

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CIVIL SUIT NO. 120 OF 2004

KAKIRA SUGAR WORKS LTD:..... PLAINTIFF

VERSUS

1. PATRICK MASOMBO

2. GEOFREY NAENDA WASIKYE :..... DEFENDANTS

BEFORE: HON. MR.JUSTICE BASHAIJA K. ANDREW

JUDGMENT

This is a case in which *KAKIRA SUGAR WORKS LTD* (hereinafter referred to as the “plaintiff”) a limited liability company seeks the recovery of Shs.1, 429,000,000/= (*One billion four hundred and twenty nine million Uganda Shillings*) from *PATRICK MASOMBO and GEOFREY NAENDA WASIKYE* (hereinafter referred to as the 1st and 2nd “defendants” respectively). The two were the company’s former employees. They are sued jointly and severally for alleged fraudulent acts committed during the course of their employment from 1995 and 2000, which include making false claims for money paid on account of weigh bridge and motor vehicle road licensing fees to Uganda Revenue Authority (URA), obtaining fake URA receipts as well as fraudulently altering approved requisitions or accountabilities.

At the Scheduling Conference, three issues were agreed upon for determination of this court as hereunder:

- 1. Whether the defendants fraudulently claimed and received from the plaintiff the suit sum.**
- 2. Whether the defendants are liable for the loss incurred by the plaintiff.**
- 3. What are the remedies available.**

The plaintiff was represented by *M/s Okalang Law Chambers, Advocates and Legal Consultants*, and the defendants by *M/s Akampulira & Partners, Advocates and Legal Consultants*. Both Counsel filed written submissions and argued the issues in a concurrent order, which court adopts in determining them.

Issue No.1:

Whether the defendants fraudulently claimed and received from the plaintiff the suit sum.

The plaintiff contends that the defendants, while in the course of their employment, raised several accountability statements and attached forged receipts purported either to originate from the Weigh Bridge or URA. They physically moved the claims to the payment accountant, who then raised payment vouchers based on the false accountabilities. From there the defendants took the documents to the other officers that is; the Auditor, Chief Accountant and Financial Controller for approval up to the Cashier, from whom they received the money claimed in cash. This happened for a period from 1995 to 2000.

The plaintiff adduced evidence of four witnesses (PWs) to prove its case, and tendered various documents as exhibits in court. The main witness PW1, Krishana Iyengar, the Company Secretary, testified that along with other company officials, he carried out an audit which established an excess claim arising out of the fraudulent acts of the defendants, and thus loss to the company amounting to Shs.1,429,000,000/=. The audit findings were reduced into a

report that was tendered in court as *Exhibit P1* attributing the loss as follows (at page 11 thereof):

1. Patrick Masombo (1 st defendant)	Ugshs.	381,000,000/=
2. Patrick Masombo (1 st defendant)	Ugshs.	555,000,000/=
3. Patrick Masombo & Pillai	Ugshs.	387,000,000/=
4. Geoffrey Naende (2 nd defendant)	Ugshs.	106,000,000/=

1,429,000,000/=

According to PW1's evidence, Mr. Pillai, one of the defendants' supervisors at the company, was also involved in the fraud at some point due to the accountabilities he approved. However, by the time of institution of the criminal case and the present civil case, he had died in a motor vehicle accident, and so could not be charged, sued, or be procured as a witness in any of the cases mentioned.

PW1 tendered in evidence *Exhibits P2, P3, P4 and P5* consisting of payment vouchers bearing the names of Mr Pillai and Mr Sriram respectively (the latter being the defendants' supervisor who took over as Head of Department after Mr. Pillai's demise in 1999) as payees, accountability statements written by the defendants, but signed by either Mr. Pillai or Mr. Sriram, and URA fake and genuine receipts attached thereto.

