The Hon. Justice Tsekooko

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HC.C.S. no. 23/1992

SENABULYA FRANCIS :::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

NYANZA TEXTILES INDUSTRIES LTD ::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

The plaintiff in this suit is one Francis Senabulya trading as "Junior Traders" he filed this suit against the defendant for a sum of shs. 354,000/= and damages for breach of contract and inconveniences caused to him by that breach. The defendant Nyanza Textiles Industries also known as NYTIL denied the claim and made a counter-claim for a sum of shs. 5,414,940/= being an outstanding balance which the plaintiff Senabulya had not paid to the defendant for materials delivered to him on credit.

When the case came up for hearing 4 issues were framed as follows:-

1. whether or not there was any breach of contract and if there was any, who among the parties was in breach.
2. whether or not an amount of 24,693,000/= was paid by the plaintiff to the defendant.
3. whether or not the defendant is entitled to the counter-claim.
4. whether or not any of the parties is entitled to any damages, and if so, how much?

Before I proceed to deal with these issues there are 2 preliminary matters which I feel I should dispose off at once. The 1st matter is that of the contract which is the subject of this suit. According to paragraph 13 of the

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Agreement (Ex.P1) the parties agreed that if ever any disagreement arose between them in respect of that contract the matter would first be referred to a 3rd party for his opinion and if that 3rd party failed to resolve the dispute then it would be referred to an arbitrator, or to the courts of law. It would seem both sides, by their conduct, decided to ignore the existence of this provision of their agreement and they chose the alternative part of the agreement which stated that the matter would go to the courts of law. Since neither of the parties complained about this issue I take it that they decided to avoid going to the third party or the arbitrator and came directly to the court. I find no injustice has been caused to the parties by their choice of coming directly to the court.

The 2nd preliminary matter concerns the issue of procedure to be taken in dealing with the plaintiff's claim and then defendant's counter-claim. There is no fast and hard rule concerning this matter but the authorities seem to suggest that the proper procedure to be followed should be to deal with the original claim in the plaint and then the counter-claim separately. I will therefore follow the accepted procedure of dealing with the 2 claims separately: <u>Odgers' Principles of Pleading and Practice 21st Edition pages 198-199 and Halsbury's Laws of England 3rd edition volume 34 paragraph 750 page 421</u>.

I now turn to the real issues involved in this matter, starting with the 1st issue. It is the case for the plaintiff that the defendant is in breach of the agreement under which the defendant agreed to supply the plaintiff some Nytil materials on credit; because when the plaintiff placed his order for 10 bales of materials the defendant did not supply them. On the other hand it is the case for defence that it is the plaintiff who is in breach of the contract because he has been in arrears up to the tune of shs. 5,414,940/= being outstanding amount for the materials supplied to him on credit.

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To understand the whole matter one has to look at Ex.P1 which contains the terms upon which the parties proceeded to transact their business. Art. 3 of the agreement provides that the present plaintiff had to deposit a security of immoveable property with the defendant he also had to pay the necessary sales tax to the government before credit facilities could be extended to him. It is not in dispute that the plaintiff deposited his land title with the defendant as security thus complying with one of the requirements. According to Ex. P3 the plaintiff paid sales tax on 19-11-1991 hence fulfiling the second requirement. Art. 5 of the agreement in particular paragraph 1 provides that the plaintiff was to pay for the goods supplied to him within 30 days from the date of delivery of the goods by the defendant and Art. 6 provides that once the security has been deposited and sales tax has been paid the defendant would proceed to deliver goods. According to the evidence available the plaintiff complied with these 2 requirements i.e. depositing of land title and payment of sales tax. It was left to the defendant to carry out his part of the contract.

The reason given by the defendant as to why they did not supply the plaintiff with 10 bales of materials was that he was in arrears. He had not paid the balance of materials previously supplied to him; by provisions of Art. 9 of the agreement the contract was supposed to have been terminated the moment the purchaser(plaintiff) defaulted payment for goods delivered to him. But before he could be held as being in breach the defendant had to serve him with a written notice terminating the agreement. The evidence available does not indicate that this provision of the contract was complied with by the defendant. There is nothing on record showing that the plaintiff was ever served with a notice terminating the contract. The provisions of Art.9 paragraph 4 of the agreement therefore does not apply to the present case.

In my view it was the defendant who was in breach of the contract when he failed to deliver to the plaintiff 10 bales of materials, even if the plaintiff was in arrears to the tune of 5,414,940/= still his security of land title which was still in the hands of the defendant and whose value is believed to be over 20,000,000/= would have been enough security for the defendant providing the 10 bales of cloth. My answer to issue no. 1 is therefore that it was the defendant who was in breach of the contract by failing to deliver 10 bales of clothes on credit as agreed by the parties in the agreement.

