

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**COMMERCIAL DIVISION**  
**HIGH COURT CIVIL SUIT NO.94 OF 2006**

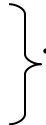
**KAYKAY ELECTONICS SALES AND SERVICE LIMITED**

.....**PLAINTIFF**

**VERSUS**

**HITECH INDIA (U) LTD**

**ANIL GUPTA**



..... **DEFENDANTS**

**BEFORE THE HON. JUSTICE GEOFFREY KIRYABWIRE**

**JUDGMENT**

The plaintiff, Kaykay Electronics Sales and Service Limited, a limited liability company incorporated under the laws of Uganda, brought this suit against the first defendant, Hitech India (U) LTD, a limited liability company incorporated under the laws of Uganda and the second defendant Anil Gupta for the recovery of Ug.Shs.79,200,000/= (seventy nine million two hundred thousand Uganda shillings) being a refund of a security deposit, general damages, interest and costs for the suit.

The case for the plaintiff is that on 1<sup>st</sup> June 2001, they entered into an agreement with the defendants under which the plaintiff was appointed as a distributor of M/S Hitech India. That the plaintiff was requested by the second defendant who was the managing director of both the defendant company and M/S Hitech India (located at plot 9/50, Kirti Ngar Industrial area, New Delhi 110015 hereinafter referred to as “Hitech India”) to deposit Ug.Shs.79, 200,000/= (equivalent of US \$ 40,000) which money was passed on to the second defendant as a security deposit for performance and payment. A blank cheque was then issued, signed and presented by the second defendant to the plaintiff as receipt to be refunded in the event that the arrangement was revoked. However in January 2006 the plaintiff ceased being a distributor and requested for a refund of the deposit from the defendants and that this was not done

The defendants in their Defence deny the allegations and aver that the first defendant never had any agreement with the plaintiff. They aver that the agreement was between the plaintiff and M/S Hitech India which was a separate and independent legal entity from the defendants. The second defendant averred that he had never received Ug.Shs.79,200,000/= (an equivalent of US \$ 40,000) from the plaintiff and that they never issued to the plaintiff the cheque No. 0142284. The defendants further averred that the cheque No. 0142284 on which the plaintiff's claim is premised was stolen from the first defendant's premises and a report was made to Bank of Baroda on 15<sup>th</sup> October 2001.

The parties at the pre trial conference agreed to the following facts:-

1. The plaintiff is a private limited company incorporated in Uganda.
2. The first defendant is a private limited company incorporated in Uganda.
3. The plaintiff and the defendant have at different times acted as Agents /Representatives OR customers of M/S Hitech India based at 9/50, New Delhi -110015.
4. On 1<sup>st</sup> June 2001 the defendants on behalf of M/S Hitech India based at 9/50, New Delhi - 110015 appointed the plaintiff as the latter's agent to deal in its goods until 31<sup>st</sup> December 2003 and the period was subject to extension.

The parties agreed on the following issues for trial:-

1. Whether the defendants issued a cheque No. 0142284 to the plaintiff and if so for what purpose?
2. Whether the defendants owe the plaintiff the sum of Shs. 79,200,000/=?
3. What are the remedies available to the parties?

Mr. Yese Mugenyi appeared for plaintiff while Mr. J.W. Kwesiga appeared for the defendant at the beginning of the case however it was later taken over by Mr. Arinaitwe. The plaintiff called two (2) witnesses namely Kishan Charid Kewlani (PW1), the Managing director of KAYKAY

Electronics Sales and Services Ltd and Amit Bhatia (PW2) the operational manager of KAYKAY Electronics Sales and Services Ltd. For the defendants, Mr. Anil Gupta (DW1) testified.

The defendants in their amended written statement of defence prayed that the first defendant be struck off as a party to this suit since the distributorship agreement made between the plaintiff and M/S Hitech India and not with the first defendant. During the trial, it was an agreed fact by both the plaintiff and the second defendant in their testimonies that there were no direct dealing between the plaintiff and the first defendant. I have carefully reviewed the evidence in this area. Whereas the plaintiff company's witnesses testified that they did not deal directly with the first defendant, both the certificate of distributorship (Exh. P 1) and the letter to The Bank of Baroda stopping suit cheque no. 0142284 were written on the first defendant's letter heads. The second defendant is also the principal director in the first defendant company and therefore directly controls its actions. The two defendants are really the same and the first defendant is really a cloak of the second defendant. Consequently the first defendant shall not be struck out as a party to the suit.