By the above *Exhibits P2, P3, P4 and P5*, PW1 showed how the alleged fraud was initiated and perpetuated. The defendants would get genuine URA receipts bearing the official URA stamp on it with genuine amounts in respect of motor vehicle licence fees. Then the defendants would raise hand written

accountabilities and attach the genuine supporting documents for their supervisor's signature. After procuring the signature the defendants would manipulate the accountabilities by inserting new entries and fresh totals to already approved amounts. The accountability for one single amount duly approved used to be inflated by adding another big amount supported by fake URA receipts (bearing no official stamp), and be taken to the accounts office. A voucher was raised based on the manipulated accountabilities and physically taken by the defendants through the entire payment process until they would be paid cash and they take the money.

PW1 highlighted that the manipulations included insertions made after white washing the original figures, as can be seen in *Exhibit P4*, whose accountability document has a clearly visible white-out and another figure over-written or inserted over the white-out. Also some fake receipts were repeatedly used. Other receipts' serial numbers do not appear in ascending order as against the dates on which they were issued.

PW1 illustrated from *Exhibit P1* at page 172 where there is a cash payment voucher for a claim of money spent out of the float issued to the Transport Department towards payment of licence fees worth Shs. 1,997,000/=. In support of the voucher, the 2nd defendant attached a statement of claim / accountability duly authorised by the Head of Department at page 173, and also attached a URA receipt as at page 174. However, at page 175, there is a statement of claim which is the exact copy of the one as at page 173 with the exception of the insertion of Shs. 1,436,000/=.

Further, that at page 175 the defendants initiated a claim for Shs. 561,000 =, which was the actual amount paid to URA, and it was then signed and approved by the Head of Department. Spaces would be left in between the figures after

which the defendants would insert a higher figure supported by a fake receipt in order to total up to almost the Shs. 2,000,000/= float, and then present it to the cashier for payment.

At page 174 in the above illustration, the fake upper receipt with a manipulated figure of Shs.1, 436,000/= has no official URA stamp, but the lower one which is the genuine with the actual figure of Shs. 561,000/=, on the same page bears the official URA stamp, and the vehicle number for which payment was purportedly made with the fake receipt does not have. These manipulations appear in several of the accountabilities prepared by either of the defendants, and most of them were authorised / approved by V. Sriram as can be seen from the documents attached in *Exhibit P1* from page 172 up to page 247.

PW1 also testified that the accountabilities authorised by Mr.Pillai did not have any suspected alterations or manipulations. Only one fake receipt with no official URA stamp would be attached, but with inflated figures. These variously occur on pages 34-35, 37-38, 46-47 and 49-50 of *Exhibit P1*. PW1 further noted that Mr. Pillai also made several fraudulent approvals of evidently fictitious accountabilities, which is an indication that he was party to the fraud.

Evidence of PW1 was also to the effect that some receipts were repeatedly used bearing different claims / amounts on different dates, but having the same BXD or BXE number. Instances of this occur on page 21 of *Exhibit P1* for Serial Nos. 218 and 219, on page 22 for Serial Nos. 324 and 325, on page 23 for Serial Nos. 426 and 427, and on page 25 for Serial Nos. 556 and 557. All bear similar BXD or BXE numbers but for different amounts and on different dates. Copies of the said receipts are highlighted in *Exhibit P1* from page 27 to page 50.

PW1 also testified that the URA receipts issued on different dates ordinarily bear serial numbers appearing in ascending order. For instance, a receipt issued on an earlier date ought to have a lower digit serial number than one issued on a subsequent date, but that was not the case for many of the purported URA receipts submitted by the defendants. For example, in *Exhibit P2*, Serial No. 588 with a payment voucher dated 30/12/1999 issued two days later reads 0195223, and the receipt is dated 29/ 12/1999. On 28/12/1999, however, for Serial No. 596 the URA had purportedly issued a receipt reading 0195853, which is a higher number than one on the receipt issued on the 29/12/1999, just a day later. PW1 maintained that logically there would be no way such a latter serial number could come on an earlier date.

