THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CV-CS-0043/2003

DR. OKELLO ANAM SILVANUS .....PLAINTIFF

VERSUS

OTTO RICHARD .....DEFENDANT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGEMENT

The plaintiff is a Medical Officer currently working in Apac hospital. In 2001, he was working as a paediatrician in Mbale referral hospital. While there, he treated the child of the defendant. A relationship grew therefrom, and the defendant, who introduced himself as a teacher by profession offered to import into the country a motor vehicle for the plaintiff. This was apparently the defendants other business. From May 2001, the plaintiff paid to the defendant instalments, which in August totalled of shs. 7 million as part payment for a 5-door Escudo make vehicle. The said vehicle was to be delivered within one month of this payment.

In November, the defendant delivered to the plaintiff a 3-door Escudo make vehicle. The plaintiff rejected it as not conforming to the contract. He demanded for either a 5-door Escudo vehicle or a refund of his money shs. 7million. The defendant offered to import another vehicle a Toyota Corona into the country, which offer the plaintiff rejected, as it did not conform to the contract. The plaintiff made several demands for now the return of the money.

In August 2002, the defendant offered the plaintiff another vehicle, a Toyota Corona belonging to one Ebong Patrick; an employee of U.E.B. The plaintiff was by this time so frustrated that he was willing to take this vehicle, in order to cut his losses. The defendant led him and one Paul Odong PW2 for inspection of this vehicle. Ebong informed them that the vehicle was available, and soon as the purchase price of shs. 6 million was paid; they could take possession of the same. But the defendant failed to pay for that vehicle also. The plaintiff then brought this suit against him for recovery of the money, for special and general damages, interest and costs of the suit.

The defendant filed a written statement of defence. Later, he filed an amended written statement of defence and counter claim. On the day of hearing the suit, Counsel for the defendant withdrew the amended written statement of defence and counter claim, as this had not been served on the plaintiff. He reverted to the original written statement of defence, in which he admitted the facts above, save that there was an amendment to the contract from the supply of a 5-door Escudo motor vehicle, to supplying a Toyota Corona as this was the make of vehicle that could be purchased from the shs. 7 million, which the plaintiff paid. He stated that this vehicle Toyota Corona registration No. UAE 348 V dark blue in colour in the names of Dr. Anam was even then in customs bond at the U.R.A., ready for collection if the plaintiff was willing to take delivery.

Four issues were agreed for determination as follows.

1. Whether the agreement for the supply of a 5-door Escudo motor vehicle was subsequently altered to supply a cheaper motor vehicle a Toyota Corona.

2. Was the motor vehicle Toyota Corona imported and offered to the plaintiff by the defendant.
3. Whether the plaintiff is entitled to a refund of shs. 7 million or ought to take possession of the imported Toyota Corona.
4. The reliefs, which the parties are entitled to.

At the scheduling conference, I directed that the parties inform court on the status and whereabouts of this elusive dark blue Toyota Corona vehicle, as the defendant insisted it was available and ready for collection from the U.R.A. customs bond, where demurrage charges were piling up by the day, while the plaintiff said he had never seen that vehicle at all. Mr. Otim learned Counsel for the plaintiff wrote to the U.R.A. in respect of that vehicle. U.R.A. responded that the said motor vehicle was released from customs bond under release order No. 227310 on 13th May 2003. The scheduling conference was held on 2nd March 2004, some ten months after the vehicle was released from customs bond.

At the close of the case for the plaintiff, Mr. Olubwe learned Counsel for the defendant declined to offer any evidence. He proceeded to submit on the evidence on record.

I will deal with the issues in the order in which they were framed. The first issue was whether the agreement for the supply of a 5-door Escudo motor vehicle was subsequently altered to supply a cheaper motor vehicle a Toyota Corona. Dr. Okello Anam testified that that there was no alteration of the agreement to supply a 5-dor Escudo vehicle at any time at all. When the defendant brought in a 3-door Escudo vehicle, he rejected it. There was no

way he could have settled for an even cheaper vehicle. Mr. Paul Odong PW2 testified that the plaintiff introduced the defendant to him as a car importer. That he ordered for a Suzuki vehicle through the defendant, and in the course of time, received it. He was aware of the dispute between the two in respect of the importation of a 5-door Escudo motor vehicle. The defendant asked him to persuade the plaintiff to accept a Toyota Corona instead of the 5-door Escudo vehicle, but that when he tried, Dr. Anam refused, and preferred a refund of his money.

It was submitted for the defendant that by accepting the offer of the Toyota of Mr. Ebong, the plaintiff thereby altered the contract from the Escudo vehicle to a Toyota one. He was therefore estopped from denying the Toyota and ought to be ordered to take possession of the same.

From the evidence of Dr. OkelloAnam, there was no change or alteration of the agreement. He was supported by the only other witness PW2 Paul Odong. There was reference in the written statement of defence to a verbal alteration of the agreement. There was no evidence offered to this effect. The person with whom it was allegedly made denied the same. Other evidence on record tended to support the view that there was no such alteration of the agreement. All the time, the plaintiff was demanding for either the 5-door Escudo or a refund of the money. There was no middle ground. None was shown.

