

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS- 0994-2004

G.K. O. MEDICINES LTD.PLAINTIFF
VERSUS

FAMILY CARE PHARMACY LTD.DEFENDANT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

JUDGMENT

The Plaintiff, GKO Medicines Ltd, brought this suit against the defendant, Family Care Pharmacy Ltd. for recovery of a sum of Shs8,635,000/=, general damages for breach of contract, interest and costs. The plaintiff's case is that between June 2002 and July 2003 the plaintiff supplied to the defendant various drugs and pharmaceuticals totalling Shs23,240,923/=. The defendant paid a sum of Shs 14,099.923/= leaving an outstanding balance of shs8,635,000/= which the defendant has failed to pay.

The defendant on the other hand denies that it has any outstanding money to pay to the plaintiff. The defendant contends that it paid for all the drugs supplied to it.

At the scheduling Conference it was agreed as a fact that there were purchases of drugs and pharmaceutical products made by the defendant from the plaintiff. The following issues were agreed upon:

1. Whether the defendant is indebted to the plaintiff in the sum claimed.
2. Remedies available.

Representation was Mr. Wilfred Niwagaba for the plaintiff. Initially Mr. Enoth Mugabi appeared for the defendant and later Mr. Sekabanja.

Issue No1. Whether the defendant is indebted to the plaintiff in the sums claimed?

Each party called only one witness, namely Hajara Namiembe, PW1 and Natallie Remutulle Nabbimba, DW1.

Hajara Namirembe was at all material times the accountant with the plaintiff company. Her duties were to manage the accounts which involved looking at the plaintiff's creditors' and debtors' performance. She testified that the defendant company used to purchase pharmaceutical products on credit from the plaintiff. For the supplies made the Marketiers would prepare invoices, which the witness would record in a Ledger Book. The witness tendered in evidence pages from two Ledger Books. The accounts for the defendant, shown on pages 95 to 97, running from 4th January 2001 to 5th February 2003 closed with an outstanding amount of Shs4,786,584/= The pages were tendered in evidence as exhibit P1A. This balance was carried forward to a new book opened in January 2003. The defendant's accounts run from 4th January 2003 to 10th May 2004. It shows a total outstanding balance of Shs9,249,208/=. Two pages thereof were tendered in evidence as exhibit P1B. The witness would make entries in the Ledger Books against invoices issued to the defendant. Payments would be made against the invoices. The witness testified that 34 invoices totalling Shs8,635,000 were not paid. She had prepared an extract of the unpaid invoices. The extract together with photocopies of 34 invoices were received in evidence as exhibit P2. Each invoice was signed by an officer from the defendant company who had received the particular supply. Among these officers, the witness identified the signatures of Kayizi Mwanje, Kalinzi Fred and Serufusa. She stated that whenever a claim for payment was made the defendant's response would be that they had no money to pay.

The defence witness, Natallie Remutulle Nabbimba, testified that between 1999 and 2003 she was the Supervising Pharmacist and Managing Director of the defendant company. The other directors being her son, David Nabbimba and sister in law, Victoria Nabbimba. From 1997 up to until 2004 the defendant company used to buy drugs from the plaintiff company. According to her Sales Representatives from the plaintiff used to come to the defendant's premise where either the witness or the nurse would make orders and later deliveries be made. Either cash or cheque payment would be made on delivery.

The witness argued that by the size of the defendant's business they could not make bulk purchases or make purchases at the frequency shown by the plaintiff's invoices. That it was not possible for the defendant to make daily purchases at the intervals of two or three days. That the defendant used to make purchases once or twice a month. That the defendant could not make purchases which could go to figures as high as Shs1,780,000/= or Shs2,190,800/=. She stated that she did not have the invoices exhibited by the plaintiff as unpaid. She contends that she would have had them if supplies had been made. She stated that she could not identify the signatures of the people who had signed on the respective invoices acknowledging receipt of the drugs. She however, in cross-examination, recognised that of Kalinzi whom she said used to work with the defendant company as a cleaner and turn-boy and who could not receive drugs.

