IN THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON JUSTICE A.E.N.MPAGI BAHIGEINE, JA

5 **HON JUSTICE C.K.BYAMUGISHA, JA**

HON JUSTICE S.B.K.KAVUMA, JA

CIVIL APPEAL NO. 30 OF 2005.

NGEGE LTD::: APPELLANT.

VERSUS

10 **DAVID WAMALA:: RESPONDENT.**

[Appeal from the decision of the High Court of Uganda (Commercial Division) by Hon. Justice Mr. James Ogoola delivered on 19/01/05 in Civil suit No.1186 of 1999]

15 **JUDGEMENT OF HON.JUSTICE A.E.N.MPAGI BAHIGEINE, JA.**

This appeal is against the decision of the High Court dated 19th-01-2005, wherein the respondent/plaintiff was awarded Shs 11,041,210/= (principal amount) with interest and costs of the suit.

20 The background is as follows. The respondent filed this suit against the appellant claiming Shs 11,041,210/= with general damages for breach of contract which indebtedness the appellant allegedly acknowledged (Ex P1). This breach arose out of fish worth Shs 51,569,310/= the respondent had supplied to the appellant, between 19th October and 2nd November 1998.

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The appellant effected some payments leaving the balance of Shs 11,041,210/=. The appellant also counterclaimed Shs 4,428,355/= on account of unsupplied fish, general damages and costs.

30 The learned trial Judge entered judgement for the respondent as above indicated which the appellant now challenges on four grounds, namely that:

1. **The learned trial Judge erred in law and in fact when he wrongly evaluated both the plaintiff's and the defendant's evidence and as a result, made wrong findings on issues 1, 2, &3.**

5 2. **The learned trial Judge erred in law and in fact when he misdirected himself on the following principles of law, and wrongly relied on Exhibit P1 for his judgement.**
    a) **The burden of proof**
    b) **Standard of proof in civil matters**
10 c) **The best evidence rule and admissibility of evidence,**
    d) **Inconsistency of evidence**

3. **The learned trial Judge erred in law and in fact when he misdirected himself and inferred insincerity and a suavely**
15 **conduct on the defendant and queried the credibility of its evidence owing to the amendment of the Defendant's written statement of defence.**

4. **The learned trial Judge erred in law and in fact in holding that**
20 **Oburu and Haruna were employees or Agents of the Defendant Company.**

5. **The Award of interest on interest awarded by the learned trial Judge is unjust, unreasonable and is excessive.**

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Ms. Wasswa for the appellant argued grounds 1, 2 and 4 together. Her main contention was that the acknowledgement, Ex P1, was the only document relied on by the Judge. She argued that the Judge should never have relied on it let alone admitting it in evidence as it had been authored
30 under dubious circumstances.

She pointed out that David Wamala the respondent (PW1), Wamala Mbowa (PW2) and Oburu (PW3) each testified that Ex P1 was drawn by Oburu. Oburu however, stated to have drawn it on the basis of information

supplied to him by one Haruna (PW4). Learned counsel submitted that the contradictions were so glaring that the Judge should not have relied on the document. The witnesses said Oburu made the payments to the fishermen yet Oburu said that he only made payments after Kim the Managing Director had authorised him to do so. However, according to Kasozi's evidence (DW1), Oburu used to pay as well (though he claims not to be an employee of the company). Learned counsel argued that the Judge gave more weight to oral evidence than to the unchallenged documentary evidence on record.

This argument was a little difficult to follow:

> Oburu did not deny paying out any money, he only stated he had to do it on instructions from Kim, the chief executive.

Commenting on the late filing of their written statement of defence and its contacts, counsel submitted that it was hurriedly drafted and filed in order to beat the deadline but that it was later amended to include specific details and a counterclaim after exhaustive research on facts.

In reply, Mr. Onesmus Tuyiringire, learned counsel for the respondent submitted that the learned Judge correctly appraised the evidence on record. He pointed out that the 1st issue before the lower court was whether the defendant/appellant owed the plaintiff money and if so how much? The burden of proof lay on the plaintiff/respondent to establish that he supplied and the defendant/appellant received fish and that therefore the appellant owed him money for the above transaction. Learned counsel argued that the evidence on record showed beyond doubt that the respondent had indeed supplied fish to the appellant and payments would be made on delivery after the weight of fish having been taken.

