THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0733-2000

SIMBA MOTORS LIMITED :::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. JOHN SENTONGO
2. SALAMA ENTERPRISES LTD :::::::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff is a limited liability company registered and carrying on business in Uganda. It sued the defendants, an adult Ugandan and a company respectively, for a sum of Shs.9,100,000- with interest and costs of the suit.

The following are the points of agreement in the case:

1. The defendant issued a post-dated cheque of Shs.7,000,000- to the plaintiff.

2. Shs.2,000,000- on that sum was paid.

3. The cheque was dishonoured.

4. Notice of dishonour was given.

5. The 1st defendant borrowed some money from the plaintiff.

From the record of the proceedings, the parties did not frame the issues for determination at the scheduling stage. The then trial judge reserved them for framing later. She left the station before doing so. The omission did not come to light till the submissions stage. At this stage each side came up with its proposed issues for determination. From those proposals, I have derived the following issues for determination:

1. Whether the bounced cheques, one for Shs.7m and another for Shs.1.3m were issued by the defendants, and whether the invoice for Shs.800,000- was signed by the defendants, or any of them.

2. Whether the defendant is indebted to the plaintiff in the sum claimed in the plaint or at all.

3. Whether the defendants pledged a water pump to the plaintiff as security for payment.

4. Remedies, if any.

Counsel:

Mr. Kityo for the plaintiff.

Mr. Niwagaba for the defendants.

Before I consider the evidence of the parties, let me state the law on proof in civil cases.

In law a fact is said to be proved when Court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When such party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on a balance of probabilities. Relating the above principle to this case, the plaintiff has alleged that the defendants are indebted to it. The burden lies on it to prove that allegation.

At the scheduling stage, learned counsel for the plaintiff intimated to Court that although the original claim was for Shs.9,100,000-, the plaintiff had before giving him instructions to recover the same received Shs.2,000,000- which fact had however not been communicated to him at the time of filing. The plaintiff accordingly stated its claim to be Shs.7,100,000-. During the pendancy of the suit, the defendant paid another Shs.3,000,000- to the plaintiff through its counsel. This further reduced the plaintiff's claim further to Shs.4,100,000-, the plaintiff's current outstanding claim.

There are two conflicting versions as to how the indebtedness arose.

From the plaintiff's point of view, according to its Managing Director PW1 Christopher Sebuliba, the 1st defendant bought a house from him in 1997. The purchase price was Shs.7,700,000-. The house was in Kizungu Zone of

Makindye. His attempt to take possession failed because of a certain lady who also claimed to have bought the same property. Upon the failure of the consideration, the 1st defendant agreed to refund the purchase price. Hence the cheque in the sum of Shs.7,000,000-, Shs.700,000- having been refunded to him in cash.

As to the cheque of Shs.1,300,000-, Sebuliba's evidence is that the 1st defendant approached him again for a loan of Shs.1,300,000-. He gave it to him. That later, he approached him for further assistance and he gave him four tyres at a cost of Shs.200,000- each. Hence the genesis of the cheque in the sum of Shs.1,300,000- and the invoice dated 24/4/98, P. Exh. V.

From the defendants' point of view, as per the evidence of DW1, Sentongo, they dealt with Sebuliba as a person and not the plaintiff. About the cheque of Shs.7,000,000-, Sentongo says that it was not in respect of a sale of a house as the plaintiff alleges but a loan of Shs.5,000,000- which he got from Sebuliba. According to him, he wanted to pay some taxes on goods he had imported and the said Sebuliba gave him that money, to attract interest of Shs.2,000,000-. Hence the cheque. His evidence is that the two parties made an agreement, P. Exh. 1, in the hope that if he defaulted in the payment, Sebuliba would take the house. As to the other cheque in the sum of Shs.1,300,000-, Sentongo's evidence is that he received Shs.1,200,000- in cash from Sebuliba and he was to pay interest on it in the sum of Shs.100,000-. Hence the cheque for Shs.1,300,000-. I have considered

these versions. It would appear to me that as between the plaintiff's and the defendants', the defence version makes much more sense. Having said so, this Court is of the view that whether it goes by the plaintiff's version or that of the defendants, the fact remains that the parties had financial dealings which gave rise to the instant dispute. It has not been suggested, and there is no evidence to indicate so, that the plaintiff's cause of action is founded upon an immoral or illegal act. The presumption is that it was a moral and legal act, and therefore legally enforceable.

Regarding the first issue, both cheques were payable to Simba Motors Ltd. It was not a payment to Sebuliba to raise inference that these dealings were on personal basis. This disposes of the 1st defendant's argument that he dealt with Sebuliba as an individual and not his company. The first defendant has not denied issuance of the two cheques. He has also not denied the signature on P. Exh. V, the invoice dated 24/4/98. The first issue is answered in the affirmative.

As to whether the defendants are indebted to the plaintiff in the sum claimed in the plaint or at all, I have already observed that the current claim is for Shs.4,100,000-. The plaintiff's claim is based on the two cheques and an invoice which are not denied by the 1st defendant. I will start with the invoice.

