

UGANDA / JUDGMENT

**Kizito & Another v Shumuk Properties
Limited & 2 Others (CIVIL SUIT NO. 304 OF
2013) [2019] UGHCCD 249 (17 May 2019)**
[2019] UGHCCD 249

COURT

HC: Civil Division (Uganda)

BEFORE

Mugambe, J

CASE / FILE NUMBER

CIVIL SUIT NO. 304 OF 2013

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(CIVIL DIVISION)****CIVIL SUIT NO. 304 OF 2013****1. KIZITO EMMANUEL****2. AMPAIRE JAVIRA ::::::::::::::::::::::::::::::::::: PLAINTIFFS****VERSUS****1. SHUMUK PROPERTIES LTD****2. SHUMUK DIARY PRODUCTS LTD****3. DFCU BANK LTD ::::::::::::::::::::::::::::::::::: DEFENDANTS**

BEFORE: LADY JUSTICE LYDIA MUGAMBE**JUDGMENT****a) Introduction**

- 1. This judgment is in civil suit No. 304 of 2013 in which the Plaintiffs seek to recover special damages for unpaid salaries and arrears totaling Ug. shs: 103,487,247.80/= (Uganda shillings one hundred and three million, four hundred eighty seven thousand two hundred forty seven and eighty cents only), interest at 24% per annum, general damages and costs of the suit. The Plaintiffs represent thirty eight other former employees of Dairibord (U) Ltd by representative order vide miscellaneous application No. 140 of 2012.
- 2. The Plaintiffs are jointly represented by Mr. Babu Rashid and Mr. Kiggundu Vincent of M/s. Lubega, Babu & Co. Advocates and M/s. Vincent Kiggundu Advocates & Solicitors

respectively, the first and second Defendants are represented by Mr. Augustine Kibuka Musoke of M/s. Kibuka Musoke & Co. Advocates & Solicitors and the third Defendant is represented jointly by Ms. Sarah Kisubi & Mr. Cyrus Baguma of M/s. Kalenge, Bwanika, Ssawa & Co. advocates.

- 3. On 20th April, 2009 the Plaintiffs and 38 other former employees of Dairibord were laid off and rendered redundant after Dairibord was put under receivership by the third Defendant without being paid their salary arrears. By agreement dated 17th February 2012, the third Defendant sold Dairibord plant and equipment, land and building assets to the first Defendant. The third Defendant received money from the first and second Defendants well aware of the law on priorities of debts/creditors but ignored/ failed/refused to pay the Plaintiffs and other former employees their outstanding salary and wage arrears and/or benefits from the proceeds of the sale of Dairibord. The Plaintiffs demanded their salary arrears and benefits from the Defendants but all the Defendants denied knowledge of the claim.
- 4. In its written statement of defence, the second Defendant averred that the Plaintiffs have no known cause of action against it and it would move court at the hearing to have the suit against it dismissed for being vexatious, frivolous and an abuse of court process. On 23rd January 2014, the second Defendant's counsel - Mr. Kibuka Musoke orally raised this preliminary objection in court.
- 5. This court gave directions that the preliminary objection is put in writing and gave timelines in which to file a response to the preliminary objection. This court delivered its ruling dismissing this preliminary objection on 24th February 2014 and found that there was an a nexus between the second Defendant and the Plaintiffs since the second Defendant bought properties, proceeds from which sale should have been used to pay off the Plaintiffs but was not. The court also found that to exclude the second Defendant at that early stage would be to kill the Plaintiff's action in the bud.

- 6. The second Defendant also averred that it was not privy to any sale of Dairibord plant and equipment, land and buildings or other assets by the third Defendant. The second

Defendant also averred that it was not privy to any dealings between the receiver appointed by the third Defendant if any or the third Defendant itself in dealing with the property belonging to Dairibord.

- 7. The third Defendant in its amended written statement of defence averred that it never sold Dairibord as alleged but only sold assets which belonged to it and they were its property under lease agreements between it and Dairibord. That the assets were not properties of Dairibord as it failed to fulfill its obligations under the lease agreement and property had not passed to Dairibord at the time of the sale.
- 8. Further that the said assets and landed property were sold to the second Defendant on the understanding and specific provision that Dairibord was a going concern and that the question of putting the employees of Dairibord into redundancy was not part of the said sale. It did not sell the assets of Dairibord as a receiver but as a proprietor of the assets and as a mortgagee of the landed property and that as a result it is not in any way liable to pay outstanding salary and wage arrears to the Plaintiffs and other employees of Dairibord.
- 9. The issues agreed for resolution at the scheduling conference are:
 - i) Whether the plaintiffs are entitled to payment from the Defendants the sum of Ug. shs:103, 487, 247.80/= being salary arrears and benefits.
 - ii) Which of the Defendants is responsible for payment of the Plaintiffs claim? iii) Remedies.
- 10. Section 12 of the Insolvency Act provides for preferential debts. Subsection 5 provides that after making the payments listed in subsection (4), next to be paid shall be— (a) all wages or basic salary, wholly earned or earned in part by way of commission for four months; (b) all amounts due in respect of any compensation or liability for compensation under the Worker's Compensation Act, accrued before the commencement of the liquidation or bankruptcy, not exceeding the prescribed amount; (c) all amounts that are preferential debts under section 33 or 105.
- 11. After considering all the pleadings and submissions, it is clear that in all the dealings in issue between the first, third Defendants and Dairibord, they were dealing with Dairibord as an insolvent company which they were selling. While there was no formal receivership process for Dairibord, everything was being done for an insolvent Dairibord. Because of this similarity in circumstances, this court considers it fair, just and equitable to consider the protection envisaged under the law for the Plaintiffs like this was a proper insolvency or receivership process.

