

THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0627-2003

CENTRAL PURCHASING CORPORATION

LIMITED

.....

PLAINTIFF

VERSUS

HON. MAJ. GEN. (RTD) KAHINDA OTAFIIRE **DEFENDANT**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff, a limited liability company, sued the defendant for recovery of Shs.83, 250,000=.

The basis for the claim is that on 19th October 1999, the defendant received 10.000 iron sheets worth Shs.86,000,000= from the plaintiff and paid for them by cheque No. 6500015702 which subsequently bounced. That he later paid only Shs.2, 750,000= leaving an outstanding debt of Shs.83, 250,000=.

The plaintiff had moved Court for a decision under Summary Procedure. In the course of time, the defendant successfully moved Court for leave to appear and defend the suit. In his Written Statement of Defence, the defendant denied the plaintiff's claim in toto and pleaded that he is wrongly sued and has no locus standi in the suit and that he has never ordered for nor taken delivery of the alleged suit goods. He claims that the goods were ordered by and delivered to Kibule Simon, Kakare and Mugisha Bruno, who even partly paid for them.

At the scheduling conference which neither the defendant nor his counsel attended, three issues were framed for determination:

1. Whether the plaintiff supplied iron sheets to the defendant.
2. If so, whether the defendant paid for them.
3. Whether the plaintiff is entitled to the reliefs sought.

Representations:

Mr. Dennis Owor for the plaintiff.

Mr. Davis Ndyomugabe for the defendant.

Before I consider the evidence adduced by the parties in support of their respective claims, I find it necessary to comment on some aspects of the law involved herein.

Firstly, the burden of proof.

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. The standard of proof is on a balance of probabilities. Relating this principle to the instant suit, the plaintiff has alleged that it supplied iron sheets to the defendant. The burden lies on it to prove that allegation.

Secondly, formation of contract.

A contract is simply an agreement enforceable at law. An essential feature of a contract is a promise by one party to another to do or for bear from doing certain specified acts. One party has to make an offer to the other, who in turn must accept the offer, thus formulating an agreement. The agreement may be oral or written.

I now turn to the evidence.

As to whether the plaintiff supplied iron sheets to the defendant, the evidence of the plaintiff's witness, PW1 Anthony Okwenye, is that he is the Managing Director (M.D) of the plaintiff company. He states:

“I know Kahinda Otafiire. Sometime in October 1999, he called me on phone and said he needed 10.000 galvanised iron sheets urgently. He asked me to accept his cheque which would mature in 4 days. I asked him to put that in writing and he sent me a note to that effect. Accompanying the note was a cheque of Shs.86m. When I saw the note

and the cheque, I processed through the relevant departments of the organization a credit sale for him. The credit sale was processed and I approved it. The cheque which had been presented was forwarded to my accounts department. I thought this was meant to conclude the matter. However, after a few days I was told the cheque had bounced. He had already taken the goods.”

For his part, the defendant states that he is an M.P. for Ruhinda Constituency and Minister for Local Government. That in 1999 he was serving in Congo. He was in the process of getting ready for re-election. That he summoned Ruhinda Schools Development Committee for a meeting to try and source iron sheets for supporting the schools. He had 131 public schools in the Constituency. He asked them to try and find out where they could get iron sheets and he was told that one Kibule Simon could connect them to Central Purchasing Corporation, the plaintiff herein. He continues:

“Simon Kibule asked me to call the M.D. Mr. Okwenye which I did. He confirmed that I could get the iron sheets. He asked me to give him a cheque and we agreed that he should only bank it after I have acknowledged receipt of the iron sheets. I then drew a cheque from the Ruhinda Schools A/C in my capacity as Chairman and gave it to one Bruno Mugisha.”

The gist of the defendant’s submission on the issue of who did what can be summarized as follows:-

- (i) It was not the defendant but rather an entity known as Ruhinda Schools Development Committee which ordered for the iron sheets from the plaintiff.
- (ii) That Ruhinda Schools Development Committee did not receive the iron sheets.
- (iii) That the iron sheets were received and embezzled by one Kibule an agent of the plaintiff.
- (iv) That it was agreed between the plaintiff and the defendant that the cheque for Shs.86m was not to be banked until the iron sheets were received by the defendant, for which reason the said cheque was never banked even until the suit was filed.

