

THE REPUBLIC OF UGANDA

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

HCT-0-CC-CS-0188-2002

**GLOBAL FORWARDERS &
CLEARING LTD**

.....

PLAINTIFF

VERSUS

**HENRY MUGYENYI
t/a KIFARU HIGH COURT BAILIFFS &
AUCTIONEERS**

.....

DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff filed this suit against the defendant, a Court Bailiff, seeking orders for Shs.18, 300,922=, interest and costs of the suit. From the pleadings and evidence of the parties, the plaintiff had a suit against Uganda Revenue Authority (the URA) and another. It was **HCCS No. 583 of 1998**. The suit was determined in the plaintiff's favour and the defendant was mandated by Court to recover the decretal amount from the judgment-debtor. The judgment-debtor, the URA, paid the amount by cheque drawn in the Bailiff's names. The amount recovered has variously been stated as Shs.80, 048,055= or Shs.80, 548,055=, a difference of Shs.500, 000=. At the scheduling conference, the parties agreed that the amount recovered from URA by the Bailiff was Shs.80, 048,055=. The Nile Bank deposit slip in respect of that cheque indicates Shs.80, 048,055= as the amount on the cheque banked on the defendant's account on 5/7/2001. In view of the agreement of the parties on the amount recovered from URA, I make a finding that that the defendant recovered Shs.80, 048,055= from the URA on the plaintiff's behalf. The parties also agree that on 12/7/2001, the defendant paid Shs.15, 000,000= to the plaintiff. They also agree that a cheque of Shs.26, 225,922= issued by the defendant

to the plaintiff on 13/7/2001 bounced. However, Shs.18, 000,000= was subsequently paid by the defendant to the plaintiff, thereby leaving a balance of Shs.8, 225,922= on that cheque. As the suit was pending hearing, the defendant made a further payment of Shs.6, 000,000= which he had admitted as the outstanding amount in his Written Statement of Defence (the WSD). Accordingly, the amount acknowledged by the plaintiff as recovered from the defendant is Shs.39, 000,000=. The defendant puts it at Shs.41, 225,922=.

I now turn to the dispute itself. The plaintiff contends that the amount recoverable from the URA as principal and interest was Shs.51, 300,922=, implying that the rest were the costs of the suit. The defendant does not dispute this fact. He, however, argues that after the money had been recovered from URA, the plaintiff's officials, its lawyers and himself (the Bailiff) had a meeting in which they agreed on the mode of sharing the entire amount. According to him, the meeting directed him to pay Shs.41, 225,922= to the plaintiff and the rest to disburse as agreed, which he did. The plaintiff disputes such an arrangement. Hence the plaintiff's claim of Shs.12, 300,922=, which when added to the Shs.39, 000,000= he does not dispute receipt of would come to Shs.51, 300,922=.

I have to decide:

1. Whether the plaintiff is entitled to a sum of Shs.12, 300,922= as claimed or at all.
2. Remedies, if any.

Mr. Bogere Jeff for the plaintiff.

Mr. Byamugisha Nester for the defendant.

Whether the plaintiff is entitled to payment of Shs.12, 300,922= from the defendant depends of course on whether the defendant owes the plaintiff that much.

The plaintiff's action is a kin to the action of money had and received. The basis for such action is rooted in a quasi-contract on the footing of an implied promise to repay. The action is applicable whenever the defendant has received money which, in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff.

There are two conflicting versions regarding the fate of the money the defendant recovered from the URA on behalf of the plaintiff. As expected, each side peddles its own version, complete with evidence to support it. Of course one side is lying or both sides are. 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 a 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.

It is noteworthy that the defendant herein was not party to HCCS No. 533 of 1998 in which the money, the subject matter of this case, was awarded to the plaintiff. As a Bailiff, he came in at the execution stage, as an emissary of the Court to recover the amount on behalf of the judgment creditor. Under the Judicature (Court Bailiffs) Rules, he was obliged to deposit in Court all proceeds of the execution within seven (7) days of the execution and thereafter submit his bill of costs to the Court for taxation. From the records, however, this was not the case.

Instead, on 29/6/2001, the Bailiff wrote to the URA, Exh. P1, demanding a settlement of the amount in the following terms:

| | | |
|----|-----------------------------------|---------------------------|
| 1. | Decretal amount (principal) | Shs.30, 236,300= |
| 2. | Interest awarded | Shs.21, 064,622= |
| 3. | Taxed Advocates costs (2 counsel) | Shs. <u>33, 061,215=</u> |
| | Total | Shs. <u>84, 362,137=</u> |
| | Less VAT | Shs.8, 500,000= |
| | Balance | Shs.75, 862,137= |
| | Bailiff taxes costs | Shs. <u>4, 685,918=</u> |
| | Total | Shs.80, 548,055= <hr/> |

The judgment debtor obliged and released the payment in the names of the Bailiff. He got the cheque, deposited it on to his account and when it matured, a meeting was convened in the Chambers of DW2 Wycliff Birungi. The parties are not agreed as to who the convenor thereof was. The plaintiff's lawyers claim that the convenor was the plaintiff's Managing Director, Mr. Kamara. The Managing Director denies it. It is interesting how the truth can be suppressed at the behest of a dispute. Be that as it may, all the parties to the payment, i.e. PW1 Kamara and his daughter PW2 Irene Kamara, DW1 Henry Mugenyi, DW2 Wycliff Birungi and DW3 Mayambala attended the meeting. It is also agreed that in the meeting a discussion as to how the money would be shared out ensued. The disagreement is on what was allegedly resolved in the meeting.