- 12. In the circumstances of this case, this court considers that the failure by the first and third Defendants to cater for the Plaintiffs salary arrears when they took over and/or sold property of an insolvent Dairibord which was their employer, and the third Defendant's receipt of proceeds from the final sale of this property and disbursement of the same without sorting the Plaintiffs salary arrears in issue was an unjust, unequitable and unfair grand scheme.
- 13. The third Defendant's claims that it disbursed the money due to Dairibord from the final sale balance to pay utilities and other expenses at the directive of Dairibord through its lawyers looks like an easy explanation. However the same is not protected by section 48 of the Employment Act, 2006. Section 48 provides that "notwithstanding any other law to the contrary, on the bankruptcy or winding-up of an employer's business, the claim of an employee or those claiming on his or her behalf, wages and other payments to which he or she is entitled to under this Act, shall have priority over all other claims which have accrued in respect of the twenty-six weeks immediately preceding the date on which the declaration of bankruptcy or winding-up is made."
- 14. In the facts before me there is no demonstration that the payments the third Defendant was directed to pay out on behalf of Dairibord qualified to be prioritized before the payment of salary arrears of the plaintiffs under this section. There is also no satisfactory demonstration by way, for example, of acknowledgement of receipt that the third Defendant actually paid out any money to the creditors of Dairibord as allegedly instructed.
- 15. This court considers that within the meaning of section 48 of the Employment Act, the Plaintiffs salary arrears took priority over any payments the third Defendant made out from the 20% share it says Dairibord was entitled to out of the sale balance. Dairibord and the third Defendant entered a consent judgment in civil suit No. 112 of 2009 on 24th November 2009. Under paragraph 2(b) of this consent the amounts from the assets sale were to be shared in the ratios of 80 to 20 for the third Defendant and Dairibord. This was after an initial priority payment of Ug. shs: 1,400,000,000/= to the third Defendant. Even out of equity and in the interest of justice under sections 98 and 33 of the Civil Procedure Act and Judicature Act respectively, this court considers that on the final sale of Dairibord's properties, the Plaintiffs salary arrears should have been prioritized and paid.
- 16. According to the purchase agreement dated 17th February 2010 at page 131 of the third Defendant's trial bundle, the third Defendant sold the assets of Dairibord to the first Defendant at USD 1,200,000. At page 8 of its submissions, the third Defendant coverts the purchase price to be at Ug. shs: 2,400,000,000/= and says that the 20% share due to Dairibord as stipulated in the consent was Ug. shs: 188, 800,000/=. If the Plaintiffs claim had been sorted at the time of payment in 2010, this money was sufficient to clear their salary arrears.

- 17. The failure to cater for the Plaintiffs salary arrears in the entire process of taking over and/or selling the property of their employer points to a grand scheme to illegally, unfairly and unjustly deprive them of their remuneration for work done. The court cannot protect such a scheme.
- 18. There is no satisfactory evidence that the third Defendant gave Dairibord Ug. shs. 188,800,000/= after the sale to the first Defendant, used it to clear Dairibord's creditors as alleged, or that if it cleared these creditors, it prioritized payment or cleared the plaintiffs salary arrears as the justice of this case requires.
- 19. This together with the fact that Dairibord is no longer a going concern or in operation makes the third Defendant liable for the Plaintiffs' salary arrears claimed in this suit. The first and second Defendants as buyers who paid the third Defendant for the assets in issue as part of an agreement between Dairibord and the third Defendant

but did not in any way directly deal with Dairibor - the Plaintiffs employer, cannot be held liable for the plaintiffs claim.

- 20. For their suffering and pain through the years without payment of their salary arrears the plaintiffs are entitled to general damages. This court also considers that they are entitled to interest on their salary arrears because they could have invested their money or used it gainfully if they received it in time. However this court considers interest of 24% per annum prayed for by the plaintiffs, when they have damages for the inconvenience, may result in unjustified enrichment. I consider interest of 15% per annum from 17th February 2010 - when the final sale of assets to the first Defendant was effected, till payment in full.
- 21. Accordingly issues 1 and 2 are resolved in the affirmative. The plaintiffs suit succeeds with the following orders:
 - i. The third Defendant shall pay the plaintiffs salary arrears of Ug. shs: 103,487,247.80/= (Uganda shillings one hundred three million, four hundred eighty seven thousand, two hundred forty seven and eighty cents only).
 - ii. Interest on (i) above at a rate of 15% per annum from 17th February 2010 when the final sale of Dairibord was made till payment in full.
 - iii. Each of the plaintiffs is awarded general damages of Ug. shs. 10,000,000/= for the pain, suffering, inconvenience and psychological torture.
 - iv. The plaintiffs are also awarded costs of the suit to be paid by the third Defendant.

I so order.

Lydia Mugambe Judge 17th May 2019.

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