THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.201 0F 1993

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

VERSUS

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

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING

The plaintiff in this case was suing the defendant for payment of 7,000,000/= shillings being the value of goods supplied to the defendant at the instance of the latter. The plaintiff also sued for breach of contract. The plaintiff called evidence and closed its case.

When DW2 a government analyst and expert working on the questioned documents attempted to tender in evidence a report he compiled on a document already tendered in court as Exp1 there was an objection raised by Mr. Lutakome counsel representing the plaintiff on the admissibility of the said report and hence this ruling to resolve than matter. Mr. Lutakome submitted that he objected to the type of evidence DW2 intended to give such evidence, it should have been pleaded in the written statement of defence then evidence would have been adduced to prove the same. The defendant had sufficient time to decide whether there was any fraud or not. The fact that the plaintiff pleaded that they supplied produce was proved by the delivery note Annexture A and B and demand latter annexture C.

About Exp.1 the defendant had plenty of time to decide whether they were defrauded or not. There is an objection about Exp.1. It was argued and it was admitted in court. It is no good going back to the matter which was already decided on by the court. So this witness should not be allowed to testify.

Mr. Nshimye on the other hand submitted that the objection of his learned friend was misconceived because if there is party that is guilty of taking the other by surprise it is the plaintiff. EXP.1 was never annexed to the plaint so as to give an indicator that it has never been forged. So there is no way they could plead that is was forged. The plaintiff took them by surprise by producing Exp.1 and another latter which was of his protracted objection at that time. His learned friend was then saying that he (Mr. Nshimye) was not a handwriting expert to question Exp.1 and replied that they were going to bring the handwriting expert and that was why he came to court. The court has to do justice to look at parties. There is no way it should uphold the suggestion by his learned friend that the document should be shut behind. The expert witness could otherwise be of assistance in the court to come to a just decision. He prayed that the objection be overruled so that the defence might be given an opportunity to be heard on the mysterious document.

Mr. Lutakome in reply submitted that his colleague had submitted that they argued about exhibit P1 concerning the handwriting expert when they argued about the admissibility of he exhibit in question. They did not go into the Intricacies of the law regarding fraud. At least we only argued whether it was in order to admit exhibit P1 as exhibit when not attached as annexture. It was ruled that he was in order at that time. His learned friend never raised the issue that the document was forged. If he had done so he would have attacked him on the allegation. Since that time when you allowed Exp.1 the pleadings were not amended. So it is irrelevant to consider the issue when it was not pleaded. It is not in order to produce evidence in an issue which was not raised.
I have carefully considered the submission of the learned counsels. In my ruling of 23rd August, 1993 I dealt at length with the question of admissibility of EXP.1 which was a letter written by the defendant permitting the plaintiff to supp]y the defendant company with commodities like beans, maize and etc at their camp at Kiganda on Mityana Road. There was strong objection raised by Mr. Nshimye to the admissibility of the said document and this court because of reasons it gave overruled the objection by Nshimye that the said letter formed part of the pleadings and the same was tendered in evidence as exhibit P1. There was then no allegation from the learned counsel that the document had been forged and even if he had raised such allegation which I find he did not I am of the view that at that stage Mr. Nshimye could have proceeded under order 16 rule 18 and have the pleadings amended. The court will of course

refuse leave to amend where the amendment substantially would change the character of the action into one of substantially a different character See **Releigh Vs. Gochan (1891) 28 Ch 73. 81** or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment by for instance depriving him of a defence of limitation accrued since the issue of the right **Weldon vs. Neal (1871) 9 QBD page 394.** The main principle is however that the amendment should be allowed where it causes injustices to others. See also **David Kedi vs. Attorney General (1991) HCB p. 110. Construction Engineers Builders Ltd vs. Attorney General (1991) HCB p.56 British India General Insurance Co. Ltd vs. G.M. Parmar and Co. [1966] EA p.122.**

In the instant case Mr. Nshimye never bothered to seek leave to amend his written statement of defence by including in the pleading that EXP.1 was a forgery. That amendment would not have changed the character of the action into one of substantially, a different character See **Raleigh vs. Gochan Supra**. Also the arrangement would not have prejudiced the right of the opposite party existing at the time when this case came up for further hearing. Mr. Nshimye could not therefore be heard to say that Exp.1 was a forgery.

In effect the pre1iminary objection by Mr. Nshimye offends against Order 6 Rule 6 of the Civil Procedure Rules in that it was a clear departure from the original proceedings. A party is bound by his pleadings **Hassan Wasswa and 9 others *vs.* Uganda Rayon Textiles (1982) HCB p.137.**

From what has transpired above the preliminary objection by Mr. Lutakome is upheld with costs.

I. MUKAZA
JUDGE
14.7.1994.