

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

HIGH COURT CIVIL SUIT NO.755 OF 2003

WAMALA NANSEERA :::::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

NORTH BUKEDI COTTON COMPANY LTD ::::::::::::::::::::::::::::::DEFENDANT

Before Justice Geoffrey Kiryabwire

JUDGMENT:

This suit was brought by the Plaintiff Wamala Nanseera (PW1) against the defendant, North Bukedi Cotton Co. Ltd. The plaintiff's claim is for recovery of money, specific performance, and general damages, interest and costs. In his pleadings the plaintiff alleges that he entered into an agreement (EXHIBIT P1) with the defendant for the purchase of a truck Reg. No. 237 UCM from the defendant. For the plaintiff it is pleaded that a fundamental condition was that the defendant secures all the documents pertaining to the transfer of the ownership of the truck by the 30th April 2000, a condition which the plaintiff alleges that the defendant breached. They further allege that the police have now impounded the plaintiff's truck as it lacked the relevant documents, which are still in the defendant's possession. As a result the plaintiff has suffered financial loss to the tune of Ug Shs. 11,550,000/=.

The defendants in their defence denied that the said agreement was breached. However they plead that the transfer of ownership of the said truck was subject to the plaintiff paying all the instalments as provided for in the

contract by 29/2/2000 to which the plaintiff did not comply. Furthermore the defendants pleaded fraud in the sense that the plaintiff issued himself company receipts as proof of payment for the truck whereas the company received no money.

Two Issues were framed for determination

- 1. Whether the plaintiff completed payment of the purchase price to the defendant company.*
- 2. Whether the plaintiff is entitled to the remedies sought.*

The plaintiff was represented by Dunstan K. Nsubuga while the defendant was represented by Dennis Owor.

Issue 1:

Whether the plaintiff completed payment of purchase price to the defendant company.

PW1 Mr. Wamala Nanseera tendered the sale agreement, Exhibit P1 as evidence of the agreement between the two parties. The defendants did not contest the agreement. The Plaintiff testified that this agreement was breached in as far as the defendant did not secure the documents of ownership within the period of the agreement and despite paying for the truck. In support of his contention that he indeed completed the payment the plaintiff relied on the payment receipts. Exhibit P2 Receipt No.32871, dated sometime in 2000 was for the sum of Ug Shs. 500,000/=, Exhibit P3 Receipt No 32324, dated 14th January 2001 was for value of Ug

Shs1,500,000/=, Exhibit P4 Receipt No 32696, dated 4th July 2001 which indicates that it was final payment bears the amount Ug.Shs.1,000,000/= (all the foregoing receipts total Shs 3,000,000/=).

PW1 Wamala Nanseera admitted that as the cashier of the defendant company at the time that he issued the receipts and that he always entered that information into the Petty Cash returns. However as it transpired even the relevant petty cash returns were missing from the defendant company's records.

The defendants aver in their written statement of defence that exhibit P2, and P4 were receipts Issued from a receipt book that went missing. According to the testimony of DW1 James Waluye Nambala an accountant currently with the Defendant Company the plaintiff did not fully pay for the said truck. He testified that only Exhibit P3 for Shs 1,500,000/= could be traced in the company's petty cash returns Exhibit D1. In addition to the return in respect of Exhibit P3 DW1 Nambala was also able to trace another payment of Shs 1,000,000/= vide a receipt No 32325. It is important to note that this particular receipt was not exhibited or testified on by the plaintiff; but is accepted by the defendants as paid. Furthermore in his testimony DW1 James Waluye Nambala stated the Exhibit P2 could not be traced back to the Petty Cash Returns, which must always reflect all the moneys paid into and out of the company. With respect to the Exhibit P4 he stated that the fact that it bears the words

"cotton floats" could be interpreted to mean that this receipt was issued with respect to the cotton account. He testified that for cotton floats a cashbook would be opened but would be closed in June when the cotton-buying season ended yet Exhibit P 4 has a date of 4th July 2001. After June a ginnery expense book would be opened. DW 1 Nambala testified that both the cashbook and the ginnery expense book for the period were checked and the payments in Exhibit P 4 not found. Both accounting books however were not produced in court. However DW 1 Nambala tendered in Exhibit D 2 which were cotton petty cash returns for 3rd July to 5th July 2001 which did not reflect the payment in Exhibit P 4. DW1 Nambala in conclusion testified that out of the contract price of Shs 4,500,000/= he could only account for a payment to the defendant company of Shs 2,500,000/=.

Counsel for the defendant referred the court to section 101 and 102 of the evidence Act. Section 101 which provides for burden of proof states:

" Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts, which he or she asserts must prove that those facts exist."

Section 103 which provides for burden of proof as to a particular fact states:

" The burden of Proof as to any particular fact lies on that person who wishes the Court to believe in it's existence, unless

it is provided by the law that the proof of that fact shall lie on any particular person."

