiff was prepared. The same were tendered in evidence as Exhibits P1, for Wagon Number C523044, P2 for wagon Number C521499 and P3 for Wagon Number C521518.

The seals on the wagons were found intact, except for Wagon Number C521518, Exhibit P3, where the seal had been tampered with.

According to the tally sheets; Exhibits P1, P2 and P3, of the 800 bags of sugar in wagon No.C523044 only 615 were received and of the 860 bags of sugar in wagon No.C521518 only 440 bags of sugar were received.

The defendant's witness Mr. Musana Brogan, in support of the defendant's denial of liability for the loss of the sugar, testified that Uganda Railways was not involved in the loading of the sugar. It was Tanzania Railways and the plaintiff who loaded the sugar at Dar-es-salaam. Tanzania Railways transported and passed it over to Uganda Railways at Mwanza. At Mwanza Uganda Railways checked the seals and found them intact; and the external of the wagons alright before transporting the cargo to Kampala-Uganda, and then off-loading and handing over the sugar to the plaintiff.

The evidence of this witness had grave contradictions. In one measure he stated that it was Tanzania Railways, as the first transporter of the cargo, who originated the consignment notes: Exhibits P4, P5 and P6, and that the defendant was not involved in filling in the said consignment notes. The witness then changed his version and admitted that it was the defendant who supplied the forms to the consignee for filling up. He then further admitted that one Sekitto who accepted the contents of the form on behalf of the Uganda Railways Corporation, was a resident representative of the Defendant in Dar-es-salaam and that **“a document signed by a representative binds URC”**.

The court thus prefers to believe the evidence of the plaintiff and the documentary evidence tendered in evidence to that of the defence witness DW1. Court thus finds as proved that the consignment notes exhibits P4, P5 and P6 were executed by the defendant through its Dar-es-salaam representative, one Mr. Sekitto, and the plaintiff through his clearing agent, and that the contents thereof bind both plaintiff and defendant.

It is necessary for court to examine the legal significance of a consignment note, exhibits P4, P5 and P6 in this case. A consignment note is written confirmation of a contract of carriage between the carrier and the owner of the Cargo, the subject of transportation. The consignment note shows inter alia, the nature and quantity of cargo entrusted by the owner to the carrier to transport. It is executed in triplicate, one copy accompanies the cargo, and the carrier and owner of the cargo retain one copy each.

The consignment note has to contain a number of statements and particulars, including the name and address of the sender, the carrier, the consignee, the place and date of taking over the cargo, the nature of the cargo, its packages/articles, particulars of its weight, its monetary value, the destination place of the cargo, the distance from the place of taking over the cargo and the particulars of the charges charged.

It is the law that on taking over the cargo, the carrier is required to check the accuracy of the particulars and statements contained in the consignment note as to, inter alia, the quantity, number of packages, their marks and numbers, weight and the condition of the cargo and its packaging. Where the carrier has no reasonable means of checking the cargo, then the carrier must state so, and give the grounds for the inability to check on the consignment note. The carrier must also specify the grounds for any reservations with regard to the apparent condition of the cargo and its packaging. In effect the consignment note is prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the cargo by the carrier: See

CHITTY ON CONTRACTS : The common Law Library No.2, 27th Edition, Volume II, SPECIFIC CONTRACTS, London SWEET & MAXWELL, 1994, PP 500-501 paragraphs 35-141 and 35-142.

Pursuant to section 91 of the Evidence Act, the consignment notes, exhibits P4, P5 and P6, are admissible as documents constituting the contract of carriage of the cargo between the plaintiff and the Defendant to the exclusion of other evidence in proof of the terms of that contract.

