

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

HIGH COURT CIVIL SUIT NO.0991 OF 2004

PEARL ENGINEERING COMPANY LIMITED ::::::::::::::: PLAINTIFF

VERSUS

MAGDALENE AGUTI ::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The plaintiff, Pearl Engineering Company Ltd, a limited liability company incorporated under the laws of Uganda, brought this suit against the defendant, Magdalene Aguti, by way of plaint for the recovery of Ug.Shs.15,000,000/= (Fifteen million Uganda shillings), general damages for conversion and breach of trust with interests thereon from the date of judgment till payment in full plus costs of the suit.

The case for the plaintiff is that on or about the 9th of August 2004 the defendant, who was employed as a cashier by the plaintiff company, was given a cheque No.102016 in her names with instructions to withdraw Ug.Shs.15,000,000/= (Fifteen million Uganda shillings) from Standard Chartered Bank (U) Ltd in her capacity as cashier of the plaintiff and distribute it to the officers of the plaintiff company to be used for its business. The defendant later informed the management of the plaintiff company that there were insufficient funds on the plaintiff's Bank Account to cash the cheque but she kept the cheque. On or about the 31st of August 2004, without the knowledge or consent of the plaintiff company's management, the defendant used the said cheque No.102016 to withdraw Ug.Shs.15,000,000/= from the plaintiff's bank account which she put to her own use to the plaintiff company's detriment and loss. The defendant later disappeared and absconded from

duty. It is the case for the plaintiff that the defendant's acts amounted to breach of contract, conversion and breach of trust and therefore occasioned great loss to the plaintiff's business.

The defendant in her written statement of defence denies the allegations and avers that on the 9th of August 2004 she was given instructions to go to Standard Chartered Bank (U) Ltd to cash cheque No.102016 worth Ug.Shs.15,000,000/=. That, at the bank she was informed that the cheque could not be cashed due to lack of sufficient funds. That on that very same day she returned the cheque to the Managing Director. It was further averred that on the 31st of August 2004, the defendant was given the same cheque by the accountant, her immediate supervisor, who instructed her to go and cash the cheque which she did and she deposited the money with the cashier Mr. Aloysius Nuwagira and the same was duly recorded in the register. The defendant therefore denies converting the said money or absconding from duty as alleged.

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

1. The defendant was employed by the plaintiff as an Accounts Assistant.

The agreed issues were the following:-

1. Whether the defendant converted shillings 15,000,000/= withdrawn from the company accounts by herself.
2. Whether the defendant delivered the money to the company as instructed by the company.
3. What remedies are available to the parties?

Ms. Joy Ntambirweki appeared for the plaintiff while Mr. Joseph Kasozi appeared for the defendant. The plaintiff called three (3) witness namely Gumisiriza Birantana PW1 the Managing director of Pearl Engineering Company, Igulu Richard Wanema the Accountant and Nuwagira Aloysius Cathburt PW3 a cashier at Pearl Engineering Company. For the defendant, Magdalene Aguti DW1 testified.

For convenience, I will consider issue No.2 first before proceeding to issue No.1.

Issue No. 2: Whether the defendant delivered the money to the company as instructed by the company.

Counsel for the plaintiff in relying on the testimony of Mr. Gumisiriza Birantana (PW1) submitted that on the 9th of August 2004, the Managing Director of the plaintiff company requisitioned for money to carter for the employees of the plaintiff and carry out other necessary business activities while at the site in Fort Portal. Counsel for the Plaintiff submitted that instructions were given to the defendant to go to Standard Chartered Bank (U) Ltd with cheque No.102016 to withdraw money as a bank agent. She however returned and informed the Managing Director of the plaintiff company that the bank had refused to give her the money due to insufficient funds on the plaintiff company's bank account.

It was the testimony Mr. Gumisiriza Birantana (PW1) that he was the only officer of the plaintiff company who was authorized to authorize cash withdraws and payments in the plaintiff company. That he never authorized the defendant to withdraw the money using the cheque apart from the day when he gave instructions to her that is on the 9th of August 2004. Counsel for the plaintiff submitted that the defendant admitted to having been given instructions by the Managing Director of the plaintiff company on the 9th of August 2004 to withdraw Ug.Shs.15,000,000/= using cheque No. 102016 marked exhibit P.1 which was written in her names. She however alleged that on the 31st of August 2004 she was given instructions to go and cash the cheque and that she gave the money to the cashier, Mr. Nuwagira Aloysius in the presence of the accountant, Mr. Igulu Richard Wanema. Mr. Igulu Richard Wanema PW.2 however testified that the cash payments were only made when an order came from the Managing Director of the plaintiff company.

Counsel for the Plaintiff therefore submitted that this evidence corroborated that of Mr. Gumisiriza Birantana (PW1) that he was the only authorized person in the plaintiff company who can authorize cash payments and withdrawals and any other payments. Counsel emphasized that the accountant Mr. Iguru Pw.2 does not authorize payments as clearly stated by him in the evidence he adduced before court.