Counsel for the defendant argued that the plaintiff alleged certain facts and so the burden lies on him to prove that those facts exist. However, he has failed to prove that he made the full payment that he alleges. Counsel for the defendant submitted that it is not disputed that the plaintiff made some payments however the evidence at hand leaves doubt as to whether he completed the payments.

I have perused the evidence before court and the submissions of both counsels on the matter. It is clear to me from the onset that the record keeping of the defendant company leaves a lot to be desired and may actually be the reason for this case as it is. There were no checks and balances in the cash office as would be expected in a company of the defendant's size and operations. PW1 Wamala Nanseera the plaintiff was both the administration manager and cashier at the same time. In a transaction like the subject of this case the plaintiff could easily be the buyer, and the administrator who oversees his own purchase and the cashier who receives the money from the sale. The defendant company appeared comfortable with this arrangement until something went wrong. Even when critically examined the main exhibit of the defendants Exhibit D1 which is the petty cash Return one notes that both receipts conceded by the defendants namely Nos 32324 and 32325 were

both entered next to each other in different ink on the 14 January 2000. One cannot help wondering why if the same person paid the money on the same day for the same purpose why one instead of two receipts was issued? Furthermore Exhibit D 1 is headed Bugema Cotton Company Ltd (even though the words Bugema are crossed out in blue ink and replaced with the words "NB" I suppose meaning North Bukedi the defendant company). Exhibit D 2 on the other hand, which is also a petty cash return, is mostly in respect of returns for another company called Africa Resources Cotton Company Limited. Interestingly despite this practice at the defendant company the defendant's in their amended written statement of defence allege fraud on the part of the plaintiff in para 6 in that he issued receipts to himself well knowing that no money was received.

I agree with the cases submitted by both counsels to the parties namely

R G Patel Vs Lalji Makanji [1957] E A 314

For the proposition that allegations of fraud must be strictly proved even though the standard of proof need not be beyond reasonable doubt. However in a situation like this case of poor accounting systems and records this proof of fraud can be very daunting. Indeed there is case law that to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received from the latter i.e. money. A mere

entry in an account which does not represent such a transaction does not prove a receipt, whatever else it may be worth; see Lord Lindley in

Gresham life Assurance Society V Bishop [1902] AC 287 at 296.

In this case however the system is such that the person to give the money is the same person to receive the money. Who then does one believe the company cashier or the company, which set up the very system? I find that a case for fraud cannot reasonably and objectively be made out in the circumstances of this case. From the evidence on record the plaintiff has tendered receipts worth Shs 3,000,000/= though the last receipt Exhibit P4 is written as a final payment. The onus was on him to prove his case and that is the amount he could show. On the other hand the company is able to recognise through Exhibit D1 payments of Shs 2,500,000/= of which Shs 1,000,000/= actually was not shown by the plaintiff and could therefore be put to his credit. That leaves three possible figures as to payment Shs 3,000,000/= as alleged by the plaintiff, secondly Shs 2,500,000/= as alleged by the defendants or a third possibility of Shs 4,000,000/= paid by the plaintiff. Whatever the truth may be, the record is clear that none of the figures equals the contract amount of Shs 4,500,000/=.

Of course this is not a satisfactory position as to the actual amount that is due and owing. Section 33 of The Judicature Act mandates courts in the exercise of their jurisdiction to grant absolutely or on such terms and conditions as it thinks just all such remedies so that as far as possible all matters in

controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning the matter avoided. It would be necessary at least on the balance of probabilities to make a finding as to the amount of money that the plaintiff paid the defendants based on the evidence before court. On the basis of the accounting system and documents of the defendant company I find that the plaintiff paid Shs 4,000,000/= out of the contract sum of Shs 4,500,000/=. There is therefore in the absence of any further evidence an outstanding amount due to the defendants of Shs 500,000/=; which I suggest the plaintiff pays with commercial interest from 2000.

Accordingly I find on Issue 1 that the plaintiff did not make the full payments as stipulated in the agreement.

Issue 2:

Whether the plaintiff is entitled to the remedies sought.

The plaintiff sought the following remedies in the amended plaint

- a) Shs 11,550,000/=and loss of earnings for extra each day the vehicles stays impounded after filing the suit at a rate of Shs 30,000/= per day
- b) Specific performance of the contract or refund of the purchase price of the vehicle
- c) General damages
- d) Interest at 24%

- e) Costs of the suit
- f) Any other relief that court may deem fit.