While it is true that the sender declared in each of the consignment note: Exhibits P4, P5 and P6 that:-

“The acceptance by this corporation of the goods referred to herein shall not be evidence of the correctness of the declared nature, weight and quantity of the goods at the time they were received by the Corporation.”, this declaration cannot oust the application of sections 91 and 92 of the evidence Act, Cap.6, to the effect that the consignment notes, Exhibits P4, P5 and P6 are, as documents themselves, evidence of the terms of the contract of carriage between plaintiff and defendant. At any rate, there is, apart and independent of exhibits P4, P5 and P6, evidence in the nature of invoices: Exhibits P7, P8 and P9 of the quantity of sugar unit price per bag and total amount paid C&F, Kampala. These particulars of Cargo are similar to the particulars stated in the consignment notes, exhibits P4, P5 and P6. It is this cargo that the plaintiff asserts he passed to over to and paid the defendant to transport to Kampala, from Mwanza, Tanzania. As a matter of fact, the defendant, at conferencing, admitted as a fact, having loaded at Mwanza on its stated wagons, the quantity of sugar stated in the consignment notes; exhibits P4, P5 and P6 and having offloaded and handed over to plaintiff at Kampala less sugar, as exemplified by the Tally Sheets, Exhibits P1, P2 and P3. The defendant’s contention therefore that a false declaration as to the quantity of sugar was made in the consignment notes or that the consignment notes cannot be used as evidence of the quantity of sugar handed to him at Mwanza cannot be valid.

Further, as already stated, a consignment note requires, that the carrier on taking over the cargo, has to check the accuracy of the particulars and statements contained in the consignment note relating to the cargo; and note any qualifying remarks, if any, on the consignment note. The defendant was obliged to do this in respect of the plaintiff’s cargo. If the sugar was lost between the journey from Dar-es-salaam to Mwanza, then surely, the defendant would have found, on taking over the sugar at Mwanza, the weight of the cargo to be less than the 40 metric tons in respect of each wagon, the weight stated and accepted by the Defendant’s, Dar-es-salaam representatives, Mr. Sekitto, and which weight formed the basis for determining the transport charges that the plaintiff paid to the defendant. Such a finding, and any other concerning the cargo, would have been stated as

“qualifying marks” in box 43 of each of the consignment notes, exhibits P4, P5 and P6. No such “qualifying marks” were noted by the defendant. Yet the issue of the safe custody of the plaintiff’s cargo, while being transported by the defendant, was a matter especially within the knowledge and control of only the defendant, to the exclusion of the plaintiff, who awaited in Kampala, to have the sugar delivered to him. Once the plaintiff proves that the quantity of sugar handed over to the plaintiff got reduced through loss, the burden shifts to the defendant to give a valid explanation as to the loss. See: **Section 106 of Evidence Act**. Defendant, apart from maintaining that the seals of the wagons had not been tampered with by the time of off loading the sugar, offered no explanation to justify or account for the loss.

This Court, on the evidence before it, finds that plaintiff has proved, on a balance of probabilities, that at Mwanza, Tanzania, the defendant took over transportation of the Plaintiff’s cargo of sugar of the quantity, weight and other particulars contained in the consignment notes, Exhibits P4, P5 and P6; and that on off loading and handing the said sugar to plaintiff, in Kampala, Uganda, the sugar was less than what had been handed over to the defendant.

Court has been referred by the defendant’s counsel to the case of **AGROVALUE PROCESSORS IMPEX (U) LTD VS URC H.C.C.S NO.025 of 2005**, unreported. In that case the plaintiff contracted the defendant to transport 516 bales of used clothes from Mombasa to Kampala. On arrival in Kampala only 306 bales were found. 210 bales were missing. The defendant (URC) denied liability and contended that if there was any tampering with the goods this was before the consignment was delivered to the defendant. Court (Egonda-Ntende J.) held in favour of the defendant and dismissed the suit with costs.

The facts of the **Agro Value Processors Impex (U) Ltd Vs. URC** case (supra) are however distinguishable from the plaintiff’s case in that in the *“Agro – Value Processors Impex (U) Ltd, case Egonda Ntende J.;* based his decision on the finding that:-

“Along the chain of transportation, from the US to Kampala there were several points along which this container could have been tampered with before it got into the hands of the defendant.”