Regard to the Weigh Bridge receipts, PW1 testified that by looking at page 13 of *Exhibit P1*, it appears as if the department had a book for the plaintiff company alone. For instance, Serial Nos. 50 to 54 have no correlation in dates at all, because the serial numbers therein run consistently from lowest to highest, but on different dates that are not equally consistent. Some dates are earlier or later than those following upon them, yet the serial numbers run consistently. Further, that it also appears as if vehicles from other companies were never weighed and receipted as well during that period, which PW1 maintained was an indication that the receipts in question are fictitious.

PW1 testified that at page 253 and 254 of *Exhibit P1*, there are some illustrations of Weigh Bridge receipts showing inflation of charges for vehicle fees, particularly for a tractor that was ordinarily meant to be charged Shs.20,000/= only, but was instead purportedly charged Shs.39,000/=, and 22 other tractors were charged a fee of Shs 990,000/= respectively, which is simply a fraudulent inflation.

PW1 went on and testified that the fraud started in 1995 when the 1st defendant and Pillai were in charge, and later continued under Sriram, and after the 2nd defendant a relative of the 1st defendant joined in. That at the time Pillai was Head of Department the fraud had been perfected and the defendants no longer made insertions or erasures of figures in the accountabilities, but simply attached fake URA receipts and reflected an otherwise higher figure of their choice to ensure that almost all the float of Shs.2, 000,000= was accounted for, hence withdrawn from the cash office. The witness maintained that the defendants knew of; and participated in the fraud, and should be jointly and severally liable for the total loss to the company, and that they should be ordered to refund the money, and to pay costs of this suit.

On their part, the defendants denied participation in the alleged fraud. They contended that the role they played was only that of messenger acting on the instructions of their respective bosses / Heads of Department, and would generate accountabilities of the Shs.2 million float usage in the payment of the relevant motor vehicle licence and weigh bridge fees and sign the same. Then the defendants would move the payment documents through the relevant offices / officers for approval until they got to the Cashier, who would give them the cash for onward transmission to either Mr. Pillai or Mr. Sriram, which they delivered.

The defendants further maintained that this was the course of dealings for the whole of the alleged period of time, which was the accepted mode of operation adopted by the company. That this can also be deduced from the testimony of PW2, Margaret Mafabi, the Chief Cashier of the plaintiff, who testified that she would cash the vouchers and release the money to the defendants for onward transmission to the Head of Department / payee, and that she did this on the instruction of Mr. Pillai way back in 1995, after the documents had been

scrutinised and found authentic and approved for payment by the relevant company officials. This procedure was followed till his demise, and was even continued during the time of Mr. Sriram as head of the same department / payee.

The Defendants pointed to the testimony of PW3 to the effect that she did not receive any complaints from either Pillai or Sriram that the expected funds had not been received by them, and that the alleged anomalies in accountability and receipts were never raised by the said Heads of Department. The defendants maintained that the Plaintiff did not adduce any evidence whatsoever to prove that any of the vouchers or accountabilities were originated or signed by the defendants.

The Defendants also pointed out that they were charged over the same matter on allegations of embezzling the company funds in court, as per *Exhibit D1* which is a copy of the judgment, but that they were acquitted as having no case to answer. They contended that Pillai and Sriram who were the ultimate sole beneficiaries of the money were not charged or sued because the company selectively prosecuted the defendants in order to have scapegoats for the financial loss suffered. The defendants prayed that the suit be dismissed with costs.

Resolution.

It is evident from the testimonies of the plaintiff's and defendants' witnesses alike that fraudulent acts were carried out and they occasioned loss of enormous amount of money to the company to the tune of Shs.1,429,000,000/=. The issue to be determined is whether the defendants are liable for that loss. This invariably depends on whether they fraudulently claimed and received the said

suit sum as alleged by the plaintiff, or whether they had knowledge of the fraud and/ or whether they were party to it.