I shall start with the relief of specific performance. Specific performance is a discretionary remedy given in equity. As a result it is given in accordance with certain rules. According to the learned author Hodgkin in his book **The Law Of Contract In East Africa** 1997 Ed p 221 he writes

" There are several instances when the court will not grant this remedy... If the plaintiff himself is in breach of a particular undertaking then court will not entertain his request that the other party be compelled to complete his part of the contract (Lamare V Dixon (1873) L R 6 HL 414)"

In this case the plaintiff has not completed payment of the truck so it would not be equitable for court to compel the specific performance of the contract. This is the rule of "clean hands" i.e. the plaintiff must be free from blame on his part. If the plaintiff had fully paid it would be in a better moral and legal position to pursue this breach. Given the passage of time in this matter a refund of the purchase price also will not make much sense.

The plaintiff has also sued for special damages being loss of opportunity to use the said truck because the police had impounded it, as it had no licence. This is as a result of the defendants failing to provide the plaintiff with the necessary transfer papers for the truck. The particulars of the special; damages are as follows

- a) Earnings of the vehicle per day before impounding at Shs 30,000/=.

b) Day's the vehicle spent at the police station at date of filing the suit
385 days.

c) Total now owing at date of filing this suit $385 \times 30,000 =$
 $11,550,000/=$

It was the testimony of the plaintiff PW1 Wamala Nanseera that he was not given the transfer documents of the truck by the time he left the employment of the defendant. As a result he was not able to transfer the ownership of the vehicle into his names. Consequently on the 13 November 2002 the said truck was impounded by police at Kalungu trading centre based on Exhibit P6 for not having the proper papers (including third party insurance), which he was asked to produce, but could not because the defendants continued to refuse to give them to him. He says he was using the vehicle without these papers as and when it was safe because it was a "crime" to use it without the said papers. He says that his net take home from using the truck was Shs 30,000/= per day which was his net. The plaintiff further testified that the defendants were in breach of their contract in not giving him the transfer papers by the 30th April 2000 and therefore he has suffered this special damage as a result of this breach

For the defendants it is argued that the provision of the transfer documents in the contract was contingent upon the plaintiff fully paying for the truck, which was not done. Counsel for the defendant further submitted that the plaintiff knowingly used the truck illegally on the road and in any event Exhibit P6 is not evidence of the said truck being impounded but rather it is a request to have the documents of the vehicle produced before the police. Counsel for

the defendant contests the figure of Shs 11,550,000/= as special damages as being a gross earning which is an estimate and is not sustainable. He referred me to the case of

Yonasani Kanyomozi V Motor Mart (U) Limited Civil Appeal No 15 of 1995

Where Justice Mulenga (JSC) in a similar matter where a claim was made for non-use of a truck awarded 20% of the claimed special damages as a means of factoring in imponderables in order to get a net earning. If this case was to be followed then the plaintiff would only get Shs 2,310,000/=. Lastly counsel for the defendant submits that the plaintiff should have mitigated his loss by trying to establish why the documents of the truck were being held in the bank and then try to secure them from there (either by paying off the security as the case may be).

I have perused the evidence on file and submissions of both counsels on this matter. The active clause in the contract is para 3, which states

"...That the company undertakes to secure all documents pertaining to the transfer of ownership not later than 30/04/2000..."

The contract is very simply written but clearly para 3 puts in place a time /deadline not later than which the documents were to be secured by the defendants. The only logical interpretation to this is that by that date the documents would have been passed over to the plaintiff and time in

commercial transactions time is of the essence unless otherwise provided for. However this has also to be read with para 4 of the contract that provides

"... Payments to be made as follows

- Cash down 14/1/2000 1,500,000/=
- 31/1/2000 1,500,000/=
- 29/2/2000 1,500,000/=

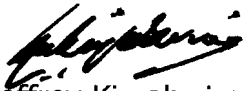
Para 3 places obligations on the defendant while para 4 places obligations on the plaintiff. One cannot read into the two paragraphs as counsel for the defendant submits that para 3 is contingent on para 4. However Reading para 3 and 4 together one does forms the impression that it was the intention of the parties that by the time the documents in para 3 were secured the payments under para 4 would have been completed. PW 1 Wamala Nanseera did testify that The Managing Director of the defendant had told him that he had not been able to secure the documents for the truck from the bank and it was mutually agreed that the plaintiff pay as and when he got money; however this was not reduced into writing. This of course would amount to a variation/waiver of an express term of the contract Exhibit P1. Such a variation or waiver of a specific term in a written agreement should also be in writing. I according find that it was the intention of the parties that the transfer documents for the truck were to be given to the plaintiff at a time after he had paid for the truck. Accordingly it cannot be said that the plaintiff incurred loss by way of special damages because he did not

he had not fully paid for it.

As to General damages in light of my findings above these would only have been payable if the plaintiff had successfully proved that he had paid for the truck.

Since no damages have been awarded so then also no interest is awarded.

This suit as filed therefore stands dismissed. As to costs, because of the poor accounting procedures and corporate governance of the defendant company, which in my view significantly contributed to this dispute, I am not inclined to award any costs to the defendants. Each party shall therefore bear its own costs.



Geoffrey Kiryabwire

JUDGE

Date: 22 JUNE 2005.