

UGANDA / JUDGMENT

Oryx Oil Uganda Limited v Hi-Tech Foam Limited (Civil Suit 870 of 2018) [2024]

UGCommC 363 (4 November 2024)

[2024] UGCommC 363

COURT

Commercial Court of Uganda

BEFORE

Anna B. Mugenyi, J

CASE / FILE NUMBER

Civil Suit 870 of 2018

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO 0870 OF 2018

ORYX OIL UGANDA LTD:::::::::::::::::::::::::::::

VERSUS

HI-TECH FOAM LIMITED:::::::::::::::::::::::::::::

BEFORE: HON. LADY JUSTICE ANNA B MUGENYI

JUDGMENT

The plaintiffs claim against the defendant is for recovery of a liquidated sum Ugx \$503,936,888/\$ = (Five hundred three million nine hundred thirty-six thousand eight hundred eighty-eight only) arising from the supply of fuel products by the plaintiff to the defendant.

The plaintiffs case against the defendant is that the plaintiff supplied fuel products to the defendant in the year 2017 and 2018 amounting to Ugx \$503,936,888/\$ = (Five hundred three million nine hundred thirty-six thousand eight hundred eighty-eight only). The plaintiff issued invoices for payment of the sum due for the fuel products and the defendant failed to pay the outstanding amounts claimed.

The defendant contends in their defence that it is not indebted to the plaintiff and has never being supplied with fuel products by the defendant on the dates alleged in the statement of account. The defendant further contended in its defence that the statement of account prepared solely by the plaintiff containing false invoice claims is not evidence that the defendant is indebted to the plaintiff.

REPRESENTATION

The plaintiff was represented by M/s KSMO Advocates whereas the defendant was represented by M/s Gadala & Partners Advocates & Solicitors.

JUDGMENT

I have read the pleadings of the parties, listened to the testimonies of the witnesses in this matter and considered the submissions of counsel as well.

Court takes notice of the fact that the defendant filed their submissions in reply seven days after the timelines given by this court. Timelines are given by Courts to ensure order and timely determination of disputes. Such timelines must be

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adhered to by the parties and followed strictly unless for sufficient cause. Whereas the defendant has not demonstrated sufficient cause as to why they filed their submissions late, in the interest of resolving the main issues in dispute and in a bid to bring finality in litigation, this Court will consider the defendant's submissions in reply in resolving this dispute.

During the scheduling conference, the parties agreed on the following issues to be resolved by this Court:

- a) Whether the defendant is indebted to the plaintiff in the sums claimed and if so how much
- b) What remedies are available to the parties

The defendant, however, raised a preliminary objection that the verbal understanding between the plaintiff and the defendant cannot be legally enforced for having not been reduced into writing and that the plaintiff departed from its pleadings.

I will address the two points of law raised separately.

Preliminary objection 1:

Whether the verbal understanding between the plaintiff and the defendant cannot be legally enforced for having not been reduced into writing

Counsel for the defendant relied on section 10(5) of the Contracts Act which provides that:

"A contract with the subject matter of which exceeds twenty-five currency points shall be in writing."

Counsel for the defendant submitted that the above provision is mandatory and the amount which is claimed by the plaintiff is above the subject matter envisioned under the Act and as such is required to be in writing.

Counsel for the defendant relied on the case of *Kaggwa v Kolin Insaat Turizn & 2 Others* HCCS No 318 of 2012 where Hon. Justice Masalu W. Musene held that:

"And in conformity with the above highly persuasive decision, I hold that the word "shall" under S. 10 (4) of the Contracts Act is mandatory. The provisions that such a contract shall be in writing is in plain English which can be understood by anyone who has gone to school. There is therefore no need for this court to bring in any other interpretations to suit the circumstances of the plaintiff's case. And the rationale behind that legislation under S. 10 (4) of the Contracts Act was to prevent persons or groups of persons from conspiring to claim huge sums of money from others under dubious deals. So in cases like the present one where hundreds

of millions of Uganda shillings (after converting US\$ 500,000.00) is being claimed this court cannot admit nothing less than a written contract. "

Counsel for the defendant further averred that in the absence of a written agreement for the contract of Ugx 503,936,888/=, it is unenforceable and enforcing the same would tantamount to sanctioning an illegality.

Counsel for the plaintiff submitted that the plaintiff's claim is backed by written proof in the form of delivery notes and statement of account which when taken as a whole constitutes the contractual framework, understanding and agreement between the parties within the meaning of section 10(5) of the Contracts Act.