Fraud is defined under the *Black's Law Dictionary, 8th Edition pg 660* as:

“An intentional perversion of truth for the purpose of inducing another, in reliance upon it, to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. It may also be anything calculated to deceive, whether by a single act or combination, or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture...A generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated.
”

According to the *Halsbury's Laws of England, 4th Edition, Volume 31, pg 644 paragraph 1060*, the question whether there is any evidence to support an allegation that a representation made was fraudulent is a question of law. Subject to this, the question whether a false representation was actually fraudulent is, in every case, a question of fact.

The relevant standard regarding fraud was addressed by the Supreme Court of Uganda in *Shokatali Abdulla Dhalla v. Sadrudin Meralli Supreme Court Civil Appeal No. 32/1994*, which was cited by Counsel for the defendants. Oder J.S.C (R.I.P) stated that:

“In the recent case of Kampala Bottlers Ltd v. Damanico (U) Ltd Supreme Court Civil Appeal No. 22 of 1992 (unreported), this Court made what may be said to be a summary of the law on fraud as stated in previous decisions. It is said that fraud must be pleaded and strictly proved, the burden being heavier than on a balance of probabilities generally applied in Civil matters.”

In the said case of ***Kampala Bottlers Ltd v. Damanico (U) Ltd (supra)***; which position was also upheld in the case of ***Fredrick J.K. Zaabwe v Orient Bank Ltd and 5 Others S.C.C.A. No. 4 of 2006 [2007] UGSC 21***, the court decided that even if fraud is proved, it must be attributed directly or by necessary implication to the transferee (put in context of the instant case, it should be attributed directly to the defendants). Wambuzi CJ. (as he then was) stated at page 7 of his judgment:

“..... fraud must be attributable to the transferee (defendants in the instant case). I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee (defendants) must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.”

The learned Chief Justice further stated that:

“Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.”

Applying the above principles to facts of the instant case, it is clear that all the accountability documents that the defendants are said to have falsified were

signed by either P.R. Pillai or V. Sriram, who also appear as the payees on each of the attached Cash Payment Vouchers.(See *Exhibits P2, P3 and P4*). By signing the accountabilities that correspond with the receipts attached thereto, P.R. Pillai or V. Sriram , *prima facie*, became the authors of the same.

It is also noted that none of the defendants' signatures appear on the said documents. At the same time, however, the defendants admit to have raised or written the accountabilities, albeit under either Mr. Pillai's or Mr. Sriram's instruction. The defendants endorsed their signatures thereto, thus also owning the contents of the said documents before submitting them to the next level. Raising the accountabilities and appending their signatures meant that the defendants became part of the problem.

Being part of the problem however, would not *per se* impute fraud on the defendants to make them liable. The critical issue is whether actual fraud can be directly attributable on them. From the foregoing evidence, particularly of PW1 based on *Exhibits 1, 2, 3, and 4*, the defendants participated in originating the falsified accountabilities, even though they were not the authors in the strict sense. They would personally effect payment of actual amount of fees to the URA and the Weigh Bridge, and obtain the genuine receipts. On making accountabilities, however, evidence is that they would attach fake receipts reflecting a higher value.

The above being the position, it would follow that the defendants knew of the truth and concealed it by their actions. To that extent there is no doubt that their role extended beyond that of mere couriers / messengers acting upon their bosses' instructions, but they actively participated in the financial scam. The plaintiff, in my opinion, has proved that the defendants knew of the fraud and took advantage of it for their own benefit.

It is noted that the defendants argue that Mr. Pillai and Mr. Sriram were not called as witness nor were they charged in the criminal case, which was later dismissed. Counsel for the defendant maintained that there was evidence of PW3 and PW4 that there had never been complaints from Pillai and Sriram that they never received the money the defendants had collected supposedly on their behalf, and that there was no evidence either indicating that Pillai's or Sriram's signature was forged by the defendants or otherwise, since these two were never called as witnesses

With due respect, the above arguments are untenable for three major reasons. Firstly, as a Heads of Department, Pillai and Sriram had become part of the problem, and it would be far-fetched to expect any complaint from them to anybody that they did not received the money collected by the defendants. In particular, Mr. Sriram appears to have at first been unaware of the defendants' fraudulent activities, but later joined hands with them. Otherwise, there would have been no logic for the defendants first presenting for his signature genuine documents from URA only to manipulate them afterwards with insertions, erasures, white outs or over-writing and fake URA receipts.

