THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA/KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT 709 OF 2003

1. URAZA SAIDI]
2. AMADI LOKIM] :: PLAINTIFFS

VERSUS

SONI .M. :: DEFENDANT

BEFORE: JUSTICE GEOFFREY KIRYABWIRE.

JUDGMENT.

The brief facts of this case are as follows. The Plaintiffs in partnership together agreed to sell rare precious stones (gemstones) to the Defendant. The nature of this partnership was not fully disclosed to court but the 2nd Plaintiff (PW2) Amadi Lokim at least testified to the effect that both him and the 1st Plaintiff (PW1) Uraza Saidi were in the 'deal together' and came from Karamoja (North Eastern Uganda).

The Plaintiffs were introduced to the Defendant one Soni Indrauaden Maganlal (DW1 and consistently referred to as "Soni M." throughout the proceedings). By one Sheikh Kamulegeya of the Uganda Muslim Supreme Council at Old Kampala. Mr. Soni who is the Managing Director of M/S Pear Jewelers and according to his business card is said to be dealing in gold Diamond, Gemstones and Silver Jewellery, Specialist in Wedding and engagement rings.

The parties to this dispute then on the 21st June 2003 entered into an agreement (Exb P1) where by the Defendant is alleged to have bought from the Plaintiffs by written agreement Gemstones (Five different grades of Ruby totaling 1,570 gms and Blue Saphire weighing 49.4 gms) at US 7,400 (United States Dollars seven thousand four hundred only). On the day the written agreement was signed the Plaintiffs received $300 and the balance was to be paid after the said Gemstones were sold in India. It is from this point that the evidence becomes contentious. For the Plaintiffs it is pleaded and argued that the Defendant only thereafter paid the Plaintiffs Shs. 1,000,000/= leaving unpaid the outstanding amount of $6,600 (United States Dollars Six thousand six hundred only).

For the Defendant it is pleaded and argued that the agreement for $ 7,400 was conditional upon the Gemstones being sold in India at that price. As it turned out the said Gemstones when taken to India could not attract the price desired so the parties settled on the 18th July 2003 by written agreement for an adjusted

contractual sum of Shs. 3,000,000/= of which shs. 1,000,000/= was paid leaving a balance of shs. 1,200,000/= which they admitted. Thus while the Plaintiffs pleaded that $ 6,600 was outstanding the Defendants pleaded on the contrary that Shs 1,200,000/= was outstanding. Judgment on admission in favour of the Plaintiffs was then entered by court for Shs 1,200,000/= the balance was put to trial.

The following legal issues were framed by the parties

1. Whether the price of US$ 7,400 was agreed upon or not.
2. Whether or not there was a 2nd agreement dated 18th July 2003 and if so, what impact did it have on the 1st agreement dated 21st June 2003.
3. Whether the Plaintiffs are entitled to the prayers.

Issue No. 1 whether the price of US$ 7,400 was agreed upon or not?

The agreement, which is alleged to have contained the said contractual sum of US $ 7,400, is Exb P. 1 the full text of this short agreement reads as follows: -

"

Agreement

21/6/2003

- To Mr. Amadi Lokim

or Mr. Urea Saidi.

- Buyer:
  Mr. I.M. Soni
  Managing Director
  Pearl Jeweler
  KAMPALA.

Mr. Buyer received Gemstone Ruby and Blue Sapphire as per copy detail, from seller from marketing in India. We agreed that if we sell in India US $ 7,400 we will sell, if not Mr. Buyer bring all stone from India.

By today Mr. Buyer paying to seller US$ 300 cash, part payment from US$ 7,400. If Mr. Buyer bring back all stone from India, Mr. Seller have to return back US$ 300. We both parties agreed by Today on 21/06/03.

If we get good price in India, balance, Mr. Buyer pay on 7/7/03 Monday.

Thanks

Buyer **Witness** **Seller**

1). (Signed)
2). (Signed)

"

Mr. Opwonya learned counsel for the Plaintiff submitted that the price for the Gemstones was clearly fixed at US $ 7,400 to be sold in India. Should the sale not have been possible at that price then all the stones were to be returned from India. He argued that the stones were indeed taken to India but the agreed price was not paid. This meant that the Defendant was to return with the stones

in which case US $ 7,100 was due. Out of this only Shs. 1,000,000/= was paid by the Plaintiff.