The law on burden of proof is that he who asserts must prove. See Sections 101 – 103 Evidence Act. It is an agreed fact that there was a business relationship between the plaintiff and the defendant whereby the defendant would buy drugs and pharmaceutical products from the defendant. The plaintiff's accountant testified that over the period between 4th January 2001 to 10th May 2004 the defendant would from time to time make credit purchases from the plaintiff. The practice was that the plaintiff's marketiers, whom the defendant's witness referred to as sales representatives, would go out in the market to obtain orders. The marketiers would obtain orders from the customers, among whom was the defendant. The marketiers would effect deliveries to the customers' premises and

the customer would on receipt of the deliveries sign against the invoices. She testified that the defendant has an account with the plaintiff which the witness maintained in a Ledger Book. The witness was responsible for recording the sales in the ledger book from the invoices prepared by the marketiers. Payments were made by the defendant against the invoices and would be accordingly recorded. The witness tendered in evidence pages 95, 96 and 97 of the Ledger Book for the period from 4th January 2001 to 5th February 2003 received as Exh P1A. The Ledger Book showed a closing outstanding balance of Shs4,786,584/= She also tendered the pages of the Ledger Book for the period from 4th January, 2003 to 10th May 204 as Exhibit P13. It showed a carried forward outstanding balance of Shs4,786,581/= from Exhibit P1A and a closing outstanding balance of shs9,249,208/= . The witness tendered 34 unpaid invoices. The bundle of invoices was received as exhibit P2 and totalled to Shs8,635,500/= This is the amount claimed by the plaintiff. She identified the signature of Kayizi Mwanje, Serufusa and Kalinzi Fred as the officers of the defendant who had received deliveries made upon the said invoices. Her evidence shows that most of the unpaid invoices were received by Kalinzi.

The defendant's Managing Director DW1 denied having received supplies from the plaintiff on credit. Her testimony was that supplies were always paid for either by cash or cheque upon delivery. The witness tendered in two sets of receipts as exhibits. That is two receipts as exhibit D1A and D1B and a bundle of eight receipts as Exhibit D2. Receipt No. 1471 Exhibit D1A, dated 8th May 2004 indicates payment as of "Goods supplied on Account." Receipt No. 0855 of Exhibit D2 dated 20th January 2004 indicates payment as of "Drugs on A/C," Receipt No. 0532 dated 6th January 2004 of Exhibit D2 indicates payment as of "Drugs on Inv. No. 0884", No. 0678 of 8th December 2003 indicates payment as of "invoices 0870 & 0812," No 0906 of 15th October 2003 indicates payment as "of invoice 0042;" No 2671 dated 12th February 2003 indicates payment as "of

invoices 163 & 1152 cheque No. 035821 dated 13/2/03.”

The above defence evidence corroborates the testimony of PW1 that payments were made against invoices and that supplies could be made on credit.

According to the defendant's witness it was only her or the nurse, one Ragiana Mukose, who could make orders. That Kalinzi was a cleaner and turn boy who could not receive the supplies. The witness tendered a bundle of eight invoices received as exhibit D3. Five of the invoices indicate as received by the witness; one by a person whose signature I could not make out and two by Serufusa. The evidence of receipt of delivery by Serufusa contradicts the witness' testimony that it was only her and the nurse who could make orders. Further the witness concedes that at the material times the said Kalinzi was employed by the defendant. The duties of Kalinzi were an internal matter of the defendant. Counsel for the plaintiff cited the case of Royal British Bank Vs Turuand (1843 – 60) All ER Rep 435. The holding in that case is to the effect that a third party dealing with a company is not bound to ensure that all the internal regulations of the company have in fact been complied with as regards exercise and delegation of authority. DW1's testimony of as to who was or was not mandated to receive delivery on behalf of the defendant was an internal affair of the defendant which could not be assumed to be within the knowledge of the plaintiff. The plaintiff also cited Lloyd Vs Grace, Smith & Co 91912) AC 716. where the House of Lords held that acts might be within the scope of authority of an agent or servant notwithstanding that they were done fraudulently and for his own benefit and not for that of his master or principal. In the instant case the plaintiff's evidence show that goods were delivered to the defendant. The bulk were received by Kalinzi and some by Serufusa, who were both the defendant's servants at the material time.

As Gower says at page 184 of his Principals of Modern Company Law, 4 Edn the indoor management rule is manifestly based on business convenience, for business could not be carried on if everybody who had dealings with a company

had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt had actual authority.