Secondly, the moment the defendants became part of the racket that perpetuated the fraud for all that period, the extent of their participation or their ranks in the structure of the company becomes immaterial in so far as apportioning the loss is concerned. They are regarded as accomplices and to that extent considered in equal measure as the authors of the falsified documents, and not as persons who were merely couriering the same under instructions.

Thirdly, Pillai and Sriram could not be charged or sued for obvious reasons, that one had died, and the other returned to India by the time of instituting this suit.

It should be emphasised that even if they were still alive or present in Uganda, the law is that a plaintiff is *dominus litus*, and is at liberty to sue whom he chooses, and thinks he or she has a claim against. A plaintiff cannot be forced to sue anybody See *Animal Feeds v. Attorney general, H.C.C.S. No 788 of 1990 per Ntabgoba PJ(as he then was); Batemuka v. Anywar [1987]HCB 71*. I believe that this is the main reason that the defendants in this case were sued jointly and severally.

The defendants claim they duly handed over the money to the respective payees, and that from the testimonies of PW3 and PW4, no complaint was ever received to indicate that the money was never received as duly expected and no anomaly in accountability was ever reported.

I find this proposition too weak to maintain given that the fraud had assumed the proportions and nature of the usual and acceptable course of dealings by the defendants. This is the more reason it had gone on for five years unnoticed. Certainly, the defendants as subordinates had no power to demand that for whenever the cash given, their bosses should put in writing for evidential purposes. Additionally, PW4 in his testimony stated that the practice was that Heads of Departments would delegate to their assistants to transact on their behalf.

Even though the practice appear to have been acquiesced by the company over time, practically the fraud assumed the semblance of the normal procedure and passed un detected even by the senior levels officials, who relied only on the documents originated by the junior level staff to inform them. For as long as the documents *prima facie* appeared genuine, it did not raise any suspicion off hand. In light of the foregoing, therefore, the plaintiff has, in my opinion,

adduced evidence which proves that the defendants fraudulently claimed and received from the plaintiff company the suit sum, which led to financial loss.

Issue No 2.

Whether the defendants are liable for the loss incurred by the Plaintiff.

Counsel for the plaintiff argued that *Exhibit. P1* indicated how much each defendant received fraudulently. He further stated that the defendants were taking advantage of the death and absence of the named payees (bosses) to attribute the fraud to them. He argued that each of the defendants knew and directly participated in the alleged fraudulent acts and falsification of documents, and are thus personally liable for the fraud.

On his part, Counsel for the defendants contended that the testimonies of PW1, PW3 and PW4 were very clear on the various roles played by several officers in the payment process. The vouchers were signed and approved by the Payment Accountant, Auditor, Chief Accountant and Financial Controller. The accountability was done by the Heads of Department. That there is therefore no nexus between the defendants and the loss of funds. According to the defendants, all funds collected on behalf of their bosses were delivered and accounted for, and it is therefore surprising that none of the Heads of Department was ever called as a witness to prove otherwise. Counsel opined that the senior managers and not the defendants were liable for the loss.

Counsel for the defendants also argued that since the defendants were acquitted of the charges of embezzlement as per *Exhibit D1*, it was an indication that they were not liable for the loss in the civil case that arose out of the same facts. Counsel for the plaintiff, counteracted this proposition arguing that the legal position is that a criminal proceeding cannot found a tort or a civil case and is

thus irrelevant to civil proceedings He cited the case of *Esso Standard (U) Ltd v Mike Nabudere, C.S No.594 of 1990*.