He maintained that the respondent's testimony was corroborated by those of PW3 and PW4 that the fish was received by the factory as the learned Judge indeed found. He submitted that the evidence on record was enough to show that Patrick Oburu, PW3 was an employee/agent of the

appellant and that the acknowledgement, Ex P1, he had drawn could sufficiently commit the appellant in relation to their daily business. Mr. Tuyiringire prayed court to dismiss grounds 1, 2 and 4.

5 The learned Judge observed:

> **"To succeed, each party must prove its case on a balance of probabilities. To prove its case, the defendant company exhibited a batch of payment vouchers collectively amounting to Shs 50,550,00/= (Exhibit D1); a Statement of Account (Exhibit D4); and fish supply schedules (Exhibit D2) in respect of fish deliveries allegedly made by the plaintiff to the defendant company in an amount of Shs 46,421,645/=. Furthermore, the defendant called three witnesses DW1, DW2, and DW3 who testified about the defendant's procedures for receiving and paying for fish deliveries...**
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> **The defendant itself could not remember the alleged transaction when in its original Written Statement of Defence the defendant simply and flatly denied the existence of any fish transaction between itself and the plaintiff. It took the defendant a whole amendment of its pleadings to recollect the transaction....**
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> **In this regard, it is to be remembered that the defendant disowned both Oburu and Haruna as having ever been employees at all....**
>
> **I am satisfied that PW3 (Oburu) was indeed an employee or agent of the defendant company....PW3 knew the exact period of the plaintiff's fish deliveries to the defendant company (namely, September – November 1998). He knew the exact places where those fish deliveries took place (namely Kiyindi landing site and at the defendant's fish factory at Luzira). He knew the names of the defendant's**

fish buyers at Kiyindi (one Abdalla Haruna and Picho), and the Defendant's paymaster at Luzira (one Kasozi, effective from 3rd November, 1998. He knew which facets of the defendant's fish business were transacted at Kiyindi (namely, weighing the fish and recording their price, etc); and which ones were transacted at Luzira (namely, paying the fish sellers their dues for their deliveries). He knew and described accurately the exact weights of fish that were delivered by the plaintiff at Kiyindi (namely, 39,401 kgs of small fish and 5,200 kgs of the big fish). He knew and described all the operational procedures used by the defendant in the business of buying, receiving, sorting, weighing, preparing, storing, transporting and exporting the fish. He effected all the payments that were ever made to the plaintiff prior to 3rd November, 1998 (when Kasozi took over); and then prepared Exhibit P1 by way of documentary record and confirmation of the plaintiff's remaining balance of Shs 15 million to be paid to the plaintiff subsequently. Indeed, Shs 4 million out of that 15 million was subsequently paid to the plaintiff by Kasozi himself no less ..... this court can harbour no doubts whatsoever but that PW3 was fully privy to the transactions in issue, and that he could not have derived all this detailed knowledge and information about all these official transactions except through having had an extremely intimate working relationship with the defendant's business operations ...... he was indeed an employee or agent of the Defendant company at the material time.

Both PW2 (Wamala Mbowa) and PW3 (Oburu) did recount in the minutest detail every aspect of PW1's evidence. They both confirmed the material period as being September –

> **November 1998; the primary place of the fish deliveries as being Kiyindi landing site, the buyers as being Haruna and Picho (employees of the defendant company), and the place of the partial payments as being at the defendant's Luzira fish factory. All three confirmed that it was Oburu who prepared the crucial Exhibit P1 confirming the plaintiff's outstanding claim of Shs 11,041,240/= and that he did so at the defendant's company offices and in the presence of the plaintiff and Mbowa Wamala. These were basically simple fishermen telling a simple story. I found them to be consistent and their story to be wholly convincing. None of them wavered at all with their evidence."**

I cannot fault the learned trial Judge's finding in any aspect. He heard the testimonies and observed the witnesses' demeanour with meticulous care as evidenced by his pertinent comments in respect thereof.

