

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL SUIT NO. 366 OF 2004

COTTON PRODUCTS (U) LTD ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. MOSES OLOWO a.k.a.
MOSES OYUKI T/A
CONSUMER CONNECT LINK PROMOTIONS ::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The plaintiff company is the sole agent for M/S Kimberly Clark Vietnam Ltd for Kotex sanitary pads in Uganda. The plaintiff claims the recovery of Shs.17,703,000/= interest, damages and costs from the defendant being the cost of Kotex freedom sanitary pads supplied to him to sell to the public as agent of the plaintiff. The plaintiff claims that pads taken by the defendant would be sold at Ug.Shs.1,400/= to allow the defendant realize his expenses and earn some profit.

In his defence the defendant pleads that he was never the sales agent of the plaintiff on the contrary the defendant claim that he was just an advertising agent of the plaintiff. The defendant then counter claims for the recovery from the plaintiff of a

commission of Ug.shs.5,400,000/= general damages, interest and costs. It is the case for the defendant, that he was hired by the plaintiff as part of a promotion / advertising drive and that the defendant would get Shs.5,400/= per carton sold in the drive. The defendant alleges that 1000 cartons were sold and so is entitled to a commission of Shs.5,400,000/=.

Three issues were framed for trial namely;

1. Whether there was a valid contract between the parties?
2. If there was a valid contract whether there was breach on the part of the defendant?
3. What remedies are available.

Mr. D. Ndyomugabe appeared for the plaintiff.

Mr. Moses Olowo the defendant defended himself (though his defence was filed by M/S Oging & Co. Advocates).

Issue No. 1: Whether there was a valid contract between the parties?

Counsel for the plaintiff submitted that there was a valid contract though it was an oral one. He referred me to the learned author Cheshire and Fifoot book contract 8th edition at Plaintiff 107 where they wrote;

“As a general rule however, no formality is needed. A contract may be wholly by word of mouth, or wholly in writing, or partly by word of mouth and partly in writing...”

in this case Counsel for the plaintiff argues that the contract is evidence by invoices, delivery notes and receipts.

According to evidence of Mr. William Oketcho (PW1) the Managing Director of the plaintiff company the defendant in late November, 2003 approached the plaintiff so that the defendant may buy and sell their goods. Mr. Oketcho testified that the defendant told him that he wanted to buy on credit as he did not have his own capital. He said that the defendant wanted to sell at his own price to cover his costs and give him a profit. Mr. Oketcho then recommended a price of sale to the public at Ug.Shs.1,400/= a packet and Ug.Shs.50,400/= per carton. This was because the plaintiff company sold a packet at Ug.Shs.1,250/= and Ug.Shs.45,000/= per carton. Mr. Oketcho testified that the defendant took goods worth Ug.Shs.23,328,000/= and made part payment leaving a balance of Ug.Shs.17,703,000/= to date.

Mr. Oketcho presented court with a letter Exh. P1 to the defendant dated 28th February 2004 detailing the items of sanitary pads taken against listed delivery notes and showing an outstanding unpaid amount of Ug.Shs.17,103,000/=.

On the 15th March 2004 Mr. Oketcho also wrote another letter to the defendant informing him that 2 cheques the defendant had issued the plaintiff totaling Ug.Shs,3,100,000/= had been dishonoured. The plaintiff company pressed criminal

charges in respect of these dishonoured cheques and the defendant was charged in criminal court in this regard.

The defendant presented a fairly disorganized defence. First of all he failed to attend court with his lawyer. He failed to fully explain the absence of his lawyer who had filed his defence. He then ended up defending himself as he could not procure another lawyer. After some time the defendant just disappeared without cross examining the plaintiff company's witness and without himself giving evidence.

In the circumstances this court has no option but to review the pleadings and evidence placed before it in coming to its findings and decisions.

It is clear that the parties view this oral contract differently. One says it's a sales agency contract while the other sees it as a promotion/advertising contract.

The nearest independent evidence to corroborate what happened is Exh. P6 which is a general letter to "*whom it may concern*" from the plaintiff company.

However, there is even more to this relationship than meets the eye. First Mr. Oketcho tendered into evidence 15 separate delivery notes (Exh. P4 i - xv) from the plaintiff to M/S Consumer Link which were signed for by the defendant.

Mr. Olowo Okumu the defendant was in court at the time and consented to the delivery notes being put in evidence as he conceded that he signed them. These delivery notes have a total value of Ug.Shs.25,200,000/=. These delivery notes to my mind are consistent with what would happen in a sale. Indeed the sale price on the delivery note is Ug.Shs.1,250/= per pad which tallies with Mr. Oketcho's testimony that, that was the price the plaintiff company sold the pads.

It would appear that the relationship between the parties was both one of promotion and sale. Much of this speculation could have been settled through a written contract. Asked by the court why no written contract was made Mr. Oketcho replied that the defendant was personally known to him and they both came from Tororo district. It further therefore appears to Court that at best there was a contract albeit a very informal/simple one that covered promotion and sale of the sanitary pads.

Issue No. 2: If there was a valid contract whether there was breach on the part of the defendant?

I have already found the existence of an informal/simple contract between the parties.

As to the issue of breach the plaintiff company has adduced evidence of non payment of Ug.Shs.17,703,000/= by the defendant as a breach of contract. This evidence has not been controverted as the defendant abandoned the case midway. Court must assume that the defendant has lost interest in defending these allegations.

I therefore find that the defendant is in breach of the contract. As to the extent of the breach however, I find a slight arithmetical error in the pleadings and evidence. The plaintiff and Mr. Oketcho state that the outstanding amount is Ug.Shs.7,703,000/=. However the evidence in Exh. P1 will suggest that sanitary pads worth Ug.Shs.23,328,000/= were taken by the defendant.

The defendant then paid Ug.Shs.6,220,000/= to the plaintiff company. This leaves a balance unpaid of Ug.Shs.17,103,000/= and not Ug.Shs.17,703,000. I therefore find that the defendant is in breach of the contract in the sum of Ug.Shs.17,103,000/=.

Issue No. 3: Remedies.

In light of my findings above, I find that the defendant is to pay the plaintiff company the sum of Shs.17,103,000/= as special damages.

Counsel for the plaintiff has prayed for Shs.5,000,000/= as general damages for breach as being fair and reasonable. No further justification was given to court for this figure. However, given the very informal nature of this contract which makes the assessment of damages difficult I would award nominal damages at Shs.200,000/=.

Counsel for the plaintiff prayed for interest at 30% p.a. from date of break (I believe of the contract) until payment in full. First I find it impossible to determine a date when breach or break as counsel put took place. Secondly, I believe interest at 30% p.a. is excessive given the current ruling rates in commercial banks. I accordingly award interest at 24% p.a. from date of judgment until payment in full.

I award costs to the plaintiff.

Finally I hereby dismiss the counter claim for want of prosecution.

Geoffrey Kiryabwire

JUDGE

Date: 29/11/05