**Issue 1: Whether the defendants issued a cheque no. 0142284 to the Plaintiff and if so, for what purpose?**

Counsel for the plaintiff in relying on the testimony of Mr. Kishan Charid Kewlani (PW1) submitted that on 1<sup>st</sup> June 2001 the plaintiffs entered into an agreement with the defendants, for the plaintiff to be appointed as a distributor of M/S Hitech India. That the plaintiff was requested by the second defendant who was the managing director of both the first defendant company and M/S Hitech India, to deposit Ug.Shs.79, 200,000/= (seventy nine million two hundred thousand Uganda shillings an equivalent of US \$ 40,000), which money was passed on to the second defendant as a security deposit for performance and payment. A blank cheque was issued, signed and presented by the second defendant to the plaintiff as proof of receipt to be refunded in the event that the arrangement was revoked. That in January 2006 the plaintiff ceased being a distributor and requested for a refund of the deposit from the first defendant and that despite persistent demands for payment the defendants have refused to pay.

It was the testimony of Mr. Kishan Charid Kewlani that he got to know Mr. Anil Gupta Since 1993 and that they entered into agreement in contention in 1999. He was given the certificate of distributorship in 2001 upon giving Anil Gupta a deposit of Shs. 79,200,000/= . It was Kewlani's testimony that the letter that he was given appointed him the sole distributor of Tactics Radio in Uganda. He further avers that when he was giving the money to Anil Gupta, Mr. Amel Badhia the operational manager of KAYKAY Electronics was present and that he wrote on the cheque No. 0142284 after Anil Gupta had signed it because the second defendant's handwriting is very poor. This evidence was confirmed by the testimony Mr. Amel Badhia.

The Counsel for the defendants on the hand submitted that the plaintiffs claim for Ug.Shs.79,200,000/= is premised on cheque No.0142284 as a deposit for the agency which was issued by the defendants to the plaintiff. He further submitted that the reading of Certificate of Agency unequivocally shows that the plaintiff is appointed by M/S Hitech India, New Delhi. Counsel for the defendants submitted that if any money was given as a security deposit in the manner alleged, then it is M/S Hitech India, that would be legally be liable as principle and not the present defendants. Counsel referred me to the case of

**Montogomerie v United Kingdom Steamship Association (1891)1QB370** at **page 3761** where **Wright J** held,

*“The contract is the contract of the principal not that of the agent and prima facie at common law the only person who can sue is the principal and the only person who can be sued is the principal.”*

He further submitted that Mr. Kishan Charid Kewlani stated that he never had any dealings with the first defendant. He also relies on the evidence of Mr. Anil Gupta Who admitted that the signature on the cheque was his but that the cheque had been stolen and that he had reported the matter to Bank of Baroda. It is the submission of counsel for the defendant that on the whole the plaintiff has failed to show how the plaintiff came into possession of the first defendant's cheque with whom they had no business relationship. The second defendant has clearly shown that the cheque got lost or was stolen from the first defendant's premises.

I have considered the submissions of both Counsel and evidence adduced before Court. The parties agree that the signature the cheque (Exh. P2) belongs to the second defendant; who does not deny it. However the point in contention is how the cheque came in to the possession of the plaintiff. I have considered the evidence before me I am satisfied that there was an oral transaction between the parties involving this cheque No.0142284 and I am convinced that the defendant willingly handed over the cheque to the plaintiff. I am not persuaded by the testimony of Mr. Anil Gupta that the cheque was stolen.

In the case of **London Joint Stock Bank .v. Macmillan and Arthur [1918] A.C 777 at page 789-790 Lord Finlay** of the House of Lords held that;

*“...if the cheque is drawn in such a way as to facilitate or almost invite an increase in the amount of forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence.”*

The acts of Mr. Anil Gupta in signing the blank cheques and leaving them with his employees from where he alleges they were lost if true is a sign of negligence. The hand written letter written by the second defendant on the letter head of the first defendant to The Bank of Baroda dated 15<sup>th</sup> October 2001 stopping the cheque (on the grounds of possible theft) about one month after the cheque had been written without more is very suspicious. The cheque is not even printed in the company names as is the practice for company cheques in Uganda. To my mind the cheque issued appears to have been a personal cheque. That notwithstanding on the balance of the evidence before Court it is more probable than not that the said cheque was indeed given to the plaintiff company in the presence of two of its officials.

I find therefore basing on the evidence before me that the cheque was never stolen from the defendants as alleged but was rather issued to the plaintiff by the second defendant to act as an acknowledgement of receipt of the deposit of \$ 40,000 (Forty thousand United States Dollars).

