

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT Jinja  
CIVIL APPEAL No 27 OF 2012  
(ARISING FROM CIVIL SUIT No. 100 of 2017 at KAMULI COURT)**

**KISAMBIRA ALI**

=====

**APPELLANTS**

**VERSUS**

**ODEDRA ENTERPRISES LTD**

=====

**RESPONDENT**

**BEFORE: HON. JUSTICE MICHAEL ELUBU**

**JUDGMENT**

This appeal was filed by **KISAMBIRA ALI** against **ODEDRA ENTERPRISES LTD** challenging the judgment and orders of HW Kintu Simon Zirintusa, the Magistrate Grade I Kamuli Court, which was delivered in Civil Suit 100 of 2011 on the 21<sup>st</sup> of January 2012.

The brief background is that the respondent (Odedra Enterprises Ltd) filed a plaint under summary procedure, against the appellant (Kisambira Ali) who was later granted leave to appear and defend the action.

In his pleadings the plaintiff states that his claim against the defendant was for 8,067,150/- (eight million sixty seven thousand one hundred and fifty shillings). That the plaintiff is a company based in Kamuli town in Kamuli District where it runs a wholesale shop. The defendant is also a Kamuli based businessman and wholesaler. Between the 7<sup>th</sup> and 23<sup>rd</sup> of October 2009 the plaintiff supplied the defendant with merchandise in the sum stated, which the defendant has not paid for despite several demands to do so. The defendant adduced evidence stating that he had been

supplying the defendant goods since 2008. The arrangement was that he collects goods, on credit, from the plaintiff and pays a deposit towards the purchase price. He would get invoices for the goods he obtained on credit and receipts for the payments made. The plaintiff states that at the end of their dealing the amount stated had not been paid. A ledger was tendered in evidence to back up the claim and to show that the defendant owed the money.

The defendant (respondent here) denied the claim. He stated that he made all the payments owed and that the plaintiff even paid him a balance and then stopped supplying the respondent with goods.

The trial Magistrate believed the plaintiffs case and found that based on the ledger evidence, the receipts and invoices tendered it was clear that the defendant owed the plaintiff 8,067,150/- and entered judgement in favour of the plaintiff.

Being dissatisfied with the finding of the trial magistrate the defendant filed this appeal with two grounds namely,

1. The trial magistrate erred to introduce in the case transactions prior to 7<sup>th</sup> of October 2009 and to admit exhibit PEA.
2. The learned trial magistrate failed to properly evaluate the evidence before him and arrived at a wrong decision.

Mr Onesmus Tuyiringire appeared for the plaintiff. The respondent was represented by Mr Shaban Muziransa.

As this is a first appeal, this court is under duty of law to subject the entire body of evidence produced in the lower court to a fresh scrutiny and come to its own conclusions based on the law and evidence bearing in mind that it has not seen the witnesses testify and cannot properly make findings based on demeanour.



## Ground 1

**The trial magistrate erred to introduce in the case transactions prior to 7<sup>th</sup> of October 2009 and to admit exhibit PEA.**

It was the submission of counsel for the appellant that based on paragraphs 3 and 4 of the plaint the claim arose on the 7<sup>th</sup> and 23<sup>rd</sup> of October 2009 when the appellant obtained goods from the respondent. That the appellant denied these claims and in his written statement of defence indicated that he only received goods worth 4,388,250/- and later 5,537,450/- which he paid for and does not owe any money. That the trial magistrate allowed the appellant to tender and rely on a ledger and two invoices. That both relate to payments before the 7<sup>th</sup> of October 2009. The first one was No. 6290 showing an invoice of the 20<sup>th</sup> of July 2009 and the second one No. 2292 is an invoice dated 19<sup>th</sup> of September 2009.

That these invoices are for transactions prior to the dates named in the plaint as can be clearly seen from the ledger tendered and relied on by the respondent. It is the submission of counsel that in allowing the respondent to introduce these documents in evidence, without leave of court to amend the pleadings, was an error fatal in law. The appellants' counsel relied on **Interfreight Forwarders (U) Limited Vs East African Development Bank SCCA 33/1992 cited in Fang Min v Belex Tours and Travel SCCA 1 of 2014** where the court held that a party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings.

The respondent opposes this ground of appeal. It is the submission of his counsel that the business relationship between the parties had run from 2008. That the transactions for which there was an outstanding amount dated 7<sup>th</sup> and 10<sup>th</sup> of October

2009 resulting in a sum owed of 8,067,150/- started in 2008 and would not make sense if it was only those two dates extracted and examined. Reference to these invoices was in fact in favour of the appellant. That there was therefore no error in referring to transactions before the claimed dates. That admitting the accounts ledger into evidence helped to demonstrate the business relationship. The departure should only be considered fatal where it affects the courts final decision. In the present case counsel submitted that it did not. Relying on the decision in **Mukula vs Uganda (2013) HCB 100** he submitted that the general rule is that reversal of decisions by the appellate courts should only be done where there was an error which resulted in unfairness to the appellant.

