THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: ***S. T. MANYINDO, DCJ; S.C. ENGWAU, J. A AND A. TWINOMUJUNI,*** *J. A.*

CIVIL APPEAL NO. 2/97

UGACHICK POULTRY BREEDERS LTD…… APPELLANT

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- VERSUS –

TADJJN KARA T/A S.T. ENTERPRISES LTD…… RESPONDENT

(Appeal from judgment of the High Court (Mr. Justice J.P. Berko) dated 14/4/96 in HCCS No. 924/94)

JUDGEMENT OF A. TWINOMUJI J. A. — (DISSENTING)

This is an appeal from the judgment and decree of the High Court sitting at Kampala in which the appellant was ordered to pay U.Shs. 68,000,000/= to the respondent plus the costs of the suit. The facts which gave rise to this dispute were ably summarized in the judgment of the learned trial judge as follows: -

> "**Tajdi Kara's firm T.S. Enterprises financed its sister Company MIS Animal Feed Products to import from Belgium UDS Protein Concentrate into the country. The total was 224 tons and made up of Layer Premix, Broiler premix and chicks premix. The goods arrived in the country sometime in May, 1991. They were cleared and stored in the go-down of S.T. Enterprises at the Railways in Kampala.**

It is the case of the plaintiff that sometime between June and July 1994 one Mr. Aga

Sekalala, the Operations Manager of Ugachick Poultry Breeders Ltd, approached Mr. Tajdin Kara of S.T. Enterprises and enquired if it was true that the company had premix concentrates for sale. Mr. Tajdin Kara replied that they had some in stock. Mr. Aga Sekalala was alleged to have asked for samples of the premix for testing and that he would let Mr. Tajdin Kara know if Ugachick would be interested. Mr. Tajdin sent a clerk to go to the go-down with Mr. Aga Sekalala for the sample and that was done.

According to plaintiff, three days later Mr. Aga Sekalala came back and told Mr. Tajdin Kara that the sample he took was very small and that he needed a full bag of each type. These were given to Mr. Aga. Sekalala and he took them away.

The above facts are not seriously disputed by the Ugachick; the defendants. So far the only difference between the plaintiffs case and the defence is that, whilst Mr. Tajdin Kara says that it was Mr. Aga Sekalala who came to him and inquired if he had premix concentrates for sale, Mr. Sekalala, on the other hand, says that it was Mr. Tajdin Kara who approached the defendants and offered to sell the premix concentrates to them. These differences are not material and nothing turned at the trial.

Mr. Aga Sekalala took the samples and sent some to their Technical Manager. The remaining samples were sent to the Food and Science Department of Makerere University. The Technical Manager of the Department and the University were to test for the Rancidity. They were also to test for protein and mineral contents of the concentrates.

Two or three days after Mr. Aga. Sekalala had taken the samples away Mr. Tajdin Kara said that he received a message from Mr. Aga Sekalala that he, Mr. Tajdin Kara, was wanted at the defendant's factory at Majigye. Mr. Aga Tajdin Kara said that he met Mawanda, (the General Manager) and Mr. Aga Sekalala. After discussion the defendants agreed to buy the total stock of the concentrates, which was said to be 104 tons.

The above facts are not disputed. The point of difference between the parties is the price agreed upon. According to Mr. Tajdin Kara, the defendants' initial offer was 500 shillings per kilo which he did not accept. Eventually they settled on the price of 650 shillings per kilo. The total purchase price came to 68 million shillings.

The defendants, on their side, said the agreed price was 50 shillings per kilo. That gave a purchase price of 5,200,000/=.

The bone of contention between the parties therefore is at what price was the concentrates sold. This is central issue in the case.

To resolve that issue there is a subsidiary issue that has to be resolved first. It is the case of the defendants that at the time of the contract was entered into the shell life at the premix concentrates had expired or about to expire. I shall refer it later.

Now after the contract was concluded the defendants were allowed to cart the concentrates from the plaintiffs go-down. The defendants collected all the concentrates. This is not denied by them.

Then after the goods had been delivered to the defendants, the plaintiff sent Invoice No. 25794 to the defendants. This is exhibit P2. In that exhibit the purchase price was stated to be 68, million shilling. The defendants deny ever receiving Exh.P2. Following Exh. P2, Mr. Tajdin Kara approached the defendants for payment. That was where the parties fell apart resulting in the preset action."

After consideration of the evidence and legal arguments which were before him, the learned judge concluded in part that;

"**I have already found that the vitamin components had not yet expired or about to expire at the time of delivery. I think I am entitled also to find and to hold that the contract price was 68 million shillings as claimed by the plaintiff."**

Against these and other holdings the appellant appeals on the following grounds: -

1. The learned trial judge misdirected himself and erred in law in holding that Exhibit D2 had no probative value and that it was mere conjecture.

2. The learned trial judge misdirected himself in holding that the agreed contract price was shs. 68 million of Shs.5, 200,000/=.

3. The learned trial judge misdirected himself in finding that the vitamin component of the concentrates had not expired, despite the overwhelming evidence of DW4 the manufacturer of, and exporter of said concentrates to the respondent.

4. The learned trial judge wrongly evaluated the evidence and thereby arrived at wrong conclusions which occasioned a miscarriage of justice.

The appellant's prayer is that the appeal be allowed, the judgment and decree of the trial judge be set aside and that the respondent pays the costs of the appeal and the court below.

Mr. Masembe-Kanyerezi argued the appeal for the appellants. His main attack on the judgment of the trial court concentrated on two main areas.

First, he argued that the trial judge misdirected himself and erred in law in holding that exhibit D2 had no probative value anc9 that it was a mere conjecture. He further contended that the trial judge equally misdirected himself when he held that the vitamin component of the concentrates had not expired despite the overwhelming evidence of DW4, the manufacturers and exporter of the said concentrates. He was highly critical of the manner the trial court handled the expert evidence of DW4. He cited the case of MTAC V Ikanza [19861 H.C.B. 43 in support of his argument that expert evidence was reliable evidence and not mere conjecture. He submitted that the court should have accepted the evidence of DW4 who was not only an expert nutritionist but the manufacturer of the goods in dispute who was thoroughly acquainted with them in his profession. He submitted that though evidence of laboratory tests would be good, the evidence of the expert in this case was even better and as it was not contradicted at all it should have been believed.

