

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT**

**KAMPALA**

**CIVIL SUIT NO. 132 Of 1991**

**BIRIMU**

**WILSON:.....:PLAINTIF**

**F**

**VERSUS**

**AKAMBA (U)**

**LTD:.....:DEFENDANT**

**BEFORE: THE HON. MR. JUSTICE G.M. OKELLO**

**JUDGMENT:**

**The Plaintiff brought this action against the defendant for damages for breach of contract on the ground that the defendant delivered the contract goods, very much outside the contract time.**

**Perhaps I should first point out, that at the hearing of this case, I had some trouble with John Matovu of Sebalu and Lule Advocates for the Plaintiff. This was a part heard case whose hearing had already over-delayed and counsel for the Plaintiff was responsible for most of the adjournments. When the hearing resumed on 28/10/93, the Plaintiff's case was closed and counsel for defendant called his sole witness after which he too closed the defendant's case. This was at about 10.50 a.m. I then adjourned the case to 3.00 p.m. to enable the counsel to organise themselves for submission. This was to give me time too to deal with other cases.**

**When the court resumed at 3:00 pm. for submission, counsel for the Plaintiff**

at once sought an adjournment which I declined. I ordered counsel for the defendant who had the right to begin to deliver his submission. He did. Then I called upon counsel for

For the plaintiff to reply to that submission, he declined saying he was not in a position to reply then. That he needed time. He was in effect insisting to get the adjournment which had been rejected.

I thought that was an unreasonable demand, I accordingly decline the demand and adjourned the case for Judgment.

The Plaintiff is a farmer who grows sugar cane from which he produces jaggery. In 1987 he obtained an Agricultural loan from UCB So buy agricultural implements.

He particularly wanted a tractor, plough and a Tiller. The defendant company are a local Agent of Messey Ferguson (U.P.) the manufacturer of Messey Ferguson Tractors and their other accessories. The Plaintiff/Approached the defendant with a view to immediately purchase these agricultural implements. But the defendant did not have these items in their stock at the time though they were expecting new consignment of them. However, the defendant advised the plaintiff on various models of Messey Ferguson Tractors with their price range.

They told the plaintiff from experience that a direct order of such items from the supplier would take three months to arrive in Kampala. The Plaintiff decided on model 365 of the

Messey Ferguson Tractor, a plough and a Tiller. The defendant assisted the Plaintiff to procure pro-forma invoices (Exh. PI) directly from the supplier for the items he wanted.

(1) Pro-forma invoice No. LU 4249 was for LC 55-2 tractor. (2) Pro-forma invoice No. LU 4250 was for Disc, plough and (3) Pro-forma invoice No. LU 4251 was for a Tiller. With these pro-forma invoices was sent a document containing detailed terms and conditions of the sale. All those documents were delivered to the Plaintiff.

On receipt of these pro-forma invoices, the Plaintiff instructed his Banker the UCB which opened irrevocable letters of credit (EXH D1.) in favour of M/S Messey Ferguson (U.K.). Four months after the Plaintiff 's Banker had opened

**the letter of credit in favour Messey Furguson (U.K.), the defendant received his expected consignment of Messey F u r g u r s o n T r a c t o r s and ploughs. Because of the good understanding that existed between the Plaintiff and the defendant company, the later delivered, to the Plaintiff a tractor and a plough from their rely arrived consignment on the tractor and plough ordered by the plaintiff would replace the ones taken from the defendant's consignment when they arrived. This was a reasonable arrangement. However the Tiller did not arrive until nine months. It was a considerable delay. The delay was blamed on the shipping Agents from whom the goods got lost at the port Mombasa.**

**The Plaintiff complained that the defendant as the local agent of Messey Furguson (U.K) undertook to supply to the plaintiff a Messey Furguson Tiller within three months as from 30/8/88. That the defendant had failed to honour his said undertaking and did not deliver the Tiller until after twelve months. The defendant denied that there was any such contract between the defendant and the Plaintiff. That the contract of sale was between Messey Furguson (U.K.) directly and the Plaintiff.**

**The first question framed at the beginning of the hearing for this court to answer was whether there was a contract between the Plaintiff and the defendant.**

**To decide whether or not there is a prima facie existence of a contract between two people, it is important to determine whether the three essential elements of a simple contract do exist. These are offer, acceptance and consideration.**

**In the present case, it is not in dispute that the pro-forma invoice (Exh. PI) was sent to the Plaintiff by Messey Furguson (U.K.) The pro-forma invoices spelt out the prices of the items wanted by the Plaintiff, mode of payment and the terms of delivery. This constituted an offer. This offer was accepted by the Plaintiff when his Banker opened irrevocable letter of credit in favour of Messey Furguson (U.K.) for the purchase of these machineries on these terms. The Plaintiff (IW1) himself testified, that payment for these machineries was made directly to Furguson (U.K.) by telex. The question of consideration moving from the Plaintiff to Messey Furguson (U.K.) and vice versa is**

obvious. The Plaintiff was parting with his money, the price of the items ordered while Messey Furguson (U.K.) was parting with the machinery. In my opinion, the contract was thus between the plaintiff and Messey Furguson (U.K.). There is no evidence to show that the defendant company as the local Agent of Messey Furguson (U.K.) contracted with the Plaintiff directly or even on behalf of his Agent or that they were in any way a party to the contract.

