THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 97 OF 2009
Arising from High Court Civil Suit No. 633 of 2009

PHENNY MWESIGWA :: APPELLANT

VERSUS

PETRO UGANDA LIMITED :: RESPONDENT

(Appeal from the Judgment and Decree of the High Court (Commercial Division), dated 22nd January, 2009, in High Court Civil Suit No.97 of 2009, before Hon. Justice Geoffrey Kiryabwire).

BEFORE: HON. JUSTICE EGONDA NTENDE, JA
HON. JUSTICE ELIZABETH MUSOKE, JA
HON. JUSTICE HELLEN OBURA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

Introduction.

This is an appeal against the Judgment of the High Court (Geoffrey Kiryabwire J, as he then was), dated 22nd January, 2009, where the Court made an award against the appellant of UGX 536,000,139/= as special damages due and owing to the respondent, UGX 2,000,000/= as nominal damages, interest and costs of the suit, arising from breach of contract .

Background.

The facts as found and accepted by the trial Judge are as follows:

The respondent, a petroleum Company and the appellant a businessman had a business relationship involving the sale of petroleum products since 1999. The relationship was multifaceted in the sense that the respondent was a tenant at 12 fuel stations belonging to the appellant for which the respondent paid rent at an agreed sum per litre of fuel sold at the premises. On the other hand, the appellant became a petroleum dealer for the respondent. As a dealer, the appellant would receive the respondent's

products which were supplied at the invoiced price less the dealer's margin. The respondent also provided the appellant with its equipment for use at the said petrol stations. The respondent also under a separate arrangement supplied fuel to DFCU Bank, which was the appellant's client.

The respondent's case against the appellant in the lower court was for a total sum of UGX 2,400,464,123/= on account of sums due to the respondent for fuel supplied, rent outstanding and loss of profit arising from termination by the appellant of the business relationship in August 2003.

On his part, the appellant in his defence denied that he owed the respondent the claimed money. He contended that the parties had failed to agree on the dealer margin due to him and that some of the leases relied upon by the respondent were either expired or ineffective. It was also the appellant's case that the parties had negotiated a settlement regarding the outstanding amounts due to the respondent, which led to the release of a caveat on the appellant's property. He indicated that the release of the caveats signified that all pending claims had been satisfied.

The learned trial Judge made a finding that the respondent's evidence was more credible than the appellant's. He passed judgment in favour of the respondent.

The appellant, being dissatisfied with the decision of the trial Court appealed to this Court on the following ground:

1. The Learned trial Judge erred in law and fact when he found that the respondent applied the correct margin for the fuel.
2. The Learned trial Judge erred in law and fact when he admitted and relied upon inadmissible evidence.
3. The Learned trial Judge erred in law and fact when he found that the appellant owed the respondent unutilized rent paid in advance.

4. The Learned trial Judge erred in law and fact when he found that the respondent was not stopped from making the claim in view of a settlement that had been reached.
5. The Learned trial Judge erred in law and fact when he did not find that the withdrawal of all caveats and return of original titles formerly held as security to the appellant by the respondent did not constitute estoppels by record. `

Representation.

The appellant was represented by Mr. Cephas Birungi and Mr. Martin Mbanza Kalemera (Counsel for the appellant) and the respondent was represented by Mr. Edwin Karugire (Counsel for the respondent).

Counsel for appellant and counsel for the respondent filed written submissions in support of and in opposition of the appeal respectively. Counsel addressed grounds 4 and 5 of the appeal jointly, and grounds 1, 2 and 3 together. Ishall adopt the same order in addressing the grounds of the appeal.

Grounds 4 and 5

The Learned trial Judge erred in law and fact when he found that the respondent was not stopped from making the claim in view of a settlement that had been reached.

