

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HIGH COURT CIVIL SUIT NO.471 OF 2014

KLM ROYAL DUTCH AIRLINES.....PLAINTIFF

VERSUS

KATWINE INTERNATIONAL SHIPPING LTD.....DEFENDANT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO:

JUDGMENT:

1. Background:

The plaintiff instituted this suit against the defendant seeking to recover USD 178,993.65 (United States Dollars One hundred seventy eight thousand, nine hundred ninety three and sixty five cents), special and general damages, interest and costs of the suit.

The brief facts leading to the cause of action are that between the month of October and November 2013, the defendant contracted the plaintiff to transport several shipment cargos on its flights to different destinations worldwide and the plaintiff invoiced the defendant for all the cargo transported to the tune of USD.178, 9993.65. The plaintiff demanded for payment of the cargo so transported but the defendant refused, ignored or neglected to pay hence this suit.

2. Failure by the defendant to file a defence:

Upon instituting the suit, summons to file defence were issued for service upon the defendant. The process server attempted to serve MMAKS Advocates who were the known lawyers of the defendant but the said lawyers declined service and instead advised the process server to serve

the defendant personally but the process servers' attempts to serve the defendants personally did not bear fruit. The summons issued then expired and the plaintiffs applied for renewal of the summons and sought to serve the defendants by substituted service which orders for substituted service were granted by this court on the 10th day of February 2015. The defendants were then served by way of substituted service in the Monitor Newspaper of 22nd January 2015. An affidavit of service deposited by one Solomon Ssebowa was filed on the court record to that effect. On the 6th day of March 2015 when this matter came up for mention, Mr. Frank Ssewaggudde appeared for the plaintiff and applied for judgment in default. Court on being satisfied that the defendant had been duly served but failed to file a defence and on further being satisfied that the plaintiff has filed an affidavit of service deposited by one Solomon Ssebowa entered an interlocutory judgment for the plaintiff and the matter was set down for formal proof.

3. The evidence:

Mr. Jean Marie Joun (Pw1) the Regional Commercial Manager of the plaintiff informed this court on oath that the plaintiff started working with the defendant way back in 2009 in that the arrangement between the two parties was that the defendant would take to the plaintiff perishable goods for carriage on board the plaintiff's aircraft with the plaintiff subsequently invoicing the defendant for such service which the defendant would subsequently pay with that nature of business continuing smoothly until the month of October and the first week of November 2013 when the defendant failed to pay for services rendered during that period by the plaintiff totalling approximately to USD.239,000 with the plaintiff from then on trying to recover the outstanding amount owed by the defendants in vain even after giving the defendant a discount of USD.50,000 and even writing off an additional USD.10,000 but that generous action did not compel the defendant to pay thus the plaintiff was aggrieved and is now seeking to recover USD.178,000 being the balance from the amount initially was demanding. This witness described how the business undertaking between the two parties as he stated that the defendant would submit goods for carriage and that would be done electronically through a system known as Cargo Accounts Settlement System (CAS) which on a monthly basis enabled the defendant to receive an invoice for all the business it had done with the plaintiff and would thus pay the plaintiff which would also receive its payment through the same system. That, however, for the month of October and the first week of November 2013, the plaintiff did not receive payment as it was suppose to do

though the defendant had made appropriate bookings and deliveries which were automatically recorded by the CAS system with the witness not being in the know as to what could have happened to the defendant but was to subsequently learn that the defendant's business had gone down though it had the duty to pay for the services already rendered which indeed it had agreed to pay but had not done so to date. To substantiate this position this witness adduced documents called airway bills identified as B1 to B61 which were in copies which were in the names of both the defendant and plaintiff and which indicated the weight of the shipment, the quantity and type of goods and the total amount to be paid to the plaintiff in united states dollars with each airway bill bearing a specific number with the plaintiff's international code for airway bill starting with 074 followed by the number of the document for example B1-074-75234854 which would then be a complete number of the documents between July 2009 and October 2013 and that documents B1 to B61 were such similar airway bills originating from the CAS for the benefit of the plaintiff for the period between 1st October 2013 to 5th November 2013 which have never been paid by the defendant to date and that this specific period is the only period the plaintiff has never been paid for by the defendant since the two began business relations in 2005 and thus this witness prayed that the court would find favour in its case and award the plaintiff the sum of USD.178, 993,000 being special damages as well as general damages, interest and the costs of the suit.

4. Resolution:

The question for consideration by this court in resolving this matter is whether there existed a contract of carriage of goods between the plaintiff and the defendant to which the defendant breached when it failed to pay the consideration for the delivery of the goods to their destination.

Section 10 of the Contracts Act No.7 of 2010 defines a contract to mean an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

In Nakawa Trading Co. Ltd versus Coffee Marketing Board HCCS No.137 of 1991 and in the case of United Building Services Ltd versus Yafesi Muzira T/A Quickest Builders & Co. HCCS No.154 of 2005 it was held by the courts that that a breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms.

Relating the above to the instant matter, and according to Paragraph 3 of the plaint the plaintiff's claim can be seen to be for the recovery of the price of the goods transported by the Plaintiff by its airplanes and the amount is United States Dollars One Hundred Seventy Eight Nine Hundred Ninety Three Sixty Five Cents (US\$178,993.65). **Further** paragraph 4 of the plaintiff's plaint show the facts which gives rise to the cause of action for it is stated therein that the defendant contracted the plaintiff to transport several shipments of cargo on its flights to different destinations worldwide as **Annexture A** to the plaint showed with this position is confirmed by the sole testimony of the plaintiff's witness Jean Marie Joun (Pw1) as to the existence of the bookings and deliveries invoices to the defendant as shown by Annexures B1 to B61 which are Airway Bills for the goods of the Defendant transported.