Counsel for the plaintiff averred that the principle in the case of *Kaggwa v Kolin Insaat Ttrrizim & 2 Others* (supra) relied on by the defendant is not applicable in the instant case as the case was concerned with the enforcement of an illegal contract that was unenforceable under the law whereas the contract in this case is legal and therefore enforceable.

Counsel for the plaintiff further submitted that the defendant admitted to making payments for fuel delivered to it from time to time through cheques which in itself is an admission that they benefited from the verbal contract. Counsel averred that such a defendant cannot be seen to later deny the same facts in order to avoid indebtedness as this would be against the principle of approbation and reprobation.

I agree with counsel for the plaintiff that the case of *Kaggwa* (supra) as submitted by the defendant is distinguishable from the facts of this case. In that case the parties tried to enforce an illegal contract and there was no written documentation to infer any business/ contract relationship between the parties.

In the instant case, it is not in dispute that the parties had an oral understanding whereby the plaintiff would supply/deliver fuel products to the defendant who would then pay for the same at a cost.

It is the plaintiffs case that they supplied petroleum products to the defendant amounting to Ugx 503,936,888/= which has remained unpaid. The defendant however contends that it is not indebted to the plaintiff and that they paid in advance before delivery for all the petroleum products supplied to them using cheques.

Section 10(2) of the Contracts Act provides that:

"A contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties".

This provision seems to contradict section 10(5) of the same Act which requires contracts with the subject matter exceeding twenty-five currency points to be in

writing.

A currency point as per the Contracts Act is \$Ugx 20,000/\$ = therefore twenty-five currency points amounts to Ugx \$500,000/\$ =. The amount claimed by the plaintiff is Ugx 503,936,888/\$ = \$.

In the case of Musoke Kitenda v Roko Construction Limited Miscellaneous Application No 1240 of 2020 Justice Stephen Mubiru while dealing with the same provision of the Contracts Act stated that:

"The writing envisaged does not require a formal written contract. This requirement is satisfied by any signed writing that; reasonably identifies the subject matter of the contract; is sufficient to indicate that a contract exists, and states with reasonable certainty the material terms of the contract. It can be a receipt or even an informal letter".

The learned Justice went to state that:

"Part performance of an oral contract makes it enforceable in equity....it is a doctrine of equity that a contract required to be evidenced in writing will still be enforceable even if it is not so evidenced provided that one of the parties does certain acts by which the contract is partly performed.....part performance is achieved when pursuant to the contract visible acts are taken by the party seeking to enforce it, such as handing over possession of the subject matter of the contract.*

The fact of possession is a substitute for the contract required by the Contract's Act, 2010 because it would be intolerable in equity for one party to knowingly suffer another to invest time, labor and money on the item, upon the faith of a contract which did not exist....."

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In the instant case, the defendant nevertheless entered into the oral agreement and even admitted to having made payments in consideration for the supply of fuel willingly. This can be seen in the testimony of DW1 who stated that the defendant used to receive deliveries from the plaintiff after agreeing on the price and the products to be delivered. He further testified that the defendant would sign on a document called the confirmation of delivery once the delivery was made. The same witness admitted to receiving five deliveries and paying for them using cheques and the amounts claimed to have being paid by the defendant through cheques exceeds the amount envisaged by the Contracts Act.

I find that the defendant benefited from the said oral contract and cannot therefore turn around and state that the same contract was illegal. Part performance of the oral contract on its part as stated in the above case makes the same enforceable in equity.

Further the defendant's witness DW1 testified that they used to sign confirmation of delivery forms which he did not adduce as part of his evidence but admitted to part of the statement of account adduced by the plaintiff as evidence. From this written document it could be inferred that the parties had a contract and a business relationship.

I therefore find that the contract between the parties was legal and this preliminary objection is accordingly overruled.

Preliminary Objection 2:

Whether the plaintiff departed from its pleadings

The defendant submitted that there is a departure by the plaintiff from its pleadings because they claimed for the recovery of a liquidated sum of Ugx \$503,936,888\$ = and yet PW1 testified during hearing that their claim was Ugx 443,400,000/=. Counsel submitted that the court should treat the said testimony as inconsistent with the pleading and therefore a departure from the pleadings which warrants a dismissal of the suit.

