

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)**

**HCT - 00 - CC - CA - 04 - 2007
(Arising from Mengo Civil Suit No. 403 of 2004)**

COMPANY PROFILES UGANDA LTD APPELLANT

VERSUS

**MANSOOR NYERA T/A DIGITAL TEC }
M/S DIGITAL TECH LTD } RESPONDENTS**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

This is an appeal against the Judgment of Her Worship Sylvia Nabaggala Magistrate Grade 1 in Mengo Civil Suit No. 403 of 2004.

The brief facts of the appeal are that Appellant (plaintiff in the lower court) an advertising company sued the Respondents (defendants in the lower court) jointly and severally for the sum of Shs.300,000/= for breach of contract, general damages and costs.

The Appellants claim is that around October 2003 the Respondent vide an order form No. 459 placed an order to have its company

advertised in Appellant's publication called "*Company Profiles*" 2003 edition (a form of directory). The order was charged at Ushs.300,000/= and was duly published in the said edition. The Appellants however were not paid for this work.

The Respondents on the other hand are engaged in the repair of mobile phones and website designing at a shopping arcade known as "*Kalungi Plaza*" in Kampala. The Respondents do not deny not paying for the said advert. They however counter-claimed in the court below that it was the Appellants which breached the contract by not placing in the said advert, the Respondents desired details about their business. In their written statement of defence the Respondents singled out the absence of their shop number in their advert. At the trial in the court below the Respondents also referred to the none reference to their business in web designing and two telephone numbers.

The learned trial Magistrate found that the Appellant was in breach of the said contract by not including all the particulars given by the Respondent on the order form which she also found to be the signed contract of both parties. She further found that the Respondent was not in breach of contract as he did not pay for work that did not meet his satisfaction. The learned Magistrate however did not award

the Respondent any damages for breach of contract as no consideration had passed between the Respondent and the Appellant. Judgment was accordingly entered against the Appellant with costs.

The Appellant now appeals that judgment on 4 grounds namely:-

- 1- The learned Trial Magistrate erred in law and in fact in finding that the Appellant and not the Respondent had breached the contract.
- 2- The learned Trial Magistrate erred in law and in fact when she wrongly evaluated the evidence on record and disregarded the fact that the Appellant had published the advert.
- 3- The learned Trial Magistrate misdirected herself and erred in law and in fact when she allowed the Respondent to depart from their pleadings and introduce new alleged causes of action alleging that the Appellant had omitted not only the shop number but also telephone numbers and text on their web design business.
- 4- The learned Trial Magistrate misdirected herself when she wrongly awarded costs of the suit to the Respondent.

Ms. Patricia Basasa-Wasswa appeared on record for the Appellants while Mr. Kasozi holding brief for Mr. R. Omongole appeared for the Respondents.

Issue No. 1 and No. 2 were argued together and I will therefore address them in the same manner.

Counsel for the Appellant submitted that the learned Magistrate erred in law in fact when she found that the details in the order form No. 459 (Exh. P. E1) were details that were to be published in the advert. She submitted that the said order form which also comprised the contract placed the obligation on the Respondent to provide the necessary editorial material for publication. Counsel for the Appellant submitted that the evidence on this matter given by the parties was at variance. The Appellants case was that they relied on material presented to them by the Respondent on a computer diskette. On the other hand the Respondents deny the existence of any diskette but rely on the information they provided on the order form.

Counsel for the Appellants submit that the learned Trial Magistrate wrongly relied on the Respondents version simply because the said

diskette was not produced in court; without evaluating the evidence as a whole.

She argued that the order form was only an authorisation to run the said advert with a reservation under clause 5 thereof for the Appellant to use the information available on the said order form if the Respondent did not provide them with material for publication by the 30th November 2002.