Secondly, learned counsel for the appellant criticized the trial judge for misdirecting himself in holding that the agreed contract price was shs. 68 million instead of shs.5, 200,000/=. He submitted that this was due to the judge's wrong evaluation of the evidence which led him to the wrong conclusion which occasioned a miscarriage of justice. He invited this court to re-evaluate

the evidence and hold that the contract price was actually shs. 5,200,000/- and not shs. 68 million.

On the other hand Mr. Twesigire who represented the respondent supported the findings of the trial judge. With regard to the evidence of DW4 and Exh. D2, he submitted that both were of no value at all because the evidence of DW4 was mere conjecture as his opinion were not based on actual examination of the condition of the goods as they were in July 1994 (time of sale) . He submitted that his oral evidence contradicted the Exh. D2 and rendered it totally useless.

On the holding that the contract price was Shs. 68 million and not shs. 5,200,000/=, Mr. Twesigire submitted that this was correct as it was supported by circumstantial evidence which included the admission by the appellants to the effect that at the time of the sale, the market price of the goods at shs. 68 million would be reasonable if the vitamin component had not expired. He submitted that it was the duty of the appellants to prove that the vitamin component had expired which they failed to do. He prayed that this court upholds the judgment of the trial court and dismisses this appeal.

Before I embark on the task of evaluating the evidence upon which the learned trial judge acted in determining the case in favour of the respondent, it is necessary first to recast the powers and limitations of an appellate court when dealing with printed evidence. I take guidance from the words of Sir Kenneth O'Connor P in the East African Court of Appeal decision of Peters v Sunday Post Limited [1958] E.A. 424 at page 429 where he said:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had had the advantage of seeing and hearing the witness. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

The learned President of the East African Court of Appeal declared that he would take guidance in the exercise of this appellate jurisdiction from the opinions of their Lordships in the House of Lords in Watt vs. Thomas [1947)A.C. 484 where VISCOUNT SIMON L.C. said at p.484:

> **"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view or facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from classes of case in which the powers of the court of appeal are limited to deciding a question of law (for example, on a case stated or an appeal under the county courts Act) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate to so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witness, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of the first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on the question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witness before him and observing the manner in which their evidence is given."**

In the same case at page 487 LORD THAAKERTON said:

> "**Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so**

unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judges conclusion.
The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having ,seen and heard the witnesses, and the matter will then become at large for the appellate court."

Finally LORD MACMILLAN said in the same case at page 491:-

"So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so….then the decision of the trial judge, who has enjoyed the advantages not available to appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of the court of appeal on the questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of the circumstances admitted or proved or otherwise to have gone plainly wrong."

As I embark on the exercise of examining the testimony in this case I shall be guided by these great words of wisdom by eminent judges which I highly respect and feel bound to accept.

I now turn to consider the merits of this appeal. There is no dispute that there were two main issues namely whether the shelf life of the goods had expired or about to expire at the time of delivery and secondly what the terms of the contract were.

I wish to observe from the outset that it seems the learned trial judge accepted that from the evidence before him the plaintiff failed to produce direct evidence as to what price was agreed

upon during negotiations before delivery of the goods to the appellants. The evidence of the appellants was that the agreed price was shs. 5,200,000/= and that of the respondent was that the price was shs 68 million. There was evidence before him however that the appellants accepted delivery of the goods after they had had opportunity to examine their quality and that the market price at shs. 68,000,000/= would be reasonable if the vitamin content in the goods had not yet expired. The appellants pleaded however that they could not pay because they found out that the goods had expired before accepting delivery, told the respondent about the expiry and therefore could not have agreed to pay shs. 68,000,000/= for the goods. The learned trial judge decided that it was up to the appellants to prove that the goods had expired and although earlier on he had observed that the central issue was the price at which the concentrates had been sold, he now handled the issue as follows:

> **"As I have already indicated earlier on the central issues in the case is the second issue (whether the shelf life of the goods had expired).**
> **From the evidence of DW2, the test carried in their Laboratories and by Food and Science Department of Makerere University showed that at the time of the contract and delivery the vitamin content of the concentrate had expired. The only useful part that was left was the soya which was used as carrier. Because of the soya that was left, they agreed to buy the concentrates so as to use it to make low grade animal feed. That was the reason they offered 50 shillings per kilo to the plaintiff which he accepted. This being the gravamen of the defence of the defendants, and as was pleaded in their written statement of defence, burden of proof lies on them: (S100 of the Evidence Act). They have to prove that that time the concentrates were delivered their shelf life had expired or about to expire.**
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> **There is evidence that before the contract was concluded, Mr. Aga Sekalala took samples to their Technical Manager. The remaining samples were sent to Food and Science Department of the Makerere University. The best evidence on the condition of the premix concentrate at the time of the contract of sale and delivery would have been reports from the Defendants Technical Manager and Food and Science Departments of the Makerere University. For reasons best known to the defendants neither their Technical Manager nor somebody from Makerere University was**

called to tell the court the results of their tests. The evidence would have been useful because they actually saw and tested the products at the time when the contract was being concluded in Uganda.

Instead, the defendants for reasons known to them went all the way to Belgium and brought Mr. Louis Vanhoudt DW4 whose company sold the premix concentrates to Animal Feeds Products Company. According to him after the sale of and before delivery of the concentrates to Animal Feed products, he came to Uganda. He found the buildings of the Animal Feeds Products factory standing. The machinery were on the ground. They had not been installed and so were not producing. He went back. After the goods had been supplied, he came back to Uganda to give Animal Feeds Products the formula for using the premix concentrates. On the second visit he found that the machinery had still not been installed and not production was going on. He then advised Animal Feeds Products to sell the premix to Mr. Blasberg, the Managing Director of the Defendants Company to prevent the concentrates from going bad.

It is reasonable to assume at this stage that at the time he advised Animal Feeds Products to sell the products to the defendants the shelf life of the concentrates had not expired. If they had expired he, as nutritionists, would not have advised that they should be sold to the defendants. He was positive that an expired concentrates had no value for making animal feeds.

Then on the 27/01/95 the defendants Managing Director Mr. Blasberg sent a fax message to DW4. In response to the fax message DW4 sent Exh D2. It is sated 6/2/95. In Exh. D2 he said that as at 6/2/95 when he wrote Exh. D2, the concentrates had expired and therefore could not be used for making animal feed.