The Learned trial Judge erred in law and fact when he did not find that the withdrawal of all caveats and return of original titles formerly held as security to the appellant by the respondent did not constitute estoppels by record. `

Counsel for the appellant submitted that the respondent had released the caveats placed on the appellant's land titles as a form of security and returned the original tittles upon receipt of UGX 400,000,000/= , and was thus stopped from raising any further claims. Counsel then made reference to the finding of the trial Court that estoppel could not discharge a party by allowing him or her to pay a lesser amount for a higher debt. In

counsel's view, the above was an erroneous finding by the trial Court. He relied on **section 114 of the Evidence Act** and ***Erukana KuIVersus Vasrambai Damji Veder, Supreme Court Civil Appeal No. 2 of 2012***, for the submission that a person who makes a representation to another, with the intention that the latter should act on it to his detriment and he does so act on it, he is estopped from denying the content of his representation. Counsel argued that in the present case, a settlement had been reached between the parties, which created legal relations and was acted upon by the appellant with the full knowledge of the respondent.

Counsel further submitted that the respondent had no right to make any other claims after receipt of the said payment as a means of settlement and release of the caveats on the appellant's premises. Further, that the respondent's conduct of accepting the payment and releasing the appellant's tittles waived his right to any claims/damages that were likely to arise from the previous contractual relationship.

Counsel made reference to the finding of the trial Court that the payment of a lower amount could suffice for the extinction of a higher debt by a process known as 'accord and satisfaction', which had not been satisfied in the present case. He cited ***Black's Law Dictionary, 8th Edition***, and further submitted that the validity of accord and satisfaction was dependent upon the same principles of contract namely offer, acceptance and consideration. Counsel explained that in the present case, during negotiations between the parties, the appellant offered payment of UGX 400,000,000/= and the same was accepted by the respondent as payment in full and final settlement.

In counsel's view, the fact that there was an agreement between the parties to settle all outstanding claims was sufficient evidence that there was accord and satisfaction. He contended that the payment of a lesser sum discharged the larger sum that might have been owed.

In reply, counsel for the respondent submitted that the claim under the caveat was an interest in the land comprised in Plot 22 High Street & Plot 1 Bananuka Drive and Plot 45-49, Kabale Road (Mbarara/ Rwizi Fuel Station titles) and it did not secure interest in any other land or claims for unpaid fuel supplies. Counsel contended that the caveat withdrawal could only have released the 10 year sublease claim for Mbarara/ Rwizi Fuel Station titles but not fuel supplies, unpaid rent and unreturned equipment since those were not claims under the caveat. Further, that the only claim arising from the Mbarara/ Rwizi sub lease was for the loss of profits for the unexpired period, which was disallowed by the trial Court.

Counsel further submitted that the conduct of the respondent did not in any way create estoppel. He contended that the release of caveat by letter dated 4th December, 2003, was followed by a letter dated 15th December, 2003, requiring the return of the plant and equipment and payment of at least 50% of the amount due to the respondent. Counsel relied on ***Bank of Uganda Versus Fred William Masaba & 5 Ors (1999) KALR 310*** and submitted that for the doctrine of estoppels to operate, there must be a clear and unequivocal representation. He pointed out that what was unequivocal was the statement in the withdrawal of caveat which showed that the release was from claims made under the caveat.

Court's consideration.

As a first appellate Court, this Court is required, as one of its duties, to re-appraise the evidence that was adduced in the Court below and to draw inferences of fact there from. ***(See rule 30(1) of the Judicature (Court of Appeal rules) Directions SI 13-10, Pandya Versus R [1957] EA 570).***

From the evidence adduced by the appellant and the respondent, it can be deduced that from the business relationship between the parties, the appellant owed the respondent a certain amount of money from the rental payments and the fuel supplies made to the appellant.

According to the appellant's evidence, all the amounts owing to the respondent were satisfied by mutual agreement when it was agreed that the respondent releases the caveats on the appellant's land titles upon the appellant paying UGX 400,000,000/=in full and final settlement of the entire debt. However, the respondent's case through PW1 was that the respondent had only released the caveats upon the appellant promising to pay the amount owing after the release of the caveats and return of the land titles. The UGX 400,000,000/= was part payment of the amount owing.