When the plaintiff stated that he was in the long run willing to settle for a Toyota, this was after such a protracted struggle for satisfaction of his contract from the defendant that he decided to, as it were, cut his losses. This

readiness to accept a cheaper vehicle was not in any way an admission of the alteration of the contract. The idea of supplying a Toyota vehicle was an attempt by the defendant to opt out of the original terms of the contract, but this was resisted and rejected by the plaintiff.

It was clear that the two parties entered into a contract for the supply of a motor vehicle whose specifications were well known and agreed. The defendant admitted this. It was further admitted that no such vehicle was ever delivered. There was no evidence that the terms of the contract were ever amended or altered either expressly or by the conduct of the parties.

I therefore find that there was no alteration of the agreement from the supply of the 5-door Escudo vehicle to the cheaper Toyota Corona vehicle.

The second issue was whether the defendant imported a Toyota Corona vehicle, and offered the same to the plaintiff. From the evidence of the plaintiff, the only vehicle, which was the subject of the contract, was the 5-door Escudo vehicle. This evidence was not controverted in any way. Whether or not the defendant subsequently imported and offered a vehicle of a different make to the plaintiff, which make of vehicle was outside of the contract terms, this would not absolve the defendant from liability under the contract.

The evidence on record in this respect was from the two witnesses. Their testimony was to the effect that the defendant offered the plaintiff a Toyota Corona vehicle, which belonged to one Patrick Ebong of U.E.B. Mbale. They went and inspected the same. Ebong told them he was selling the

vehicle at shs. 6 million. The plaintiff was at this stage so frustrated and in real fear of losing all his money that he was willing to settle for this cheaper vehicle. However, the defendant was not able to pay for the same, and the matter collapsed at that stage. The plaintiff told court that much later, he was offered a dark blue Toyota Corona, but he has never set eyes on the same.

At the scheduling conference, it was claimed by the defendant that the dark blue vehicle was still in the custom's bond, awaiting clearance and delivery to the plaintiff if he was willing to take the same. A logbook of this car in the names of the plaintiff was annexed to the written statement of defence. During cross examination, the plaintiff reluctantly stated that even at that stage, if the acceptance of the dark blue vehicle was the only means to ensure return of his money, he was willing to take possession of the same.

I stated earlier that this vehicle, according to the records from U.R.A. was released from customs bond almost a year earlier. There was therefore no vehicle for the defendant to offer to the plaintiff. It cannot therefore be said that the defendant imported a Toyota Corona vehicle which he offered to the plaintiff. That issue is answered in the negative.

The third issue was whether the plaintiff is entitled to a refund of shs. 7 million or ought to take possession of the imported Toyota Corona. Since I have found that the defendant clearly breached his contract for the supply of a 5-door Escudo vehicle, and that there was no amendment of the terms of that contract whether expressly or by implication, it would not be in the terms of the contract to force the plaintiff to accept a vehicle in respect of which he did not contract. That presupposes that one is available anyway,

but that is beside the point. The contract was for the supply of a given motor vehicle. The price was paid. All this was admitted. The vehicle was not supplied. The defendant is liable as he was in breach of the contract terms. He cannot wriggle out of the contract terms by supplying an inferior make of vehicle. That issue is therefore answered in the negative.

The last issue concerns the reliefs, which the parties are entitled to. The plaintiff is entitled to the sum claimed, being the money paid for the contract in respect of which there has been a breach. He is also entitled to damages for the breach. A sum of shs. 2 million under that head was claimed. I find that sum not unreasonable in the circumstances, and I award the same.

There was a claim for special damages in the sum of shs. 791,200/-. Special damages must be specifically pleaded and proved. They were pleaded in paragraph 6 of the plaint. But there was no evidence adduced in that regard. All that the plaintiff stated was that he travelled from Apac to Mbale many times to demand for his money. That was not sufficient proof of the sum claimed. I therefore decline to award the sum claimed. But it is obvious that the plaintiff must have spent some money on travel and accommodation while moving from Apac to Mbale as he struggled to get back his money. I will award him shs. 150,000/- to cover those expenses.

In view of my findings above, judgement is entered for the plaintiff against the defendant in the following terms.

1. The plaintiff shall recover from the defendant the sum of shs. 7 million paid for the vehicle, which was not delivered.
2. The defendant shall pay shs. 2 million as general damages.

3. The plaintiff shall recover shs. 150,000/- as expenses on travel and accommodation.
4. The defendant shall pay the costs of the suit.
5. The sum awarded in No. 1 above shall carry interest at a rate of 22% per annum from date of filing the suit till payment in full, while the sums awarded in Nos. 2, 3 and 4 above shall carry interest at court rate from date of judgement till payment in full.

RUGADYA ATWOKI

JUDGE

25/08/2004

Court: the Deputy Registrar of the court shall read this judgement to the parties on 17th November 2004.

RUGADYA ATWOKI

JUDGE

25/08/2004.