Though, the report, Exh.D2 was made by a person of great learning in the field of animal feeds and attrition, it does not appear to me to have any probative value. Firstly the report was the result of a message. The content of the fax message was not made available to the court. Therefore the court was not in a position to know what Mr. Blasberg asked for. One cannot rule out the possibility of Exh D2 being a self- servicing evidence to support the defendants case. Secondly, the report, Exh. D2 was not about the actual conditions of the products as found in Uganda at the time

of sale and Delivery. Exh D2 was the witness's opinion as what the condition of the products would probably be and not what they actually were. It was mere conjuncture not supported by facts: <u>Management training and Advisory Centre vas Patrick Kakuka Ikaaza (1986) H.C.B. 43.</u> In the result I have come to the conclusion that the evidence of DW4 and Exh. D2 have no probative value. I place no reliance on them. If the laboratory tests carried out by the Technical Department of the Defendant Company and Food and Science Department of Makerere University confirmed that at the time of the contract the vitamin components of the concentrates had expired, and was about to expire, leaving only soya, the defendants would have called those who conducted the test to come and say so. Failure to call them meant that their contention cannot be true. The tests carried on did not establish what they set out to prove. I therefore find that at the time of delivery the shelf life of the concentrates had not expired or about to expire."

With the greatest respect to my learned brother, I cannot agree with him on three matters all of which he dealt with in the above quoted passage namely:

(a) The shifting of the burden of proof on to the appellant.

(b) His treatment of Exhibit D2

(c) His treatment of the defence witness DW4.

Dealing with the burden of proof first, the law on this matter is clearly stated in section 100 of the Evidence Act which reads: -

"**Who ever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof is on that person."**

Section 102 of that Act clarifies further: -

“The burden of proof as to any particular fact lies on that person who wishes court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

It goes without saying that the burden of proof in this case lay on the respondent who was the plaintiff in this case. He had the duty to prove that before delivery of the goods a definite price for the goods had been arrived at. The standard of proof required had to be on a balance of probabilities. If he failed to do this, it was not open to the trial judge to look to the defence evidence as he did in this case to help establish a prima facie case for the plaintiff. The evidence before the trial court was that before the goods were delivered, a meeting was held at the appellant’s factory. It was attended by the respondent and one of his assistants, the operations Manager (DW2) and the General Manager of the appellant. The sole issue was to discuss the sale of the concentrates by the respondent to the appellant. By that day the appellants had already obtained the samples of the goods to be sold and had already carried out the tests in their laboratory. As dealers in these concentrates, they must have known the quality of what they were buying. Depending on what information they obtained from their lab tests, the appellants could have offered anything from one shilling to shs 98million which the respondent first demanded (i.e. 104 tons at the rate of shs 950 per kilo).

It is in this meeting that the price was discussed. If there was any agreement at all it must have been arrived at this meeting. What we know however is that shortly after this meeting all the goods were delivered and accepted by the appellant. This would tend to suggest that a deal was struck. So what was the deal? Was it shs 5,200,000/=? Or shs 68m/=. Is there any other evidence on record other than the word of the parties? In my humble judgment there is none. It means that at that stage the respondent plaintiff failed to establish on a balance of probabilities that it was shs.68 million which was agreed upon and not shs. 5,200,000/=. Whether the vitamin component had expired or not was not relevant because at the time of final negotiations the appellant was already aware that the vitamin component of the goods had expired but was still ready to buy them for another purpose other than as premixes for chicken feeds. In trying to use the issue of expiry or non-expiry of the goods to help determine the agreed price of the goods was a perfect example of conjecture and the learned judge was putting the cart before the horse. In requiring

that the appellant takes the burden to prove that the concentrates had expired, he dangerously shifted the burden of proof on the appellant/defendant contrary to the rules of Evidence. Secondly, I totally disagree with the manner the learned judge handled Exh D2 in his judgment. This is how he handled it: -

> **"Then on 27/01/95 the defendants Managing Director Mr. Blasberg sent a fax message to DW4. In response to the fax message DW4 sent Exh D2. It is sated 6/2/95. In Exh. D2 he said that as at 6/2/95 when he wrote Exh. D2, the concentrates had expired and therefore could not be used for making animal feed.**
>
> **Though, the report, Exh.D2 was made by a person of great learning in the field of animal feeds and attrition, it does not appear to me to have any probative value. Firstly the report was the result of a message. The content of the fax message was not made available to the court. Therefore the court was not in a position to know what Mr. Blasberg asked for. One cannot rule out the possibility of Exh D2 being a self- servicing evidence to support the defendants case. Secondly, the report, Exh D2, was not about the actual conditions of the products as found in Uganda at the time of sale and Delivery. Exh D2 was the witness's opinion as what the condition of the products would probably be and not what they actually were. It was mere conjuncture not supported by facts: Management training and Advisory Centre vas Patrick Kakuka Ikaaza (1986)H.C.B. 43. In the result I have come to the conclusion that the evidence of DW4 and Exh. D2 have no probative value. I place no reliance on them."**

Exhibit D2 itself in part read:

> **"In regards to your question concerning the current value or availability of the vitamin in these premixes, we have to point out that the labels mention as date of fabrication: August l992 .Although we add extra-oxydants to the premixes for hot climate countries, we would recommend not to use any products older than one year,**

for your industrial farms. It is internationally assumed that premixes in hot climate are not to be used as a source of vitamins after twelve months of storage."

Exhibit D2 was written by Mr. Jonis Vanhoudt, the managing Director of V.D.S. Belgium, and an internationally renowned company which manufactures and specializes in the manufacture of premixes or concentrates for animal feeds. The letter was in response to a fax he received in January 1995 from the managing Director of the appellant.

I say that the exhibit was treated unfairly because first, it did not say that at 6/2/95 the concentrates had expired. It said that they expired twelve months after August 1992. This would put the date of expiry at august 1993. Second, after appreciating that the report was made by a person of great learning in the field of animal feeds and nutrition, the trial judge claimed that D2 did not have any probative value simply because the fax message which solicited the exhibit was not brought to court. But the exhibit itself says the writer was responding to a question as to what the value of the concentrates were at the time of writing and since the witness himself flew from Belgium to give evidence and did give evidence, I do not with respect see what extra evidence the production of the fax could have added.

Thirdly, the claim that the evidence contained in exhibit D2 was mere conjecture not supported by facts was a gross misdirection. The case of Management training and Advisory Centre v Patrick Kakuku Ikanza [19861HCB 43 is authority for holding that evidence to prove a case on a balance of probabilities must be inferred not from pure conjecture which has no legal value, but from reasonable inference. In that case the respondent who was an employee of the appellant was sent to Nairobi to purchase certain items. He brought items which included a welding machine which he put in the workshop of the appellant. Soon after he took it to his home allegedly to mend his fence. Two letters requesting him to return the machine were written to him and ignored. These letters were not exhibited at the trial. At the trial the respondent said the machine was bought with his own money. There were not records to prove he had been sent on official duties to buy the machine, neither were there any records to prove that the machine was the appellants property. The trial court was not satisfied with the appellants evidence and decided in favor of the respondent.