Counsel for the Respondent submitted that the learned Trial Magistrate properly evaluated the evidence before her. He submitted that evidence of the plaintiff's witnesses was contradictory as to which form of material was provided to the plaintiff for publication. Counsel for the Respondents submitted that PW2 Mr. Wasswa (the CEO of the Appellant company) testified that the material for publication was on a diskette while PW2 Ms. Dora Eguny (a former editorial assistant in the Appellant company) testified that Respondent had provided what she termed "*Raw data*". He further submitted that the Trial Magistrate found that the person in the Appellant company who allegedly took the artwork for approval to the Respondent was not called to testify and so the Trial Magistrate could not rely on the contradictory evidence of PW1 and PW2.

Counsel for the Respondent also submitted that the diskette was not produced in evidence. He said in the circumstances the learned Trial Magistrate was therefore justified to invoke clause 5 of the order as a default.

Counsel for the Respondent submitted that the resultant advert left out important details of the Respondent's business like physical location and telephone numbers. He also submitted that the Appellants had failed to discharge their burden of proof under Sections 101 and 103 of the Evidence Act.

I have looked at the proceedings below, the judgment of the learned Trial Magistrate and the submissions of both counsel on these grounds. The role of an appellate court is well settled.

In the case

Sanyu Lwanga Musoke V Sam Galiwango SCCA No. 48 of 1995

Karokora (JSC as he then was) held

*“it is settled law that a first appellate court is under a duty to subject the entire evidence on record to an exhaustive scrutiny and to re-evaluate and make its own conclusion, while bearing in mind the fact the court never observed the witnesses under cross-examination so as to test their veracity (**Pandya V R**)*

[1958] EA 336 & **Selle V Associated Boat Co.** [1968] EA 223 followed)...”

Applying the above authority to this case some interesting matters clearly arise.

The first one is that it is not in contention that the said advert was indeed run by the Appellant in their publication “*Company Profiles 2003*” and it was not paid for by the Respondent. This is a critical fact that appears not to have been given its due weight. Instead there appears to have been a spirited contest as to what was the contracted as “*advertising material*”. This while an important question, seems to overshadow the fact of the actual publication of the advert. The plaint in the lower court as I see it, was a claim for non payment of the advert and it is that which formed the basis of the breach. In other words the case before the Trial Magistrate was that of breach of contract by reason of non payment of the advert fee/charge of Ushs.300,000/= (as per para 5 of the plaint). In answer to the plaint the Respondents in their defence (para 4) totally deny this breach and put the plaintiff to strict proof thereof. In other words they deny not paying the said fee/charge. In her judgment at P. 13 the learned Trial Magistrate however found

“...There was no consideration passed by the defendant to the plaintiff...”

Clearly para 4 of the Respondent’s defence is not sustainable in this regard as an answer to para 5 of the plaint. The real problem here relates to what the contract terms as to payment were.

A review of the order form Exhibit P.E 1 does not show when payment was to be made.

The evidence of Mr. Wasswa PW2 the C.E.O. of the plaintiff company is equally not exact as he says that Respondents were to pay within 30 days of invoicing while during cross-examination he charged that period to 90 days. No invoice was produced in evidence at the trial. So it is not possible to establish the exact date when payment was to be expected.

At the trial DW 1 Mr. Mansoor Nyera seemed to suggest that he did not pay because when he saw the published advert, it did not meet his business expectations. That would seem to suggest that DW1 was to pay for the advert after seeing it and certifying that it met his expectations.

Whatever the truth may be it is clear that this contract did not have an express term as to the time of payment and therein may have been the source of the problem.

In a contract for services like this one (i.e. advertising) where there are no clear term as to when payment is to be made, court will imply a term unless the contrary can be shown that payment shall be made before the service is provided. That in any event is the common commercial practice in this regard. Where in a case like this the service is provided, the service provider is then entitled to immediately claim his payment.

This is because the law of contract is all about enforcing the bargain of the parties. In this case it was the parties bargain that the Appellant would publish the Respondent's advert at the charge of Ushs.300,000/= and the Respondent would pay for it. The advert was published so there was performance, though contested, by the Appellant who wants to be paid.