**Issue No. 2: Whether the defendants owes the plaintiff the sum of Ug.Shs.79,200,000/=**

It was the testimony of Mr. Kishan Charid Kewlani PW1 that he gave Mr. Anil Gupta the second defendant the amount of Ug.Shs.79,200,000/=(seventy nine million two hundred thousand Uganda shillings) as security after being appointed sole distributor of “Tactics Radios” however there was no formal receipt given save for the cheque itself as he relied on the good relationship that existed between him and Mr. Anil Gupta. It was their understanding that the cheque would be refunded when their business relationship ended. Mr. Kewlani further testified that in 2005 he discovered that the business of distributing Tactics Radios had been given to some one else. He therefore terminated the contract orally and on the 20<sup>th</sup> June 2006 a letter was written to Hitech India (U) Ltd demanding for a refund of the Ug.Shs.79,200,000/= which had been deposited as security for the distributorship agency of “Tactics Radios”. The defendants however did not reply and now deny ever receiving the said amount.

Counsel for the defendants on the hand submitted that the defendants do not owe the plaintiff the sum of Ug.Shs.79,200,000/= as there was never a relation ship between the plaintiff and the first defendant. Counsel for the defendant further submitted that the plaintiff’s evidence was insufficient to prove any basis for a credit- debtor relationship between the plaintiff and the defendants. It is Counsel’s submission that the cheque in issue was stolen from the defendants and that the whole claim is fraudulently set up by the plaintiff.

**According to R. W. Hodgkin in the Law of Contract of East Africa published by Kenya Literature Bureau at page 12** a contract is defined as a legally binding agreement between two or more persons and it can be made either orally or in writing.

In the case of **Printing and Numerical Registering Company v Sampson (1875) LR 19 Eq 462, Sir George Jessel** said,

*“if there is one thing more than the other that public policy requires is that a man of full age and competent understanding should have the utmost liberty to contract and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”*

Mr. Kishan Charid Kewlani PW1 testified that he and Mr. Anil Gupta the second defendant orally agreed that the amount of Ug.Shs.79,200,000/= would be deposited as security on the understanding that the said amount would be returned upon termination of the distributorship contract. The plaintiff claims that upon termination of the contract the defendants did not return the said amount. It appears to me that the defendants do not contest that the plaintiff company has terminated their relationship of distributing the said radios. There is no counter claim by the defendants that the security deposit had in some way been offset to clear unpaid amounts by the plaintiff company. Given my earlier finding in issue number one that the said cheque was issued as a security deposit it follows that deposit which the cheque secured has to be refunded.

On the basis of the above It is therefore my finding that the second defendant owes the plaintiff the sum of Ug.Shs.79,200,000/= (seventy nine million two hundred thousand Uganda shillings).

**Issue No. 3: What are the remedies available to the parties?**

The plaintiff, Kaykay Electronics Sale Service Limited prayed for judgment against the defendants and also seek the recovery of Ug.Shs.79,200,000/= (seventy nine million two hundred thousand Uganda shillings), being a refund of a security deposit, general damages, interest and costs for the suit.

In light of my earlier findings, I award the plaintiff the sum of Ug.Shs.79,200,000/= (seventy nine million two hundred thousand Uganda shillings) against the defendants jointly and severally which was the amount deposited as security for the distributorship agreement.

As to General damages, according to **Lord Macnaghten** in the case of **Storms. V. Hutchinson [1905] AC 515** held that general damages are such as the law will presume to be the direct natural or probable consequence of the act complained of.

The law presumes damage in respect of any unlawful act such as breach of a contract or any injury to a legally enforceable right or interest. In the instant case the plaintiff's case for general damages was not well presented to court. Court was not guided on quantum to be given neither did the plaintiffs specify the amount to be awarded in general damages. In light of the above I award Ug.Shs.7,900,000/= (seven million Uganda shillings) as general damages against both defendants jointly and severally.

Regarding the question of interest, Kaykay Electronics Sale Service Limited prayed for interest at court rate from the date of cause of action.

The principle that emerges from decided cases, notably **Sietco .V. Noble Builders (U) Ltd SCCA No. 31 of 1995** is that where a person is entitled to a liquidated amount or specific goods 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 are 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.

It is not clear why the plaintiff prayed for court and not commercial interest as a business entity. That notwithstanding since the termination was oral I accordingly award the plaintiff interest against both defendants jointly and severally on the award of Shs 79,200,000/= at 8% per annum from date of filing until payment in full and 8% on general damages from the date of judgment until payment in full.

As regards costs, the usual result is that they follow the event. The plaintiff are therefore awarded the costs of the suit.

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**Geoffrey Kiryabwire**  
**JUDGE**

**Date: 08/10/2009**

08/10/09

9:35am

**Judgment read and signed in open court in the presence of:**

- G. Byamugisha for Plaintiff
- Rose Emeru – Court Clerk

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**Geoffrey Kiryabwire**  
**JUDGE**

Date: **08/10/2009**

