THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CA – N0. 20 OF 2013

(Arising from Civil Suit No. 030 of 2011)

BYAMARWA MOSES APUULI.....APPELLANT

VERSUS

KARUGA GALEEB PATRICK.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an appeal against the decision of His Worship John Kategaya Magistrate Grade 1 at Kamwenge Court delivered on 11/10/2013.

Background

The Appellant instituted a Civil Suit against the Respondent for recovery of UGX 10,361,000/=, general damages, interest and costs.

The facts constituting the cause of action are that in between August 2010 and March 2011the Appellant supplied the Respondent with 4441 Kilograms of cotton, at a total consideration of UGX 10,361,000/= which he failed to pay even after numerous demands.

The Respondent in his Written Statement of Defence denied all the contents of the plaint and made a Counter- Claim to the effect that the Appellant owed him UGX 3,650,070/= as rent for hiring out his land from 2010 – 2011 and money that the Respondent advanced to the Appellant to purchase cotton that was never refunded. The Respondent also prayed for costs for being wrongly sued.

Issues for determination were;

1. Whether the Defendant or this agent received 4441 Kgs of cotton?
2. If so, whether he paid for the same?

The trial Magistrate decided in favour of the Appellant only to a tune of UGX 1,849,400/= for 6 receipts that had on them “not paid” and the other receipts as presented by the Appellant were not considered.

The Appellant being dissatisfied with the trial Magistrate’s decision lodged the instant appeal whose grounds are;

1. That the Magistrate of Kamwenge Grade 1 Court erred both in fact and law when he failed to evaluate the evidence of the witnesses hence arrived at a wrong decision.
2. That the Magistrate of Kamwenge Grade 1 Court of Kamwenge erred in fact and law for failure to apply the facts to the law hence arrived at a wrong decision.

Counsel Bwiruka Richard appeared for the Appellant and filed written submissions.

The Respondent failed to show up in Court since the appeal was lodged despite being served numerous times even through substituted service. Counsel for the Appellant prayed for an Exparte hearing which was granted by this Court.

The duty of the first Appellate Court has been vested in many cases and the case of **Banco Arab Espanol versus Bank of Uganda S.C.C.A No. 8/1998** quoted with approval the case of **Kifamute Henry versus Uganda S.C.C.A No. 10/1997** (unreported) where it was stated thus;

"*The first Appellate Court has a duty to re-hear the case and to reconsider the materials before the trial Judge. The Appellate Court must then make up its own mind not disregarding the Judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another, and the question turns on the manner and demeanour, the Appellate Court must be guided by the impression made on the Judge who saw the witness.* "

It is therefore the duty of this Court to subject the evidence on record to a fresh and exhaustive scrutiny to reach a fair and just decision.

Resolution of the grounds:

The grounds will be discussed jointly.

Counsel for the Appellant submitted that it was the evidence of the Appellant as PW1 that he supplied the Respondent with 4441kgs of cotton for a consideration of UGX 10,361,000/= and tendered in Court notes to support his claim.

DW2 an employee of the Respondent confirmed writing the notes but could not tell whether the Appellant was paid or not.

Counsel for the Appellant noted that the Appellant proved that he did deliver the cotton and the burden to prove the payment shifted to the Respondent. The Appellant testified that he had not been paid and the trial Magistrate in his judgment only considered the receipts that were written on "not paid". And yet there was no evidence by the Respondent showing that payment had been made.

In the case of **Kelesensio Kakuru versus Policalipo Nyamuchoncho HCCA 65/1994, Reported in 1998 KALR 779**, it was held that **Section 102** of the Evidence Act (now **Section 103**) requires that when a person wishes to be believed with regard to any particular allegation the burden of proof lies on that person to prove the allegation, unless the law provides otherwise.

Counsel for the Appellant went on to submit that the Appellant proved on a balance of probabilities that he supplied the cotton and was not paid and if the Respondent says that he was paid it was incumbent on him to prove so.

