

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA.**

**CIVIL APPEAL NO. 46 OF 2003**

**CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ**

**HON. JUSTICE S.G. ENGWAU, JA**

**HON. JUSTICE A. TWINOMUJUNI, JA**

**SOWEDI KATONGOLE & ANOTHER .....APPELLANTS**

**VERSUS**

**M/S SENTONGO PRODUCE &**

**COFFEE FARMERS LTD. ....RESPONDENT**

*(Arising from the Judgment of the High Court of Uganda at Kampala delivered by Justice Oscar Okumu-Wengi on 17-12-2002 in High Court Civil Suit No. 291 of 2003)*

**JUDGEMENT OF HON. DEPUTY CHIEF JUSTICE L.E.M. MUKASA-KIKONYOGO**

This is an appeal against the judgment of the High Court sitting at Kampala dated 17.2.2002. The Appellants, Katongole Sowedi with his wife, Katongole Shamim were aggrieved by the judgment of the trial court and hence lodged this appeal to this Court.

## **Background**

The background of the appeal is that the Respondent in this appeal M/s Ssentongo Produce & Coffee Farmers Ltd., was a company carrying on business in Uganda.

The Appellants were the defendants in the High Court. The parties were dealing in coffee and selling it to exporters in Kasese. They entered into an agreement to supply and deliver coffee to the respondent under which the appellants were paid a sum of Ug.Shs.22,272,000/=. It was not disputed that prior to that, there was an outstanding debt in the sum of Ug.Shs.2,467,500/= due on account of 2,285kgs of coffee which had not been delivered. One of the terms of the agreement was that the coffee would be delivered before 15<sup>th</sup> June 2001.

The respondent advanced various sums of money as pre-payment which were remitted to the appellants' account in Kasese A/c No. 31-00116-5 at Commercial Bank Kasese Branch. The appellants also mortgaged their property comprised in LRV 2754 - Folio 1 Plot 35 New Kabaale Road Ntungamo District as security for the advances. The said payment included the Ug.Shs.20,000,000/= received by the appellants from the respondent but whose purpose was disputed by either party.

The aforesaid advance payments notwithstanding, the appellants in breach of the agreement failed to deliver or to refund the purchase price to the respondent. Additionally, the respondent claimed interest because the money advanced to the appellants was obtained from banking institutions on a loan.

The Appellants denied liability. They denied that the sums of money advanced to them were in respect of the agreement as alleged by the respondent. As far as they are concerned, they agreed to supply 38,400kgs of coffee of which they delivered 19,448kgs. Although, more deliveries were made, the appellants were only able to supply to the respondent a total of 2,285kgs worth

Ug.shs.2,467,500/=. They would have delivered all the coffee if the respondent had not refused to take delivery. In the premises, the appellants denied liability to pay a sum of Ug.Shs.23,752,400/= to the respondent or that they were in breach of the agreement.

Further, there was a controversy between the parties over the purpose for which Ug.shs.20,000,000/= was remitted to the appellants. The court had to decide whether it was paid under the agreement to supply coffee to the respondent or whether it was kept by the respondent for safe custody.

To establish the claim, DW1, Mrs. Katongole, testified before court that the money was not remitted to the respondent under the agreement to supply coffee but for safe custody. For security reasons, as she was travelling a long distance, feared to carry such large sum of money without adequate security.

### **Decision of the Trial Court**

Upon listening and considering the evidence adduced by both sides and the submissions of their counsel, the learned trial judge disbelieved the defence and passed judgment in favor of the respondent. Dismissing the claim he had the following to say:

**“I have, therefore, decided not to believe the evidence of the defence witness. Since a sum of U.Shs.2,467,500/= is admitted and since the deposit of the money to the plaintiff ostensibly intended for a lorry purchase was not pleaded by the defence, I must enter judgment against the defendant in the sum of Ug.Shs.22,272,000/= in favour of the plaintiff. The defendant will also pay costs to the plaintiff and the decretal sum will attract interest at 12% since the date of filing till payment in full”.**

The appellants dissatisfied with the decision of the court instructed their learned counsel to file the appeal. Mr. Matovu appeared for the respondent who was the plaintiff in the lower court.