According to PW1 Ernest Kamara, calculations were made in Mr. Birungi's chambers which resulted in the decision to give the plaintiff Shs.41, 225,922= instead of Shs.51, 300,922=. He said, however, that the explanation he was given for this adjustment was not satisfactory to him. He refused to reveal to Court what that explanation was. His daughter, PW2 Irene Kamara, offered some explanation. She said:

“..... . We told them that from the judgment, we were entitled to receive Shs.51m and some additional digits being principal amount and costs. We had an argument about the sharing. We asked him to explain and he, Birungi, said we could not get Shs.51m but Shs.41m. The meeting ended in a row.”

Asked further what Birungi told them about the variation of the amount, PW2 said:

“..... Birungi said we would not get it, because there were other costs to be taken care of. Mayambala was with us. He did not object to Birungi's proposal. We went out of Mr. Birungi's office having rejected the idea of Shs.41m.”

Clearly, the evidence of PW2 Irene Kamara contradicts that of her father on the issue of whether or not the lawyers offered to them an explanation as to the amount they would each get. It supports the evidence of DW2 Birungi and DW3 Mayambala in very material respect that commissions and other expenses were discussed as payable and that the parties agreed that they be paid due to the complexity of actual execution against the URA. DW3 Mayambala's evidence is that the meeting considered that URA was not an ordinary judgment debtor against which execution could be carried out easily. That in the meeting, the Bailiff explained that it was not easy to access the URA yard to attach its properties; that he required extra security including military personnel and assistance to do so. That short of that the execution would have been resisted or payment would have taken longer by URA using legal and other means to delay the payment. It is the evidence of DW2 Birungi and DW3 Mayambala that PW1 Kamara appreciated and accepted the explanation. I have already pointed out that Mr. Kamara disputes all this. I have very carefully addressed my mind to all this evidence. In my view, whether or not Mr. Kamara appreciated and accepted the explanation is not the point. After all, he had services of two counsel, one of them his own relative. The point is that such a discussion took place and the parties did determine for themselves the way forward. Considering that Exh. P1, the Demand Letter, was written on 29/6/2001 and by 5/7/2001 the cheque was being banked, whether or not the facilitation was illegal, I get the impression that it (extra-facilitation) was indeed given.

And from the evidence of PW1, Kamara and PW2 his co-director, I am satisfied that the proposal for payment of Shs.41, 255,922= to them instead of Shs.51, 300,922= was indeed first met with resistance. The issue is whether it was finally accepted.

I have not found any direct unchallenged evidence on this point. The matter was apparently just discussed. It was not reduced to writing. In the absence of any recorded minutes, a letter of complaint by the plaintiff to the Court that was handling the matter of execution, immediately after the said meeting, regarding the manner in which the lawyers had allegedly handled the matter would, in my view, be evidence of the plaintiff's dissatisfaction with the status quo at the time. There is no evidence of any such complaint being lodged. While there is no direct evidence on the matter, there is in my view a wealth of circumstantial evidence that PW1 Kamara Ernest and PW2 Irene Kamara consented to the proposal for the plaintiff to get Shs.41,225,922= instead of the anticipated Shs.51,300,922=. My honest assessment of Mr. Kamara's demeanour throughout the proceedings is, respectfully, that he is not the type of person that would keep quiet in the face of any injustice to his company. The conduct of the plaintiff after the meeting suggests, in my view, that he was in full agreement with the proposal. If he had disagreed with it, and had stormed out of the meeting as he and PW2 Irene claim, it is most improbable that he would easily have agreed to walk with the defendant to Nile Bank to receive Shs.15,000,000= in cash, which he did, or accept the cheque of Shs.26,225,922=. The two payments add up to Shs.41, 225,922=, the amount he is said to have accepted at the meeting. I would have expected him to lodge a complaint with the Court that was handling the matter at the time if the payment had been forced on him. Instead, what we have on record is D. Exh. 2, a memo appearing to have been written on 20/7/2001. The date on it is not clear. In that memo, PW1 Kamara complained about the defendant causing further embarrassment by failing to pass on to him payment in the sum of Shs.8,225,922= besides issuing a bounced cheque. This amount is the difference between the Shs.18m paid to the plaintiff by the defendant after the cheque had bounced and the amount on the said bounced cheque. From the evidence, the Shs.18m was put on the plaintiff's account on 20/7/2001. If there had been a disagreement on the amount the plaintiff was to get, this would have been the time to point it out.