This court finds that the facts from the submissions are correct. The respondent had indicated in paragraphs 3 and 4 that his claim was for 8,067,150/- and that it arose between 7<sup>th</sup> and 23<sup>rd</sup> of October 2009.

It is true that a party ought to be bound by his pleadings. In this case however the parties had a long business relationship. The respondent would supply the appellant goods on credit. The appellant would then make partial payment and be billed by invoice for the amount left outstanding.

Therefore to understand how the amount owed had grown cumulatively, one had to study the previous business transactions leading up to 7<sup>th</sup> of October 2009. It is therefore the finding of this court that the business transactions before the 7<sup>th</sup> of October are relevant facts and applicable under S. 6 of **the Evidence Act** which stipulates that,

Facts which are the occasion, the cause or the effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.



By virtue of this section this court finds that the admission of the evidence of the business ledger was necessary as the transactions it showed constituted the chain of transactions which cumulatively led up to the respondents claim said to arise on the 7<sup>th</sup> and 23<sup>rd</sup> of October 2009.

Strictly speaking therefore the respondent did not set up a claim that fell outside his pleadings but adduced evidence to show how his claim had arisen.

For this reason ground 1 fails.

## **Ground 2**

**The learned trial magistrate failed to properly evaluate the evidence before him and arrived at a wrong decision.**

The submission here is that the appellant, from his written statement of defence and his testimony, denied the debt and adduced evidence to show that he had made all the payments. That he paid the respondent ten million shillings (10,000,000/-) which is more than what was owed and that the respondent had in fact paid him a balance and not supplied him any goods since. That evidence was not challenged by the respondent when it was given in the lower court.

It was the contention of counsel for the appellant, relying on two authorities that failure to challenge the evidence by cross examination led to the inference that the evidence had been accepted subject to its being assailed as inherently incredible or palpably untrue (see **Ug vs P.C. Naura 1977 [HCB] 103, John Kayibanda vs Ug [1977] HCB 253**).

The respondent in reply stated that when all the evidence was properly evaluated and showed that there was money owed by the appellant. That when the appellant adduced evidence to say that he had paid all outstanding sums then the burden of

proof, under Section 101 of **the Evidence Act** shifted to him to prove it. That the appellant ought to have proved that he had paid all the outstanding sums as claimed.

It is also the contention of counsel for the respondent that the respondent chose not to cross examine the appellant as he did not dispute the payments claimed and that those payments were all reflected in the ledger.

Turning now to the merits in this ground, the appellant in his defence stated he did not agree with the debt the respondent claims. That he paid all the money and that the respondent even paid a balance to show no more money was owed. That the amount was extended to him as a loan of 9,925,700/-. The appellant paid four million shillings on the 23<sup>rd</sup> of October and then another four million shillings on the 16<sup>th</sup> of November 2009. The last receipt was for two Million paid on the 23<sup>rd</sup> of Feb 2010.

The respondent did not cross examine the appellant on this evidence.

As stated earlier it is the duty of the first appellate Court to re-evaluate all the evidence. It is also a cardinal rule in evaluation of evidence that the court must evaluate the evidence as a whole. In this case the case is proved on a balance of probabilities.

Here the appellant in his testimony put up a case disputing the claim by raising an alternative situation and produced receipts to show that he had paid off the entire sum owed and had even been given a balance by the respondent to acknowledge payment.

It is pertinent that this evidence went unchallenged as the respondent did not cross examine or contest the assertions of the appellant. Counsel for the respondent has argued that the payments are not disputed by the respondent.

The court notes however that the appellant stated that the actual sum owed was 9,925,700/-. He produced Odedra receipts amounting to 10,000,000/-. These receipts



were not challenged by the respondent. The last receipt was for 2,000,000 on the 23<sup>rd</sup> of February 2010 for a period after the records in the ledger (whose last entry was on 16<sup>th</sup> of November 2009 stating the sum owed is 8,067,150/-). It is also true that all the receipts are reflected in the ledger with the exception of the last payment of 2,000,000/-.

When this undisputed evidence by the respondent that he paid off all the owed moneys is weighed against the claims made by the respondent that the appellant owed money it would appear that the appellant paid off the entire sum as he stated and does not owe the respondent any moneys. He had paid the respondent more than was owed. He was paid a balance. The account was thereafter closed and he was never supplied more goods. The sum paid of 10,000,000/- is much more than that owed of 8,067,150/-.

The second ground of appeal succeeds.

I would consequently hold that the plaintiff did not prove his claim in the lower court whose judgement and orders are set aside.

The appeal is accordingly allowed with costs.



**Michael Elubu**

**Judge**

**21.1.2019**

4/2/19

Appellant present.  
Mr. Odeh: representative of the Respondent.  
Mr. Kize: counsel for the Appellant.  
Mr. Odeh: representative of the Respondent.  
Mr. Kize: counsel for the Appellant.