## **Grounds of appeal**

*The appeal is based on the five grounds which read as follows:-*

- 1. Having heard and believed the testimony of DW1 that all their transactions with the plaintiff were documented, the learned trial judge erred in law and facts when he disbelieved her evidence that the Ug.Shs.20,000,000/= was not meant for the purchase and supply of coffee.**
- 2. The learned trial judge erred in law when he failed to formulate an issue which could have assisted the court to determine all the issues in controversy between the parties, namely, whether or not there was an agreement between the parties for the supply of coffee worth Ug.Shs.22,272,000/=.**
- 3. The learned trial judge erred in law and fact when he failed to analyze and evaluate the evidence on record thereby arriving at an erroneous finding prejudicial to the appellants.**
- 4. The learned trial judge misconceived misrepresented the facts and proceedings generally when he recorded that Kwarisiima prayed for the document (Exhibit P.1) to be admitted in evidence which occasioned miscarriage of justice.**
- 5. The learned trial judge did not analyze and evaluate the evidence on record and as a result he erred both in law and fact when he:-**
  - (a) Entered judgment in favor of the respondent, which had failed to prove its case.
  - (b) Awarded a sum of Ug.shs.22,272,000/=

(twenty two million, two hundred seventy two thousand shillings) to the respondent in special damages which was not specially proved as by law required.

### **Submissions by Counsel for the parties**

Counsel for the appellants, apparently argued all the five grounds together. This is because to him, the aforesaid five grounds notwithstanding, there was only one issue for the court to determine namely the holding of the court that ***“Ug.Shs.20,000,000/= was remitted to the appellants’ account for supply of coffee.”*** To the appellants, the money was not paid under the agreement as alleged by the respondent but for other purposes.

The gist of the complaint by the appellants against the decision of the court is the finding of the learned trial judge on the purpose of the payment of disputed decretal amount of Ug.shs 20,000,000/= to the appellants.

Counsel contended that the learned trial judge wrongfully entered judgment for the respondent who had failed to prove its case but instead awarded it the sum of Ug.Shs. 22,272,000/= which also was not proved specifically as required by the law. To him there was no evidence to support the claim.

Furthermore, it was contended for the appellants that there was no proof of existence of an agreement between the parties, in any case it was not signed. It could not be described as a legal document.

Additionally, counsel submitted that the auditor’s report was not of much use as it had not been proved and worse still the learned trial judge misconceived and misrepresented the facts.

In reply, counsel for the respondent, following the same order as counsel for the appellants supported the Judgment of the trial court and therefore invited this Court to dismiss this appeal with costs. He argued that, in the light of the many admissions of the transactions between the parties under the agreement including auditor's report exhibit P.1 and receipt of cash in the sum of Ug.shs.2,467,000/= under the agreement between them, the learned trial judge properly entered judgment for the respondent and awarded it costs.

### **Consideration by court**

On consideration of the evidence on the court record particularly the documentary evidence including the auditor's report, the testimony of DW1, Mrs. Katongole and the admissions by the parties, I proceed to make the observations stated below:

As the first appellate court, we bear in mind our duty to re-appraise the evidence on record and draw inferences of fact in compliance with Rule 30 of the Judicature (Court of Appeal Rules) Directions and reiterated in the cases of Pandya V R 1958 E.A. 336 and Kifamunte Vs Uganda SCCR AC 10/1997 (noted).

It should be noted that this appeal hinges mainly on the findings on the credibility of DW1, Mrs. Katongole. It was the contention of the appellants that, had the court believed her version it would have come the correct finding on the purpose for the 20m payment to the respondent.

The principles governing interference with the decisions of a trial court or single judge are well settled and reiterated in many authorities. When considering a question of credibility resolved by the trial judge after evaluation of the facts, it should exercise caution before interfering with it. In the case of Benmax Vs Austin Motor Co. Ltd. (1955) 1 All E.R. 326, the House of Lords held (on 2<sup>nd</sup> appeal) that:

**“An appellate Court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge.”**

In this appeal, I agree with the finding of the learned trial judge that the purpose for the remittance of Ug.shs.20,000,000/= to the respondent was not for buying a lorry but for supplying coffee under the agreement. He was in a better position to decide on the issue of credibility of DW1 as he was able to observe her demeanor. Clearly her evidence was an after-thought for reasons not hard to find.

First and foremost, the evidence was introduced belatedly.

Secondly, as submitted by counsel for the respondent, the appellants should have pleaded or mentioned it at an earliest stage or at least at the subsequent amendment of the plaint. It would have been a strong and persuasive piece of evidence if believed.