On appeal counsel for appellant argued that the trial court should have inferred from the respondents two letters in reply to the appellants that the machine belonged to the appellant. The Court of Appeal held:

> **"It would be mere conjecture and not reasonable inference to find from the letters that the machine belonged to the appellant. It is true that the region of pure conjecture and that of reasonable inference are separated by an indefinite line but it is well settled that inference has legal value while a conjecture has not. The two letters did not take the appellants case beyond the region of mere conjecture into legal inference, on the whole, the appellant had failed to establish that the machine belonged to him."**

As I propose to show presently when I discuss the evidence of DW4, Exhibit D2 contained the solid opinions of an international Expert whom the trial judge found to be "a person of great learning in the field of animal feeds and nutrition". The expert also happened to be the Managing Director of a Belgium based company which manufactured the concentrates, the subject matter of this suit and markets them all over the world. In my humble judgment the case of MTAC vs. IKANZA was completely inapplicable and irrelevant to the facts of this case.

I now turn to the evidence of DW4 which in my humble judgment was treated unfairly and was not given due weight. As I have already stated above DW4 was the Managing Director of an internationally renowned company in the field of animal feeds. The learned judge himself acknowledged that he was a man of great learning in the field of animal feeds and nutrition. Although it does not appear on record how long he has been in the field, it would be reasonable to assume that to become a Managing Director of such an internationally renowned company, you must have considerable experience. In his evidence before the trial judge, he stated that his company was a specialist in animal feeds and he himself had studied chemistry, Agriculture and nutrition. His testimony both in exhibit D2 and before the trial court was about a product his own company had manufactured and marketed all over the world for many years. His evidence was not challenged at all by anyone. Does such a witness not qualify to be called an expert within the meaning of section 43 of the Evidence Act? The section reads:

“When the court has to form an opinion upon a point of foreign law or of science or Art or as to identity of handwriting or finger impressions, the opinion upon that point of persons especially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions, are relevant facts, such persons are called experts.”

This provision is discussed in SARKAR ON EVIDENCE 11TH EDT. P. 497 where he says:

“The opinions or beliefs of third persons are as a general rule irrelevant and therefore inadmissible and witnesses are to state facts only i.e. what they themselves saw or heard or perceived by any other sense. It is the function of the judge or jury to form their own conclusions or opinions on the facts stated” THARICAR ON EVIDENCE goes on page 488:-

“There are cases in which the court is not in position to form a correct judgment without the help of persons who have acquired special skill or experience on a particular subject, e.g., when the question involved is beyond the range of common experience or common knowledge or when special study of the subject or special training or special experience therein is necessary. In such cases the help of experts is required. In these cases the
rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision. Under this head comes, matter of science, and trade, handwriting, finger-impressions and foreign law. The rule admitting expert evidence is founded on necessity.”

On the same page the author defines an expert as:

“**One who has acquired special knowledge, skill or experience in any science, art, trade or profession. Such knowledge may be acquired by practice, observation, research or careful study.”**

The learned author then deals with the differences between the testimony of an ordinary witness and that of an expert. He describes one of the differences as follows: -

> **"An experts evidence is not confined to what actually took place but he can give his opinion on facts, e.g. a medical man may give his opinion as to cause of a persons death or injuries or effect of poison, on facts stated by other witness at the trial, although he may not have personally attended the patient and observed things for himself." (emphasis mine).**

From the foregoing, I have no doubt in my mind that DW4, whom the trial judge accepted as a man of great learning, who testified on the value and worth of commodity he himself manufactures and markets and whose evidence was never contradicted was an expert whose evidence should have been treated with respect. He knew when the premixes were manufactured by his company. His testimony was that it was in or around August 1992. When he came to Uganda early 1993, he advised that unless they were used soon, they would be useless.
He in fact advised that they should be sold to the appellant company. However this was not done. As an expert and a manufacturer he knew the chemical properties of his commodity and how it would react under different climatic conditions. It is the same science that is used widely throughout the world to fix expiry dates of various commodities. DW4 did not have to physically examine his product to know that after the period determined by his company as expiry date, it would be useless for the purpose it was made. The witness was therefore shocked to learn in January 1995 that the premixes of August 1992 were still stored in Kampala unused. He categorically stated that after twelve months they were worthless as premixes for animal feeds. This was contained in exhibit D2. He went further and agreed to come to court here and say so. His evidence was not challenged. Against this evidence, it is amazing that the learned trial judge was able to hold that:

> **"I therefore find that at the time of delivery, the shelf life of the concentrates had not expired or about to expire."**

With respect there was not a single piece of evidence o justify the drawing of such a sweeping scientific conclusion. On the contrary it was entirely against the weight of evidence. I hold that the evidence contained in exhibit D2 and the evidence of DW4 were highly sound and valuable and not mere conjecture. In my judgment the first and third grounds of the appeal would succeed.

Now I consider matters which were raised in the second and forth grounds of appeal and which were argued together by learned counsel for the appellant namely that the trial judge wrongly evaluated the evidence and arrived at a wrong conclusion that agreed price of the premixes was shs. 68 million instead of shs. 5, 200, 000/=.

I have already partly agreed with this submission when 1 held that the respondent did not prove that by the time of delivery of the goods to the appellant the price thereof had been agreed. I have also partly upheld the submission when I held that the evidence in exhibit D2 and the evidence of DW4 were wrongly evaluated. Not only do I find that the respondent failed to establish what price was agreed upon before delivery of the goods but I am also inclined to hold that at the time of delivery and thereafter the terms of sale were never concluded. I am strengthened in this by the evidence of PW1, the plaintiff himself and that of DW1 Anne Sebageleka who was then the Financial Controller of the appellant. I now consider that evidence.