These Airway Bills were tendered in evidence in secondary form as the original of which as indicated is deposed by an affidavit of the sole plaintiff's witness dated the 30th September 2015 not possible to be retrieved even after trying to do so for a period of over three months as is deposed that such records could only be retained for three years and thereafter automatically deleted and thus were no longer available in original form and hence the reliance on the Annexures B1 to B61 which are copies as secondary evidence to prove the plaintiff's case.

From the testimony of the plaintiff's witness and the analysis of the pleadings coupled with annexures thereto this court would indeed be inclined to believe that there existed a contract of carriage of goods between the plaintiff and the defendant for the copies of the airway bills evidently show such situation which is in any event not even disputed by the defendant who unfortunately chose even not to enter an appearance to defended itself against the plaintiff's claims and therefore excluded itself from these proceedings leaving this matter to the proceed *ex parte*.

From the documents tendered by the plaintiff it is evident that there existed a relations of a commercial nature which as was noted Hon. Lady Justice Stella Arach-Amoko (as she then was) in the case of **Atom Outdoor Limited v Arrow Centre (U) Limited [2002-2004] UCLR 67 at pages 69-70** while quoting from **LS Sealy & RJA Hooley** in their book, **Text and Materials In Commercial Law, Butterworth's, pages 14-15** would convince this court to accept the fact that there was indeed a contract between the parties herein for the learned judge had this to say and I quote;

“...there is only one principle of construction so far as commercial documents are concerned and that is to make, so far as possible, commercial sense of the provision in question, having regard to the words used, the remainder of the document in which they are set, the nature of the transaction, and the legal and factual matrix”.

When this very provision quotation is related to the instant matter, this court would inclined to believe that indeed the attached copies of documents Annexures B1 to B61 are commercial documents in the nature which created a contract between the parties herein as they show the party issuing the Airway Bills being the plaintiff and the party seeking carriage of goods being Katwine Shipping International Ltd and since the nature of the transaction between the parties clearly show that there would be no other reason than for the issuance of such documents then the conclusion to be had from the documents would be that the claim made by the plaintiff against the defendant is verifiable and thus is true. Therefore , that being the case, this court would on the basis of the testimony received by it and the documents adduced on record conclude that on a balance of probability the plaintiff has proven its claim to the effect that it did provide the air cargo services indicated to the defendant and thus ought to be paid for the same as no other reason exist to deny it such payments. Consequently judgment would be entered in the favour of the Plaintiff for the amount claimed being **United States Dollars One Hundred Seventy Eight Thousand Nine Hundred Ninety Three Thousand Sixty Five Cents (US\$178,993.65)** as special damages.

The plaintiff did also pray for general damages amongst its other claims. In regards to such a claim, the position of the law is well settled in that a court while considering an award of general damages would while exercising its discretion presume that a defendant’s act or omission was the natural consequence of a loss or inconvenience incurred by a plaintiff as was the position taken by the court in the case of **James Fredrick Nsubuga v Attorney General, H.C.C.S No 13 of 1993. In addition to that aspect a court** in assessing the quantum of damages will mainly be guided, *inter alia*, by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach as was held in the case of **Uganda Commercial Bank v Kigozi [2002] 1 EA. 305. Consequently a** plaintiff who suffers damage due to the wrongful act of a defendant ought to be put in the position he or she would have been in had she or he not suffered the wrong as was the pointed out by the Supreme Court

in the case of **Kibimba Rice Ltd. v Umar Salim in the Supreme Court Civil Appeal No 17 of 1992.**

Relating the above considered principles of the law to the instant matter while taking into account the fact that there is no doubt that the plaintiff being a business entity consequently suffered a great inconveniences and even loss owing to the defendant's breach of its obligation therefore the consideration of this court would be that the plaintiff herein would be entitled an award of general damages against the defendant who knew very well the consequences of not paying for the commercial service offered it by the plaintiff and thus this court would grant the plaintiff general damages of up to the tune of Uganda Shillings Sixty Million Only (Ug. Shs. 60,000,000/=) for the inconvenience and loss of business as against the defendant.

As to costs, its trite law that costs follow the event as is provided for by **Section 27(2) of the Civil Procedure Act** and was restated in the case of **Jennifer Behangye, Rwanyindo Aurelia, Paulo Bagenze v School Outfitters (U) Ltd Court of Appeal Civil Appeal No 53 of 1999.**

Therefore, the Plaintiff being the successful party herein would be awarded costs of this suit **in any event for it had to pursue court redress to obtain what is legally it's from the defendant.**

5. Orders:

- a. The Plaintiff is awarded United States Dollars One Hundred Seventy Eight Nine Hundred Ninety Three Sixty Five Cents (**178,993.65**) being proven s Special damages to be paid with interest at the commercial rate of 9% per annum from the date of filing this suit till payments in full.
- b. The Plaintiff is also awarded general damages of Uganda Shillings Sixty Million Only (Ug. Shs. 60,000,000/=) only to be paid with interests at the rate of 6 per centum per annum from the date of this judgment till payment in full.
- c. The Plaintiff is also awarded the costs of this suit as the successful party.

I do so order accordingly.

HENRY PETER ADONYO

JUDGE

27TH NOVEMBER, 2015