

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.

JUDGMENT

The plaintiff which is cooperative society incorporated under the co-operative Act 1963 filed this action defendant Energo Construction Company incorporated and carrying on business in Uganda claiming payment of shillings 7.000.000/= plus general damages for breach of contract plus interest and costs.

According to the plaint on 15th day of November 1991 the plaintiff delivered 30.767 tons of beans each one being at the cost of shillings 150.000/= to the defendant's site at Kiganda Mityana Mubende District. The total cost of the aforesaid 30.767 tons was shillings 4,500,000/=. The relevant photostat copy of the delivery note was attached and marked "A". The plaint further showed that on the 22nd day of November 1991 they delivered 20.559 tons of maize each one being at the cost of shillings 125.000/= to the defendant's site at Kiganda Mityana, Mubende District. The total cost of the aforesaid 20.559 tons was shillings 2,500,000/= and the relevant photocopy of the delivery note was annexed and marked "B".

The plaint further showed that despite numerous demands for payment the defendant had neglected and or refused to pay them and that the whole purchase price is still unpaid. The defendant's refusal to pay them constituted breach of contract as a result of which they had suffered great loss of business profit and financial embarrassment and business inconvenience.

In its written statement of defence the defendant pleaded that it has no knowledge of and does not admit the plaintiff's claim. It will be put to strict proof thereof. And the defendant would seek for further and better particulars of the claim such as order for the supply of the said beans and maize because the defendant company does not deal in the said produce and was not supplying its workers with the same.

At the commencement of the trial of this case the following issues were framed and agreed upon by parties namely:

- (1) Whether there was request for supply of goods mentioned in the plaint by the plaintiff or alternatively whether the plaintiff applied to the defendants to supply the goods.
- (2) Whether the said application to supply was accepted by the defendants.
- (3) Whether the goods were actually supplied and finally.
- (4) What remedies are available to the plaintiff?

On the side of the plaintiff two witnesses testified in support of the plaintiff's case George William Kigozi (PW1) was the treasurer of the plaintiff's society, while Mbabali Steven PW2 was a former employee of the defendant company. He was a mechanic.

On the part of the defence also two witnesses were called in support of the defence version. Bradislav Govannovic DW1 was the project manager of the defendant company whereas Charles Olulu DW2 was an investigation officer from the Immigration Department Headquarters Kampa1a

PW1 testified that the society used to buy maize and beans and sometime they used to buy soya beans. They used to sell crops to companies. In the course of their duties they used to deal with the defendants. He was working in conjunction with the chairman of the society who passed away in 1992. There was a tender for the supply of the produce as per exhibit P1. They supplied 30 tons of maize. They supplied on 22nd November 1991. The deliveries were made at the defendant's site at Kiganda and according to PW1 two trips were made. They were selling maize at 150 shillings per kilogram and that would realise about 4.5 million shillings. Beans cost Shs.

125/= per kilogram and this culminated into the figure of shillings 2.5 million and thus bringing the total cost to Shs. 7 million. They issued delivery notes acknowledging receipts of the said commodities. The delivery note was tendered in Evidence and marked as exhibit P.2. The defendant was supposed to pay for the produce within 14 days but they failed and or neglected to pay them. They told them to hang on because they had some financial constraints. Despite repeated demands for payment the defendant did not respond and they decided to institute an action against the defendants and that the money they used in purchasing that produce delivered to the defendant was a loan from the bank and the bankers were on their necks.

The evidence of PW2 was simply that he was employed by the defendant company as a mechanic at Kiganda site. He joined the company on 2nd February 1990. He used to service motor vehicles and tractors. He left the company on 15th October 1992. He left the company when it stopped operating. He left honorably as shown in exhibit P3. He knew the names of some officers of the company. Among them he knew a personnel manager called George and there was another one called Dragon. The latter was an employee of the company. He was in the company in 1991 and left the company in the year 1992. His immediate boss was called Datishi and by the time he left the personnel manager was stable and that was the very officer who signed exhibit P3. At Kiganda they (the workers) used to get amenities like clothes, shoes and food. Money for food, clothes and shoes used to be deducted from their salaries. They used to get food like maize flour beans and maize uncrushed. They used to get food from the at.ces in Kiganda and that was a company stores. During his stay there used to see Lorries deliver food to the company. He used to see PW1 and Senyonga in 1991. They used to sell maize and beans to the company. They did that by motor vehicles. He saw 5 vehicles which used to deliver maize and beans. Two Lorries brought in maize and the rest were for beans. The store food was manned by two men, a European called Nicholas and an African by the name Kasule. The latter used to sign for commodities and by the time he left Nicholas was still there.