It is dated 24/4/98. It is on a would have been plaintiff's order paper couched thus:

> *"To pay on the 16th of May Shs.800,000- (Eight hundred thousand shillings only)."*

There is no indication thereon as to what was being transacted. The same does not therefore speak for itself. The plaintiff's case is that the first defendant was taking four tyres on credit. The first defendant denies it. He claims that he borrowed Shs.1,200,000- on two different occasions and that the cheque dated 15/5/98, P. Exh. IV, was a refund of that amount and the attendant interest of Shs.100,000-. I have already accepted as truthful the defence version on this issue. In addition to that acceptance, I have considered the fact that the parties did not indicate what was being transacted. If it was a sale of tyres on credit as alleged by Sebuliba, one fails to see why the author did not state so. I note that the same is dated 24/4/98. The parties agreed that payment be on 16/5/98. Just a day before the due date, that is, on 15/5/98, the first defendant issued the impugned cheque, P. Exh. IV, in the sum of Shs.1,300,000-. It was in my view not merely coincidental. It is evidence that by 15/5/98, the amount due and owing from the defendants to the plaintiff on the transaction of 24/4/98 was Shs.1,300,000-. The first defendant issued the impugned cheque on 15/5/98 to settle that indebtedness. The Court's finding on this point is that this ill-fated cheque, P. Exh. IV, constituted a payment of some additional borrowing

from the plaintiff by the defendants. Seeking recovery of Shs.1,300,000- being the value of the bounced cheque and Shs.800,000- being the amount stated in the invoice is to claim twice in respect of the same debt. I hold so.

I now turn to the two cheques. Their issuance is not denied by the defence. Both parties agree that they bounced. This means in effect that the obligations of the drawers of the two cheques which were to settle debts owed by them to the payee, the plaintiff, not discharged. It is settled law that when a bill is dishonoured by non-payment an immediate right of recourse accrues to the holder. Accordingly, a cause of action arose in favour of the plaintiff when the cheques were dishonoured.

It is argued for the defendants that the plaintiff not having given notice in reasonable time in accordance with S.48 of the Bills of Exchange Act committed an act that discharged the defendants from the liability on the cheque for Shs.1,300,000- against the 1st defendant and the cheque for Shs.7,000,000- against the 2nd defendant. Counsel has placed reliance on **J.B. Turyagenda –Vs- Charles Tumwesigye HCCS No. 57 of 2000** (unreported), a decision of Byamugisha J. (as she then was). In that case, Court found that the plaintiff's suit was time barred for non-issuance of a notice of dishonour in time. The delay was for five months. I have addressed my mind to counsel's argument and the law. The Bills of Exchange Act, Cap 68, contains detailed rules relating to notice of dishonour.

When a cheque has been dishonoured by non-payment notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged. Section 47 refers. The notice may be given as soon as the cheque is dishonoured and must be given within reasonable time thereafter. Section 48 (I) refers. In the absence of special circumstances, notice is not deemed to have been given within a reasonable time unless:

(i). Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(ii). Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there is a post at a convenient hour on that day, and if there is no such post on that day then by the next post thereafter.

These rules have been applied rather strictly by the Courts. Thus in **Govind Ukeda Patel –Vs- Dhanji Nanji [1960] EA 410,** the plaintiff, a resident of Nairobi, presented a cheque, drawn on a Mombasa Bank, for payment through his Nairobi bank on 13/12/1958. On 16/12/1958, his banker verbally informed him that the cheque had been dishonoured. The plaintiff received back the cheque on 18/12/1958 marked “refer to drawer.” On 19/12/1958 he sent the cheque to a friend in Mombasa to hand it over to an advocate for necessary action. The advocate wrote a letter on 22/12/58 informing the

defendant that the cheque had been dishonoured which letter he received on 23/12/58. On appeal from the judgment of the lower Court, the Court of Appeal held that on the evidence it was clear that notice of dishonour had not been given within reasonable time and the appellant had not given any evidence to show that he had acted with due diligence or that there were any special circumstances justifying the delay. In our situation, the law provides that delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable by his default, misconduct or negligence. S. 49 (1) thereof refers.

In the instant case, the plaintiff through PW1 Sebuliba testified that it issued a notice of dishonour to the 1st defendant on 19/3/99. The cheque of Shs.7,000,000- was dishonoured on 18/2/97. The one for Shs.1,300,000- was dishonoured on 19/5/98. This in effect means that the notice of dishonour was issued after over two years in respect of the first cheque and after ten months in respect of the 2nd cheque. No explanation has been offered for the inordinate delays. As if that was not bad enough, the suit was filed on 28/06/2000, more than 3 years after the dishonour of the first cheque.

