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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CV-CS-0035 OF 2000

MIDLAND EMPORIUM LTD.....PLAINTIFF

VERSUS

NATHAN WODDAMBA alias ABDU.....DEFENDANT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGEMENT

The suit arose from a dispute between two parties who were business associates for a long time over failure to pay for goods supplied. The plaintiff from as far back as 1999 was a supplier of assorted goods to the defendant trading under the name and style Bamwaule General Traders.

Sometime later, the defendant defaulted in the payments for goods supplied worth shs. 362.666.000/-. The defendant issued cheques to the plaintiff in settlement of the indebtedness. When the cheques were presented for payment, they were returned unpaid with the remarks ' refer to drawer'. No payment has since been effected in payment of the goods in spite of demands and reminders to do so, hence this suit.

The following issues were framed for determination;

1. Whether the plaintiff supplied the goods to the defendant.
2. Whether the defendant issued the cheques amounting to shs. 362.666.000/- to the plaintiff.
3. Whether the said goods were fully paid for by the defendant.

4. Whether the said cheques were dishonoured on presentation for payment.

The plaintiff called one witness, Mr. Jagadish Kotecha a Director of the plaintiff company. The defendant gave evidence but did not call any witness. While various Counsel represented the defendant at different stages of the proceedings, no final submissions were filed by them as directed by court.

I will deal with the framed issues in the order as set out above. The evidence of the plaintiff's sole witness was that the plaintiff firm used to supply assorted goods to the defendant who was trading under the name and style of Bamwaule General Traders. Goods were transported to the defendants and the defendant signed the respective delivery notes acknowledging receipt of the goods. These were tendered in evidence as exhibit PE 1 'A – F'.

Each of the delivery notes bear details of the consignment and the registration number of the vehicle which transported the goods, and the invoice number. There is inserted in each invoice the total amount of the value of the goods. The details of the Delivery Notes were as follows;

D/N NUMBER	**QUANTITY**	**GOODS**	**AMOUNT**
11801	1200 bags	sugar	55.200.000
-do-	240 bags	white wash	1.680.000
		TOTAL	**56.880.000**
11810	1200 bags	sugar	55.200.000
-do-	290 bags	white wash	2.030.000
		TOTAL	**57.230.000**

11834	1320 bags	sugar	60.060.000
-do-	430 bags	white wash	3.010.000
		TOTAL	**63.070.000**
11835	1240 bags	sugar	56.420.000
-do-	220 bags	white wash	1.540.000
		TOTAL	**57.960.000**
11837	1320 bags	sugar	60.060.000
-do-	425 bags	white wash	2.975.000
		TOTAL	**63.035.000**
11854	1350 bags	sugar	61.425.000
-do-	438 bags	white wash	3.066.000
		TOTAL	**64.491.000**
		GRAND TOTAL	**362.666.000**

The defendant signed each of these delivery notes. Each was from the plaintiff company, and addressed to Bamwaule General Traders, Mbale. There was an ink stamp of Bamwaule General Traders Ltd on each of them where the defendant signed. That was the crux of the defence, that the goods were supplied to a limited liability company, but not to an individual. I will get to that in due course.

The defendant signed six cheques in respect of each of the above transactions. These were exhibited as PE2 'A-F'. When they were tendered for payment, they were dishonoured with the words 'refer to drawer'. All the above was not disputed.

The defendant testified that he indeed received the goods in exhibits PE1 A-F. He conceded that this was evidenced by his signature on the delivery

notes. He told court that he received the goods only on behalf of Bamwaule General Traders Ltd, a limited liability company. He told court that this company was incorporated in 1995, with three shareholders who were also the directors. These were himself, the late Makyese Richard who died in 1999, and the late John Wodamba. A copy of the certificate of incorporation, and a copy of the memorandum and articles of association were admitted in evidence as DE1 and DE2 respectively.

The surprise was that the said John Wodamba who was stated to be 33 years old at the time of registration of the company according to the copy of the memorandum and articles of association exhibit DE2, died in 1995, four years before the company was incorporated. This was the evidence of the defendant in cross examination.

The defendant told court that he stated dealing with the plaintiff company way back in 1994. At that time Bamwaule general Traders was not yet incorporated even though he and his deceased brother, Richard Makyese were using the trade name in transactions with the plaintiff company.

The defendant told court that he issued the cheques exhibit PE2 A-F. He told court that these cheques were not meant to be banked in settlement of the debt. They were only meant to act as security for the goods supplied. He produced copies of bank drafts as evidence of previous payments to the plaintiff company. These were admitted as exhibit DE3 a-d. They are dated 14th July, 19th July, 26th July and 11th August respectively.

The plaintiff admitted that in the past dealings, the defendant paid by bank drafts, but when the bank drafts dried up in spite of constant reminders, and no payment was forthcoming in respect of the goods supplied, the subject of this suit, he banked the cheques with the aforesaid results. He only tendered the cheques in December 1999, upon realising that no more bank drafts were forthcoming since September.