In determining the contention above, the trial Judge stated as follows:

> *"The legal position as when the payment of a lower amount can suffice for the extinction of a high debt can only be achieved by a process known as "accord and satisfaction". Estoppel as an equitable remedy cannot discharge a party by allowing him or her to pay lesser amount for a higher debt. Under common Law a contract has to be discharged in the same way in which it was formed. As a result such a discharge must be made under seal or supported by fresh consideration. There must be a fresh agreement discharging the old agreement called "Accord" and the performance of that agreement through fresh consideration called "satisfaction". I am not satisfied that there is sufficient evidence before court of accord and satisfaction in this agreement that the payment of a lesser sum in this case will discharge the larger sum owed in the agreement."(sic).*

Section 114 of the Judicature Act makes provision for the principle of estoppel. It provides as follows:

> *"When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his nor her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of the thing".*

From my analysis of the evidence before the trial Court, there was no receipt or documentation to acknowledge the payment of the UGX 400,000,000/=. It would have been easier to discern from such acknowledgement or receipt whether the amount paid by the appellant was in full settlement of the amount owing as per the respondent's representation. The only documentation relied upon by appellant to prove the estoppel was the release of caveat by instrument No. 339045, for the Mbarara/ Rwizi Fuel Station.

First, I agree with counsel for the respondent that the caveat withdrawal could only have released the sublease claim for Mbarara/ Rwizi Fuel Station and it did not release any other land or claims for unpaid fuel supplies. There was nothing on record to show that it was the intention of the parties that the payment of UGX 400,000,000/= was in full settlement of the amount owing to the respondent for all the fuel supplies made or other claims unrelated to the above said sublease.

Further, there was nothing on record to show that the appellant and the respondent had reached an understanding that the payment of UGX 400,000,000/= would be in full settlement of the amount that was owing to the respondent. Therefore, as found by the trial Judge, 'accord and satisfaction' could not be applied in this case.

I am not satisfied that the appellant acted on the respondent's release of caveat to believe that all claims had been abandoned by the respondent.

I, therefore, disallow grounds 4 and 5 of the appeal.

Grounds 1, 2 and 3

The Learned trial Judge erred in law and fact when he found that the respondent applied the correct margin for the fuel.

The Learned trial Judge erred in law and fact when he admitted and relied upon inadmissible evidence.

The Learned trial Judge erred in law and fact when he found that the appellant owed the respondent unutilized rent paid in advance.

On grounds 1, 2 and 3 of the appeal, counsel for the appellant submitted that in awarding general damages, the trial Judge based his decision on two invoices (Exh P18 and P19) from Rwizi Service Station to determine that the fuel margin was UGX 45/= and not UGX 100/= for all Stations. Counsel made emphasis that the derivation of UGX 45/= per litre of fuel was based on only two transactions out of a period of 3 years. Further, that the determination of the margin for Rwizi being UGX 45/= should not have been used to determine the margin for other stations.

Counsel further submitted that the learned trial Judge determined that the margin for all stations was UGX 45/= regardless of the testimony of PW1 that the rates were verbally agreed on to be UGX 90/= for the first year, UGX 70/= for the second year and UGX 70/= for the third year. Counsel further submitted that the rates for Ishaka, Ishanyu, Kashenshero, Nyakabirizi, Rwizi, Nyakasharu and Rwizi/Mbarara were never agreed upon by the parties. In counsel's view, the trial Court erred in determining the margin rate using the two invoices (Exh P18 and P19) which were in contradiction with the evidence of PW1.

Counsel further submitted that the learned trial Judge was wrong in finding that no Station had a margin above UGX 45/=, yet PW1 had confirmed that the Ishaka margin was UGX 100/=.

In counsel's view, bearing in mind the contradictions in figures in PW1's evidence, the decision of the learned trial Judge on the balance outstanding and owing to the respondent was erroneous.

Counsel further submitted that in error, having found that the Agreements relating to dealership were not properly executed and thus unenforceable, the trial Court went ahead to rely on the same documents as constituting quasi agreements.

