THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA

HON. JUSTICE A.TWINOMUJUNI, JA

HON. JUSTICE A.S. NSHIMYE, JA

CIVIL APPEAL NO.50 OF 2008

BETWEEN

BRITISH AMERICAN TOBACCO (U) Ltd …….. APPELLANT

AND

1. SEDRACH MWIJAKUBI
2. MUKITALE ASIIMWE
3. JOSHUA BYANGIRE
4. FENEKASI BABYESIZA
5. SOLOMON KIIZA …….. RESPONDENTS

[Appeal from the decision of the High Court at Kampala (Egonda-Ntende, J, as he then was) dated 26th June 2008 in High Court Commercial Division, Civil Suit No.268 of 2005]

JUDGMENT OF ENGWAU, JA

This appeal is against the decision and orders of the High Court, Commercial Division, (Egonda-Ntende, J) given on June 26, 2008 in High Court Civil Suit No.268 of 2005.

The background facts of that suit were as follows:

1. ***The respondents had brought the suit on their own behalf and on behalf of numerous farmers of Tobacco in Masindi and Hoima Districts. They claimed they were tobacco farmers contracted by the appellant to grow tobacco in Masindi and Hoima Districts for the 2004 season. They also claimed that they had written contracts from the appellant under which the appellant advanced loans to them to grow tobacco.***
2. ***The respondents also claimed that the appellant supervised the growing and harvest of the tobacco, providing technical advice, along the way. At harvest all the tobacco had to be sold and or bought by the appellant at predetermined prices. For 2004 season the appellant initially purchased some tobacco early in the season and then announced that it would not purchase any more tobacco from the farmers.***
3. ***The respondents brought this action to recover from the appellant the value of the tobacco they grew and delivered to the appellant's buying sheds but which the appellant refused to purchase less the outstanding loans given to the farmers by the appellant. The respondents further sought interest on the said sums of money at the rate of 26% from 20th December, 2004 till payment in full and costs of the suit.***
4. ***The appellant denied that the respondents were its contracted farmers. In the alternative, in case the respondents were appellant's contracted that this suit was premature as it informed the respondents that it was carrying out a verification exercise to establish that the said farmers grew the tobacco in question in accordance with their contracts, the Tobacco (Control and Marketing) Act and regulations.***

"Remedies

30. The defendant is liable to pay the plaintiffs and the other farmers on whose behalf this action was brought, and in respect of whom, registration numbers with the defendant have been provided in exhibit P2 and P3, the value of the tobacco shown in exhibit P2 and P3 to have been delivered to the defendant's marketing sheds. There is a weight for each farmer shown. The value at the end is not proven given that the tobacco was not graded. According to P2 and P3 the value had been calculated at Shs.1,600.00 per kilogramme.

31. It is more appropriate to take the price provided by the defendant in exhibit P6 which puts the average price at Uganda Shs.1,200 per kilogramme. This shall be the multiplier with the kilograms delivered to the defendant's sheds as shown in exhibit P2 and P3. Offset from this sum will be the loan amounts advanced to each of the farmers by the defendant, as shown in exhibit P2 and P3.

32. In addition for each plaintiff and or individual farmers' value of his tobacco crop for the 2004 season, interest shall be paid thereon at the rate of 26% per annum on daily balances compounded monthly, in line with regulation 11(2) and (3) of the Tobacco (Control and Marketing) Regulations, S.1 35-1.

33. The plaintiff shall be entitled to costs of this suit".

The appellant appeals to this Court against the whole of the above-mentioned decision on the following grounds, namely:

1. ***The learned trial judge erred in law and in fact in the evaluation of evidence.***
2. ***The learned trial judge erred in law and in fact in answering issue No.1 in the affirmative.***
3. ***The learned trial judge erred in law and in fact in deciding issue No.2 in favour of the plaintiffs.***
4. ***The learned trial judge erred in law and in fact in deciding issues Nos. 3 and 4 in favour of the plaintiffs.***
5. ***The learned trial judge erred in law and in fact in relying on the evidence of PW1 and PW2 and in holding that that evidence proved plaintiffs' case.***
6. ***The learned trial judge erred in law and in fact in holding that the defendant was in breach of contract with the plaintiffs when it failed to buy the plaintiffs' tobacco.***
7. ***The learned trial judge erred in law and in fact when he held that:***

   "Counsel for the defendant, in his written submissions on this issue made reference to exhibit D25 and D51 and attached the same to his submissions. Those documents are simply not part of the evidence in this case".