In his testimony PW1 stated:

"**After delivery I went for payment. The total cost was 68 million. The defendants told me that they were in financial difficulties and so would not be able to pay all in full. They promised to pay by installment. I dealt with the Financial Controller and others in the management. They were all in a room. The first installment of 17 million was to be paid on 2/8/94, the second installment of 12 million on 12/8/94 the third installment of 12 million shillings on 19/8/94, the 4th installment of 12 million on 26/8/94; the last installment of 15 million shillings on 2/9/94. They asked me to collect the cheques from their office in Kampala**. **The proposed settlement was put in writing by the financial Controller. I do not know her name. The proposal was brought to me in writing. I have in hand the proposal."**

Then he tried to introduce in evidence a piece of paper he alleged was the proposal. It was not addressed to anybody or signed by the author. It had on it handwritten figures and dates which were meaningless. The admission was objected to and the document was rejected, rightly so in my view by the trial judge. The significance of this evidence however remains intact. After

delivery of the goods the respondent was still trying to negotiate the terms of payment which apparently were not finalized before delivery.

Secondly, if this evidence is believed, then another meeting between top executives of both parties took place AFTER delivery of the goods which tends also to suggest that there were matters still to be agreed concerning the deal. But the evidence of DW1 on this meeting is totally different. This lady was the Financial Controller of the appellant but was not involved in the negotiations of the deal BEFORE delivery. She had no first hand knowledge of what price (if any) had been agreed. This is her evidence: -

"The plaintiff came to my office after the concentrates had been delivered and asked when he will be paid. I told him I was not aware of the price. I asked him to let me know what he had agreed with our manager and let me know so that i could prepare a payment plan. The plaintiff told me that the price was 68 million shillings. I told the plaintiff that I would suggest a payment plan. I would then confirm the actual price with the General Manager. I put the suggested plan in a note form for myself. Later on that day I confirmed the price from the General Manager. The General manager told me the price was 5 million shillings. The plaintiff has not been paid. The plaintiff said shillings 5 million was not the agreed price. That is the reason why the plaintiff has not yet been paid."

The evidence of this lady was not commented on by the learned trial judge but in the circumstances of this case I believe her evidence to be accurate. It confirms that after delivery of the concentrates both the price and the terms of payment had not yet been agreed upon. DW2 Aga Sekalala who did most of the negotiations with the respondents confirms and corroborates this finding. He testified:

"After we had collected the goods, the plaintiff came there and had a meeting with the financial Controller. I was not present. After the meeting the financial controller approached me for the price. She told me the plaintiff was demanding 68 million shillings. I

replied that we had agreed to pay shs 5 million shillings.

After further discussion with my General Manager, I went and saw the plaintiff in an effort to resolve the difference, but we could not reach an agreement. I reported to the General Manager that the plaintiff was now demanding shillings 68 millions. The General Manager asked me to write exhibit Dl inviting the plaintiff to come and collect his goods. He did not come to collect them. The goods are still lying in our premises. We are still willing to pay shilling 5 million to plaintiff.

We increased the offer to 10 million shillings to avoid legal proceedings. We rather agreed to increase it to 9 million shillings and not 10 million as pleaded in the plaint."

Again the learned trial judge did not comment on this evidence and I see no reason to doubt its accuracy.

It is significant to note that exhibit Dl referred to in DW2's evidence above was written to the plaintiff on 3/8/94 before the plaintiff made any written demand for payment. It was the first time anyone put anything in black and white (as far as the trial court record is concerned) concerning this deal. The letter said in part:

"Several weeks ago we had discussions about the purchase of protein concentrates (approx 100 tons). When you came to our offices we made an offer of 5 million shillings for the whole lot. We seemed to have reached an agreement so we accepted to collect the concentrates from your stores at the railway yard. From the 19th to 25th 2090 bags were collected and put in our stores at Magigye. Subsequently we failed to agree on the price of the concentrate.

Unless you are willing to reconsider our initial offer we would like you to collect the concentrate from our premises….."

On receipt of this letter, the respondent went straight to his lawyer who on 8th August 1994 wrote to the appellant threatening court action unless payment for the goods was made before

12th August 1994. The letter said that if payment was not made, he would take legal action for recovery of the price as per the agreement prior to delivery and acceptance of the goods. (emphasis mine). It should be noted that this demand letter did not say how much was being demanded and certainly it never mentioned the figure of 68 million shillings. It is reasonable to infer that since no written agreement was in existence then the advocate himself did not know how much was agreed upon (if at all) . This would also tend to suggest that his client did not tell him the amount of money he demanded. This would be consistent with my finding that none had been agreed upon yet. In my humble judgment, there was overwhelming evidence on record which showed that no agreement was reached on the price of the concentrates either before or after they were delivered to the appellants premises. It is unfortunate that the learned trial judge totally ignored this evidence and did not evaluate it at all. I have no doubt in my mind that had he done so, he would have arrived at a different conclusion.

Looking at all the evidence that was received by the trial judge, my interpretation of the evidence is that by early 1993 the respondent (or his agents) was told by an expert and the manufacturer of the concentrates, DW4, that unless he sold the concentrates then, they would be rendered useless in a few months time as they were due to expire in August 1993. This advice was partly accepted by selling off some concentrates but by July 1994, 104 tons of the product still remained. By this time, the respondent must have realized that the situation was desperate because this was one year after the projected expiry of the concentrates. Anyone in this situation could have done anything in order to at least mitigate his losses. So I believe the evidence of DW2 that it was the respondent who approached the appellant company and not the other way round as claimed by
respondent.

To his surprise and pleasure the appellants showed interest in the deal. Negotiations began but the appellants who had already smelled a rat gave a very low price. Though the respondent did not probably accept it, yet he felt safer with the goods off his hands and hoped to arm twist the appellants after delivery. On the other hand the appellants probably hoped that after delivery the respondent would have no choice but to accept the low price they had offered.

It is significant to note that because of this situation none of the commercial practices usually followed were even considered although the goods were said to be worth UgShs. 98, 800,000/= which is a lot of money by Uganda standards. For example no proforma invoice was prepared, but if it was, it was never delivered to the appellants. If the price was agreed, one would have expected the respondent to insist on a written order before delivery. This is especially so as he, the respondent, testified that he had previously dealt with the appellant selling them goods but it rook over one year for them to pay him. It seems since the goods were near worthless anyway, he did not think these precautions would help him. After delivery he goes to DW1 the Financial Controller who knew almost nothing about the transactions. He tells her that he was demanding shs. 68million. She then prepares a payment plan as her rough private notes on a piece of paper but told the respondent that she would have to get confirmation of what price had been agreed from those who took part in the negotiations. Somehow the desperate respondent steals the chit prepared by DW2 (which he later tried to present in evidence with disastrous consequences) . Later the appellants press the respondent for finalization of the deal without success. They then write exhibit Dl followed by exhibit P.3 and hence this suit.