I have addressed my mind to the evidence of the parties. The defendant’s own admission is that he personally called the plaintiff’s Managing Director, PW2, and placed an order for iron sheets. The Managing Director agreed to give them to the defendant on credit. The defendant, in a letter dated

19/10/99, under his own hand, confirms Mr. Okwenye’s testimony regarding the discussions he had with the defendant prior to the release of the iron sheets. He wrote (D. Exh. 11):

“.....

Dear Mister Okwenye,

This note serves to confirm that our cheque will be ready for collection within 4 days time: Refer our conversation Otafiire – Okwenye.

Please oblige.

Thanks

Sgd

KAHINDA OTAFIIRE

Col.

C/MAN”

In the Note, the defendant does not allude to Ruhinda Schools Development Committee or any other person. Asked about Bruno, Kakare or any other person in connection with the case, PW2 Okwenye denied knowledge of them. He insisted that he dealt with the defendant on the strength of his status in society. Asked about the word “C/MAN” after Col., PW2 said that he was seeing it first time. He insisted that the defendant called him on phone and told him that he needed 10.000 iron sheets urgently. He continued:

“He himself told me so and said he was sending a cheque which would mature in 4 days. He did so. I was dealing with him as Col. Otafiire. He did not refer me to anybody else. Even in our phone conversation, he did not talk of other people” [Pages 48 – 49, Court hand written proceedings).

Court’s impression of this witness (PW2 Okwenye) is that of a sincere and truthful man. He had no axe to grind with the defendant. It could as well be that ten thousand iron-sheets were not for the defendant’s personal use; that they were to benefit schools in his Constituency. He has indeed given the motive for acquiring them: to boost his impending election campaign. Be that as it may, the submission that he signed as Chairman of Ruhinda Schools Development Committee is not supported by the defendant’s note to PW2. I have not attached any particular significance to the acronym ‘C/MAN’ on the note, the same way I have not done it for the acronym ‘COL’ above it.

These are, in my view, short forms of office titles which may not necessarily imply that the person is transacting business in that capacity, unless of course the context of the particular transaction so warrants.

I have further considered the defence argument that it was not the defendant who placed the order for the iron sheets but Ruhinda Schools Development Committee. It is settled law that he who alleges must prove. In the instant case, no evidence has been furnished to Court that the Committee alleged by the defendant to have placed the order is an entity with legal rights and existence, including the ability to sue and be sued, to sign contracts, to receive gifts, to appear in Court either by itself or its lawyers, and generally, other powers incidental to the full expression of the word 'person' in law. This burden was on the defendant. He did not discharge it.

Learned counsel for the plaintiff has submitted that the contention that the defendant ordered for the iron sheets on behalf of Ruhinda Schools Development Committee is an ingenious but belated attempt by the defendant to avoid liability. I'm inclined to the same view given that this story about Ruhinda Schools Development Committee was never pleaded by the defendant in his Written Statement of Defence. What the defendant pleaded is that he never ordered for the goods nor took delivery of them. He claims that the order for them was placed by Kibule, Kakare and Mugisha. It is trite that a party is expected and bound to prove the case as alleged by him and as covered in the issues framed. He cannot be allowed to succeed on a case not set up by him and/or be allowed at the trial to change his case or set up a case inconsistent with what is alleged in his pleadings except by way of amendment. See: **Interfreight Forwarders Ltd –Vs- EADB SCCA No. 33 of 1993.**