8. ***The learned trial judge erred in law and in fact in awarding to plaintiffs damages based on Shs.1,200 per kilogramme as a multiplier of the kilogrammes shown in exhibits P2 and P3.***
9. ***The learned trial judge erred in law and in fact in awarding the excessive interest of 26% per annum compounded on daily balances.***

Arising from the above grounds of this appeal, counsel for both parties framed and agreed upon the following issues for determination by this court:

1. ***Whether the respondents were appellant's contracted farmers.***
2. ***Whether all the persons in annexture "B"and "C"(List of farmers) have the same interest.***
3. ***Whether the respondents' suit tobacco was grown in accordance with the contract.***
4. ***Whether the respondents' suit tobacco was the quality that the appellant contracted to buy.***
5. ***Whether the appellant was in breach of contract with the respondents.***
6. ***Whether the respondents are entitled to damages awarded by the trial judge.***
7. ***Whether the respondents were entitled to interest at the rate of 26% compounded monthly.***

Dr. Joseph Byamugisha, learned counsel for the appellant, argued grounds 2,3,4 and 8 separately in full and stated that his submissions on those grounds will cover the remaining grounds as well. Mr. Muwema, learned counsel representing the respondents followed the same order in his submissions and I shall do the same.

Ground No.2 of this appeal relates to issue No.1 "whether the respondents were the appellant's contracted farmers". According to Dr. Byamugisha, this issue should have been answered in the negative on the ground that without producing their passbooks upon which there was a contract, the respondents were not appellant's contracted farmers. This is because, according to counsel, Order VII, rule 14 of the Civil Procedure Rules provides for:

"14. Production of documents on which plaintiff sues and listing of other documents on which plaintiff relies.

(1) ***Where a plaintiff sues upon a document in his or her possession or power, he or she shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy of it to be filed with the plaint.***

(2) ***Where a plaintiff relies on any other documents (whether in his or her possession or power or not) as evidence in support of his or her claim, he or she shall enter the documents in a list to be added or annexed to the plaint".***

Dr. Byamugisha conceded that only PW1's passbook was annexed to the plaint, and could have been properly admitted. Further, the other passbooks which were put in cross-examination were also properly admitted as exhibits D1 to D213. Counsel's concerns are based on the following erroneous holdings by the learned trial judge:

"11. It is true that only 214 passbooks have been produced in court as exhibits. In addition, though through the testimony of PW1, exhibits P2 and P3 that are admitted into evidence contain the registration number of each farmer with the defendant.

12. Plaintiffs 3 and 4 appear on exhibit P2, which is a list of contracted farmers that PW1 and PW2 state they compiled on interviewing farmers whose tobacco had not been purchased.

13. According to the testimony of PW1, when they interviewed the affected farmers, they looked at their names and numbers. The defendant has not adduced any evidence to show the contrary which is within the defendant's knowledge as the defendant registered all their contracted farmers".

It is the contention of Dr. Byamugisha that the learned trial judge erred in the above holdings. Counsel submitted that if the trial judge had properly evaluated the evidence of PW1 and PW2, it would have not been correct to say PW1 and PW2 stated they compiled exhibits P2 and P3 on interviewing the farmers whose tobacco had not been purchased. Nor was it correct to say, according to the testimony of PW1, when they interviewed the affected farmers they looked at their contract passbooks and confirmed their names and numbers.

Learned counsel submitted that PW1 and PW2 neither interviewed the affected farmers together nor did either of them interview all the affected farmers. Exhibits P2 and P3 are compilations of collected material by different persons and neither PW1 nor PW2 collectively or singlly can own either exhibit as compiled by them directly from the farmers. The groups of people split themselves and went to the markets to find people who had not sold their tobacco.

Counsel further pointed out that for the trial judge to hold that: ***"the defendant has not adduced any evidence to show the contrary which is within the defendant's knowledge as the defendant registered all their contracted farmers,"*** amounted to shifting the burden of proof on the appellant. It was incumbent on the respondents to prove that they had contracts with the appellant. According to counsel, mere provision of the registration number was not proof of any contract. The words ***"interviewed the affected farmers,"*** in law is an information which is hearsay. In counsel's view, even when compared with passbooks it is still hearsay and it should not have been relied on.

On the other hand, Mr. Muwema representing the respondents responded as follows: In the first place, counsel pointed out that the 1st respondent together with 4 other respondents brought the suit by representative action after obtaining permission from Court to do so on their behalf and on behalf of numerous tobacco farmers as listed in Exhibits "P2"and "P3".