This area of law was in my view well canvassed by counsel for the Appellant in her submissions in the lower court. She referred the learned Trial Magistrate to the learned author R.W Hodgin in his

book Law of Contract in East Africa Kenya literature bureau 2006 at P. 172 where it is written.

“...if one party has substantially completed his side of the bargain, leaving a minor omission or fault, the court may accept such performance as discharging his obligations, subject to the innocent party’s rights to deduct a sum to cover the fault...”

This is the principle of substantial performance. The learned Trial Magistrate did not address this argument in her judgment. In this respect with the greatest of respect I find that she erred.

The learned Trial Magistrate should have treated the claim in the main suit and that in counter-claim separately and not mixed them up.

If there was dissatisfaction about the advert, which there was, then that would be the subject of the counter-claim.

The learned Trial Magistrate should have found in the main suit, as she did, that the published advert was not paid for and therefore that amounted to a breach of contract by the Respondent. I therefore find that there was breach of contract by the Respondent by reason of non payment of advert.

As to whether the counter-claim does raise an opposite breach of contract by the Appellant as well, also has to be looked at. Paragraphs 1 and 3 of the counter-claim allude to a breach by the Appellant by not including “...*the shop number in the advert even after it was brought to their attention...*”

Of course during the trial this was widened to include other things which is another ground of appeal in itself; which I will address a little later on in my judgment.

As to whether the Appellant was in breach of the contract, the learned Trial Magistrate at P. 11 of her judgment found

“... I find that the plaintiff (the present Appellant) was in breach of the contract by not including all the particulars given by the defendant on the order form as (it) was the every (sic) contract signed by both parties...”

The learned Trial Magistrate interestingly found that the missing particulars in the advert were those provided in the order form by applying clause 5 of the said order form which is a default clause.

This is because the Appellants in the court below were not able to produce the diskette in court which contained the alleged approved

material for publication by the Respondent. The first Respondent denies receiving any material for approval from the Appellant.

It appears that the learned Trial Magistrate was faced with deciding between the truthfulness of one witnesses word against another.

The absence of the approved material as alleged by the Appellants did not assist their case much.

It was conceded by the Appellants and found as a fact by the learned Trial Magistrate that indeed the Respondent's shop number was missing from the advert as pleaded in the counter-claim. Did this omission of the shop number go to the root of contract so as to render it un payable as counsel for the Respondent would have it? I think not. The adverts at page 13 of the published directory has the following details;

*“Plot 16/ 18 William Street
Kalungi Plaza Ground Floor
P.O. Box 12309
Kampala - Uganda
Tel: (041) 234779
Mobile (077) 500,963,423,993
digitaltec@hotmail.com
www.digitaltecrepairs.com”*

While that at page 51 has

*“Plot 16/18, William Street Kalungi Plaza
Ground Floor
P.O. Box 12309 Kampala Uganda
Tel +(256) 041 234 779”*

I find that the reference to the ground floor at Kalungi Plaza would be sufficient to direct a customer where to go. The absence of a shop number in my finding is not a substantial omission. Would this then under the authorities entitle the Respondent to deduct a sum to cover the fault? I think not also. Of the four adverts on page 51 of the directory (the Respondents inclusive) only one advert for “M/S R 4 International Ltd” has a reference to a room number (i.e. suite B 103).

As to the seventeen adverts on page 13 of the directory (the Respondents inclusive) none of them displays a room number.

However before I leave the question of the counter-claim, the Respondents at the trial gave further evidence of other details of what was missing in their advert. The further evidence is to the effect that the advert that was run by the Appellant also lacked

- 1) Two other telephone numbers
- 2) The website development part of his business.

Counsel for the Appellant attacked this line of evidence as a departure from the pleadings. The learned Trial Magistrate did not address this legal challenge in her judgment.