Counsel for the defendant relied on Order 6 rule 7 of the CPR which provides that:

"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

Counsel for the defendant also relied on the case of **Jani Properties Ltd v Dares- salaam City Council** [1966] EA 281 where Court observed that:

"The parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record moreover, the court itself is also bound by *what the parties have stated in their pleadings as to the facts relied on by them. No party is allowed to depart from its pleadings."*

Counsel for the defendant further relied on the case of **Interfreight Forwarders (u) Ltd v East African Development Bank** CACA No 33 of 1992 where it was stated that:

"The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the *parties upon which they can prepare and present their respective cases and upon* which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party *which will govern the interlocutory proceedings before the trial and which the court* will have to determine at the trial. See Bullen & Leake and Jacob's Precedents of pleading 12th Edition, page 3. Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed.

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He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings."

Counsel for the plaintiff submitted that, there is no departure from the pleadings and there can only be a departure where the cause of action pleaded is different from the one claimed which is the import of the decision in the case of *Interfreight* (supra).

Counsel for the plaintiff further submitted that the plaintiff's claim in both the plaint and the evidence of PW1 and PW2 is for recovery of a debt and further that the plaintiffs claim in the witness statements of PW1 and PW2 is for recovery of Ugx 503,936,888/= and not Ugx 443,400,000/=.

In the instant case, the plaintiff has not changed their cause of action to another. The plaintiff has maintained its cause of action to recovery of a debt amounting to Ugx 503,936,888/= arising from an oral contract for the supply of fuel products. While it is true that during hearing PW1 testified that their claim is UGX 443,400,000/=, she stated that it was because that was the only claim they could prove with the evidence that was available (she could get). PW2 however maintained the plaintiff's claim as stated in the plaint while testifying.

I do not see any departure from the plaintiff's pleadings that would warrant the suit to be dismissed. This preliminary objection is therefore overruled.

Issue 1

Whether the defendant is indebted to the plaintiff in the sums claimed and if so how much

Having disposed of the preliminary objections, I will now determine the above Issue. As already discussed above, the plaintiff and defendant entered into an oral contract/arrangement where the plaintiff supplied fuel products to the defendant at a cost/price.

The plaintiff claims that the defendant is indebted to them for the sum of Ugx 503,936,888/= for fuel products supplied whereas the defendant claims that they fully paid for all the fuel products delivered to them in advance through cheques and are therefore not indebted to the plaintiff.

The plaintiff presented two witnesses namely Ronah Nansamba(PW1) and Malinga Henry(PW2) who testified during the hearing of the case while the defendant presented one witness Karim Abdu(DW2) who also testified during hearing.

Section 101(1) of the Evidence Act provides that:

"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."

This implies that he who alleges has the burden to prove and the standard of proof is on a balance of probabilities. Therefore, the plaintiff bears the legal burden of proof to prove his or her case on the balance of probabilities

Section 103 of the Evidence Act on the other hand places the evidential burden on any party who alleges the existence of a set facts to prove such facts. It provides that:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

It is the plaintiff's contention that they would issue delivery notes and invoices whenever they supplied the defendant with fuel products so as to claim payment. To prove their case, the plaintiff tendered in evidence copies of their statement of account (PEX1), delivery notes (PEX 3 and 4) and tax invoices marked (PEX 6-PEX14).

Further counsel for the plaintiff submitted that whereas the defendant denies the correctness of the statement of account, it relies on the same to prove that it made payments to the plaintiff and does not adduce evidence to that effect. Counsel relied on section 106 of the Contracts Act and stated that when a fact is within the knowledge of another person, it is upon that person to prove it. Counsel contended that the defendant is contravening the principle of approbation and reprobation and invited Court to determine that in the absence of any evidence to the contrary that deliveries were made as per the delivery notes, the plaintiff has discharged its duty to prove that the defendant is indebted.

The defendant however contended that they never used to sign delivery notes but signed what was called confirmation of delivery which is different from what was adduced by the plaintiff. The defendant however did not adduce any documentary evidence in their defence and claimed that they did not have any of the copies of the confirmation of delivery.

Counsel for the defendant submitted that, all payments for delivery were done in advance and that the statement of account is a self-generated document that does not reflect the true status of the account as it is falsified.

7 | Page

The plaintiff therefore has a duty in this case to prove that the defendant is indebted to them.

During the hearing of the instant case, the defendant was able to demonstrate that the plaintiff on various occasions would post wrong invoices to the defendant's account yet the same were never delivered. This was admitted by PW1 during cross examination and she explained that though these errors could occur, they were always reversed and rectified.