In this interpretation I have relied on the testimony of PW1, DW1, DW2 & DW3 most of which was totally ignored by the learned trial judge. In my judgment, given this construction, I would hold that no agreement was ever concluded and therefore the contract of sale could never have been made

It is a well settled and recognized principle of contract law that unless the essential terms of a contract are agreed upon, there is no binding and enforceable obligation. See May & Butcher Ltd V Theking [193412KB 17, Scammel vs. Ouston [194l]AC 251 and Mayanja Nkagi vs. N.R.C. [1972]IULR 37.

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In May & Butcher Ltd vs. King (supra) at page 21 Viscount Dumdir held:

“**To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may have something which still has to be determined but then that determination must be a determination which does not depend upon the agreement between the parties**

As a matter of general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed by the parties, then there is no contract.”

In my humble judgment, the respondent was too busy scheming how to mitigate his loss at any cost which preoccupied him so much that he failed to conclude any enforceable agreement of sale with the appellant who discovered the worthlessness of the concentrates that were being sold before negotiations were concluded. The second and forth grounds of appeal would therefore also succeed

.

Throughout my evaluation of the evidence in this case I have been quite aware of the apparent inconsistency in the pleadings of the appellant and their testimony given on oath (by DW2) regarding exactly when they discovered that the concentrates, the subject matter of this suit had expired. Whereas paragraphs 5(d) of the written statement of defence said that the fact of expiry of the concentrates was discovered AFTER their delivery, DW2 Aga Sekalala testified on oath that the fact t expiry of the concentrates was discovered during the tests carried out at their laboratory BEFORE delivery. As the learned trial judge did not deal with this matter I felt free to accept the evidence of Aga Sekalala as the truth. Even if the pleadings were to be accepted as the truth, nothing much would be affected since they pleaded that the discovery of the fact of expiry of the concentrates did not influence their decision to offer shs. 5,200,000/=. That one had already been influenced by their prior knowledge even before laboratory tests that the concentrates were about to expire.

Moreover, this inconsistency would not relieve the respondent of the burden of proof which lay on him throughout the trial to prove the terms of the sale agreement.
As a result, I would allow the appeal, set aside the judgment and decree of the lower court and condemn the respondent to pay costs of the appeal and in the court below.

Dated at Kampala this .27th...day of April 1998
Amos Twinomujuni
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APEAL OF UGANDA
HOLDEN AT KAMPALA
(CORAM: S. T. MANYINDO - DCJ, S. *C.* ENGWAU - JA, A. TWINOMUJUNI - .JA)
CIVIL APPEAL NO. 2 OF 1997
B E T WE E N

UGA CHICK POULTRY BREEDERS LTD: :::::: :::::: APPELLANT
VE R S US
TADJINKARA T/A S.T. ENTERPRISES LTD: :::::: RESPONDENT

(Appeal against the judgment and decree of the High Court (J. P. Berko - J)
delivered on the I4 April 1996, Civil Suit No. 924 of 1994)

JUDGMENT OF S. T. MANYINDO - DCJ
The facts of the case have been ably set out in the judgments of my lords just delivered. I need

not repeat them here. I agree with Engwau, JA, that this appeal must be dismissed. It is not disputed that the respondent supplied and the appellant received 104 tons of the concentrates. That was after the concentrates had been tested by the appellant's officials as well as the Department of Food and Science of Makerere University. For reasons not disclosed, the appellant chose not to put the results of the tests in evidence at the trial of the suit. It is also not disputed that if the concentrates' shell' life had not expired
then the price of Shs. 68 million would have been right.

Therefore, this case turns on the question whether the learned trial Judge was right, on the evidence, to hold that the vitamin components of the concentrates had not yet expired or were about to expire. The evidence clearly shows that before taking delivery of the goods the appellant subjected them to tests for their worthiness. In my view in absence concrete evidence that the tests showed that the goods' vitamin components had expired, the logical conclusion would be that the goods had been found to be in order.

The evidence of Mr. Jonis Vanhouldt (DW4), the Managing Director of the Belgian Company which manufactured the concentrates was to the effect that in stating his opinion in exh. D2. his letter to the appellants of 6-2-95. He had assumed that the concentrates had expired as their normal life expectancy of two years had lapsed. He saw no need to examine the concentrates to establish their condition. He put it thus:

"There was no need for research on the consignment. As a Nutritionist when you have animal feed that had stayed over two years, do not use it."

In the same letter, on which he relied very much in his testimony. DW4 stated among other things, that it is internationally assumed that prernixes in a hot climate are not to be used as a source of vitamins after 12 months of storage. It is remarkable that in his evidence he puts the expiry period at 2 years. DW4 was treated as an expert witness although his evidence showed only that he had studied Chemistry, Agriculture and Nutrition. Assuming that he was an expert in the field of animal feeds, the Court was not bound to accept his opinion if it found good reason

for not doing so, although to reject expert evidence without giving reasons might well be unjudicial. Here the learned trial Judge gave reasons for rejecting the opinion

.

DW4's opinion was based on a fax message sent to him in Belgium by the appellant in which it was apparently claimed that the concentrates had expired. Strangely, the fax massage was not put in evidence. Admittedly DW4 did not examine the concentrates when he came to Kampala to testify on behalf of the appellant. In fact his evidence was that he did not see the consignment. He was not even shown the tests that were made on the concentrates. He did not see the report of any such tests either.

In the circumstances I cannot see how it can be said that the evidence of DW4 proved that the concentrates had expired. The opinion was based not on tests but on assumption. Since the opinion was formed without sufficient grounds, it amounted to conjecture in my view. Accordingly I see no merit in the first ground (that the learned trial Judge misdirected himself in holding that exh. D2 had no probative value and that it was mere conjecture) and ground 3 (that the learned trial Judge wrongly rejected DW4's evidence that the concentrates had expired).

The second ground of appeal, that the learned trial Judge was wrong to hold that the agreed contract price was Shs. 68 million instead of Shs. 5,2O0,000/ must also fail since it was conceded by the appellant's witnesses that Shs. 68 million would have been the market price of 104 tons of concentrates. I find ground 4 - that the learned trial Judge wrongly evaluated the evidence and so came to the wrong conclusion - superfluous as it is covered in grounds 1 and 3. In the result this appeal is dismissed.

There will be an order for costs in terms proposed by Engwau -

JA.