Secondly, the plaint with annextures included "all documents to be furnished by the defendant under notice to produce". Such documents included the Farmers Contracts, Lists and Particulars of contracted Farmers and they were served on the appellant/defendant on the 19th September, 2005. Therefore, the plaint complied with the requirements of 0.7 r 14 CPR where a list of documents intended to be relied upon was attached to the plaint.

The main complaint of the appellant on this issue is well captured, according to Mr. Muwema, by the learned trial judge in his judgment thus:

> ***"The dispute lies with the people on whose behalf this action was brought and their passbooks were not produced. Plaintiffs' counsel in their Written Submissions contend that for the rest of the numerous people estimated to be 2,836, their position has been***

proved by secondary evidence of "PW1"and "PW2"who stated that they recorded their names after inspecting their passbooks".

Counsel for the defendant submitted that in light of S.64 of the Evidence Act, S.62 of the Evidence Act does not assist the Plaintiffs. All the Plaintiffs had to prove that they were contracted Farmers by producing their passbooks. Sections 101 and 103 of the Evidence Act were the applicable law on proof of a fact".

Mr. Muwema submitted that having properly identified the bone of contention, the learned trial judge evaluated the evidence which was adduced regarding the other Farmers whose passbooks were not produced thus:

"PW1 at page 73 of the record lines 22-25;

We would go to the market and find people who had not sold tobacco. We split ourselves and went to various markets. When we reached the markets and found people with their tobacco, British American Tobacco had closed buying tobacco on 20th December 2004. Everyone was crying. British American tobacco closed the markets without telling us the reason".

"PW1 at the same page lines 19-20;

After we grew in number, we elected an executive. This was the group of people who had not sold their tobacco……..."

"PW1 at page 74 of the record lines 15-21 while giving evidence on how exhibits "P2"and "P3"(List of defendant's contracted farmers) were compiled:

I met farmers who had not sold their tobacco. The farmer would tell us his or her name and would also give you the BAT contract book from which you confirm the name and number. These contract booklets were the same as mine – Exhibit P.1.

In the market, the person would tell us their names, then would show us his tobacco. The tobacco was labeled with names. He would show you the tobacco and you would

count the bundles of 40Kgs. If he said he had 1,000Kgs, you would count 25 bundles and get the weight".

Mr. Muwema submitted that "PW2"corroborated the evidence of "PW1" when he confirmed that he together with "PW1"and others visited various markets on the compilation exercise. They subsequently typed out the list which they verified to be correct with the appellant's representative based in Hoima one Swaibu Kyamanywa. In those circumstance, Mr. Muwema submitted that the evidence of PW1 and PW2 is not hearsay because they personally interviewed the farmers and compiled Exhibits P2 and P3. They did not obtain or hear of the names of the farmers from a third party.

Learned counsel contended that the appellant did not adduce any evidence to support its line of defence in paragraph 4 of the Written Statement of Defence i.e. that the plaintiffs were not its contracted farmers nor did it adduce evidence of its much promised verification exercise of the "actual contracted farmers".

Counsel further contended that even without production of all passbooks from the farmers, the respondents had properly discharged the burden of proof by adducing secondary evidence under S.62 and 64 of the Evidence Act. Once that burden is discharged, the responsibility lay on the appellant to show otherwise because it is a requirement of law that the appellant is obliged to keep records of all its contracted farmers. See: Regulation 8(3) The Tobacco (Control and Marketing) Regulations 1996 that requires a sponsor (like the appellant in this case) is supposed to maintain records of all the growers with whom it has subsisting sponsorship agreements. In the circumstances, the appellant should not blame the trial court for its failure to comply with statutory duty of keeping and availing its record of contracted farmers when faced with the respondents' list in a court of law. No burden of proof is shifted on the appellant by so doing.

Accordingly, counsel prayed that the learned trial judge should not be faulted on this issue and ground 2 must fail.

Having perused the evidence on record on this issue, submissions of counsel for both parties, the law involved, decided cases and the findings of the learned trial judge, I have no justification to fault the trial judge who held that the respondents and other beneficiaries they represented were all contracted farmers of the appellant.

In the premises, I would concur with the learned trial judge when he found ground 2 in favour of the respondents.

Ground No.3 captures issue No.2 – "Whether all the persons in Annextures "B"and "C"(list of farmers) have the same interest".

It is the contention of counsel for the appellant that since other farmers refused to surrender their passbooks unlike others who did, they clearly have no interest or same interest with others in the suit. It was, therefore, an error on the part of the learned trial judge to answer this ground/issue in favour of the respondents.