On the other hand Mr. Bakiza learned counsel for the Defendant argued that the Agreement Exb. P1 was a conditional agreement. The price of US$ 7,400 was conditional upon the gemstones being sold in India at that price. Since the said price of US$ 7,400 could not be obtained there was no binding contract to pay the US$ 7,400. Mr. Bakiza argued that, because of the failure to get the price of US$ 7,400 for the Gemstone in India, on the grounds that the Gemstones were poor quality, the parties renegotiated a price of Ug. Shs. 3.000,000/=.

I have studied Exb. P.1 and the submissions of counsel. There has been a bit of argument that the parties were not very conversant with the English language and especially so the first Plaintiff and this may have affected the bargain of the parties. However even Exb. P.1, which was drafted by the Defendant, is written in poor English. That not withstanding I find that the terms of Exb. P.1 are quite clear. The gemstones were supposed to have been sold in India at an agreed price of US$ 7,400 and the Plaintiffs were given an advance of US$ 300 on that understanding. In case the price could not be obtained the Gemstones would be returned and the advance of US$ 300 would be refunded. The sale of the Gemstones in India at US$ 7,400 was therefore a condition precedent to the performance of the agreement. Both PW1 Uraza Saidi and PW2 Amadi Lokim agree in their testimonies that the Gemstones were to be sold in India. I am

therefore persuaded by the more detailed exposition of the legal position in the written submissions by counsel for the Defendant that the confirmation of the price of US$ 7,400 in India was a condition precedent to sealing the contract price.

I agree with the authorities cited namely;

Folomera Nalongo Vs. **Luwero Town Council** HCCS No 303 of 1993

Lee Partner & Another Vs. **Izzet & Other** [1972] All ER 800.

Locket Vs. **Norman Wright** [1952] Ch 33.

that where there is a condition precedent to the contract until that condition is fulfilled there is no binding contract. In answer therefore to the first issue I find that the price of US$ 7,400 was agreed to but subject to a condition precedent that the Gemstones would be sold in India at that price. However if the stones were not sold in India they were to be returned to Uganda and the deposit given to the plaintiffs returned.

Issue No. 2 whether or not there was a 2nd agreement dated 18th July 2003 and if so what impact did it have on the 1st agreement dated 21 June 2003.

The second issue appears to me to be the crux of this dispute. For the Defendant it is submitted that on DW1 Mr. Soni failing to get the price of US$ 7,400 because of the alleged poor quality of the stones he rang Mr. Uraza Saidi and told him the price would not be obtained. DW1 then proposed to conclude the deal at Ug. Shs. 1,500,00/= which was a considerably lower price. DW1 then testified that PW1 said would accept shs. 3,000,000/= which DW1 accepted and concluded the deal at that price. When DW1 returned to Uganda from India he then allegedly entered into a second agreement with PW1. The Text of that short agreement Exb. D1 reads: -

"

Mr. Uraza Saidi
T. No. 077316550
Kampala
Date 18/7/03

To Mr. I. Soni
C/o Pearl Jeweler
Kampala.

As per our agreement on 21/6/03 by today I am agree that we settle amount for Gemstone Shs. 3,000,000/= but not US$ 7,400.

From that amount I received 600,000/= Ug. Shs, second time I received Ug. Shs. 200,000/= and by Today I received Ug. Shs 1,000,000/= in case position.

Now immediate balance, I will be getting from Mr. Soni by next week.

Total I received Ug. Shs. 1,800,000/= in 3 installment as an above.

Thanks

Mr. Uraza Saidi *Recd*

1800,000 U sh

signed uraza

witness

Signed. *1) MUZAWARU JAFFERS*
2)
3)
18/7/2003 *4)*

"

Apparently Exb. D1 was written at the back of a photocopy of Exb. P1 and the side with Exb. P1 on was crossed out with the words "cancelled" written by DW1 Soni.

Mr. Soni at some stage later wrote at the back of his business card Exb. P.2.

" *Uraza*

You come for your last installment 1.2 million on 16/08/03 Saturday

Signed "

For the Plaintiff it is emphatically argued that there was no 2nd agreement. It was submitted that PW1 on the 18th July 2003 only went to see the Defendant to receive a further installment of Shs 1,000,000/= and not to execute another agreement. It would appear that PW1 at all material time thought he was signing a receipt for the Shs. 1,000,000/= and that Exb. D1 was not translated to him so he did not know what he was signing.