***DATED* at *KAMPALA this*: *27th- day of. April 1998*.**

S. T. MANYINDO

DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CIVIL APPEAL NO. 2 OF 1997

(CORAM: S.T. MANYINDO - D.C.J., S.G. ENGWAU,J.A. & A. TWINOMUJUNI,J.A.)

UGACHICK POULTRY BREEDERS LTD. : : : :: :: : :: ::::: : : ::::: ::APPELLANT

VERSUS

TADJIN KARA T/A S.T. ENTERPRISES LTD. ::: ::: :::: :: ::: : : :RESPONDENT

(Appeal against the judgment and decree of the High Court (J.P. Berko, J.) delivered on the 14th April, 1996, Civil Suit No. 924 of 1994).

JUDGMENT OF ENGWAU, J.A.

The respondent, trading under the name and style of S.T. Enterprises Ltd., successfully sued the appellant company for U.Shs. 68,000,000/= with costs of the suit arising from a contract of supply and sale of VDS protein concentrates to the latter.

Briefly, the facts of this case as they appear in the proceedings are as follows. In between June and July, 1994 both the appellant and respondent companies entered into an oral contract through their agents; Aga Sekalala - DW2 and Tadjin Kara - PW1 respectively, in which it was agreed that the respondent would sell 104 metric tons of VDS protein concentrates to the appellant. There were 3 types of those concentrates, namely: Layer premix, Broiler premix and chicks premix.

The parties also agreed that before the respondent company would supply the products, the appellant company was to be given some samples of each product for testing first. The test was based on rancidity, whether the goods had gone bad or rotten and whether vitamin proteins and minerals had their shelf life expired or was about to expire. In the first place, the respondent gave the appellant samples of each product but in small quantities. On the second occasion, and at the instance of the appellant, a bagful of each product was taken for testing. The appellant then sent the samples to their Technical manager and also to The Food and Science Department of Makerere University for testing.

About 3 days later, the Management of the appellant company invited Mr. Tadjin Kara for the respondent to a discussion at their place. It appears that the discussion centered on what should be the purchase price of the goods. A deal was struck between the parties resulting into the appellant transporting the goods and keeping them into their store, from the respondent’s go-down at the Railways Goods - Shed in Kampala.

Later in the course of that transaction, a disagreement arose between the parties relating to the following matters: Firstly, the appellant allegedly claimed that after the delivery of the goods, the shelf life of the concentrates had expired but the respondent disagreed. Nevertheless the appellant was still interested to buy the products but at a reduced price. Secondly, there was disagreement on what ought to be the purchase price of the goods already supplied. The appellant put the purchase price at shs. 50/= per kilo, totaling to shs. 5,200,000/ = and yet the respondent stated that he had agreed to reduce his cost price from shs. 950*1*= per kilo to shs. 650*1*= per kilo thereby bringing the total for 104 tons to shs. 68million.
The learned trial Judge found that at the time the goods were delivered, their shelf life had not expired or was about to expire. Consequently, the Judge for reasons stated in his judgment found that the parties had agreed on the purchase price of the goods at shs. 68 million and he allowed that claim with costs, hence this appeal.

The Memorandum of Appeal sets the grounds as hereunder: -

1. The learned trial Judge misdirected himself and erred in law in holding that Exhibit D2 had no probative value and that it was mere conjecture.

2. The learned trial judge misdirected himself in holding that the agreed contract price was shs. 68 million instead of shs. 5, 200,000/=.

3. The learned trial judge misdirected himself in finding that the vitamin component of the concentrates had not expired, despite the overwhelming evidence of DW4 the manufacturer of, and exporter of said concentrates to the Respondent.

4. The learned trial judge wrongly evaluated the evidence and thereby arrived at wrong conclusions which occasioned a miscarriage of justice.

At the hearing of this appeal, counsel for the appellant argued grounds 1 and 3 together. The

learned counsel contended that the trial Judge erred in law in holding that Exh. D2 (a letter written by DW4) had no probative value but was a mere conjecture. In that letter DW4 was explaining that the concentrates had expired and so were unfit for use and making animal Feeds, but still could be used as fertilizer. DW4 was the Manager of U.D.S. Company, Belgium who supplied the concentrates to the "Animal Feeds Products Company" in Uganda at the beginning of 1992. Learned Counsel contended that DW4, being the manufacturer and exporter of those concentrates, gave an expert opinion evidence on the matter, which should not have been taken lightly as a mere conjecture. Learned Counsel relied on the authority of:
Management Training & Advisory Appeal, Civil Appeal No. 6/85, [1986] H.C.B. 43 in which it was held that the difference between "a conjecture" and "an inference" is that the latter has legal value while the former does not. His opinion evidence in that regard was good except that the trial Judge put too much weight on the failure to call the evidence of those who tested the concentrates, counsel submitted. He further submitted that the evidence of DW4 was not challenged by any scientific evidence and that the vitamin component would normally last 12 months from the date of manufacture which was based on facts and not mere conjecture. Finally, counsel submitted that the evidence of DW2 showed that the vitamin component had already expired but the soya component was still good.

Like the trial Judge, I am satisfied that exh. D2 is of no probative value on the matter before court. It was written in February, 1995 and the content bears an expression of opinion of the probable condition of the concentrates but not what they were at the material time of sale. The appellants sent samples of the goods to their own Technical Manager and also to The Food and Science Department of Makerere University in July 1994 for testing before delivery of the goods. The contract price was negotiated before the appellant was supplied with the goods. Clearly the condition of the goods answered the description of the goods as merchantable and that was why the appellants took them.
I think, like the trial Judge that DW4 was devoid of the necessary knowledge about the condition of the concentrates at the time of sale. He did not look at the results of the test nor did he see the concentrates themselves before he gave evidence. I agree with the submission of the learned counsel for the respondent that the opinion of DW4 was not conclusive evidence as he did not establish that the goods had gone bad. That evidential burden had shifted to the appellant to

prove on the balance of probabilities that the concentrates had expired which burden they did not discharge. In my view, the trial Judge rightly held that the goods had not yet expired in the absence of evidence to that effect. Evidence of DW2 regarding the content of the concentrates was hearsay and therefore was inadmissible. DW2 did not produce the results of the test and yet he apparently had them. In the result grounds 1 and 3 fail.