On examination of the plaintiff's statement of account marked as PEX1, it can be seen that the plaintiff would post wrong invoices and would reverse the same with credit notes such as order invoiced on a wrong account, order not delivered to customer, wrong customer invoiced, wrong category posted, truck double booked, actual quantity received was less, and truck double invoiced. The wrong invoices were seen to be posted on the \$22/02/2017\$, \$14/03/2017\$, \$8/6/2017\$, \$29/06/2017\$, \$30/06/2017\$ and \$3/07/2017\$. The credit notes for reversals can be seen to be done on the \$1/03/2017\$, \$14/03/2017\$, \$8/06/2017\$, \$1/7/2017\$, \$12/7/2017\$ and the \$1/08/2017\$.

With such inconsistencies and errors that were constantly made by the plaintiff in their invoicing, it makes it difficult for Court to rely on the statement of account to prove that the defendant is indebted to the defendant.

I have also examined the delivery notes marked PEX 3 and PEX 4 tendered by the plaintiff. The delivery notes bear a stamp with the names HI-TECH LIMITED bearing a signature and 'received' written thereon. The details as to who signed and received the deliveries purported to be made to the defendant company is not indicated as no name is written on them. It cannot therefore be ascertained whether the person who received the fuel did so as a representative of the defendant. This makes it difficult for this Court to ascertain who received the fuel on behalf of the defendant.

Further taking into account that the defendant denied and testified through DW1 that the stamps in the delivery notes were not their company stamps and that what they used to sign was a confirmation of delivery form that would be signed by two persons in the defendant company and that delivery was received by the operations manager called Dan, the burden lied on the plaintiff to prove that the delivery notes adduced were indeed authentic.

Furthermore, the plaintiff could not explain who received the delivery on behalf of the defendant. No witness who was present during the transaction was produced to testify. PW1 who testified only joined the plaintiff company in August of 2022 after the fact and what she had were only the records which were given to her. Similarly, PW2 who testified joined the plaintiff company in the year 2018 and admitted that he was not part of the transactions between the plaintiff and

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8 | Page

defendant and he was also not aware of who was signing the delivery notes on behalf of the defendant during deliveries. He stated that he was brought on board to recover the outstanding amount of Ugx \$503,936,888/= \$.

The delivery notes adduced were crossed and when PW1 was asked as to why the same were crossed, she informed court that she does not know why they were crossed since she was never present during the transaction.

There were also inconsistencies in the testimonies of PW1 and PW2. PW1 testified that the outstanding amount demanded is Ugx \$443,400,000/\$ =, and relied on delivery notes and six invoices to prove this namely; invoice no 17575 for Ugx 89,830,650/=, invoice no 17407 for Ugx 90,554,750/=, invoice no 17406 for Ugx 90,530,000/=, invoice no 17520 for Ugx 90,563,000, invoice no 17408 for Ugx 90,513,500/= and invoice no 17405 for Ugx 93,040,750/=. When these invoices are totaled up, they amount to Ugx \$543,032,650/= \$.

PW2 testified that the outstanding debt is Ugx 503,936,888/= and relied on delivery notes and five invoices to prove this namely; invoice no 17407 for Ugx 90,554,750/=, invoice no 17406 for Ugx 90,530,000/=, invoice no 17520 for Ugx 90,563,000, invoice no 17408 for Ugx 90,513,500/ \$=\$ and invoice no 17575 for Ugx 89,830,650/= which, when totaled up, amount to Ugx 451,991,900/=.

The plaintiff also contended that the outstanding amount was initially 846,944,640 but was reduced after offsetting the debt from the transporter. Upon reviewing the statement of account, the credit notes where offsetting against the vendor was effected were on the \$18/09/2017\$, \$1/04/2018\$, \$30/04/2018\$, \$1/6/2018\$ and \$14/06/2018\$ and the invoices against which the offsetting is purported to be made are numbers 030, 36, 37, March-April 2018 invoice. These invoices do not include those that are in contention.

I therefore see inconsistencies in the evidence adduced by the plaintiff which have remained unexplained and such evidence cannot be relied on to find the defendant liable to pay the claimed monies in issue.

For all the reasons elaborated above, I therefore find that the plaintiff has failed to discharge its duty and prove their case on a balance of probabilities.

I, therefore, find that the defendant is not indebted to the plaintiff in the sums claimed and this suit is accordingly dismissed with costs to the defendant.

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HON. LADY JUSTICE ANNA B. MUGENYI DATED.....

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