In response, Mr. Muwema submitted that the Registrar, His Worship Henry Haduli, upon being satisfied that the applicants together with the other Tobacco Farmers had the same interest in the suit granted permission on 4th March 2005 before the respondents filed H.C. Civil Suit No.268 of 2005. In counsel's view, the issue of same interest of the respondents and other beneficiaries had already been adjudicated upon. The appellant never appealed against the permission granted by the Registrar. Nevertheless, the learned trial judge made a finding thus:

"I am satisfied that for those persons listed (in exhibits P2 and P3) and their registration number with the defendant was set out. Those persons interest (the other tobacco farmers) is the same as that of the plaintiffs in this case. So counsel for the appellant's contention that the plaintiffs and other farmers did not have the same interest because their passbooks were not adduced in evidence at the trial is not maintainable in law and on the facts".

I concur with the learned trial judge in his finding on this ground/issue in favour of the respondents.

Ground No.4 involves issues Nos. 3 and 4. Appellant's complaint here is that the learned trial judge erred in law and in fact in deciding issues Nos. 3 and 4 in favour of the respondents. The complaint here is twofold:

(a) ***None of the other farmers apart from PW1 were able to show that they grew and kept the tobacco in accordance with the contracts.***

(b) ***None of the other farmers apart from PW1 showed that their tobacco was of the quality that the appellant contracted to buy.***

In both (a) and (b), counsel for the appellant contended that apart from PW1, the respondents together with other farmers they represented, were to prove that they grew and kept the tobacco in accordance with the contracts and also to prove that the quality of the tobacco they grew was in accordance with the contracts. In both cases, according to counsel, the respondents failed to discharge the burden.

Mr. Muwema for the respondents did not agree. The burden of proof was on the appellant following its pleadings in defence. Counsel relied on the provisions of sections 101 and 106 of the Evidence Act.

S.101 Evidence Act provides:

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

According to counsel Muwema, whether the tobacco was grown according to standard and quality, the duty was on the appellant to establish the tobacco was grown according to contract or quality. The burden was not on the respondents.

The learned trial judge in his judgment when dealing with ground No.4 – issues 3 and 4 had this to say:

"The Defendant on his part has not adduced any evidence, worthy of note in reply to the plaintiffs' case. It called one witness whose testimony clearly was not helpful to establish any of the Defendant's defences. He was not acquainted with the events of that season in Masindi and Hoima, having been stationed elsewhere at the relevant time. He could not show that the tobacco delivered by the Plaintiffs in the 2004 season was grown in accordance with the contract or the law. There is no evidence from the Defendant as to why the tobacco in question was not purchased at all. There was no evidence as to why it was abandoned in the Defendant's sheds".

The onus showing the Quality of the tobacco remained with the appellant and it did not shift at all. The learned trial judge was right to hold thus:

"It was only the Defendant who would establish the Quality of the plaintiffs' tobacco through the grading system. For unexplained reasons in this suit, the Defendant has not explained why it did not grade the tobacco".

In view of the above findings, there is no justification to fault the learned trial judge. Ground 4/issues 3 and 4 must fail.

Ground No.8 relates to issue No.7

"Whether the respondents were entitled to interest at the rate of 26% compounded monthly".

The complaint here, as I understand it, raises two issues: First, interest of 26% is excessive. Secondly, interest is only compounded on daily balances for tobacco that has been bought by the appellant.

Dr. Byamugisha contended that the learned trial judge erred in giving the respondents interest at the rate 26% p.a. There was no proof of that interest in evidence. In counsel's view, that amount of interest is excessive taking into account that the Bank of Uganda lending rate was not proved in evidence. Therefore, there was no material from which the trial judge could have taken any judicial notice, and he did not pretend to do so. He just applied the interest, which was claimed as simple interest in the plaint, and compounded it, without any proof, even as to simple interest.

According to counsel, the interest is not justified, it is excessive and should be set aside. In support of his contention, counsel relied on the case of Bank of Baroda (U) Limited vs. Kamugunda [2006] E.A.11.

In that case, counsel for appellant asked the Court of Appeal for interest at the rate of 21% but instead the Court of appeal awarded interest at the rate of 26% without any explanation.