Counsel for the Plaintiff further argues that his client being illiterate cannot be bound by Exb. D1, which was not translated to him and is therefore protected by sections 2 & 3 of The Protection of Illiterates Act Cap 28. Lastly it is the case for the Plaintiff that the whole evidence surrounding the telephone call by DW1 to PW1 while in India was not pleaded and is therefore an afterthought for which the Defendant is estopped, for this proposition I was referred to the case of

James Kakigira Vs. **Sezi Bujasi** [1982] HCB 148.

From the evidence on record it would appear that court will have to decide whether or not the agreement in Exb. P1 was varied first orally vide a telephone conversation between the 1st Plaintiff and the Defendant and subsequently by written agreement Exb. P.2.

Whereas DW1 Mr. Soni emphasizes that he informed PW1 Mr. Uraza that he had failed to sale the Gemstones in India so they agreed first by phone then in writing on a new price of Shs. 3,000,000; PW1 Mr. Uraza denies all this happened. Counsel for the Defendant states that this evidence in any event is not admissible, as it was not pleaded.

Order 6 rule 1 provides

> *"Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for claim or defence as the case may be, but not evidence by which they are to be proved..."*

Paragraph 5 of the defence reads

> *"The Defendant...disputes the agreement of 21st June 2003 being the basis of his contractual relationship with the Plaintiffs the same being replaced with the one of 18th July 2003".*

I must agree with counsel for the Defendant that the alleged telephone call is evidence not material fact. Indeed what the defence is relying on, as a material fact is that the agreement of 21st June 2003 was replaced with that of 18th July 2003.

Be that as it may, in light of the conflicting testimonies, and nothing more, with regard to the alleged telephone call it is difficult to determine who is telling the truth or not. I therefore make no specific finding relating to the call.

The evidence however with regard to the second agreement Exb. D1 is intriguing. Mr. Uraza PW1 does not deny that he signed the document. He just says that he signed for the Shs. 1,000,000/= he received as a form of receipt and not a fresh agreement. In fact he signed the document twice, the second time indicating that he had received " 1800,000 u sh". At the time he signed the document Exb. D1 he had gone to DW1 Mr. Soni's shop alone. Mr. Soni on the other hand was in the presence of a friend of his one Jaffer Muzawaru Semitego DW2 who went on to witness the agreement of 18th July 2003. According to evidence on record DW1 Mr. Uraza says that Exb. D1 was explained to him by DW1 Mr. Mr. Soni using English and Kiswahili. On the other hand DW2 Jaffer Semitego says it is him who helped with the translation, as Uraza could not understand DW1 Mr. Soni's slang English. Semitego translated into Kiswahili, which he knew and was the language spoken by PW1 Mr. Uraza. It appears to

me that on the balance of probabilities both DW1 and DW2 took part in explaining and translating Exb. D1 to PW1.

A look at Exb D1 shows that it was addressed and written to DW1 Mr. Soni by PW1 Mr. Uraza. The actual document by just looking at the handwriting was in reality written by DW1 Mr. Soni just like he did Exb. P1. From the testimony of PW1 it appears he was not given a copy of Exb. D1. In comparison it is important to note that when preparing Exb. P1 it was PW1's colleague PW2 Mr. Amadi Lokim who did the translation and explaining to PW1. This according to PW2 was because whereas PW1 could sign his name he did not understand English.

PW2 Mr. Amadi Lokim was not present when PW1 signed the new agreement Exb. D1. Indeed he testified that he did not know of Exb. D1 and that he had never authorized his colleague to enter into any second agreement. When shown Exb. D1 PW2 did however acknowledge seeing his colleague PW1 Mr. Uraza's signature on it.

Mr. Uraza PW1 then testified that when after he was given the Shs. 1 million/= he then went back to PW1 Mr. Soni with a friend of his Mr. Hussein Gutto PW3 who understood English to demand the balance of the payment. Mr. Gutto PW3 testified that DW1 Mr. Soni wrote at the back of his business card Exb. P2.

"Uraza

You come for your last installment 1.2 million on 16/08/03 Saturday"

and signed

Mr. Gutto PW3 however testified that PW1 Mr. Uraza insisted the balance was $ 6,600 the business card Exb P2 was given to Mr. Gutto PW3.

Mr. Opwonya counsel for the Plaintiffs referred me to the Illiterates Protection Act cap 78 in particular S.2 and 3 as a defence against the enforceability of Exb. D1. This is because counsel for the Plaintiff argues the PW1 Mr. Uraza was an illiterate within the meaning of S. 1 of that Act which provides

"S.1(b)

Illiterate means, in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed."