The *Oxford English Mini Dictionary* defines “liability”, at page 320, as the state of being liable, and liable is an adjective meaning responsible by law. In other words, liability means legal responsibility for one’s acts or omissions. According to the *Halsbury’s Laws of England, 4th edition, Volume 31, pg 644 paragraph 1059*, it is stated that:

“...whenever a person makes a false statement which he does not actually and honestly believe to be true, for purposes of civil liability, that statement is as fraudulent as if he had stated that which he did not know to be true, or knew or believed to be false...”

Additionally, in *Derry v. Peek (1889)14 App. Case 337 at 374, HL, Lord Herschell* stated that:

“Fraud is proved when it is shown that a false representation has been made 1) knowingly, or 2) without belief in its truth , or 3) recklessly, carelessly whether it be true or false; the 3rd case being but an instance of the second”

In light of the foregoing, this court has got to establish whether the defendants are legally regarded as being responsible for the fraudulent acts and falsifications that eventually led to loss of funds by the plaintiff company, and whether the facts and evidence adduced by the plaintiff are sufficient to discharge his burden of proof thereof.

As seen in *Issue No.1* above, the defendants' job description and actual conduct enabled them to have taken notice that there were enormous fraudulent alterations, manipulations and insertions in the accountability and other documents that they couriered while claiming for reimbursement for float used. These included, but were not limited to fake URA receipts, insertion of false accountability figures which they admit to have filled in themselves against the receipts both fake and genuine, albeit under their bosses' instructions, replication of receipts with same BXD or BXE numbers but different dates and amounts, among others. They also took these false documents to the several stages for approval but never brought the anomalies to anybody's attention.

The defendants surely did not believe the statements to be true since they were fraudulent in nature. Given that the said false representations were made knowingly, without belief in their truth, recklessly and carelessly too, fraud was proved against the defendants and they are thus legally responsible for their acts and omissions. They are jointly and severally responsible for the fraud. It needs to be emphasised that what is under consideration is not whether money was diverted *en route* to the heads of department, but whether overall the company lost money at the hands of those who were actually involved in the fraud regardless of the level or extent.

It is noted that there were weaknesses in the internal financial control systems of the company which allowed the vice to go undetected for quite some time. It would be expected that at least one of the senior managers should have noticed the fraud and forestalled it. Failure to detect the fraud at the earliest implies that there were loopholes or weak spots in the system, which were eventually exploited. Even with these weaknesses, the defendants would still be held liable. Just because a system is weak does not give one a right to take advantage of it and knowingly perpetuate a fraud.

With regard to the criminal charges of embezzlement, acquittal of the defendants in the criminal case does not exonerate them from civil liability, if any, or stop the plaintiff from seeking a civil remedy. The civil suit and criminal case are primarily different cases under different laws and procedures, and the standard of proof in criminal cases is quite higher than that in civil cases. Therefore, acquittal of the defendants for the offence of embezzlement does not necessarily prohibit the plaintiff from instituting civil action for recovery of monies lost due to their fraudulent actions, if evidence is adduced and their liability proved to the required standard.

Issue 3

Remedies are available

The plaintiff, in their plaint, sought recovery of defrauded amounts of Shs. 1,429,000,000/= which the defendants claimed as fees paid on account of weigh bridge fees and motor vehicles road licensing fees in URA, interest on defrauded amounts, and costs of the suit. Since the plaintiff has proved its case against the defendants for the alleged fraudulent acts, court orders that the plaintiff recovers from them all the defrauded amount of Shs. 1,429,000,000/=.

On the issue of costs, the law under ***Section 27(2) CPA (supra)*** is that costs are awarded at the discretion of court and follow the event, unless for some reasons court directs otherwise. See ***Jennifer Rwanyindo Aurelia & A'nor v. School Outfitters (U) Ltd., C.A.CA No.53 of 1999; National Pharmacy Ltd. v.Kampala City Council [1979] HCB25.*** In the instant case, the plaintiff has succeeded on all the issues, and there is no compelling and justifiable reason to deny her the costs. The plaintiff is accordingly awarded costs of this suit

BASHAIJA K. ANDREW

JUDGE

25/2/2013