From the evidence it not disputed by both parties that the plaintiff supplied the goods in exhibit PE1 A-F detailed above. It is not in dispute that the defendant received the goods. The only dispute was whether the goods were supplied to the defendant or to Bamwaule General Traders limited, a limited liability company.

A company known as Bamwaule General Traders Limited was incorporated as a limited liability company and was duly registered as one on 8th December 1995. The details given in the memorandum and articles of association according to exhibit DE2, the subscribers of the company were Wagisha Richard aged 33 years, a farmer, Wadamba Nathan 28 years, a farmer and Wadamba John 33 years old, also a farmer.

From the testimony of the defendant, a director and 2nd shareholder of that company, Wagisha Richard was the one referred to earlier as Makyese Richard. He died in 1999. Wadamba John the 3rd director and shareholder died in 1992. That means that the company was incorporated by among others a dead person. This was not only ridiculous it was criminal. It was not surprising therefore that the defendant conceded that they had never filed any returns of particulars of the company with the registrar of companies.

Even after the death of the only other member of the company, Richard Wagasha Makyese in 1999, the defendant being the sole surviving member and shareholder of the company continued to act as if the limited liability status was still in existence. He insisted so in court after that admission.

A limited liability company cannot have less than 2 members under S. 3(1) of the Companies Act, Cap 110. Under S. 5 thereof, each subscriber is required to sign and date the memorandum of association at the time of incorporation. John Wodamba was dead by the time the company Bamwaule general Traders limited was purportedly incorporated. He therefore could not have signed the memorandum of association of the company. There is a penalty for false statements regarding registration requirements under Ss. 16 and 396 of the Companies Act.

The plaintiff told court that he stated dealing with the defendant in 1994 together with Richard Makyese. He was dealing with them as individuals. The defendant would sign the delivery notes as an individual. The name of Bamwaule General Traders was being used from that time. There was no indication in law and in fact that this was a registered limited liability company.

This was conceded by the defendant when he agreed that business dealings with the plaintiff company stated in 1994, and that at that time, the company was not yet registered, but the name Bamwaule General Traders was being used, as it was the name on the import licence. The plaintiff was incorporated in and was transacting business with the defendant from Kisumu, in Kenya.

The defendant conceded that they did not inform the plaintiff of the change of status of Bamwaule general traders when the company was registered as a limited liability company.

The defendant issued cheques to the plaintiff in respect of the goods supplied from his personal account in Bank of Baroda Mbale. When asked whether the company Bamwaule General traders Limited had a bank account, the defendant, the only surviving director and shareholder was non committal.

All the above showed that the plaintiff dealt with the defendant in his individual capacity, whether or not there was in law and in fact an entity known as Bamwaule General Traders Limited and I make no finding in that regard.

That answers the first issue. The second issue was whether the defendant issued the cheques amounting to shs. 362.666.000/- to the plaintiff. That was conceded by the defendant in his testimony in court. His only argument was that the cheques were not meant to be banked. That will be covered in the fourth issue, which I intend to deal with next. The second issue is answered in the positive.

The fourth issue was whether the cheques were dishonoured on presentation. Each of the cheques exhibit PE2 A-F were marked at the top in red ink with the words 'refer to drawer'. They were not honoured on presentation. The defendant told court that the cheques were not for banking, but were only security.

One wonders security for what, if not to ensure or guarantee payment. Once payment was not effected in accordance with the agreed procedure, the risk the security represented materialised, and the next obvious and natural course of action was to present the cheques in order to receive payment. They were not for acknowledgement of the indebtedness as the defendant argued. This was already reflected in the acceptance of the goods, evidenced by the signature of the defendant on the delivery notes.

The usual procedure according to both witnesses was for the plaintiff to take out bank drafts. This was not done from the time the goods were delivered in July 1999. It was not till December that the plaintiff realised that all was not well, and he sought to realise the 'security', to no avail. The cheques were issued for each respective shipment of goods supplied. They each represented payment for a specific transaction. I found that the cheques were meant to be presented for payment upon non payment by bank drafts as was the usual practice. They were duly presented and were dishonoured. That answers the fourth issue.

The third issue was whether the goods were paid for fully by the defendant. The defendant tendered in evidence copies of bank drafts exhibit DE3 a-d. These were not evidence of payment for the suit goods. The defendant did not intimate as much. They were evidence to prove the usual practice of the parties that payment was done by way of bank drafts.

The defendant testified that he intended to settle the indebtedness once a reconciliation of accounts was made between him and the plaintiff. He told court that his accountant had finalised their part of the accounts, and only

awaited that of the plaintiff. He flashed around a copy of that statement, but the said copy was conspicuously absent when tendering defence exhibits to court. The intimation was that the defendant was not indebted to the plaintiff, but rather that upon a reconciliation of accounts, it would be found that the defendant instead owed money to the plaintiff.