The circumstances surrounding Ex P1 raise no doubt in my mind whatsoever. I find PW3's testimony crystal clear and straightforward. I should add perhaps that the learned Judge did not only consider Ex P1 but took into account all the relevant evidence on record concerning the purchases, deliveries and payments in respect thereof. I thus find Ms. Wasswa's criticism of the learned Judge's finding quite unjustified and unsubstantiated.

I would dismiss grounds 1, 2 and 4.

Regarding ground No.3, learned counsel argued that the learned Judge's reliance on the case of **Dhanji Ramyi v Malde Timber Company (1970) EA 422, at 427** on the ground that it involved a personal matter whereas the instant case concerns a big company where it was not easy to know the suppliers immediately. That is why the original defence was a mere general denial, as it had to be filed hurriedly in order to beat time. The amended defence was later filed specifically denying the claim together

with the counter claim. The defendant/appellant is a big company and records took time to be dug up. Learned counsel submitted it was erroneous for the learned Judge to impute bad faith.

5 Mr. Tuyiringire in reply pointed out that the amendment of the defence was effected almost one year after the filing of the plaint. The original defence was a total denial, then by way amendment they acknowledged a long period of transaction with the respondent. Most surprisingly, the appellant was on the connected computer. There was therefore no excuse 10 for the delay. This was an unprecedented U-turn of the defence where knowledge of the respondent had been totally denied. The learned Judge was correct to apply the ratio in Dhanji's case. He prayed court to dismiss the appeal.

15 The case of **Dhanji Ramji v Malde Timber Company (1970) EA 422** is significant for the holding that:

> ***"While the amended pleading is conclusive as to the issues for determination, the original pleading may be looked at if it contains matter relevant to the issues 20 (dictum of Newbold, JA in Eastern Radio Service v R.J Patel (trading as tots) (1962) EA818 applied).***

Newbold, JA said this:

> **"Logic and common sense requires that an amendment should not automatically be treated as if it, and nothing 25 else had ever existed."**

In this that the court pointed out significant inconsistencies between the original and the amended defence, which could not be satisfactorily explained away.

30 In the instant case the learned trial Judge while applying the ratio in Dhanji's case to facts before him observed:

> **"…and especially so where the inconsistency is (as in the instant suit) a startling one. It is all the more startling**

given that the Defendant alleges a counterclaim of Shs 4,000,000/= from an original transaction of Shs 50 million. It stretches the imagination too far for the defendant to have not remembered so huge a transaction given especially that the same defendant now alleges that he had a counterclaim of Shs 4 million against the plaintiff.”

The learned trial Judge accordingly rejected the Defendant’s total explanation.

It is further important to note that the appellant’s own accountant, Patrick Batte (DW3) admitted being connected to a computer:

“I enter data about the company’s purchases and sales. I enter them from Delivery vouchers (for purchases) and from invoices (for sales). I enter them into the computer … for Wamala’s account, I am the one who made these entries …..”

However, the appellant’s legal officer, Dorothy Namubiru, in her affidavit dated 11th August 2000, gave a different story:

“At the time of filing the applicant/Defendant’s defence, the Applicant/Defendant could not trace any record dealing with the plaintiff as alleged in the plaint or at all.

That after thorough and laborious searching in the Applicant/Defendant’s archives, the Applicant/Defendant found records of transactions between the parties to the suit ….”

The foregoing coupled with the statement in the original defence that:

“At no single time did the defendant ever purchase fish, or receive supply of fish from the plaintiff, nor make part payment to the plaintiff whatsoever as alleged in the plaint” makes the appellant’s case unsustainable.” All justify the learned Judge’s remark when he said:

"I am afraid, I find the defendant's version of the suit transaction extremely difficult to believe."

I similarly find the appellant's case unsustainable and would
5 dismiss it with costs.

Since my Lords Byamugisha and Kavuma, JJ.A both agree, it is so dismissed with costs here and below.

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Dated at Kampala this ……**11th** …day of ……**January**……….**2006**.

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A.E.N.MPAGI BAHIGEINE

JUSTICE OF APPEAL.