I find comfort in the above decision from a Kenyan case of **PARKARS MUSIC & SPORTS HOUSE vs. MOTOREK LTD. (1959)**

EA 534. The facts of this case are similar. The plaintiff in that case ordered goods from a Foreign Manufacturer, He gave the written order (indent) to the local Agent of the Foreign Manufacturer to transmit to the Principal. The local Agent duly transmitted the indent which the Principal accepted. When the goods were delivered, they did not conform to the sample.

The plaintiff promptly sued the local Agent for breach of contract. The Plaintiff contended that the contract was made between the plaintiff and the defendant company and or as agent of the foreign manufacturer. It was held that on the facts the contract was not made by the defendant company not even as Agent of the foreign manufacturer, I find this decision very persuasive.

In the instant case, the evidence on record also do not disclose the existence of any contract between the plaintiff and the defendant personally or as the Agent of Messey Furguson In this I fully agree with counsel for the defendant.

The second question was whether the defendant undertook to deliver the Tractor to the- Plaintiff within three months from the date of the agreement.

It was contended for the defendant that no such undertaking was made by the defendant. That the defendant only gave the plaintiff a mere guide from his experience the time an imported good, like that would take to arrive in this country for delivery. DW1 testified that "I explained to the plaintiff that his tractor might take between three to six months to arrive". I share the defendant's contention because as the defendant was not a party to the contract it was not possible for them to undertake to deliver to the plaintiff the tractor within three months. The possible time for delivery of the goods was contained in the pro-forma invoice (Exh Pi.) Perhaps as the plaintiff was anxious to take

**the delivery of these Agricultural implements, the defendant might have explained to him from their experience the time such a consignment would take to arrive in Kampala. From the evidence on record, such explanation cannot be taken to be an undertaking. There is no evidence to show that the defendant was a party to the contract. It is therefore my view that the defendant did not undertake to deliver to the Plaintiff the Tractor within three months from the date of the contract.**

**The next question is whether the plaintiff suffered any loss as a result of the delay. It is not disputed that the Tiller was delivered nine months late. Yet the plaintiff needed it for use on his farm. He must have suffered mental stress and financial loss for non-use of the Tiller as a Result of the delay.**

**It was pleaded in paragraph 8 of the Plaint that:-**

**".As a result of the said late delivery the plaintiff who is a farmer and procured the said Tiller from a Bank loan with Uganda Commercial Bank, incurred loss of income and had to pay unnecessary interest and charges as a result of non use of the said Tiller."**

**Particulars of Loss**

- (1) - Loss of Income of shs.18,000/=**  
**per day for twelve months - 6,48,000/=**
- (2) - Loss of interest -to the Bank**
- (3) - Bank Interest and charges -----“**

**The above is a special damage. Special damages as we know are required to be strictly proved. The Plaintiff in his evidence told court that because of the delay in the delivery of the Tiller, he was forced to spend 18,000/= per day for nine months on the hire**

**of a tiller from other farmers. It is not necessary to produce documentary evidence to prove special damages. Cogent oral evidence can do. However, the above evidence of PW1 is not enough. It is not cogent. He did not name the persons from whom he hired the Tiller**

**The failure to name the persons from whom he hired the Tiller cast doubt on the reliability and cogency of the evidence.**

**As to whether the defendant was liable for the delay in the delivery of the Tiller,**

**I agree with counsel for the defendant when he said that the defendant was not liable because he was not a party to the contract. There is no evidence on record to show that the defendant was a party to the contract. He merely assisted to connect the plaintiff with the supplier. This is not sufficient to make him liable under the contract to which he is otherwise a stranger.**

**The next question is whether the Plaintiff is entitled to the remedies he claimed. It is my view that he is not entitled to those remedies against the defendant because the latter was not a party to the contract. In the end, the suit must fail.**

**Dismissal of the suit notwithstanding, I am still under a duty to assess the damages awardable had the plaintiff succeeded in his action. In this regard, the first question to answer appears to be what would the plaintiff have gained if the defendant had performed his obligation under the contract?**

**The Plaintiff testified that he needed the Tiller to work on his sugar cane farm for the production of jaggery. The jaggery was for sale for profit. From this evidence, the plaintiff's interest in the machinery was its possession and use to improve the work on his sugar cane farm. His possession and use of the machinery are thus the means by which his financial profit might be secured. This is a rather too speculative expectation for evaluation.**

**However, the measure of loss would be the rate of hiring such machinery per day for the periods it would have been used if it had been timely delivered. No evidence was given of the rate of hire of a Tiller if available. Assuming the hire rate was 18,000/= per day as stated by the plaintiff, I would multiply that by three (3) months of 26 days each. This is the period when the Tiller would be most needed on the farm.  $18 \times 000 \times 78 = 1,404,000/=$  This would be the general damages awardable. But for the reasons I have given above, the suit must be dismissed with, cost to the defendant.**

**G.M. OKELLO  
JUDGE**

**5/11/93**

**5/11/93: Judgment delivered in the presence of Mr. Sekaboja holding brief for Matovu  
John for the plaintiff**

**Mr. Buwule for the Defendant**

**Mr. Komakech**

**G.M OKELLO**

**JUDGE**

**5/11/93**