

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
HCT-00-CV-CS-0021 OF 2006**

**MOSES RUHURA:.....PLAINTIFF**

**VERSUS**

**KORICA (U) LTD:.....DEFENDANT**

**BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE**

**JUDGMENT**

The Plaintiff, a businessman, sued the defendant company for payment of the balance on a commission amounting to US\$8,303 (United States Dollars Eight thousand three hundred and three only), general damages, interest thereon and costs of the suit.

The plaintiff alleged that he assisted the defendant to obtain business of supplying current transformers to M/S Roko Technical Services Ltd (Roko) at a total cost of US\$ 86,130.00 (United States Dollars Eighty six thousand, one hundred thirty only). It was further alleged that in consideration of the assistance, the defendant verbally agreed, through its Managing Director, Mr. Kim Jin-OH to pay the defendant a total sum of US\$ 29,603 (United States Dollars Twenty nine thousand six hundred and three only). The defendant issued the proforma invoice in respect of the goods to be supplied indicating their respective prices. The commercial invoice was issued by a Korean Company, M/S East-West Express Co., naming themselves as the exporters of the current transformers, and Roko as the importer.

It is the plaintiff's contention that whereas a total figure of US\$ 29,603 was agreed upon as commission under what he termed a "secret agreement", the defendant paid him only US\$ 21,300 leaving a balance of US\$ 8.303 unpaid. Hence this suit.

In his written statement of defence, the defendant denied ever entering into any agreement with the plaintiff under which the plaintiff is entitled to payment of Shs. US\$8,303 or any other additional amounts. The defendant stated that the transaction for the sale of transformers was between M/S Roko Technical Services Ltd. and M/S East-West Express Company of South Korea and payment was made directly to the Bank Account of M/S East-West Express Company. The defendant only acted like a link between the above two companies.

While the defendant does not deny paying commission to the plaintiff, he avers that a plaintiff's demand for commission was referred to the supplier, M/S East-West Express Company, who agreed to pay only US\$ 20,000, and indeed paid the same to the plaintiff through the defendant's Managing Director. He denied that a total of US\$ 21,300= was paid out by the defendant to the plaintiff on account of commission. The defendant further denied that there was any agreement between him and the plaintiff.

The parties agreed to frame four issues:

- 1) Whether there was any agreement between the parties;
- 2) If so, what were the terms of the agreement;
- 3) Whether the agreement, if any, was breached;
- 4) The remedies available to the parties.

The plaintiff was represented by Mr. Roscoe Yiga, while the defendant was represented by Mr. Kakuba Gerald.

On the first issue, the Counsel for the plaintiff submitted that in 2003, the plaintiff was a Director in Angus Technical Services, while at the same time he was also attached to M/S Roko Technical Services Ltd (Roko) as a Freelance Business Developer, whose work was to source for new business for Roko. The plaintiff had approached the defendant for the supply of current transformers to Roko, and the defendant agreed to obtain the same from their sister company in South Korea, and supply them to Roko.

It was at this time that the plaintiff and the defendant's Managing Director, Kim-Jin-On, each representing their respective companies, agreed verbally that the plaintiff would obtain a commission of US\$29,603=. After the transformers were supplied, and payment effected, the defendant indeed paid part of the commission amounting to US\$21,300=. To prove that there was an agreement, the defendant even acknowledged paying US\$20,000=.

It was further submitted for the plaintiff that the agreement was between the plaintiff and the defendant and not the foreign company, East-West Express Co, as it was very doubtful that the foreign company could agree to pay a commission to someone they have not dealt with directly. The defendant's part payment underlined his intention to complete payment. Counsel relied on **F & G Sykes (Wessex Ltd Vs Fine Fane Ltd [1967] ILloyds Rep.53** for the proposition that "the further the parties have gone on with their contract, the readier the court will be to give effect to their intentions".

The defendant on the other hand denied ever entering any agreement with M/S Roko Technical Services Ltd; which he says, was all the time dealing directly with the Korean Manufacturers. Counsel for the defendant submitted that the defendant only introduced the Korean Company to Roko. The defendant's Managing Director, Mr. Kim Jin On, who testified as DW1, stated that he did not enter into any agreement with the plaintiff to pay him commission as the defendant did not sell the items to Roko. DW1 stated that he had come to know the plaintiff in 2003 when the plaintiff visited him and introduced himself to DW1 and gave him his business card which indicated that he was an employee of Roko. On learning that the defendant did not manufacture current transformers, the plaintiff asked DW1 to find Roko a supplier which he did. Payment was made by Roko directly to the Korean Company's account, and the goods were shipped directly to Roko by the said company.