In my view, the defendant's story about the Ruhinda Schools Development Committee making the order for the iron sheets is an after thought. It was not pleaded and it is unsupported by evidence. Bruno Mugisha alleged by the defendant in his Written Statement of Defence to have ordered for and received the iron sheets with Kibule and Kakare appeared as DW2. He said that the defendant gave him the cheque of Shs.86m and requested him to take it to Simon Kibule. He said further that he handed over the cheque to Kibule as requested by the defendant. He denied ever taking it to the plaintiff's premises. However, the cheque deposit acknowledgment letter issued by the plaintiff shows very clearly that the cheque was delivered to the plaintiff by the said Bruno Mugisha. With the greatest respect to DW2, Bruno Mugisha, he did not impress me as a truthful witness. He lied to Court about the way the cheque changed hands. Besides, and this is more

important, his evidence sharply contradicts the defendant's claim in the WSD that the iron sheets were ordered for and delivered to people who included him, Bruno Mugisha. DW2's evidence does not therefore exonerate the defendant. Rather, it supports the plaintiff's case that the order was placed by the defendant and that the iron sheets were handed over to the defendant's agent on request. It is contended by learned counsel for the defendant that according to the plaintiff's witness, PW3 Ndyomugyenyi, Simon Kibule was an agent of the plaintiff and that it is him who took the iron sheets. This argument is based on the evidence of PW3 Ndyomugyenyi, a High Court Bailiff, that he was ordered by Court to arrest the defendant in execution of the defunct *exparte* judgment. That when he contacted the defendant, he (the defendant) referred him to Kibule Simon. From his evidence, the Bailiff, instead of executing the Court order as instructed, he turned himself into a judge of sorts. He turned to Kibule Simon who allegedly told him not to harass the Minister as he, Kibule, was the one to pay. PW3 testified that Kibule admitted to him that he owed the suit funds to the plaintiff and that he had acted as a Commission agent for the plaintiff in the iron sheets deal.

The said Kibule Simon did not appear as a witness for the defence despite the defendant's undertaking to trace him and give evidence in support of his claims. It is trite that evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made. See: **Subramaniam –Vs- Public Prosecutor [1956] 1 WLR 965** at 969. In the instant case, the evidence of PW3 Ndyomugyenyi in so far as it seeks to convey to Court what Kibule told him is not hearsay. However, in so far as the defence construes it to establish, in their favour, the truth of what he said, that is, that he, Kibule, and not the defendant, was responsible for the debt, it is in my view hearsay and therefore inadmissible. It is not only illogical but also against the weight of evidence on record that shows that the contract was between the plaintiff and the defendant rendering any other person a stranger to it. His (PW3's) evidence does not fall within the instances when a statement of a person not called as a witness is relevant and admissible to prove a point in issue.

The evidence of another witness, PW1 Sekajja Dan Kavuma, an accountant with the plaintiff company has been attacked on several fronts: that he did not see the defendant at the time of the transaction, that he (the defendant) was not seen at the plaintiff's premises to raise the inference

that he is the one who collected the iron sheets; that he did not know the colour of the iron sheets. In my view, these are irrelevant considerations in the unique circumstances of this case. Surely, the defendant as a Minister wouldn't be expected to have physically gone to the plaintiff's premises to take delivery of the iron sheets. Similarly, PW2 Okwenye as the supreme head of the organization wouldn't be expected to know the finer details of the iron-sheets sold to the defendant beyond the conversation he had with him on phone.

It is noteworthy that the issue of Simon Kibule acting as a Commission agent for the plaintiff was never put to the plaintiff's Managing Director at all. And even if he was, the fact that he had served as a link between the plaintiff and the defendant wouldn't ipso facto render him liable on the contract in the absence of evidence that he had concluded any contract with the plaintiff in his own right.

It is also noteworthy that after the iron sheets had been collected by the defendant's agents, despite several correspondences to the defendant reminding him about the payment, he (the defendant) never at any one given time, in response to those letters, denied placing the order for the iron sheets in his individual capacity. From the records, he made promises to pay, which promises he has to-date never fulfilled. If he had not ordered for them, as he now claims, this was the time to say so. He did not.

The bounced cheque is on record as P. Exh. 1. The stamps on it show that it was banked on 22/10/99 and dishonoured on 25/10/99 with the words '*refer to drawer*'. Other than the defendant's word, there is no indication on the cheque leaf itself that the operator of that account was Ruhinda Schools Development Committee, if any such Committee exists. From the evidence, it was banked after the four days stated in the defendant's Note. In view of the defendant's clear message in the Note, Court is unable to accept as truthful the defendant's evidence that he had agreed with PW2 Okwenye that the cheque be banked after proof had been furnished to him (the defendant) that the iron sheets had been delivered to him.