Grounds 2 and 4 were also argued together. It is the contention of the learned counsel for appellant that the trial Judge misdirected himself in holding that the agreed purchase price was shs. 68 million instead of shs. 5, 200, 000/= and that the Judge wrongly evaluated the evidence on record and thereby arrived at wrong conclusions which occasioned a miscarriage of justice. Learned counsel conceded that the evidence of DW 1 and DW2 was to the effect that shs. 68 million would be good price if the goods had not expired. It was his submission that in the instant case the shelf life of the concentrates had expired before the sale and the delivery of the products. Nevertheless the appellant offered to buy them at shs. 9 million to avoid hazards of litigation.

In his view, the learned counsel submitted that the trial Judge should have appreciated the weight of evidence on record instead of blaming the appellant for failing to produce test results of the concentrates from their Technical Manager and also from The Food and Science Department of Makerere University before delivery of the goods. In that regard, the trial Judge did not base his judgment on the evidence before him but in anticipation on what should have been.

In conclusion, the learned counsel for the appellant prayed for the appeal to be allowed with costs here and in the court below. However, counsel for the respondent did not agree. He supported the decision and order of the learned trial Judge in respect of the purchase price. He however, conceded readily that he who alleges the purchase price of the concentrates is burdened to prove it on the balance of probabilities. I agree. Accordingly, it was his contention that the parties had agreed on the purchase price before delivery of the protein concentrates. The delivery was then made and accepted in accordance with the particulars of the products stated in the invoice Exh. P2 thereof totaling to a sum of shs. 68 million. The said invoice is dated *25/7/94.* It was invoice No. *25794.*

“QTY(KILOS)	DESCRIPTION	UNIT PRICE	TOTAL PRICE
21,600	Layers Premix 10/50	*6501*=	14,040,000/=
51,500	Broiler Premix 9/75	*6501*=	33,475,0001=
31,400	Chicks Premix 11/75	*6501*=	20,410,000/=
	Sub Total		67,925,000/ =
	Labour		75,000/ =
	Total Invoice Amount		68,000,000/=

TERMS OF PAYMENT:

Payment to be made within one week after pick-up”

It was further argued that evidence of DW 1 and DW2 is consistent with the purchase price agreed upon. Both witnesses testified that if the vitamin had not expired, 68 million shillings would have been a good price for the goods. So in Exh. P3 demand for payment was made by the respondent, failure of which legal action would follow. In reply, the appellants in Exh. P4, dated 23.8.94, stated inter alia that according to their test results, the proteins concentrates had expired. So this suit was accordingly instituted.

The trial judge in my view rightly shifted the burden of proof on the appellant. It was incumbent upon the appellant at that stage to prove on the balance of probabilities that the said protein vitamin of the concentrates ha expired before the sale agreement was entered into and also before the delivery of products. Thus the trial judge correctly invoked the provision of section 100 of the evidence act which reads:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the things which he asserts must prove those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden is on that person”

According to the evidence available on record, before the products were delivered, a meeting was held at the appellant’s factory. It was attended by both parties primarily to discuss the sale of the concentrates to be sold and had already carried out tests in 2laboratories .As dealers they

must have known the quality of what they were going to buy before the purchase price was agreed upon.

The question is what was the price agreed upon, was it shs 5,200,000/= or shs.68million? The respondent, PW1, put the purchase price at shs. 68million.He justified his claim by the details he had stated in the invoice Exh.P2 dated 25.7.94 a few days after the meeting .This was after the appellant had accepted and taken delivery of the goods. After delivery the respondent contacted the financial controller of the appellant company, DW1, for payment of the shs 68million. Apparently she proposed the payment in five instaments.The document on which DW1 wrote the proposals was disallowed in evidence on the ground that it was not addressed to anybody or duly signed by the author.

Be that as it may, DW1 and DW2 testified in support of respondent that if the vitamin part of the concentrates had not expired, shs.68 million would be a good price. Clearly the evidence of DW1 and DW2 relating to the expiry of those concentrates is hearsay and inadmissible. The appellant company had by then tested the rancidity of the concentrates in their own laboratory and also with the food and science department of Makerere university and they were already in possession of the results but for reasons best known to them they declined to give that piece of evidence during the trial. Failure by the appellant to justify their claim that the concentrates had expired, defied the provisions of section 100 of the evidence act.

Reliance was placed by the appellant on the evidence of DW4, the Managing Director of V.D.S. Belgium, a renowned company internationally, which specializes in the manufacture of premixes or concentrates for animal feeds. He testified that his company specializes in the manufacture of animal feeds. He studied Chemistry, Agriculture and Nutrition. At the beginning of 1992 they supplied the concentrates, now the subject matter in dispute in this case, to Animal Feeds Product Company in Uganda, a sister company of the respondent. In 1993 DW4 came to Uganda to give Animal Feeds Product Company a formula of how to use the concentrates but found their factory still not working. So he advised them to sell the goods to Mr. Blasberg of the appellant company or else they would expire. On 27.1.95 the appellant managing director Mr. Blasberg sent a fax message to DW4

The trial court was not availed the content of that fax message. However, in reply thereto, DW4 on *6.2.95* stated in part thereof:

"In regard to your question concerning the current value or availability of the vitamin in these premixes, we have to point out that the labels mention as date of fabrication: August 1972. Although we add extra-oxydants to the premixes for hot climate countries, we would recommend not to use any products older than one year, for your industrial farms. It is internationally assumed that premixes in hot climate are not to be used as a source of vitamins after twelve months of storage'.DW4 arrived in Uganda on 22.2.96 and testified as a witness in this case the following day 23.2.92. He said that on 6.2.95 when he wrote Exh. D2 the concentrates had expired. His opinion on the concentrates was based upon the date they were exported to Uganda. He did not see or check on the condition of the consignment by the time he wrote exh.D2 and when he adduced evidence in court. However, the appellant and the respondent entered into the sale agreement after the products had already been tested and before delivery of the same sometime in July, 1994. Reliance on his expert opinion evidence though not challenged at the trail, was rejected by the trial judge, rightly in my view, because his opinion evidence at the material time he wrote exh.D2 was not based upon the condition of the concentrates at the time the sale agreement was made or at the time those goods were accepted and delivered to the appellant. It was his opinion on what the products would have been but not exactly what they were at the material time. Therefore, DW4'S expert opinion evidence on the matter was not conclusive. It has no probative value and it would be an afterthought for the appellant to cover apparently the adverse results in their possession after tests were made on the concentrates on their request and instance. Grounds 2 and 4 also fail.

In this result, this appeal is devoid of any merit and I would dismiss it with costs here and in the court below to the respondent.

Dated at Kampala this 27th day of April, 1998

S.G.ENGWAU

JUSTICE OF APPEAL