I now move to issue no. 2 which is whether or not an amount of 24,693,000/= was paid by the plaintiff to the defendant. The case for the plaintiff has been that in November, 1991 he sold some cloth on behalf of the defendant as their agent worth 24,693,000/= and he paid that amount to the defendant. This payment was part of 24,807,940/= which was due to be paid and which left him with a balance of only 114,940/=. He produced receipts on which he allegedly paid the money. On the other hand the case for defence has been that that amount of money was never paid because the receipts produced by the plaintiff on which he purported to have paid the money were not company receipts as they did not bear the correct receipt number of the company. The receipts in question were 2, receipt no. 289 dated 19-11-1991 and receipt no. 205 dated 4-11-1991 (Ex.P2). According to the defence these receipts were nothing but forgeries because their own receipts bear both factory number and number of the printer. The 2 receipts in question were bearing only the printer's number not the factory number. The defence produced their own receipt books to compare with the receipts produced by the plaintiff (Ex. D3). I have looked at the receipts produced in court both by the defendant and the plaintiff, in particular I have examined the receipt books which were tendered by defence as Ex. D3. In these books no receipts were ever issued to the plaintiff on 19-11-1991 and 4-11-1991. I

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have also looked at the Ledger prepared by the defendant for the plaintiff Ex.D4 and Ex.D5 in both Leadgers there is no indication that the plaintiff ever made payment of money to the defendant on the 2 dates i.e. 4-11-1991 and 19-11-91 as indicated in his 2 receipts. His last payment was on 1-10-1991. It must however be stressed that the 2 receipts on which the plaintiff is said to have paid money to the defendant company bear company's stamps and they are headed like all the other receipts. These two receipts must have originated from the defendant company and it is most probable that they were issued to the plaintiff by an employee of the defendant after the plaintiff had paid 5,300,000/=. The plaintiff cannot be made to suffer for fraud committed by the defendant's employees.

What is clear however is that out of the total of 24,807,940/= for the goods delivered to him the plaintiff paid 24,693,000/= I believe his evidence when he says that he paid that amount. This is borne out in Ex. P1-P2 which are the receipts issued to the plaintiff. My answer in respect of this issue is that the plaintiff did in fact pay 24,693,000/= as evidenced by the receipts which he produced in court. It is my firm belief that the two receipts which defendant is disputing were issued by his employees in the course of their duty.

Since the 3rd issue is specifically dealing with the issue of counter-claim I feel I should pospone any discussion on it until I come to the point of dealing with the counterclaim.

I now proceed to the 4th and last issue which is whether or not the parties are entitled to any damages in this suit. The plaintiff is asking for general damages for breach of contract together with 354,000/= which he paid to the Revenue Authority. In his evidence the plaintiff did not specifically show how he incurred his expenses apart from saying that he had rented a house at the rate of 30,000/= per month for the purpose of carrying out his business and that he continued to pay that rent

even after the defendant had failed to provide him with materials for selling. I consider this to be an unfortunate claim because it is the law that special damages must not only be pleaded but they must be proved: Kampala City Council v. Nakaye (1972)EA 446 at page 449. I take house rent to be a special damage. In the present case there has not been any proof that the plaintiff was actually paying that much for rent and that he continued to pay it even after the defendant had refused to provide him with the materials for selling. e.g. the plaintiff should have produced some receipts issued to him by his landlord or should have called him as a witness to prove the fact of how much was being paid. Although it is common knowledge that the plaintiff must have been having a room from where he was selling these materials, the plaintiff's evidence is not enough to convince me that that room continued to be used by him after the defendant had failed to deliver the cloths to him and that he was paying so much for it. The plaintiff was at fault in failing to mitigate his losses by continuing to rent a house which he was not using. I feel on the issue of rent there has not been enough evidence to conclusively show that the plaintiff lost any money in form of rent after the defendant had failed to deliver to him 10 bales of cloth.

In his submission the learned counsel for the plaintiff Mr. Mutyabule prayed that the plaintiff be awarded a sum of 60,000,000/= for his losses. According to him the plaintiff was getting 1,800,000/= per month as profit for the 4 years he has not been in business he should have got 60,000,000/=. With due respect to the learned counsel, I find that his figure is not borne out by evidence or the pleadings and it is not clear as to how he came to these figures. The plaintiff in his evidence did not at any time tell the court what profit he was making per day or per month or that he was making any profit at all; profits cannot be imagined they must be

real as many businessmen do at times run their business at a loss. Even if there was any loss the plaintiff did nothing to mitigate his losses by taking some other alternative business not necessarily in textiles. That being the position I find that the claim of 60,000,000/= as damages cannot be sustained; it must however be pointed out that the plaintiff must have been inconcenienced by the defendant's failure to deliver to him the 10 bales in time; for that reason I will award him general damages of 1,000,000/= to compensate him (plaintiff) for the inconvenience he has suffered.

