

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0053 OF 2007**

HENRY MUGENYI T/A

KIFARU HIGH COURT BAILIFFS & AUCTIONEERS ::::: APPELLANT

VERSUS

GLOBAL FORWARDERS & CLEARING LTD ::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Bamwine, J. dated 26th of July, 2007, in Civil Suit No. 188 of 2002)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF THE COURT.

This is an appeal from the decision of the High Court wherein Yorokamu Bamwine, J. decreed the sum of Ug. Shs. 2,225,922/= (Two Million, Two Hundred Twenty Five Thousand, Nine Hundred Twenty Two Uganda Shillings) with interest thereon at 20% from date of filing till payment in full as well as 60% of the taxed costs of the suit with interest at the Court rate from the date of taxation till payment in full to the respondent herein against the appellant.

Brief Background

The appellant and the respondent were respectively the defendant and the plaintiff in the High Court. The respondent instituted Civil Suit No. 0188 of 2002 in the High Court against the appellant claiming for Ug. shs. 18,300,922/= (Eighteen Million, Three Hundred Thousand, Nine Hundred Twenty Two Shillings), being the balance of the decretal amount due to the respondent company from the appellant, a court bailiff who had recovered the said money from a Judgment Debtor on behalf of the respondent company. After hearing the matter, the learned trial Judge decreed to the respondent only Ug. Shs. 2,225,000/= (Two Million, Two Hundred Twenty

Five Thousand, Nine Hundred and Twenty Two Uganda Shillings) out of the initial claim of 18,300,922/= (Eighteen Million, Three Hundred Thousand, Nine Hundred Twenty Two Uganda Shillings). The trial Court also granted 60% of the taxed costs of the suit to the respondent. The trial Court also ordered for payment of interest on the decretal sum and the awarded costs as already stated above. Being dissatisfied with the said decision of the High Court, the appellant lodged this appeal in this Court on the sole ground that:

- "1. The learned trial Judge erred in law and fact in awarding Ug. Shs. 2,225,922 /= to the Plaintiff in HCCS No. 533 of 1998 against the weight of the evidence."**

Representation

At the hearing of this appeal Mr. Nesta Byamugisha, learned Counsel, appeared for the appellant while Mr. Jeff Bogere Mukwana, learned Counsel, appeared for the respondent. Counsel for both parties made oral submissions.

Appellant's case

Mr. Nesta Byamugisha in his oral submissions faulted the learned trial Judge for awarding the respondent a sum of Ug. Shs. 2,225,922 /= on the basis of an erroneous appraisal of the evidence on record. Counsel complained that it was erroneous for the learned trial Judge to conclude that the claim by the appellant to have made the payment in question to the respondent's representative, Mr. Ernest Kamara in the presence of the respondent's Advocate Mr. Wycliff Birungi was an afterthought from the appellant. In support of the appellant's case, counsel relied on the fact that the appellant, had in a letter dated 20th September, 2002 which was admitted as Exhibit D.Exh. 3, written to the Deputy Registrar of the High Court informing him that he had paid the disputed sum of money to the respondent in the presence of his Advocate, Mr. Wycliff Birungi. He further submitted that the respondent's advocates at the material time, Mr. Birungi and Mr. Mayambala had both testified during the trial that the disputed sum was indeed given to the respondent. In counsel's view, their evidence was sufficient to prove payment to the respondent although there was no receipt or other acknowledgement of payment which showed that the money in question had been received by the respondent. He cited **Muluuta Joseph vs. Silvano**



Katama, Supreme Court Civil Appeal No. 11 of 1999, for the proposition that the Court should subject all the evidence adduced before it to adequate scrutiny before determining the rights and liabilities of the parties. He then invited this Court to carry out proper scrutiny of the evidence on record and thereafter be pleased to allow this appeal.

Respondent's case.

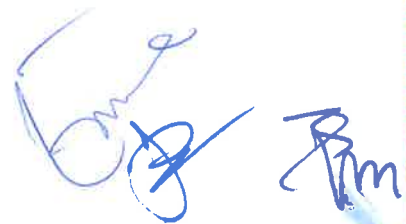
On the other hand, counsel for the respondent in his oral submissions supported the findings of the learned trial Judge by insisting that he had properly evaluated the evidence before him. He submitted that the learned trial Judge was mindful of the events which had transpired during the trial and had the benefit of observing the demeanour of the witnesses. He further contended that the learned trial Judge had taken into consideration the fact that no evidence had been adduced regarding acknowledgement of payment or receipt of the money in question. Counsel further submitted that the learned trial Judge dealt with the evidence of Counsel Birungi and Mayambala as he did, after seeing them testify, whereafter he came to the conclusion that had the money in question been paid to the respondent there would have been evidence to that effect. He then prayed to this Court to dismiss this appeal and uphold the judgment of the learned trial Judge.