Further, that it was unfortunate and regrettable to blame the witnesses of the Appellant for not knowing the quantity of cotton that was supplied by the Appellant yet this was a contract between the Appellant and the Respondent. That neglecting, the evidence of PW3 and PW4 led to a miscarriage of justice and besides there were glaring inconsistencies in the evidence of the Respondent in regard to who wrote on the receipts as presented by the Appellant.

Furthermore, that it is only logical that the Respondent also at times did receive cotton and if there was no money to pay he would write "Not paid" on the receipts and this could not be done by DW2 because he is not the one that used to pay for the cotton.

PW3 in his testimony told Court that DW2 would issue the pieces of paper bearing the quantity supplied by the seller and they would present the same to the Respondent and after payment he would tear the piece of paper. That this would only mean that the receipts as presented by the Appellant were never paid otherwise they would not be in existence.

In the instant case the Appellant alleged having supplied 4441 kgs of cotton to the Respondent and was not paid for the same. The Respondent denied the allegation and maintained that he did pay the Appellant at all times whenever he supplied him with cotton. The trial Magistrate only ordered for payment only against the receipts that had "not paid" written on them.

I have carefully gone through the evidence on record and it is my considered opinion that it was the evidence of DW2 that he was the one that issued the receipts upon persons supplying cotton for the Respondent. This was to note the amount of cotton supplied and by whom in order for the Respondent to pay. At all times it was the Respondent that paid the suppliers of cotton the Appellant inclusive. PW3 categorically told Court that when they would supply cotton to the Respondent, DW2 would write out notes with the quantity and the particular supplier who brought it which corroborated the evidence of PW3. Then the person supplying would take it to the Respondent for payment and upon payment the piece of paper would be torn.

It is my belief that if that was the practice then the Appellant's claim was true otherwise he would not have had the said notes. Though the Respondent refuted the Appellant's allegations he did not produce any evidence to the contrary for Court to rely on to decide otherwise.

Section 102 of the Evidence Act (Cap. 6) states that;

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

In short; he who alleges must prove. The Respondent in this case failed to discharge that burden.

Counsel for the Appellant also submitted as to the inconsistencies in the evidence of the Respondent. At one point the Respondent stated that he is the one that wrote on the receipts when the Appellant supplied the cotton and was not paid, then again denied the handwriting being his on any of the pieces of papers issued. Truth of the matter is that the handwritings on the receipts are not the same and a handwriting expert is not needed to prove this as it is evident. In this regard I agree with the submissions of Counsel that this indeed proved that the Respondent would also at times receive cotton and if the person was not paid then he would indicate "not paid" on the pieces of paper as was the case with the Appellant. This was to enable the Respondent pay the person claiming their money be paid at a later date.

In the case of **Aziz Kalungi Kasujja versus Nauni Tebekanya Nakakande, SCCA No. 63 of 1995,** it was held that inconsistencies in material evidence of a party are major and go to the root of the evidence leading to rejection of such evidence as worthless.

In the instant case the Respondent's evidence had major inconsistencies that went to the root of the case rendering it worthless.

I therefore find that the trial Magistrate erred in ignoring part of the evidence as adduced by the Appellant to support his claim and going ahead to blame his witnesses for not knowing the amount of cotton that was supplied by the Appellant yet this was a contract between the Appellant and Respondent.

This appeal is therefore allowed and the decision of the trial Magistrate set aside. The Respondent is ordered to pay the Appellant a total of UGX 10, 361,000/= for 4441kgs the Appellant supplied him. The Appellant is also awarded costs in this Court and in the lower Court. I so order.

Right of appeal explained.

.....

OYUKO. ANTHONY OJOK

JUDGE

23/03/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Bwiruka Richard for the Appellant.
2. James – Court Clerk

In the absence of both parties.

.....

OYUKO. ANTHONY OJOK

JUDGE

23/03/2017