Regarding the defendant's witness' contention that the defendant company could not buy the quantities or, at the frequency or the types of drugs as shown by the invoices exhibited by the plaintiff, the defendant did not support this contention with the record of its purchases within the period. Such records would have assisted court to establish the defendant's purchase trend.

Natallie Remutullie Nabbimba testified that she had first learned of the plaintiff's claim after the death of her husband, Captain Samson Nabbimba. That after the burial, the deceased's friend and the Managing Director of the plaintiff company, one Gilbert Ohairwe told her that her late husband had taken from the plaintiff company some drugs which he had not yet paid for. The late Captain Samson Nabbimba was the chief pharmacist of the UPDF. The witness during cross-examination, stated that the records which she was shown by the plaintiff's Managing Director, following her husband's death were showing debts amounting to Shs8,000,000 or Shs9,000,000. That the debts were the same which were the subject of claim in this suit. The witness by that evidence tends to shift the indebtedness to her late husband who she said was not a member or director of the defendant company. Her evidence is that the directors of the defendant company were herself, her son David Nabbimba and her sister-in-law Victoria Nabbimba.

However, while being cross-examined, she admitted that her late husband used, at list once or twice a week, to conduct business from her office at the defendant's premises. That he could make orders while in that office. She also admitted, when shown a Company Resolution, Exh P3, that her late husband was a signatory to the defendant company's bank accounts. In my view such evidence to a third party would show that the late Samson Nabbimba was an officer of the defendant company. So I agree with Mr. Niwagaba's submission

that the evidence shows that Samson Nabbimba had ostensible or actual authority to order for goods on behalf of the defendant company and that what he did from the defendant's premises was valid and effective to bind the company. Section 181 of the Companies Act provides that the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his or her appointment or qualification.

An evaluation of all the plaintiff's and the defendant's evidence show that the plaintiff has adduced evidence to prove, on a balance of probabilities, that the plaintiff supplied the defendant drugs and pharmaceuticals products on credit and the outstanding balance as per the unpaid invoices was Shs8,635,500/=. On the other hand the defendant has failed to adduce sufficient evidence to prove that it had paid for the deliveries made vide the exhibited unpaid invoices. The burden is upon he who alleges to have paid to prove payment. I therefore find that the defendant is indebted to the plaintiff in the sum of Shs8,635,500/=.

Issue No 2 Remedies available

The plaintiff prayed for Shs8,635,500/= as special damages, being the unpaid balance of the purchase price for drugs and pharmaceuticals. The plaintiff is entitled to payment for the sales made to the defendant. In view of my findings above the plaintiff is awarded the sum claimed of Shs8,635,500/=

The plaintiff also prayed for interest on the above sum at the rate of 15% per annum from the 30th July 2003 till payment in full. The last unpaid invoice is No. 2393 dated 22nd July 2003. The plaintiff's funds have since been held by the defendant. The principle is that where a party is entitled to a liquidated amount and has been deprived of the same through the wrongful act of another party, he should be awarded interest from the date of filing the suit. However, section 26(2) of the Civil Procedure Act provides that the plaintiff would also be entitled to interest from the date when the defendant denied him the use of his money by

withholding it. See Congo Trading Corporation Ltd Vs Uganda Land Commission & A/G C.A.C.A. No 38 of 2002. The plaintiff is accordingly awarded interest on the above sum at the rate of 15% per annum from 30 July 2003 until payment in full.

The plaintiff also prayed for general damages and suggested a sum of Shs2,000,000/=. General damages for breach of contract are compensatory in nature for loss suffered and inconveniences caused to the aggrieved party. Their measure is discretionary exercised judiciously to re-instate the successful party in the same position as would have been as far as money compensation can. The plaintiff has been already compensated by an award of interest on top of the special damages. In the premise I consider an award of a nominal amount of shs1,000,000/= appropriate compensation, as general damages.

The plaintiff is also awarded the costs of this suit.

Judgement is accordingly entered in favour of plaintiff in the following terms:-

- (a) Special damages Shs8,635,500/=
- (b) General damages Shs1,000,000/=
- (c) Interest on (a) above at the rate of 15% per annum from 30th July 203 until payment in full.
- (d)** Cost of this suit

Hon. Mr. Justice Lameck N. Mukasa

Judge

5th February 2008