Regarding the UGX 10,055,768/= awarded to the respondent in respect of unpaid fuel on the DFCU account, counsel submitted that this account was separate from the general dealership transaction. Even when the contract expired in August, 2003, the account was carried on with the last entry on 9th December, 2003. It was counsel's submission that while the trial Court made a finding that the appellant did not testify against the figure or call additional witnesses, the burden of proof was on the appellant to prove that a relationship existed between the appellant, the respondent and DFCU Bank. In that regard, that the learned trial Judge erred in shifting the burden of proof to the respondent.

Counsel prayed that the appeal be allowed and that the orders of the trial Court be set aside.

In reply, counsel for the respondent submitted that the appellant in his submissions misunderstood/misrepresented the claim for unpaid fuel and the claim for rental paid in advance which was unutilized.

Counsel submitted that the quantity of fuel supplied was an agreed fact and the only issue was to establish what the correct margin should have been in determining the amount due to the respondent. Counsel pointed out that while the appellant argued that he was entitled to a margin of UGX 100/= per litre of fuel sold at all stations, the respondent's case was that the margin varied from station to station.

Regarding the Rwizi/Mbarara Fuel Station, counsel pointed out that the learned trial Judge relied on EXH P10, which clearly stated that the margin for the said Station was UGX 45/=. Further, that the learned trial Judge also relied on other documents issued during the relationship.

Regarding the rental margin, counsel pointed out that as per Exh P10, the rates were UGX 25/= for the 1st year, UGX 35/= for the 2nd and 3rd years, UGX 40/= for the 4th and 5th years and UGX 45/= for the 6th to 10th year.

Counsel further submitted that the agreements on margin and rental for the Busega, New Kyengera and Ntungamo Stations were oral. Further, that it was not in contention that during the period when the contract was running, the margin applied for Busega and New Kyengera Stations was UGX 45/=, and UGX 500,000/= per month for the Ntungamo Station. However, that the respondent contended that the parties had orally agreed to a rate of UGX 100/=. In counsel's view, the respondent's account was more believable because: the appellant testified that he reconciled his accounts every month and it was unbelievable that a wrong rate was applied over a period of three years; the appellant was the sole witness of his case and he was found to be untruthful.

Counsel further submitted that while the trial Judge made a finding that the Mbarara/Rwizi Lease was defectively executed for failure to apply a company seal, he made a finding that a quasi contract existed between the parties. Counsel relied on ***Souza Figueiredo Versus Moorings Hotel Company Ltd (1960) EA 926*** and submitted that a defectively executed lease still operates as a contract inter parties. Further, that in any event, the said Lease document was only used to prove the claim for loss of profit, which claim was disallowed by the trial Court. In that regard, that the document could not affect the claim for unpaid fuel supplies which was proved and allowed by Court.

Counsel prayed that the findings of the trial Court be upheld and that the appeal be dismissed with costs to the respondent.

Court's consideration.

The major point of contention on these grounds of appeal was with regard to the dealer margin and the rental margin due to the appellant from the fuel supplies made to him by the respondent.

It is not in contention that the business relationship between the appellant and the respondent was majorly based on oral agreements. Apart from the Mbarara/Rwizi Station, there were no written agreements or documents between the parties regarding their business relationship.

It was the appellant's evidence that the fuel and rental margin for all stations was UGX 100/=. According to the respondent's evidence, the rental and dealership margin varied from station to station. For the Rwizi/Mbarara Fuel Station, the respondent's evidence was that the dealership margin was UGX 45/= per litre of fuel and the rental margin was UGX 25/= for the 1st year, UGX 35/= for the 2nd and 3rd years, UGX 40/= for the 4th and 5th years and UGX 45/= for the 6th to 10th year. The above was as per handwritten document (EXH P10). The appellant first testified that the signature appearing on the said document did not belong to him. He later accepted the signature as being his, but testified that the above document was a mere presentation of a discussion he had with the respondent's Managing Director which did not create the working relationship between the parties. I am convinced by the evidence of the respondent regarding EXH P10. I find that by the appellant and the respondent appending their signatures on the said document, it was the intention of the parties that its contents would be of effect in their relationship.