Counsel submitted that he obtained quotations for the plaintiff at the plaintiff's request, hence the proforma invoice, which he passed on to Roko. This didn't mean the defendant agreed to supply the current transformers. Counsel also relied on Chamber's 20<sup>th</sup> Century Dictionary for the definition of "a quotation" as estimated price submitted to a prospective purchaser. He further relied on **Uganda Telecom Ltd Vs Tanzanite Corporation SCCA No. 17/2004** where "a

quotation” was defined as an invoice or financial statement provided in advance to describe items, predict result or secure approval.

It was further submitted for the defendant that the allegation by the plaintiff that the defendant supplied the transformers to Roko and even paid the taxes to Uganda Revenue Authority, was not supported by any evidence. The Commercial Invoice which indicated the exporter as M/S East-West Express Co. supported the defendant’s contention that the agreement was between Roko and the Korean Company. There was, therefore, no agreement between the defendant and Roko to supply any transformers.

On the allegation of a “secret” verbal agreement between the defendant’s Managing Director, DW1, and the plaintiff to pay commission of US\$29,603 to the plaintiff, Counsel for the defendant submitted that no evidence was adduced to prove that there was such an agreement. On his part, DW1 had testified that indeed the plaintiff had asked for commission, but the defendant had promised to inform the suppliers about it and when he did, he reported back that the manufacturers had agreed to pay US\$20,000 after receipt of the value of the goods. Indeed the Korean company had honoured their end of the bargain. Counsel relied on Section 101 of the Evidence Act to state that he who alleges must prove. The plaintiff was by law bound to prove his allegations, but he had failed.

The defendant further relied on *Hannington Vs Victoria Graining Co. [1878] 3QB 549* to state that as per Exhibit D1, which was a letter from Roko signed by the plaintiffs, the plaintiff was at the material time an employee of Roko as Head of Section and he signed letters as such. By asking for a commission behind the back of his employer, the plaintiff had let his personal interest conflict with that of his employer. Having wrongly obtained the US\$20,000, he is not entitled to claim a further US\$8,303 from a 3<sup>rd</sup> party.

I have carefully considered the submissions of both learned Counsel, the law and authorities referred to. The first issue appears to have two limbs. The first is whether the contract to supply the current transformers was between the defendant and Roko or the Korean Company and

Roko. The other one is whether there was an agreement between the defendant and the plaintiff to pay the plaintiff commission and if so, what was the amount agreed.

From the evidence on record, the plaintiff who testified as PW1 stated that as Roko's representative, when a project came up he approached the defendant who agreed to supply current transformers to Roko. PW1 then asked for a commission and the defendant, though the Managing Director, agreed to pay US\$29,603=. That the goods were supplied and taxes paid by the defendant. The defendant directed payment to be paid to a Bank in South Korea.

I have however found no evidence to show that the supply and delivery of the goods was done through the defendant. Neither is there evidence to show that the defendant paid the taxes for the goods at the Uganda Revenue Authority.

In his testimony, DW1, denied that the defendant was the supplier of the goods. He stated that he made it clear to the plaintiff when he asked for commission that he would communicate the demand to the Korean Company which he did, and then reverted back to the plaintiff with the information that the Korean Company was only willing to pay US\$20,000=. DW1 further testified that this is the amount that was availed to him for payment to the plaintiff which he did. He denies paying anything over and above the said amount, although the plaintiff claimed he was paid US\$21,300.

The allegation by the plaintiff that the payment by Roko was to the defendant's Bank in Korea, Kook Min Bank was denied by DW1 who testified that although he wrote the letter dated 3<sup>rd</sup> September 2004, **Exhibit PII**, requiring Roko to pay to Kook Min Bank, this was as per the instructions of the M/S East-West Express Co./the Supplier, who were the operators of the account.

No evidence had been adduced by the plaintiff to prove that the stated Bank Account did not belong to M/S East-West Express Co., as stated by the defendant. The name of the account which is stated to be JI AN-JA is different from the defendant or its Managing Director's name.