The Supreme Court held, inter alia, that an award of 26% as interest in this case is on the high side. The circumstances given do show that the plaintiff lost use of money due to him but they do not show why he should get the high interest rate of 26% was set aside and the rate of interest was substituted as follows:

(a) ***Interest at 10% per annum from 1 January 1997 to 31 December 1998 prior to the institution of the suit.***

(b) ***Interest at the rate of 8% per annum from 31 December 1998 when the suit was instituted to 3 March 2004 when the Court of Appeal gave judgment in favour of the plaintiff.***

(c) ***Interest at the rate of 6% per annum from date of judgment till payment in full.***

According to the plaint in this case, Dr. Byamugisha pointed out that the respondents had claimed interest on a pecuniary award at the rate of 26% p.a. from 20th December 2004 till payment in full.

In the circumstances, counsel suggested interest at the rate of 10% p.a from 20th December 2004 till payment in full, if this Court is to award any interest.

Secondly, Dr. Byamugisha submitted that the appellant did not buy the tobacco in question from the respondents to warrant an award of interest at the rate of 26% p.a to be compounded, without any proof by evidence.

Mr. Muwema did not agree with both issues raised by counsel for the appellant. On the claims of interest at the rate of 26% p.a., counsel submitted that, that was based on the Bank of Uganda Minimum Commercial Lending rate at the time. In that regard, the learned trial judge was entitled to take judicial notice of this fact and award it.

As regards the claim that the appellant had not bought the tobacco from the respondents, Mr. Muwema considered the language of the contract and the conduct of the parties to determine their intention. According to the terms of the contract, the appellant undertook to provide technical assistance and supervise the farmers to grow the tobacco with a restriction that the farmers would in turn sell the tobacco only to the appellant as provided in Clause 2 (d) of the contract.

Counsel further pointed out that the growing, maintenance, handling and harvest of the crop including transporting it to the buying sheds was the preserve of the appellant who acquired a legal interest in the crop from inception of the contract.
In counsel's view, there is no doubt that the appellant gave consideration in the form of seedlings, chemicals, other inputs and technical support to the respondents in return for their growing tobacco exclusively for it.

Lastly, Mr. Muwema submitted that on the issue of calculating the interest on daily balances compounded monthly with an additional margin of 2% is a creature of law. ***See: Regulation 11(3) Tobacco (Control and Marketing) regulations,*** which the trial judge correctly applied. Counsel urged this Court not to interfere with the decision on this issue.

In his judgment when considering the issue of interest, the trial judge, inter alia stated thus:

> ***"32. In addition for each plaintiff and or individual farmers' value of his tobacco crop for the 2004 season, interest shall be paid thereon at the rate of 26% per annum on daily balances compounded monthly, in line with regulation 11 (2) and (3) of the Tobacco (Control and Marketing) Regulations, S.1 35-1".***

The Tobacco (Control and Marketing) Regulations, S.1 35-1 provides:

"11. Mode of payment of growers.

(1) …….

(2) ***Where a sponsor defaults in payments as provided under sub-regulation (1) of this regulation, he or she shall pay interest on the purchase price in respect of the period of payment, which interest rate shall be calculated at a rate equivalent to the Bank of Uganda minimum commercial lending rate.***

(3) ***The interest payable under sub-regulation (2) of this regulation shall be calculated on daily balances compounded monthly with an additional margin of 2 percent".***

According to the evidence on record, it was incumbent upon the respondents to adduce evidence regarding the Bank of Uganda minimum commercial lending rate at the time. In my view, this evidence is lacking. An award of 26% as an interest, though pleaded in this case, is on the high side without evidence of the bank of Uganda minimum commercial lending rate. I would set aside the award of interest at the rate of 26%. I would substitute the rate of interest at 15% per annum on daily balances compounded monthly, in line with regulation 11(2) and (3) of the Tobacco (Control and Marketing) Regulations, S.1 35-1.

So ground 8/issue No.7 in this case succeeds partially. In the result, since Twinomujuni and Nshimye JJA also agree, I would dismiss the appeal with costs to the respondents in this court and the court below.

I would vary the decree of the High Court as regards the rate of interest in the manner shown above.

Dated at Kampala this ……**10th**…..day of ……**August**…..2010.

S.G. Engwau

JUSTICE OF APPEAL

JUDGMENT OF A.S.NSHIMYE, JA

I have had the benefit of reading in draft the lead judgment of Hon. Justice S.G.Engwau, JA. I agree that the appeal be substantially dismissed with orders made therein.

Dated at Kampala this **12th** day of **August** 2010

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A.S.NSHIMYE
JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI, JA

I have had the benefit of reading the draft judgment of my Lord Justice S.G.Engwau, JA. I concur and I have nothing useful to add.

Dated at Kampala this **12th** day of **August 2010**

……..……
HON JUSTICE A.TWINOMUJUNI
JUSTICE OF APPEAL