As regards to 354,000/= it is clear that this money was paid by the plaintiff pursuant to the provisions of Art. 2 paragraph 2 of the agreement. With due respect I do not agree with Mr. Tuyiringire the learned counsel for the defendant when he says that the money should be recovered from the Revenue Authority. This money was not paid as a matter of choice but the plaintiff had to pay it in order to comply with the terms of the contract between him and the defendant so it is the defendant to refund it.

I must end this matter by entering judgment in favour of the plaintiff for a sum of 1,354,000/=, (1,000,000/= being the damages for breach of contract as indicated above and 354,000/= being the money which the plaintiff paid to the Revenue Authority in accordance to the terms of the agreement). The plaintiff is to get costs for this claim with interest at the rate of 40%p.a from the date of filing of this suit until payment in full. In the alternative the defendant is to deliver to the plaintiff the 10 bales of cloth at the price which prevailed at the time the plaintiff placed his order, should the defendant take this alternative then he need not pay the 354,000/= or interest on that amount.

That leads me to the 3rd issue which is in respect of the counterclaim. The defendant is claiming a sum of 5,414,940/= in the counterclaim, being the balance of the price of the goods which he claims he delivered to the

plaintiff does not admit that he owes the defendant so much.

The case for the defendant has been that the defendant delivered to the plaintiff textiles worth 24,807,970/= out of which the plaintiff only paid 19,393,000/= thus leaving the balance of the above stated figure (5,414,940/=). In his evidence the plaintiff testified that he received textiles worth the amount stated by the defendant but out of that amount he paid a total sum of 24,693,000/= thus leaving him with a balance of 114,940/=. Looking at the evidence as produced by the defendant and the plaintiff there would have been no problem if the money which the plaintiff claims to have paid under the 2 receipts of 4-11-91 and 19-11-1991 was accepted by both parties as having been paid to the defendant by the plaintiff. Although that money 24,693,000/= is not reflected any where in the books of accounts kept by the defendant in particular there is nothing to be seen in all the Ledgers made out in respect of the plaintiff i.e. Ex. D1, Ex.D2, Ex.D3, Ex. D4 and Ex. D5 the plaintiff cannot be blamed for those omissions. The issue is whether or not the defendant was ever paid that money by the plaintiff under the 2 receipts mentioned above. I have already stated earlier in this judgment that these 2 receipts were issued by the defendant's employees and therefore the plaintiff cannot be blamed for them when proving his allegations that he paid that money. That being the case and in view of the plaintiff's admission that he did not pay the full amount to the defendant I hold that the plaintiff is liable to the defendant for a sum of 114,940/= not 5,414,940/= as claimed by the defendant. I do believe the plaintiff when he says that he paid to one of the defendant's cashiers the above sum; the plaintiff impressed me as a truthful person.

In these circumstances I find that the defendant has established his counterclaim against the plaintiff amounting to 114,940/= as admitted by the plaintiff. I accordingly do enter judgment in respect of the counterclaim against the plaintiff in favour of the defendant for the

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In these circumstances I find that the defendant has established his counterclaim against the plaintiff amounting to 114,940/= as admitted by the plaintiff. I accordingly do enter judgment in respect of the counterclaim against the plaintiff in favour of the defendant for the

sum of 114,940/= with costs and interest at the rate of 40% p.a. from the date of filing this suit until payment in full.

As for the issue of general damages as claimed in the counterclaim by the defendant I feel the interest of 40% p.a. will sufficiently compensate the defendant for whatever loss or damages he might have suffered as a result of the delay by the plaintiff to make payment.

The final outcome of this case is as follows:-

1. That judgment is entered for the plaintiff in original claim for a sum of 1,354,000/= (broken down into 1,000,000/= as general damages, 354,000/= being the amount the plaintiff paid to the Revenue Authority in compliance with the provisions of the agreement)

2. The plaintiff is to get costs for the original suit.

3. The decretal sum will carry an interest of 40% p.a. from the date of filing of this suit till payment in full.

4. In the alternative the defendant is to deliver to the plaintiff 10 bales of cloth at the price prevailing on the date the plaintiff placed his order for the bales. Should the defendant choose this alternative he will not be required to pay the 354,000/= or any interest thereon.

5. Judgment is entered for the defendant in respect of the counterclaim for a sum of 114,940/= with interest at the rate of 40% p.a from the date of filing of this suit till payment in full.

6. The plaintiff is to pay to the defendant costs of the counterclaim.

7. In view of the fact that the defendant owes the plaintiff less money his (plaintiff's) debt is to be off-set by 114,940/= thus leaving the plaintiff with a balance of: 1,354,940/= - 114,940/= = 1,239,060/= payable to the plaintiff by the defendant.

C.M. KATO

JUDGE

17/2/1995