This suit was filed in court in April 2000, but up to the time of hearing the suit in 2004, no reconciliation of accounts had been done. The plaintiff testified that when the issue of reconciliation was muted, he directed their accountant to prepare the accounts and these were submitted to the defendant, but the defendant did not respond. The issue of reconciliation showing that they owed the defendant any money was denied by the plaintiff, who insisted that the defendant was using it to delay the court case from taking off.

The defendant did not allege any setoff if he claimed that instead he was the one owed money from the reconciliation. None was pleaded and none was proved.

If the defendant wanted to show that that he paid for the goods, he had to bring evidence to prove that assertion. In *J.K. Patel V. Spear Motors Ltd.* [1993] KALR 40 (S.C.), Seaton J.S.C., quoted with approval *Odgers on Pleading and Practice* 21st Ed., at page 186-187as follows;

> 'Payment before action is a matter of defence, which must be pleaded and proved by the defendant. A plea of payment should state that the payment relied on was made before the issue of the writ, giving dates

and amounts and also any facts showing an appropriation of such payments to the debt sued for in the action.'

When a party alleged non payment and the defendant alleged that payment was made, the onus was on the defendant to prove such payment. S. 100 Evidence Act provides that whoever desires court to give judgement as to any legal right or liability on the existence of facts which he asserts, he must prove that these facts exist. S. 102 of the same Evidence Act sets the burden of proof as to any particular fact on that person who wishes the court to believe in its existence. Since the defendant wished court to believe that he paid for the goods, the burden of proof was on him to do so. He did not discharge that burden. The third issue was answered in the negative.

The plaintiff prayed for recovery of shs. 362.666.000/-, being the total amount on the dishonoured cheques. The claim was brought under the Bills of Exchange Act. S. 54(1)(a) of that Act provides as follows;

'The drawer of a bill by drawing it-

(a) engages that on due presentation it shall be accepted and paid according to its tenor, and that if it be dishonoured he or she will compensate the holder or any endorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken.'

The plaintiff testified that he supplied goods and was issued cheques by the defendant as settlement of the price of the goods. The defendant did not deny issuing the cheques in question. There was valuable consideration as the goods were duly supplied and received by the defendant. This was also admitted.

In *Hassanali Issa & Co. V. Jeraj Produce Store* [1967] EA 555 (C.A.) it was held that,

> 'The position therefore that where there is a suit on a cheque and the cheque has admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgement to which he would otherwise be entitled.'

The circumstances which would disentitle the plaintiff from getting judgement are set out in S. 28(2) of the Bills of Exchange Act, and these include fraud, duress, or force and fear, or illegality. None of these was alleged, alluded to or proved in this case. The plaintiff is accordingly entitled to the relief under s. 56 (a)(i) of the Bills of Exchange Act, the amount of the bill. I would therefore award the plaintiff shs. 362.666.000/-, the total amount of the cheques, which were dishonoured as prayed.

The Bills of Exchange Act in S. 56(a)(ii), provides for award of interest on dishonoured bills. The plaintiff claimed for interest at a rate of 25% per annum from the time of presentation and dishonour of the cheques. In *Ecta (U) Ltd. V. Geraldine Namubiru & Ano.* SCCA No. 29 of 1994, Odoki Ag. DCJ., (as he then was) held that awards arising out of commercial or business transactions usually attract higher rates of interest, while awards of general damages are mainly compensatory. One could not agree more.

The plaintiff is a business entity operating business from Kisumu in Kenya. This is a commercial entity and is entitled to interest at such a rate as advised in the *Ecta (U) Ltd*. (supra). I would therefore award the plaintiff interest at a rate of 25% from the date of presentation and dishonour of the cheques till

judgement, and thereafter at the rate of 8% from date of judgement till payment in full. The plaintiff shall have the costs of the suit.

Under the alternative prayer, I would give judgement to the plaintiff for goods supplied but not paid for. This was proved on a balance of probabilities. Award of interest under S. 26(2) of the Civil Procedure Act is at the discretion of the court. Such discretion must be exercised judicially. Lord Denning MR in *Harbutt's Plasticine Ltd. V. Wayne Tank & Pump Co. Ltd.,* [1970] 1 All. E.R. 225 held that,

> 'An award of interest is discretionary. The basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.'

I would award the plaintiff interest at the rate of 25% per annum.

Judgement is therefore entered for the plaintiff against the defendant for the sum of shs. 362.666.000/-, and costs of the suit. The sum herein awarded shall carry interest at the rate of 25% per annum from the date of the dishonour of the cheques till the date of judgement. The sum awarded and the taxed costs shall carry interest at the rate of 8% from date of judgement till payment in full.

RUGADYA ATWOKI

JUDGE

6/06/2005.

Court: The Deputy Registrar of the court shall deliver this judgement to the parties.

RUGADYA ATWOKI

JUDGE

6/06/2005.