Thirdly, there was also a possibility of filing a counter claim which was not done. I do not accept the submission of counsel for the appellants that it was unnecessary because the money was already in possession of the appellants.

Fourthly, on cross-examination as to why she did not disclose that earlier on, she surprisingly replied that she had no obligation to explain especially as the matter was already in court. Her conduct was suspect and justified the conclusion the learned trial judge reached.

Fifthly, in court she changed the versions of the reasons why the money was kept in custody of the respondent. One reason given to court was that they had been advised by the respondent to buy a motor lorry for business purposes. However, she later changed the story and said it was due to security reasons, she did not want to travel long distances with large cash without adequate security. The learned trial judge was, therefore, justified to disbelieve her evidence.

For the reasoning and on the evidence on record, the learned trial judge was justified to disbelieve the evidence of DW1, Mrs. Katongole.

On the complaints on the admission of documentary evidence without proof the learned trial judge was justified to admit them for a number of reasons. Firstly, as it was rightly pointed out by the counsel for the respondent, there are serious admissions of the transactions between the parties which support the existence of the agreement by the appellants to supply coffee to the respondent. The court record at page 51 dated 29/11/2002 reproduced below is a good example. It reads as follows:-

**“29/11/2002:-John Matovu for Plaintiff.**

**Kwarisiima for Defendant.**

**Rose Emeru Court.**

**Matovu:- We got an auditor to prepare a report. I received my copy yesterday. We took on Nagenda & Company Associate Accountants. I have gone through the report. I have no problem with the report.**



**Kwarisiima:- Also gone through it. I have no problem with the findings. Only thing is that we say that the money advanced to the defendant was so done for other purposes. Pray the document be admitted in evidence.**

**Court:- I will take the report and mark it as exhibit P.1 as admitted by consent of both counsel.**

**Matovu:- I do not need other evidence. I also close my case.**

**Kwarisiima:- I will call evidence of one witness.**

**Court:- The matter comes up on Monday 9/12/2002**

.....

**JUDGE**

**29/11/2002”**

Secondly, there was clear evidence to show that payments for the coffee supplied were received by the appellants. In the premises, the learned trial judge cannot be faulted for basing his decision on the agreement and the auditor’s report for want of proof. It is not disputed that both the agreement and auditor’s report were admitted into evidence by consent during the scheduling conferencing.

In my view, it is of no consequence that the documents were not signed or there were some shortfalls in the auditor’s report. That per se did not occasion any miscarriage of Justice. It all depends on the circumstances and evidence on record. In the instant case, the appellants and their counsel having had a careful perusal accepted the auditor’s report as a true and proper record of their transactions with the respondent cannot be allowed to raise the objection belatedly.

Regarding the errors complained of in the auditor's report, in my view, those were minor, which did not go to the root of the auditor's report. They can easily be explained away, although I concede it requires exercise of caution.

Although, I note that Mr. Kwarisiima after going through the auditor's report stated that "***I have no problem with the findings of a report***" with the exception of the purpose for the payment of Ug.shs.20,000,000/=, allowing him to object after the closure of the case would be a reflection of after-thought on his part.

For the same reasons, the learned trial judge cannot be faulted for wrongfully entering judgment for the respondent. On the documentary evidence on record, the respondent had proved its case and justified the award of special damages claimed in the sum of Ug.shs.22,272,000/=. There was sufficient evidence to show how it was incurred. The judgment of the court did not cause a miscarriage of justice.

In the result, I find no merit in the appeal and I would dismiss it accordingly.

Since Amos Twinomujuni JA, also agrees, the appellant's appeal is hereby dismissed with costs.

The judgment and orders of the High Court are hereby upheld.

Dated at Kampala this ...**29<sup>th</sup>** ...day of .....**September**..... **2010**.

**L.E.M. MUKASA-KIKONYOGO**

**DEPUTY CHIEF JUSTICE**

**JUDGMENT OF TWINOMUJUNI, JA**

I have had the benefit of reading the judgment, in draft, of her Lordship the Deputy Chief Justice.  
I concur and I have nothing useful to add.

Dated at Kampala this ...**29<sup>th</sup>** ...day of .....**September**.....2010

Hon Justice A.Twinomujuni,

Justice of Appeal