For the defence DWI testified that he was the project manager and by his duties he was overall in charge of administration financial, technical and general welfare. All those departments would report to him. His company was involved in road construction from Mityana to Mubende. In 1991 he employed local labour force of 200 people and about 30 Yugoslav experts. The Yugoslavs had a restaurant and for the Ugandan, they were provided with allowance to purchase

their food. There was no time when his company bought maize and beans and supplied them to the workers. At his place there was no place where he used to keep maize and beans. He continued to work as project manager up to the end of 1992 after which he came to Kampala but still remained as the project manager.

When in Kiganda there was a man called Dragon Minjlovic. He came in January 1992. He was employed by the company. He came direct from Belgrads. He had never been in Uganda before actually not during his time. He was a personnel manager and as such he could not take decisions without his Knowledge. The former personnel manager came to Uganda in 1991 and was a lady called MIRJANA JOUVANOVIC. The headed paper (Exp 1) looks like from his company. In November 1991 Dragon was not in Uganda. The letter dated 5th November 1991 talks about food supply. He was the project manager and never ordered for such beans and maize. Dragon could have signed that letter because he was in Uganda by then. He was familiar with Dragons signature. The letter bears their stamp. He is of the view that somebody from their office misused there stamp and the head paper but was certain that was not Dragon's signature.

He had never seen PWI before and the latter had never supplied him with beans and maize. And that when a man works in the basement the mechanical shop he could not see what takes place in the office. The workshop was ten metres below the ground level. And the workshop was not open there were buildings surrounding it. They never received commodities shown in the delivery notes exhibit P2. The company does not owe the plaintiff anything.

On the other hand the evidence of DW2 showed that he had been in the Department for 2 years. The Immigration Department deals with monitoring and controlling aliens in the country. It also issues work permit to anybody who is an alien. They maintain individual files for every applicant. That when one seeks work permit the following documents may be required.

- (a) The formal written application by the firm one intends to work in established in the country.
- (b) They require registration of such firms in the country already registered here.
- (c) They also require photostat copies of' ones passport the particular pages of the passport which contain personnel detail and the arrival visa where one arrived in the country. He came

with file No. IM 129/92 exhibit D1 which contains an application for work permit in the name of Dragon Mihaljovic.

The application was made by the Ministry of Works Transport and Communication on behalf of Energo project. The date of the application is 28th January 1992. The application for work permit was granted on 30th April 1992. It was for 2 years. He arrived on 15.1.1992 through Entebbe International Airport. DW1 continued that from the pages they have, they do not have any entry visas to Uganda. If he had worked here before he could not have had one file. They maintain one file at a time. The whole file was tendered in evidence as Exh.D1.

On issue No. 1. There is a letter from the defendant company dated 5th November 1991, addressed to chairman Nangunga Cooperative Society P.O.BOX 30754, Kampala allowing tender of the commodities.

“Dear Sir,

Re: Tender to supply 30 tons of beans and 20 tons of maize.

With reference to your application for supply of food stuffs, we are grateful to inform you that you are granted a tender to supply the following:-

(1) 30 tons of beans at shillings 150/= per kilogram.

(2) 20 tons of maize at shillings 125/= per kilogram.

If the prices as quoted above will match with your calculations, please start to supply with immediate effect.

The stuff must reach our stores not later than three months from the date of the tender

Yours faithfully,

Energo Project

Mityana

Fort Portal Road

Project

“Dragon Mihajlovic Manager”

PW1 was consistent that as a result of Exh.P1 they PW1 and the deceased chairman Ssenyonga proceeded and delivered the commodities on two occasions as shown in the delivery notes exhibit P2. PW2 who was employed by the defendant company at the time those commodities were supplied, he witnessed the deliveries.

DWI denied knowledge of the delivery of the said commodities. He averred that his company did not engage in such commodities. At the time the produce was delivered one Dragon was not in the country. He admitted however that the head notes of Exhibit P1 was from the defendant company and the stamp there on also was from the company but was of the view that some one might have misused the same. Equally DW2 who produced EXH.DI was consistent that Dragon came to Uganda on 15.1.1992 and that he had never been in this country before and that he was issued with a work permit but never collected the same. As could be deduced from the evidence on record Dragon was a central figure in this dispute more so as far as the defence was concerned. The defence chose not to summon him as their witness pleading that it would cost millions of shillings by way of transport to bring him to Uganda. Since they were affirming the fact that Dragon was not in Uganda in November 1991 and that he never signed exhibit P1 the burden shifted on them to prove what they were affirming. See Evidence by Rupert cross DCL, 2nd Ed. London Butterworth page 72 (B). “The shifting of the Burden.” In fact professor Nokces when dealing with the shifting of burden of proof in an introduction to Evidence 3rd Edition p. 472 had this to say.

“The prosecutor or plaintiff has one burden /obligation that is to prove one set of facts. While the accused or the defendant may have another burden. This is an obligation to adduce evidence of different facts, such as payment of debt or other matter in disproof of the opposing evidence. The shifting of evidence means that “A” lays down his load and ‘B” picks another load. But “A” never tosses his load and B never tosses it back to A. What shifts is the obligation, but it is an obligation to prove different facts.”