In the case being considered by this Court, the evidence adduced before Court, including the facts admitted to by defendant, establish on a balance of probabilities, that the defendant took over at Mwanza Port, Tanzania the quantity of sugar stated in the consignment notes, Exhibits P4, P5 and P6. The possibility that sugar could have

been lost elsewhere along some point at which the container could have been tampered with, without the knowledge and control of the Defendant, was therefore not proved by the defendant. For this reason, this Court distinguishes the facts of the Agro-value processors Impex (U) Ltd Vs. URC case, Supra, from those of the case of the plaintiff.

This court answers the first issue, by holding that the defendant lost the plaintiff goods as alleged in the plaint. The second issue is what is the value of the sugar lost.

According to the evidence adduced and supported by the Tally Sheets, Exhibits P1, P2 and P3, on wagon C523044, the bags of sugar loaded were 800, and 615 were off loaded, thus 185 bags were lost. On wagon C521499, the bags of sugar loaded were 860, and 523 were off loaded, thus 337 were lost. As to wagon C521518 the loaded bags of sugar were 800, those offloaded were 440, the lost ones being 360.

According to the invoice Number 0602/3 of 29.05.03, admitted in evidence as exhibit P9, the value per bag of sugar of the first 800 bags was US\$26.22. Thus the value of the 185 lost bags is US\$(185 x 26.22)=4850.70.

Invoice Number 0600/5 dated 01.08.05, admitted as Exhibit P7, has US\$27.86 as the value of each bag of sugar of the total 860 bags. Accordingly the value of the 337 lost bags is US\$ (337 x 27.86)= 9388.82.

With regard to the Cargo of 800bags, plaintiff tendered invoice number 0608/5 of 14.08.05 Exhibit P8 showing that the value of each bag of sugar was US\$28.20. Thus the value of the lost 360 bags is US\$: (360 x 28.20)= 10152.

Thus the total value of the lost bags of sugar is: US\$:(4850.70 + 9388.82 + 10152) = 24391.52.

The defendant had no objection to the tendering of Exhibits P7, P8 and P9 the invoices showing the value of the sugar, and to exhibits P1, P2 and P3 the Tally Sheets showing the quantity of the lost sugar. Defendant adduced no credible evidence to rebut the value of the sugar or the number of bags lost per wagon. Court thus accepts the evidence of the plaintiff as to the value of the sugar lost.

The answer to the second issue is that the total value of the sugar lost is US\$24391.52.

As to the remedies available to the plaintiff, Court finds that plaintiff is entitled to the value of the sugar lost that is US\$24391.52 or its equivalent in Uganda currency at the obtaining commercial rate of exchange.

Plaintiff testified that he has been deprived of the use of his money for a considerable time since 2005; and as such he was entitled to substantial general damages for breach of contract of carriage by the defendant.

The law is that a breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages: See: **Cheshire & Fifoot: Law of Contract, 10th Edition: P.483.**

Court accepts the submission of the plaintiff that he has been put to inconvenience as a businessman by being deprived the use of his money the value of the lost sugar i.e US\$24391.52 plus profits for now almost four (4) years. Court awards the plaintiff Shs.5,000,000/= general damages.

Plaintiff prayed for no interest on the sums awarded both in his pleadings and also in the submissions made by his Counsel. Court thus awards no interest to the Plaintiff.

In conclusion Judgment is entered for the plaintiff against the defendant for:-

- (a) US\$24391.52 or its equivalent in Uganda currency at the rate of exchange obtaining at the date of payment, being the value of the lost sugar.
- (b) Ug.Shs.5,000,000/= general damages for breach of contract.

The plaintiff is awarded the costs of the suit against the defendant.

Remmy K. Kasule

Judge

6th February, 2009