



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1607 of 1999

SYLVANUS LUSI AMITO T/A SAVORSEN SAFARIS..... PLAINTIFF

VERSUS

MPATA INVESTMENTS LTD..... DEFENDANT

JUDGMENT

On 12.08.99 the plaintiff filed the suit herein praying for judgment against the defendant for:-

- (a) US Dollars 7,076 equivalent to Kshs.501,000/= or the prevalent exchange rates at time of judgment together with interest at 26 % p.a. until payment of full.
- (b) Cost of this suit plus interest at court rates.

Initially judgment was entered against the defendant on 02.09.99 in default of defence but the said judgment was set aside on 16.11.99. A defence was subsequently filed on 02.12.99 but on 11.04.01 the defendant filed an amended defence denying liability and added a counter-claim for US \$1,161.31 equivalent of Kshs.89,072.45 stated to be an overpayment made by the defendant to the plaintiff.

At the hearing of the case, the plaintiff was represented by learned counsel, Mr. T.O. Kopere while the defendant was represented by learned counsel, Mr A.M. Lubalellah.

Plaintiff's counsel told the court he would call only the plaintiff to testify and he did so. Defendant's counsel intimated he would call two witnesses. The first defence witness was Moses Minchil, an employee of the defendant company. When this witness concluded his evidence, further hearing was fixed for a subsequent date when defendant's counsel was to call his second witness. However, at the resumed hearing defendant's counsel announced that although the intended second defence witness, a Mr Soju Isshiki from Japan, was present, he (counsel) had decided to close the defence case without the Japanese witness testifying. Defendant's counsel then closed the defence case.

Counsel for both parties asked and were allowed to file written submissions. Eventually both counsel appeared before court and adopted their respective written submissions.

The parties filed various documents in support of their respective cases. There were lots of documents dealing with various amounts being claimed and counter-claimed. These are a matter of record and I shall not go into them in detail in this judgment but shall dwell on what I consider essential to give the basic context to the judgment.

Towards the end of cross-examination of the plaintiff by defendant's counsel, the said counsel applied for leave to amend the defendant's counter-claim from US \$ 1,161.31 to US \$ 1,335.31. The application was opposed. In my ruling on the application, I noted that the application came at the tail – end of the plaintiff's cross-examination when defendant's counsel had intimated he had only about one more question to ask the plaintiff. I also noted that the case was old and involved a lot of documents and that the proposed late amendment to the counter-claim was likely to put the plaintiff in the awkward position of having to rely on memory in dealing with issues raised by the amendment on an impromptu basis. That sounded like an ambush. I considered the proposed late amendment prejudicial to the plaintiff and refused the defendant company leave to amend its counter-claim at the eleventh hour.

The plaintiff, Silvanus Amito told the court he was the proprietor of Savorsen Safaris and used to carry out local tour arrangements for overseas tourists coming to Kenya. Silvanus said his Savorsen Safaris organization entered into partnership with the defendant company regarding tour arrangements and that his claim of US \$ 7,076 against the defendant company arose from the tour business arrangement with the company. The defendant company did not deny existence of the tour business arrangement with the plaintiff but queried the plaintiff's claim that the defendant owed the plaintiff the amount claimed. Defendant company contended through its only witness, Moses Minchil that it had in fact overpaid the plaintiff, hence the counter-claim. The figure given in the amended defence and counter-claim as an overpayment is US \$1,161.31. However, the defence witness, Moses Minchil told the court that the plaintiff owes the defendant company US \$ 1,335.31 instead. On the other hand, the written submissions filed on behalf of the defendant company state that the defendant is entitled to a credit to the tune of US \$8,669.15!

As between the two witnesses who testified in this case, i.e. Silvanus Amito as proprietor of Savorsen Safaris (plaintiff) and Moses Minchil, an employee of the defendant company, it is only Silvanus Amito who had personal knowledge of the events giving rise to the suit. The only witness, Moses Minchil who testified on behalf of the defendant company joined the said company after the events giving rise to the suit. He initially described himself as an accountant and that his evidence was based on his examination of the defendant company's records, of which he was not the author. He conceded during cross-examination that he in fact held a CPA II qualification and that under Kenya Accountants & Secretaries National Examinations Board (KASNEB) regulations, he should not refer to himself as an accountant – before completing the final part of the accounting training programme. I take the evidence of Silvanus Amito as the more authoritative on the matters in question.

There was fierce controversy regarding Invoice No.1660 dated 27.08.95 from Savorsen Safaris (plaintiff) to Mputa Investments (defendant company) for US \$1,740. The defendant company challenged the invoice from two principal fronts:-

- a) No name appears against it in the plaintiff's statement of account dated 27.08.95 (plaintiff exhibit 8).
- b) Mputa Investments Ltd (defendant) owns the Club where the guest or guests are said to have stayed.

The invoice itself is plaintiff exhibit 13 (h) and it refers to 'Mueller Party X 5'. The defendant company asked with regard to the said Invoice No.1660 how the said defendant company could be liable to pay the plaintiff accommodation charges in respect of guests who stayed in the defendant's own Club! In my view, the plaintiff never gave a satisfactory answer or explanation to that challenge.

Having duly considered the pleadings and the evidence tendered in this case, I am satisfied that the plaintiff has, on a balance of probability, proved his case, except for the claim of US \$1,740 subject matter of Invoice No.1660 dated 27.08.95 which must, accordingly, be discounted from the plaintiff's claim for US \$7,076, which in turn reduces the said claim to US \$5,336. The upshot is that the plaintiff's claim succeeds in part and I make the following final orders:-

1. I grant prayer (a) in the plaint but reduce the figure payable to US \$5,336, whose Kenya shilling equivalent shall be calculated at the same exchange rate used by the plaintiff at the time of filing suit, with interest at court rate from the date of this judgment until payment in full.

2. I grant the plaintiff the costs of the suit.

Orders accordingly.

Delivered at Nairobi this 15th day of March, 2006

B.P. KUBO

JUDGE