In the instant case the plaintiff testified that they supplied commodities to the defendant and that one Dragopn signed Exhibit P1 and Exh.P2 showed that the commodities were received. The burden of proof shifted the defendant to affirm that Dragon was not in the country at the time. They would have done this by calling him as witness. Thy failed to do so thus failed to discharge the aforesaid burden of proof.

In fact in my humble opinion this was a contract for sale of goods whereby the plaintiff transferred or agreed to transfer the property in the goods to the defendant for money consideration. See Section 3 of the sale of goods Act Cap 79. If the defendant wrongly, neglects or refuses to pay for the goods in accordance with the terms of the contract as appears to be the case here the plaintiff may maintain an action against him for the price of the goods See Section 49 of the sale of Goods Act.

Infact of the two versions I would prefer the plaintiff's case to that of the defence. DW1 and DW2 did not impress me as truthful witnesses. DW1 tried as much as possible to exonerate the company from payment and DW2 seemed not to be well versed with the issuance of work permits, entry permits visas and extra. He was a mere investigating officer. And from all that has transpired above issue No.1 is in affirmative in that there was a request for the supply of goods by the defendant.

On Issue No. 2. There is evidence from PW1 to the effect that the defendant accepted the supply of the commodities. That was reflected in the delivery notes EXP P2 and EXP I the sender for supply. As stated earlier DW1 merely denied knowledge of the receipt of such commodities. He said their company had nothing to do with the receipt of beans and maize but I believed PW2 that he at least witnessed PW1 and Ssenyuga deliver beans and maize at the site at Kiganda. It was submitted on behalf of the defendant that the mechanical workshop being in the basement PW2 could not see when deliveries were made outside in the open. But there was evidence that being interested in the commodities PW2 together with other workers assisted in offloading the Lorries. Because of what I have stated above it may not be true that he never saw what went on outside. It is true the plaintiff did not call the drivers of the two Lorries UPF 816 and UPG 416 as shown in the delivery not EXP 2. I do not think that failure to do so was fatal to their case since I found that they delivered the commodities. There were some contradictions between the

testimonies of PW1 and PW2 as to the number of Lorries involved in the deliveries of the said commodities. There were also some contradictions and inconsistency in the number of trips made.

It has been held that only grave inconsistencies if not explained satisfactorily will usually result in the evidence of a witness being rejected, minor inconsistency will not usually have that effect unless they point to deliberate untruthfulness, See **Leonard Anisath V r 1963 EA 206, Tajar's case EACA Cr. Application No. 167/1969 unreported.**

I am of the view that the contradictions and or inconsistency in the evidence as given by PW1 and PW2 were minor and did not amount to deliberate untruthfulness. Their testimonies should not be rejected. They appeared to be telling nothing but the truth I believed them.

Mr. Nshimye submitted that the plaintiff's company had collapsed and was bankrupt as of now and no bank could have advanced money to such society. That could possibly be correct but that would not exonerate the defendant company from paying for the commodities. The plaintiff company had not collapsed when it instituted the instant case. From what has been explained above issue No.2 is in the affirmative.

Issue No. 3 should also be in the affirmative in that the goods were actually supplied.

As regards Issue No. 4, the plaintiff had proved that the defendant had not paid for the price of goods supplied to them and according to paragraph 7 of the plaint there had bank loan and interest accumulated. Mr. Lutakome submitted that they be awarded 10 million shillings.

The position is that there was a breach of contract. It has been held that:-

“where two parties have made a contract which one of them had broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally in accordance to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the

breach of it See Hadley vs. Boxendade 1854 9 Exch 341 at P. 354 See also Law of contract sixth Edition Cheshire and fifoot p. 515.”

In the instant case at the time both parties entered into the contract of supplying the commodities they never thought that if there was a breach there would be payment of such colossal damages to the tune of 10 million shillings. The defendant did not at least have that in mind. The defendant did not know at the time that the plaintiff had got a loan from the bank with which he purchased the commodities he supplied to the defendant company. I am of the view that the damages ought to be received by the plaintiff in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally from the said transaction. Because of what has transpired above the interest of 40% claimed by the plaintiff on the decretal sum is rather on the wrong side of the coin.

The sum total of all this however is that the plaintiff has proved his case on a balance of probabilities. I therefore enter judgment in his favour as follows:

- (a) Payment for the price of commodities supplied to the defendant to the tune of Shs. 7million
- (b) General damages for breach of contract fixed at shillings 2 million. Interest on (a) and (b) supra, at court rates with effect from delivery of this judgment.
- (c) The plaintiff is awarded costs of this suit.

I. MUKANZA

JUDGE

16.8.1994.