In a letter from the plaintiff's lawyers to the Registrar of the Court dated 7/8/2001, the lawyers, writing on behalf of the plaintiff said:

“The affidavit of Execution was issued to M/S to the above case who have up to date failed/neglected to pay our client

Shs.8,225,922= (words) to our client and ourselves liable on a number of occasions demanded for that money in vain.”

The letter was copied to M/S Global Forwarders & Clearing Ltd, the plaintiff herein. If that was not the outstanding amount at the time, the plaintiff would probably have come out to dispute the amount in another letter to the Registrar or the lawyers. Again, no such response is on record.

In another letter, D. Exh. IV, dated 03/09/2001, the plaintiff (through PW1 Ernest Kamara) wrote to the Registrar thus:

“In the matter of the above case in which judgment was made in our favour, we were advised by our counsels (sic) that out of the payment from the defendant, we would be paid by KIFARU HIGH COURT BAILIFFS & AUCTIONEERS total Shs.41,225,922= in two installments.

1st installment of Shs.15, 000,000= (words) was received in cash vide our receipt No. 1502 of 12/07/2001.

2nd installment of Shs.26, 225,922= was made by cheque which bounced as per attached.

Upon the bouncing of the cheque, Mr. Henry Mugenyi of Kifaru deposited on our account with Stanbic Bank the sum of Shs.18,000,000= (words) and promised to pay the difference of Shs.8,225,922= soonest. The purpose of this letter is to seek your assistance to enable us get our money because neither counsels nor the Court Bailiffs are co-operative.”

Again from the tone of the above letter, by September 2001, the plaintiff's pre-occupation was recovery of Shs.8, 225,922=, the balance on the bounced cheque, no more. I reckon we all fairly know what circumstantial evidence is: a series of circumstances leading to the inference or conclusion that something happened or did not happen, when direct evidence is not available. It is sometimes regarded as of higher probative value than direct evidence, which may be perjured or mistaken.

From the circumstances which I have explained above, Court is of the opinion that the plaintiff accepted the Shs.41, 225,922= in full and final settlement of the case. The problem only arose when

the cheque, for reasons which have been satisfactorily explained to Court, bounced and the defendant was not quick to make good of it. The time he took to claim the balance of Shs.8,225,922= gave the plaintiff cause to claim, as an afterthought, what it had previously agreed to forego in favour of the defendant in form of extra-legal facilitation to him to recover the decretal amount. In my view, the plaintiff is not before the Court, as regards that claim, with clean hands. It is trite that a person who stands by and keeps silence when he observes another person acting under a misapprehension or mistake, which by speaking out he could have prevented by showing the true state of affairs, can be estopped from later alleging the true state of affairs. In my opinion if there is any case for invocation of the doctrine of equitable estoppel, this is it. Accordingly, I hold that the plaintiff is not entitled to a sum of Shs.12, 300,922= as claimed.

As to remedies, the evidence of DW1, the defendant herein, and DW2 Birungi, is that on top of the Shs.39,000,000= which the plaintiff has acknowledged receipt of, the defendant paid an additional Shs.2,225,922= to them. PW1 Kamara denies it.

I have considered the series of events that led to this suit. The meeting to share the proceeds of the execution took place on or around 12/7/2001. Soon after the meeting, Shs.15m was released to the plaintiff. And soon thereafter, the cheque of Shs.26, 225,922= bounced. P. Exh. 111, a cash deposit slip of Shs.18m indicates that the deposit was made on 20/7/2001. It is evident that the advice to the plaintiff in respect of the bounced cheque was issued on or about 18/7/2001. And by July 20, 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 application for 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 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, 225,922= 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. As regards the plaintiff's claim for interest, an award of interest is discretionary. The basis for such an award would be 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 consider it settled law that where a person is entitled to a liquidated amount and has been deprived of it through the wrongful act of another person,

he should be awarded interest from the date of filing the suit. I would accordingly award the plaintiff interest on the Shs.2, 225,922= at the rate of 20% per annum from the date of filing till payment in full.

As regards the plaintiff's claim for general damages, I have already awarded interest on the outstanding balance. This interest is in my view sufficient to compensate the plaintiff. I therefore make no order as to general damages.

As regards costs, the plaintiff has no doubt incurred costs in espousing its claim against the defendant, whether the defendant had reason to contest the suit or not. I note that despite the defendant's admission of indebtedness to the plaintiff in the sum of Shs.6, 000,000=, he did not pay until just recently during the trial. In these circumstances, I would see no good reason to deny the plaintiff the costs of the suit. However, the assessment of the claims has achieved partial success for the defendant on the issue of the outstanding amount. I assess the success at 40%. I would therefore award the plaintiff 60% of the taxed costs of the suit. I do so. The same shall attract interest at Court rate per annum from the date of taxation till payment in full.

Dated at Kampala this 26th day of July, 2007.

Yorokamu Bamwine

J U D G E

26/07/2007