THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.207 OF 1993

NANGUNGA LIVESTOCK CO-OPERATIVE SOCIETY LTD::::::::PLAINTIFF

VERSUS

M/S ENERGO PROJECT CORPORATION::::::::::::::::::::::::::;::::DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA.

RULING

In this case the plaintiff which is cooperative society incorporated under the co-operative Act 1963 filed this action against the defendant a Yugoslav construction company carrying on business in Uganda with its principal place of business and head office in Bugolobi. The plaintiff was suing the defendant for payment of 7,000,000/= being the value of goods supplied to the defendant at the instance of the latter. The plaintiff sued for damages for breach of contract.

During the trial PW1 William Kigozi testified that he was the treasurer of the plaintiff society and that the society used to buy beans, maize and soya beans. The plaintiff had a license for that which they got from the Ministry of marketing. They were selling crops to the companies and during the course of their duties they used to deal with the defendant. They supplied the latter bean worth 30 tones and they were selling shillings 150 per kilogram. The defendant was also supplied maize worth 20tonnes costing shillings 125 per ki1ogram. The deliveries were made at the camp at Kiganda Mityana Before they supplied goods to the defendant the former secretary and chairman of the plaintiff's society wrote to the defendant and applied for tender. At that juncture PW1 tendered in evidence a reply (a letter) from the defendant permitting the plaintiff a tender to supply 30 tones of beans and 20 tones of maize. First the plaintiff attempted to tender in evidence a photostat copy of the letter that was resisted by the learned counsel appearing for the defendant and rightly too since it was not the best evidence primary evidence. That was conceded to by Mr. Lutakome. The latter then attempted to produce in evidence the original copy

of the said tender to supply the commodities as explained above. This too was objected to by Mr. Nshimye and hence this ruling to decide about the admissibility or non admissibility of the said letter/document.

Mr. Nshimye submitted that he objected to the production of the letter in question. He opposed that under order 7 rule 18 (1) of the Civil Procedure Rules which provides:-

"A document which ought to be produced in court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint and which is not produced or entered accordingly shall not without the leave of the court be received in evidence on his behalf at the hearing of the suit."

That being a letter that accepted the contract it was the document that the plaintiff has been relying on and which ought to have been produced as an annexture to the plaint in accordance with order 7 rule 18 of the Civil Procedure Rules. If it was not in their possession it could have been put on a list of document in their possession so that the defendant was not taken by surprise. This order guarded against manufacture of evidence at a latter stage after filing the suit. When he compared the copies of the said, document earlier supplied to him by his learned friend and the copy made out of the document he was attempting to tender that morning, he found some obvious technical discrepancies that even a lay person could see outright which makes the latter a suspect. That if one looked at the gap between "Yours faithful Energo project extra and Mr. Dragon" where the latter is supposed to have signed and the second is supposed to have signed and the second copy. The two copies do not come from the same document. Secondly it was obvious from the body of the first copy that it was produced with use of two typewriters. There were two different characters of two typewriters used to produce the first copy. Consequently the second copy was cleared from one single copy typewriter. He concluded that somebody had been fidgeting with that letter and it did not exist at the time the suit was filed.

On the other hand Mr. Lutakome learned Counsel appearing for the plaintiff submitted that there was no legal obligation at the date of filing the suit to file that letter which was written by the defendant themselves. The law on which his learned friend s relying says where a suit is based upon a document. He was not relying on a particular document. The suit was only stating that there was a contract to supply produce and that produce was supplied to the defendant and the delivery note was issued and was annexed. It would have been a legal defect if they stated in the

plaint that goods were supplied to the defendant without producing that particular document. In that case they would have been caught by order 7 rule 14 of the Civil Procedure Rules which provides:-

"Rule 14(1) where a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented, and shall at the same time deliver the document or copy there of to be filed with the plaint

4(2) where he relies on any other documents as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint."

The learned counsel continued that was not the case in the instant case they were producing the letter on which the defendant had ordered the goods. There is no law which prevents a party to a suit to produce documentary evidence at the time of hearing he suit. They had produced he original letter the primary evidence regarding his colleagues earlier denial that he gave a photostat copy. That was the earlier copy he gave him which tallied with the original copy in his possession. He gave him the original copy that morning and photocopied the same in the library and they were similar. The other two copies the spacing is different and he one in his possession did not indicate he stamp. He was aware of the other Copy but was aware of the one which came from the file. They were in possession of the original document and it was available. There was no reason why the court could not accept he original document of ordering the goods.