The respondent also relied on tax invoices for supply of fuel to the appellant (EXH P18 and EXH P19) in determining that the fuel margin for Mbarara/Rwizi was UGX 45/=. On his part, the appellant was of the view that the Court could not rely on these two invoices to determine the fuel margin for a period of three (3) years. However, the appellant did not produce any proof to dispute the above invoices. I find that they could be of importance in guiding Court as to the margin given to the appellant during the business relationship. From EXH P18 and P19, I find that the respondent was paid a margin of UGX 45/= per litre of fuel.

The appellant argued that the agreed rate was UGX 100/= although the respondent applied a fuel rate of UGX 45/=. From the evidence of the appellant, every month he would go to the respondent's place of business to make reconciliations of accounts. It is therefore unbelievable that the appellant could carry on business for a period of three years without enforcing the agreed upon rate or even raising any complaint that a wrong

rate was being applied by the respondent. This applies to the Stations of Busega, New Kyengera and Ntungamo Service Stations as well.

I accept the finding of the trial Court that the respondent's evidence was more credible as compared to the appellant's evidence on the issue of dealership/rental margins applied.

Regarding the DFCU fuel account, the appellant argued that the learned trial Judge erred in shifting the burden of proof from the respondent to the appellant.

As pointed out by the learned trial Judge, it was not in dispute that the respondent supplied fuel to DFCU Bank, which was the appellant's customer. According to the evidence on record, the respondent would supply fuel to DFCU Bank from time to time and then invoice the appellant for payment.

The respondent's case at trial was for UGX 10,055,765/= which was the closing balance on a Ledger (EXH P7) for DFCU Bank as at 19th December, 2003. The learned trial Judge awarded the stated amount, stating that the respondent had not testified against the said figure or called additional witnesses to refute it. It is on this basis that the appellant raises the contention that the learned trial Judge shifted the burden of proof.

I accept the submission by counsel for the appellant that the burden of proof was upon the respondent to prove the allegations at trial. However, once the respondent put across his evidence to prove the allegations, the appellant ought to have explained his side of the story. The evidential burden shifted to the appellant to show that whatever allegation was leveled was baseless or unfounded. The appellant in the present case did not produce any evidence to counter the evidence contained in the Ledger.

I hold the same view as the learned trial Judge that as per the evidence on record, UGX 10,055,765/= was owing to the appellant as per the Ledger (EXH P7) for DFCU Bank fuel account.

Therefore, grounds 1, 2 and 3 of the appeal also fail.

Conclusion

Consequently, for reasons set out in this judgment, I would dismiss this appeal with costs here and below.

Dated at Kampala this 4th day of April 2019

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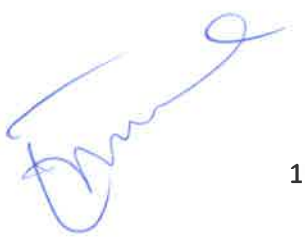
Elizabeth Musoke,
Justice of Appeal



THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL N0. 97 OF 2009

(Appeal from the judgment and decree of the High Court of Uganda (Commercial Division), dated 22nd January 2009 in HCCS No. 633 of 2009, before Hon. Justice Geoffrey Kiryabwire)

PHENNY MWESIGWA::APPELLANT

AND

PETRO UGANDA LIMITED:::RESPONDENT

JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment prepared by my sister, Elizabeth Musoke, JA and I concur with her findings and conclusion with nothing useful to add.

Dated at Kampala this......4th.....day of.........April..........2019.

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Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL NO. 97 OF 2009

(Arising from High Court Civil Suit No. 633 of 2009)

BETWEEN

Phenny Mwesigwa==========Appellant

AND

Petro Uganda Ltd==========Respondent

Judgment of Fredrick Egonda-Ntende, JA

1. I have had the benefit of reading in draft the judgment of my sister, Elizabeth Musoke, JA., with which I agree. I have nothing useful to add.

2. As Obura, JA., agrees this appeal is dismissed with costs here and below.

Dated, signed, and delivered this 4th day of April 2019

Fredrick Egonda-Ntende
Justice of Appeal