Counsel for the Respondents in this appeal submitted that no new cause of action had been introduced into evidence. He submitted that the Trial Magistrate correctly considered the additional breaches because they were consistent with the previous pleading of omitting to publish the shop number and this was within the exception of Order 6 Rule 6 of the Civil Procedure Rules.

The said order provides

“No pleading shall, not being a petition, or application except by way of amendment raise any new ground or entertain any allegation of fact inconsistent with the previous pleadings of the party pleading the same...”

I was also referred to the case of **Fam International Ltd V Mohammed Hamid El-Fathih** SCCA No. 16/93 (unreported) on this point.

Were the other missing items being two additional telephone numbers and website development inconsistent with the previous

pleadings? I think not. These like the shop number were part of the order form and therefore were within the knowledge of the Appellants. The next question is whether these additional missing items aggravate the basis of my finding regarding the missing shop number.

Exhibit P.E 2 at page 13 actual does show the additional telephone numbers (which are mobile phones) complained about as missing. The said mobile phone numbers are missing on the bigger advert on page 51 of Exhibit P. E 2. The website business is not reflected anywhere.

According to PW2 Mr. Wasswa this was because the Respondent was advertised in the category of mobile phone repairers; a categorisation which the publisher reserved.

With regard to the additional phone numbers at least they appear in the publication at page 13 so I do not see how this would aggravate the situation.

The absence of information on website development which is a different business line is more significant. It is not however clear from the evidence below just how significant this omission was as the 1st Respondent as DW1 kept testifying about his mobile phone

repair business. The defendants went further to tender in evidence (Exh. P.E.6) a side colour photograph of the shop in question. The 1st Respondent testified that due to the non effectiveness of the 2003 publication, they were forced in 2004 to place a green sign post on their shop to direct their customers to them.

Actually looking at P.E 6 there is no green sign post at all unless the term sign post has a new meaning. The only sign post in the picture is an orange sign post with the words "*Forex Bureau*" for another shop altogether. What does exist in the photograph is the name of the defendant company painted in green on the shop glass reading "*Digitaltec CSC*". Less clear are other words in painted on same shop glass in red reading "*cellphone repairers*". If these company details were painted on the shop window in 2004 after this dispute arose, then one wonders why the said paintings do not also refer to the second line of business namely; website development. On an objective test one would form the impression that website development is not the primary business of the Respondent and therefore is not very significant. Its absence from the advert therefore does not significantly aggravate the situation. I therefore find the omission of the website development business in the advert

as a minor omission or breach for which the defendants would be entitled to nominal damages.

In answer therefore to the first and second grounds of the appeal I find as follows. The learned Trial Magistrate did partially err in fact and in law when she found that the Respondents did not breach the contract. The Respondents did not breach the contract vide the main suit by not paying for the advert the sum of Ushs.300,000/= which I so order them to pay.

I also find vide the counter-claim, that Appellant did breach the contract in part by not showing the defendants second line of business; though this was minor breach. I award them nominal damages in this regard of Ushs.50,000/= being assessed as a fair reduction of the price in this regard.

In also find that the learned Trial Magistrate erred in law and in fact when she did correctly take into account the fact that the advert was published an important act in the performance of the contract.

As to ground number three, I find that the learned Trial Magistrate did not misdirect herself or err by allowing the Respondent to depart from their pleadings and add new causes of action. I find that no

new causes of action were introduced and the additional evidence relied upon at the trial was not inconsistent with the Respondents original pleadings below.

As to the fourth ground regarding costs, the situation has changed as a result of this appeal. The Appellant has largely been successful in the appeal, so I award the costs of the appeal to them. I however because of the counterclaim award them 2/3 of costs in court below.

I so order.

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Geoffrey Kiryabwire

JUDGE

Dated: 14/02/08

14/02/08

9:20am

Judgment read and signed in Court in the presence of;

- Rita Aceng Ogwang h/b Mrs. Basaza for Appellant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 14/02/08