From the pleadings and the evidence of the parties, the notice was not sent on the day each cheque was dishonoured or within any reasonable time thereafter. I agree with learned counsel for the defendants' submission that

the notice was in the circumstances of this case not valid and effectual as the law requires. The end result is that the plaintiff's action is barred by law in that it cannot sue on the cheque by reason of its failure to give notice within a reasonable time. I have considered the plaintiff's evidence that after the dishonour, before the suit was filed, and even as this suit was pending determination the defendants made some payments to the plaintiff. This evidence would only have been helpful if the plaintiff's cause of action had been for the recovery of the balance on the alleged transactions. It is not. The plaintiff's suit is pure and simple based on the dishonoured cheques. The suit is barred by time. In **Nanji Khodabhai –Vs- Sohan Singh [1957] EA 291**, a cheque was dishonoured on 25/4/1955 and notice of dishonour was not given until 29/4/1955. The Court held that the defendant was discharged because there were no special circumstances to justify any delay and notice should have been given on 26/4/1955. Applying the same principle to the instant case, no special circumstances have been pleaded or even given in evidence to justify the delays. I hold that the defendants were discharged from further liability on the cheques by reason of the inordinate and inexcusable delays. They are ipso facto not indebted to the plaintiff in the sum claimed in the plaint or at all.

As to whether the defendants pledged a water pump to the plaintiff as security for payment, I have found the evidence in support of that claim most unsatisfactory. DW1 Sentongo claims that he took it to the plaintiff's

offices; that he was with one Seguya. This Seguya has not appeared as a witness for either party. There was no acknowledgment of its receipt in writing. Sentongo claims that this was an over sight. I doubt that an important machine like a water pump said to be worth millions of shillings could merely have been dumped at the plaintiff's offices without anything to show for it. It is noteworthy that the defendants raised this issue after Sebuliba had demanded payment based on the dishonoured cheques. It appears to me that this was just an after thought; a cover up to defeat the plaintiff's claim. This water-pump transaction has not been proved by the defendants on the balance of probabilities or at all. Accordingly, the defendants' counter claim must fail and it fails.

As regards the remedies open to the parties, the law is that where one party alleges that it paid another and the other denies receipt of the payment, the onus is on the party who alleges payment to prove the payment. The rationale is that it is very hard to prove a negative: **J.K. Patel –Vs- Spear Motors Ltd SCCA No. 4 of 1991.**

I accept the principle in that case.

In the instant case, the defendants allege that one Seguya collected Shs.400,000- on behalf of Sebuliba. Seguya did not appear as a witness nor

was any acknowledgment of its receipt produced at the hearing. There is cause to doubt the alleged payment. The first defendant also claimed that Sebuliba advised him to give Shs.900,000- to a one Makumbi. As the defence was closing its case, the defendant purported to introduce in evidence as an exhibit a Makumbi's purported acknowledgment of receipt of that amount. One wonders why such a document was never produced and marked as an exhibit at the scheduling stage if at all it was in existence by then. Court rejected it because its introduction was in contravention of the conventional rules of procedure.

The plaintiff is a company. The first defendant is not an illiterate man. He is the Managing Director of the 2nd defendant. It is a fundamental attribute of corporate personality that a company is a legal entity distinct from its members. In these circumstances, the 1st defendant's alleged dealings with Sebuliba as if he, Sebuliba, was the company he had issued cheques to is to say the least amazing. Equally amazing is his insistence that he had no dealings with Simba Motors Ltd when the two cheques in issue were clearly in the name of that company. If he knew nothing about Simba Motors Ltd and the same had not rendered any service to him to warrant payment, why did he act as he did? I would have been of a different opinion if Sentongo was a simple village peasant and not the Managing Director of the 2nd defendant.

The burden of proving that the defendants fully settled their indebtedness to the plaintiff lay on the defendants themselves. They did not discharge that burden on the balance of probabilities or at all. Accordingly, the Court's finding is that the sum of Shs.3,300,000- would still be due and owing from the defendants. However, in view of the Court's finding that failure to give notice of the dishonour of the cheques within a reasonable time discharged them from further liability, I hold that the plaintiff has no enforceable claim against the defendants. Accordingly, the plaintiff's suit shall be dismissed and is hereby dismissed.

As regards costs, the usual result is that the loser pays the winner's costs. However, this practice is subject to the Court's discretion such that a winning party may not necessarily be awarded his costs. For example, in **Dering – Vs- Uris [1964] 2 All ER 660** the plaintiff sued the defendant in respect of a libel. The jury, who were obviously not sympathetic to the plaintiff, awarded him contemptuous damages of one half penny. The trial judge did not award the plaintiff his costs, even though they probably ran into thousands of pounds.

In light of the peculiarities of this case and the parties unconscionable conduct towards each other, I am inclined to order that each party bears its/his own costs, save any costs that may already have been decreed to either party in any event. I order so.

Yorokamu Bamwine

J U D G E

21/06/2006

21/6/2006

Mr. Gilbert Nuwagaba for defendants.

Mr. Kityo for plaintiff absent.

Parties absent.

Court: Judgment delivered.

Yorokamu Bamwine

J U D G E

21/6/2006