Section 2 of the Act prohibits any person writing the name of an illiterate by way of signature to any document without the illiterate first appending his mark and that person also writing his full names and address. This is inapplicable in this case because PW1 Mr. Uraza signed his own name. Section 3 prohibits any person writing any document for or at the request of an illiterate without also writing on the document his full names and address as evidence of the illiterate's instruction to do so write that document. This section on the face of it would

impact on Exb D1. However as far as non-compliance is concerned S. 4 of the Illiterates Protection Act Cap 78 provides for a Criminal Penalty, which a person on conviction is liable to a fine not exceeding Shs. 300 or in default thereof imprisonment not exceeding 3 months. This penalty is without prejudice to any criminal or civil liability that may be incurred in the circumstances by reason of fraud, forgery, and misreprestation or otherwise.

I find that S2 of the Illiterates Protection Act cap 78 would not in itself invalidate Exb. D1 and indeed no authority to that effect has been given to court.

However what is clear and consistent from the evidence is that PW1 Mr. Uraza did not understand English and I according so find. At all material times he had to be assisted by either PW2 Mr. Amadi or PW3 Mr. Guto or DW2 Mr. Semitego to understand the documents that were put to him written in English.

It is not surprising therefore that the Plaintiffs in Para 3 to the **Reply to written statement of Defence** deny even making the alleged second agreement D1 dated 18th July 2003. In other words they raise the defence "non est factum"- It is not my deed.

The law with regard to this defence was discussed by the learned author R.W Hodgin in his book *"Law of contract in East Africa"* Reprint 1997 Kenya Literature Bureau at P. 142 where he writes

> *"The basic rule is that a person is bound by his signature and he cannot be heard to say he did not understand the document or that it was too technical and too difficult to read. One exception to this rule (IS)...* ***Curtis*** *Vs.* ***Chemical Clearing Co*** *[1951] I KB 805 is where the contents are misrepresented to the signatory by the other party. In such a case he is not bound."*

The learned author then goes on to discuss that in determining whether not to apply the defence non est factum .

> *"It must be shown that the mistake was to the character or nature of the document not merely as to some aspects of its contents"*

There is however a problem to distinguish between the *"nature"* of a document and its *"contents"*. This relief seems to be very narrow indeed. Hogdin at P. 144-145 refers to the case of

The Director, Jinnah's Company Ltd Vs. **Francis Owino** Civ. App. 22-D-67 (Tanzania)

Where x pleaded non est factum in relation to a document he had signed that was in English when in fact he could not read English. The court held that he

was bound by his signature and they stressed that in order not to be bound it was incumbent on him to show that he executed the deed under a substantial mistake as to its contents and that mistake was induced by the machinations of some other person.

According to the learned author Chitty on contracts 28ed 1999 at para 5-057 the learned authors state that in United Kingdom the distinction between nature and contents of documents was rejected by the House of Lords in

Saunders Vs. **Anglia Building Society** [1971] AC 1004

The authors of Chitty go on to write

"Their lordships appear to have concentrated on the disparity between the effect of the document actually signed and the document as it was believed to be (rather than on the nature of the mistake) stressing that the disparity must be 'radical' 'essential', fundamental or very substantial."

To my mind I must say that the rules relating to the defence non est factum especially with regard to a signed document have not really changed but have been narrowed placing a heavier burden on the Defendant to proved it. However in applying these principles to the current case one cannot fail to apply them within the context of some of the businesses carried out in Uganda. One has to take Judicial notice in cases such as this one of the literacy level of the business actors to avoid injustice in other words the equity of the situation. In

this respect I agree with the learned author Hodgin (supra) when applying the test for mistake and equity when he writes

> *"Before introducing this form of equitable relief the court however would take into account the degree of literacy of the parties, the care and clarity with which the document was read out and explained to them, the circumstances in which it was executed and the course of events leading up to and subsequent to that execution."*

In this particular case I have already found that PW1 Uraza did not understand English and had to heavily rely on third parties to accept any document. In any event he did not strike me as a sophisticated Gemstone trader that notwithstanding PW1 was clear in his mind of the business deal he had transacted namely that the Gemstones be sold in India or be returned to the Plaintiff's and the $ 300 advanced to them would be refunded.