The plaintiff had also referred to the Commercial invoice, **Exhibit PIII**, and argued that the same is used to ask for payment, clearly indicating that the goods had reached the point of destination in Kampala. It is, however, noted that the commercial invoice indicates that the Korean Company, M/S East-West Express Company is the exporter, and it was for the “Account and Risk of Messrs Roko Technical Services Ltd”. The party to notify was also indicated to be Roko. The defendant is not cited anywhere in the final transaction. The fact that the defendant communicated the prices to Roko using a Proforma Invoice on his headed paper did not in my view make him the exporter/supplier when there is a clear document, commercial invoice, that shows who the exporter was.

I, therefore, find that the agreement to supply the transformers was between Roko and the Korean Company, M/S East-West Express Company. The defendant only acted as a link. I also find that it would follow from the above finding that when the defendant passed on the commission to the plaintiff, he did so on behalf of the supplier, M/S East-West Express Company.

I have found that there was an agreement between M/S East-West Express Company and Roko for the supply of current transformers, and that there is no evidence to indicate that the defendant, though he acted as a link between the two was a party to the agreement.

What is now left to resolve as part of this issue is the amount of commission that was payable to the plaintiff. He said he negotiated for total amount of US\$29,603, but was paid only US\$21,300= by the defendant.

The defendant, DW1, on the other hand testified that the supplier agreed to pay only US\$20,000= and this is what was paid to the plaintiff through him. The plaintiff stated that the agreement was verbal but that since the defendant had partly performed it he is stopped from denying liability to pay the rest.

It is not disputed that the plaintiff received commission of at least US\$20,000=. This, therefore, means that someone agreed to pay commission to the plaintiff. The issue is who are the parties

to this agreement. The plaintiff says it was between him and the defendant represented by DW1. The defendant/DW1 insists that the party to the commission agreement was the Korean supplier.

I have already found that the defendant was not the supplier of the goods and, therefore, not party to the commission agreement, except as a link between the two. I have further found no evidence to support the allegation that the amount agreed upon was US\$29,603= and not US\$20,000=. Although there does not seem to be evidence to prove the allegation by the defendant of US\$20,000= being the amount agreed upon, the plaintiff is the one who alleged that the amount was US\$ 29,603= and who must prove that allegation. The burden of proof lies on him.

Section 101 (1) of the Evidence Act Cap 6 states 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”.***

Section 102 goes on to state:

***“The burden of proof in a suit or proceeding lies on that person who should fail if no evidence at all were given on either side”.***

I find no evidence from either side to prove the amount agreed as commission.

In the absence of any evidence in that direction, I find that the plaintiff has failed to prove that the amount agreed on for the commission was US\$29,603=. The answer to the second issue as to what were the terms of the agreement between the plaintiff and defendant is that the plaintiff has failed to adduce evidence to prove the terms of the verbal agreement. The fact that the defendant paid part of the commission (**Exhibit PVI**) cannot on its own be proof of the fact that the total amount agreed upon was US\$29,603=.

The third issue is whether the agreement, if any, was breached. Because of what I have found above, I don't find it of any use to delve into this issue. Suffice it to say that as stated already, the terms of the agreement were not proved.

The last issue is what remedies are available to the parties.

For the reasons and findings already discussed above, the plaintiff is not entitled to the payment of US\$8,303 as he failed to prove the terms of the “secret” verbal agreement relating to the commission payable to him. For this reason, the plaintiff’s claim for general damages, and interest must also fail.

As for costs, I will rule that each party will bear its own costs. The proceedings in this matter have had a chequered history. The plaintiff had obtained judgment (Exparte) against the defendant on 16/02/2006 which the defendant applied to set aside vide M/A No. 162/2006, and to stay execution vide M/A No. 164/2006. Both were dismissed due to the absence of the defence Counsel. Another application, M/A No. 551/2007 seeking to reinstate interim orders earlier granted was also dismissed.

The defendant again applied vide M/A No. 550/2007 to set aside the order dismissing M/A No. 162 of 2006. They were accommodated by the plaintiff who agreed not to oppose the application to facilitate the quick disposal of the main suit. Indeed the defendant has not shown so much diligence in defending this suit. Each party will, therefore, bear its own costs.

**Elizabeth Musoke**

**JUDGE**

**16/02/2010**