Rejoinder

In rejoinder, counsel for the appellant submitted that the learned trial Judge did not base his finding on the demeanour of the witnesses; and neither did he base his decision on the fact that the payment of the money in question was not acknowledged in writing as submitted by counsel for the respondent. He contended that the submissions by counsel for the respondent in that regard ought not to be accepted and reiterated his earlier submissions in support of the appeal.

Resolution of Court

We have carefully considered the submissions of both counsel, the Court record and authorities and the law cited. We are alive to the duty of this Court as a first appellate Court which was aptly summarized in **Kifamunte Henry vs Uganda Supreme Court Criminal Appeal No. 10 of 1997** as follows:



"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

See also: Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 on the duty of a first appellate court.

As a first appellate Court, this Court has the duty to reappraise the evidence adduced before the trial Court and come up with its own inferences, bearing in mind that this Court did not in any way perceive the witnesses as they testified in the Court of first instance.

The only question for determination in this appeal is whether the learned trial Judge erred to award the respondent the money and costs of the suit in question.

It was the appellant's case that the learned trial Judge omitted to take into consideration the defendant's evidence on the payment of the money in question when he decided as he did, while it was the respondent's case that the learned trial Judge properly evaluated the evidence on the point and was justified to conclude that the defendant's claims to have paid the money in question were an afterthought.

It is worth noting that the appellant claims to have made the payment in question to the respondent's representative, Mr. Kamara Ernest in the presence of his then advocate, Mr. Wycliff Birungi. He also said that there was no written acknowledgment of that payment. At the trial, oral evidence was adduced on behalf of the appellant, to prove that the payment in question was made and there was similarly oral evidence for the respondent that the said payment was not made. The preceding oral evidence could not have helped the learned trial Judge to decide the dispute given that all the relevant witnesses may be said to have had an interest in the matter, and as such the credibility of their evidence was in issue.

The learned trial Judge handled the issue regarding the money in question at page 113 of the record as follows:

"...And by July, 2001, the plaintiff and its lawyers were already up in arms against the defendant for the balance on the bounced cheque of Shs. 8,225,922=. The payment, if any, was not documented. The first



time we get to hear of it is in September 2002 in connection with the defendant's leave to appear and defend the plaintiff's suit against him. I'm of the view that if any payment had been made on top of the Shs. 33,000,000=, and made in the presence of DW2 Birungi before the suit was filed, the two lawyers would have indicated so at the earliest opportunity in their various correspondence to the Court and others on the matter. They didn't. Like the plaintiff's case on the issue of the difference between Shs. 51,300,922= and Shs. 41,225,992=, the alleged payment by the defendant to the plaintiff in the sum of Shs. 2,225,992= is in my fair judgment an afterthought. On the balance of probabilities, the plaintiff has never received this amount. It is decreed to the plaintiff."

In civil cases, the general rule is that the burden of proving any particular fact lies on the person who wishes the court to believe in its existence. **See: Section 103 of the Evidence Act, Cap. 6.** At trial, the appellant had to prove that it was more probable than not, that he had paid the money in question to the respondent's representative. In our view, he only succeeded in proving that it was equally possible that the payment had been made as well as that it had not. Perhaps a receipt or written acknowledgement of the payment in issue would have aided his cause but none was adduced in court.

We are mindful that a payment may be proved either by the production of a receipt or by any other evidence from which the fact of payment may be inferred. However in the present case, the other evidence relied on to prove the payment in question, being the testimony of the two lawyers during the trial was not sufficient to discharge the requisite standard in a civil case.

We are unable to accept the submissions by counsel for the appellant that the issue of the payment of the monies in question, was ever brought up by either the appellant or his counsel, at any moment before the relevant suit for leave to appear and defend was filed by the respondent. We have not found any evidence to back up those submissions. On the contrary, the relevant pleadings show that the said payment was only talked about after the respondent had instituted a suit denying that the same had been made. This is borne out by the evidence which shows that; while the respondent's plaint in the trial Court was filed on 15th April, 2002, the appellant first mentioned the contested payment, months later, in an affidavit in support of an application for leave to appear and defend the suit instituted by the



respondent which was sworn on 20th September, 2002. As such, it cannot be ruled out that it was a well-orchestrated afterthought to deny liability by the appellant. In the circumstances, we are unable to fault the learned trial Judge for finding as he did. We accordingly uphold the decision of the trial Court.

In the result, this appeal hereby fails, and is dismissed with costs to the respondent.

We so order.

Dated at Kampala this 7th day of Feb 2020.



Elizabeth Musoke

Justice of Appeal



Cheborion Barishaki

Justice of Appeal



Remmy Kasule

Ag. Justice of Appeal