Finally he submitted that they (the learned counsels) were riot experts. It was wrong for his learned friend to come and argue on a technical matter when he is not an expert. He is incompetent. That letter could have been manufactured on a different machine. He prayed that the preliminary objection be overruled.

In reply Mr. Nshimya submitted that his learned friend was stating that in the plaint it is alleged there was a contract to produce. It was fundamental to produce the contract at the time of the filling of the suit. The contract is contemplated in the letter he is producing to prove. He did not agree with his learned friend that there was no gal requirement to produce the same at the time of filing the suit. He was disappointed that his learned friend was denying that he did not give him the letter before they entered the chambers. It is not true that the copy that was supplied to him last time was not a copy of a similar nature. He had a copy he had Photostatted in the library that

morning. When he was shown he original copy outside he detected that very serious discrepancy and though not an expert on handwriting and therefore not competent to argue the matter but his learned friend observed at the gap in the spacing of the letter was not the same. And as to whether two different type writers were used he argued that even there the judge could refuse the opinion of an exparte. He repeated his earlier prayer that the document be rejected.

I was opportuned to peruse the pleadings in this case. The decision being sought from me is a simple one and that is whether the letter by the defendant to the plaintiff accepting the supply of the produce was admissible in evidence.

Lets look at the pleadings. According to para.4 of the plaint it was alleged by the plaintiff that on 15th November 1991 they delivered tones of maize and bean to the defendant and relevant copy of the delivery notes were attached and marked as annexture A. Also it was further alleged by the plaintiff in para.5 that on 22nd November 1991 they made further deliveries of maize and delivery note was issued to that effect and marked as annexture "B",

In their written statement of defence the defendant averred that the defendant had no knowledge of the plaintiff's claim and that the same would be put to strict proof there of and the defendant will seek for further and better particulars as order for the supply of the said beans.

From what has transpired above it is my firm view that the plaintiff is relying on the delivery notes Annexture A and B on which he is alleged to have supplied beans to the defendant, the notes give details of the commodities supplied.

The defendant had intimated in his written statement of defence that he would seek an order for further and better particulars an idea which he abandoned after being satisfied with state of the pleadings. Had he to have lodged the application he would have saved his and the courts time in entertaining the instant preliminary objection.

However it cannot be said that the plaintiff was suing upon that letter (document). There was also no requirement to deliver the letter or copy there of filed with the court. There was in fact nothing in the pleading to show that the plaintiff was actually relying on the disputed letter. It is not therefore erroneous on the part of the learned counsel appearing for the defendant that his client will be taken by surprise when the said document/letter is tendered/produced in evidence. I say so because of the following reasons. All along Nshimye was aware that such a letter existed

addressing me from the bar the learned counsel submitted that when he compared the copies of the said document earlier supplied to him by his learned friend and the copy made out of the document Mr. Lutakome wanted to tender in evidence that morning he found some technical discrepancies in the documents that even a lay person could outright find the said letter suspect. I am of the view that Mr Nshimye objection to the letter in question was because the document the photostat copies and The letter itself seem not to come from the same source and two type writers were more likely to have been used in typing out the said letters and the photostat copies thereof. I am agreeable with the submissions of Mr. Lutakome that the question of which typewriter was used is typing the said letter whether it was one and the same typewriter through which the photostat copies were produced that was a matter for the opinion of witnesses with expert knowledge in that field which knowledge the learned counsels and this court lacked.

Moreover the referred to document is the original latter allegedly said to have been written by the defendant accepting the tender to be supplied with the said produce. Under section 61 and 62 of the Evidence Act Cap 43 Primary Evidence sometimes referred to as the best evidence is the document itself which has to be produced for inspection by the court as opposed to secondary evidence which would only be tendered in evidence after certain conditions had been satisfied See section 63 of the said Act Supra.

From what has been explained above the said document being the original letter written by the said defendant is admissible in evidence and consequently the preliminary objection by Mr. Nshimye is overruled with costs to the plaintiff.

So I order.

I. MUKANZA

JUGDE

23.8.1993.