The alleged amendment to this agreement in the form of Exhibit D1 raises many questions. PW3 Mr. Gutto who acted as translator for PW1 Mr. Uraza in his witness statement and testimony testified that PW1 did not agree that the balance was 1.2 m/= (i.e. that Exb. D1 had adjusted the price from US$ 7,400 to Ug. Shs. 3,000,000/=). PW1 Uraza signed in the bottom left hand comer of Exb. D1 that he had received "1,800,000/= Ug. Shs. but was not given a copy of the

said agreement. Instead he was given for his records a business card of DW1 Mr. Soni telling to collect his last installment of 1.2m by 16/08/03. It is not clear from the testimony why PW1 Uraza was not also given a copy of Exb. D1 for his records in the same way he was given the original agreement Exb P1. It is not surprising that his partner PW 2 Mr. Lokim denies any knowledge of Exb. D1 and indeed says if it was signed by his partner PW1 Uraza it was not authorized. It would appear that Exb. D1 was a result of two positions. The first by DW1 Mr. Soni to change the terms of Exb P1 and buy the gemstones for a lower price since he had not returned them. The second by PW1 Uraza to maintain the original agreement in Exb. P1. Based on the above I find the testimony of PW1 Mr. Uraza consistent and believable. I also accordingly find that as between PW1 Mr. Uraza and DW1 Mr. Soni with respect to Exb. D1 (and especially so to PW1 Mr. Uraza) there was a mistake as to the character and nature of Exb. D1 and not merely same aspects of its contents. This mistake given the original understanding in Exb. P1 can be classified as "fundamental or very substantial" thus making Exb D1, which clearly executed void ab initio.

As to the impact therefore of Exb. D1 on Exb. P1 I find it has no effect at all and Exb P1 contain the true bargain of the parties to the suit. However since even Exb. P1 was subject to condition precedent of selling the gemstones in India for US$ 7,400, which according to DW1 was not done then ideally the gemstones, should have been returned. As it is the gemstones were not returned but rather

several partial payments were made against two contested prices. In the circumstances since the Defendant continues to have the benefit of the gemstones he should pay for them under the principal of quantum merit.

Issue No. 3 Whether the Plaintiff are entitled to the Remedies.

The Plaintiffs have prayed for special damages as follows: -

a)	The principal sum US$ 6,600	-	13,200,000/=
b)	Hotel bills in Uganda Shillings	-	340,000/=
	Total	-	**13,540,000/=**

I have found that the Plaintiffs are entitled to the value of the gemstones, which were not returned on a quantum meruit basis. The best way to establish this value is to be guided by the agreement it self Exb. P1 which is US$ 7,400 the price the gemstones would have fetched if they were not returned by reason of being sold in India. Part payment was made sometimes in US dollars and sometimes in Uganda shillings. The parties appear to have used an exchange rate of US$ 1= Ug. Shs. 2000. PW1 acknowledge receiving a total of Ug. Shs. 1,800,000/=; thereafter judgment on admission was given for a further Ug. Shs. 1,200,000/= giving a total of Shs. 3,000,000/=. If one applied a uniform exchange rate up to this point as was done earlier that means that a total of US$ 1,500 has been paid leaving a balance of US$ 5,900; which amount I hereby

grant to the plaintiff. As to the Hotel bills of Ug. Shs 340,000/= I do agree with counsel for the Defendant that this item was not specifically proved and so I give no award under this head.

The Plaintiffs have prayed for general damages of Ug. Shs. 5,000,000/=. Counsel for the Defendant left this item to be determined in the discretion of the court. Given that the Defendant failed to comply with Exb. P1 he was in breach of that agreement and so general damages are awardable against him. I however think that the sum of Ug. Shs. 5,000,000/= would to high and punitive in the circumstances of this case and I would grant the Plaintiff's general damages of Shs. 2,500,000/=.

The Plaintiff's have prayed for interest from the date of filing the suit. None of the parties addressed the court on the subject of interest. I according grant interest on the decretal sum at 8% p.a. from the date of Judgment until payment in full.

I also grant the Plaintiff costs of the suit.

I summary judgment is given for the Plaintiff in the following terms

1) US$ 5900 special damages

2) Ug. Shs. 2,500,000/= general damages

3) Interest on the above at the rate of 8% p.a from the date of judgment until payment in full.

4) Costs of the suit to the Plaintiff.

Geoffrey Kiryabwire

JUDGE

Date 24/02/2005