I have also addressed my mind to the defendant's evidence that when the plaintiff was filing its suit in 2003, it did not attach a copy of the bounced cheque, implying that it had not been presented to the bank at all. In my view, in light of the many reminders to him, before the suit was filed, that the cheque had bounced and that he should make good of it; and in view of his failure to point out to the plaintiff about their alleged non-presentment of the cheque for encashment, the plaintiff's

failure to attach copy of the real dishonoured cheque was at best careless. It was not proof, as the defendant appears to suggest, that the cheque was not banked and dishonoured in October 1999. In any case, as learned counsel for the plaintiff has correctly pointed out, the plaintiff's case is not based on the bounced cheque alone. It is based on cogent evidence that shows that the plaintiff, at the instance of the defendant, supplied iron sheets to the defendant, which iron sheets are to-date yet to be paid for. The defendant's written responses to the demands for payment do, in my fair judgment, amount to acknowledgment of indebtedness to the plaintiff.

For the reasons stated above, Court is satisfied that the defendant personally ordered for and took delivery of the iron-sheets through his own agents. Our law recognizes that he who does something through another does it himself. Court is also satisfied that other than the Shs.2,750,000= which was paid towards the settlement of the debt, no other payment has been effected. As long as the contract was between the plaintiff and the defendant, and as long as the part payment is documented and receipt thereof acknowledged by the plaintiff, it is in my view immaterial that the plaintiff's evidence does not pin-point to the particular person who delivered the money to them. The presumption is that the payment was from the other party to the contract. I would answer issues (1) and (2) in the affirmative and I do so.

As to whether the plaintiff is entitled to the reliefs sought, section 19 of the Sale of Goods Act provides that where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both are post-poned. This is of course subject to the intention of the parties.

In the instant case, there was sale of specific goods in a deliverable state. As soon as the defendant presented payment by way of a cheque, for collection within four days, the plaintiff released the goods to him through his agents. There is in my view clear evidence in this case that the property in the goods passed to the defendant when the contract was made. The property in the goods passed with the risk in them as well. In the event that the goods disappeared while in the possession of the said agents, the defendant has himself to blame for entrusting delivery thereof to him unto dishonest agents. Under S. 48 of the Sale of Goods Act, where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain, as herein, an action against him for the price of the goods. The plaintiff has prayed that it be granted payment in

the sum of Shs.83, 250,000= . The prayer is granted. The plaintiff also prayed for interest at the rate of 25% per annum from the date of the agreement with the defendant, that is, 19th October 1999. I would agree with counsel for the plaintiff that the transaction between the plaintiff and the defendant was by its nature a commercial transaction. However, an award for interest in a case of this nature is discretionary. Lord Denning could not have expressed the principle better when he stated:

“It seems to me that 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”. See: Harbutt’s Plasticine Ltd –Vs- Wyne Tank and Pump Co. Ltd [1970] 1 QB 447 at 468.

The principle that emerges from decided cases is that where a person is entitled to a liquidated amount, as herein, and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed. In such event, interest is only given from the date of judgment. See: **Sietco –Vs- Noble Builders (U) Ltd SCCA No. 31 of 1995.**

Applying the same principles to this case, there is no doubt in my mind that the goods were supplied to the defendant on order. He ought to pay for them. In the unique circumstances of this case, I would award interest to the plaintiff on the decretal sum from the date of judgment. I do so. The same shall be at the commercial rate of 25% per annum from the date of judgment till payment in full.

In keeping with the principle that costs follow the event, the plaintiff shall have the costs of the suit.

Yorokamu Bamwine

J U D G E

31/08/2007

Order: I will not be around to deliver this judgment to the parties. The same shall be delivered to them by the Deputy Registrar of this Court.

Yorokamu Bamwine

J U D G E

31/08/2007