Further, counsel for the plaintiff submitted that the defendant never delivered the money to the plaintiff company. Counsel referred to the testimony of Nuwagira Aloysius Cathburt PW.3 who testified that he only makes payments and receives cash on the instructions of the Managing Director of the plaintiff company. He further denied receiving any money from the defendant on the 31st August 2004 and he never posted the transaction into the system. Counsel for the plaintiff submitted that the fact that the column for voucher number in the cheque register book, Marked Exhibit P.3, is empty confirms that the money was not given to the cashier as alleged by the defendant. Counsel for the plaintiff further submitted that the act of disappearing from the bank by the defendant before Mr. Gumisiriza Birantana (PW1) could discover who had withdrawn the money shows that the defendant knew that she had withdrawn money, had never remitted it to the plaintiff's cashier and was therefore running away before she could be arrested.

The defendant during examination in chief testified that on 9th August 2004, she was instructed by the Managing Director of Pearl Engineering to write a cheque in her names of Ug.Shs.15,000,000/= to draw it in Standard Chartered Bank. She wrote the payment voucher and the cheque which were duly signed and approved. That on that same day, she went to the bank where she was told that it was not possible to draw the money. The defendant claims to have returned the cheque to the Managing Director and told him that she was not able to draw the money due to the insufficient funds on the Plaintiff company account. The plaintiff in her testimony claimed that the Managing Director took the cheque from her.

The defendant testified that, on the 31st August 2004 she cashed the cheque No.102016 and that she did so, on the instructions of the accountant of the plaintiff company, Mr. Iguru Richard. She testified that the money withdrawn was deposited with the cashier of the plaintiff company Mr. Nuwagira Aloysius she and made an entry in the cheque register marked exhibit P.3 for the 9th August 2004 which was to the effect that the money was cashed to "Aloy". The defendant further testified that about a week after the making the withdrawal she was called by the Managing Director of the plaintiff company inquiring whether she had withdrawn the Ug.Shs.15,000,000/= and she told him that she had so they proceeded to the Bank to verify whether it was her who got the money. She testified that while at the bank she was told by Mr. Iguru Richard the accountant that she was going to Luzira this led to a rise in her blood pressure which caused her to seek

immediate medical attention. She further testified that since she was going on maternity leave, she notified the accountant that she would return after her leave.

Counsel for the defendant submitted that the move by the Managing Director to go to the bank was calculated to create scare with in the defendant. That the defendant did not disappear because the company had details about her whereabouts and was in touch with the defendant's husband at all material time. Counsel further submitted that the allegation of the money not being received by the company put the burden of proof on the plaintiff to prove the assertion. Counsel for the Defendant referred me to **Section 101 (1) of the Evidence Act cap 6** which provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove that those facts exist.”

It was counsel's submission that the cash was deposited with the Cashier Mr. Nuwagira Aloysius as was the practice and that the defendant entered in the remarks column of the cheque register (exhibit P.3) just like other entries not in question that “*cash to Alloy*”. Counsel for the Defendant submitted that this cheque register book was relied upon by the company to trace the movement of cheques and other subsequent payments. That the entries made by the Managing Director and the Accountant where check and balance mechanisms to ascertain transactions that have taken place in the company. Counsel in his submissions averred that the Managing Director of the plaintiff company had received the Ug.Shs.15,000,000/= and that he had confirmed this by ticking against it in the cheque register book, entered it in the computer and reconciled it. He therefore submitted that the money was received by the plaintiff company and that the plaintiff has failed to discharge their burden of proof.

Counsel for the plaintiff in reply submitted that the allegation that the defendant was instructed by the Accountant is disproved by her own evidence when she testified that she gave the money to the cashier upon returning from the bank yet she had also testified that she reports back to the person who had sent her but with this transaction she reported to the accountant just because he was in the same office as the cashier. Counsel submitted that the cheque register was for tracing cheques and not cash and that the defendant admitted to this. That the cheque no.102016 was never recorded again when it was taken out again as was required by the usual company practices. Counsel further

submitted that the tick made by the Managing Director in the register only meant that he had seen the cheque and that the posting of the cheque was made on the 9th of August 2004 and that posting did not mean reconciliation. Counsel for the Plaintiff therefore submitted that it is not true that the defendant deposited the money with the cashier. That if the money had been handed over to the cashier the defendant would have told the Managing Director that she had withdrawn the money and given it to the cashier but she instead denied that she had done so.

From the evidence before court, it is not disputed that defendant was instructed to withdraw Ug.Shs.15,000,000/= (Fifteen million Uganda shillings) from the plaintiff's account using cheque No.102016, marked Exhibit P.1, drawn on Standard Chartered Bank (U) Ltd in the names of the defendant on the 9th of August 2004. It is also not disputed that on the 31st of August 2004 the defendant went to standard Chartered bank and withdrew the said sum from the plaintiff company's account. However the point of dispute arises in regard to whether the money was delivered to the plaintiff company.

Making reference to the evidence before me, Mr. Gumisiriza Birantana (PW1) and Mr. Iguru Richard (PW.2) testified that they never gave instructions to the defendant to withdraw the Ug.Shs.15,000,000/= (Fifteen million Uganda shillings) from the plaintiff's account using cheque No.102016 on the 31st of August 2004 as alleged by the defendant. Further, Mr. Nuwagira Aloysius (PW3) claims that he never received the said amount from the plaintiff. However the testimonies of Mr. Gumisiriza (PW.1), Mr. Nuwagira Aloysius (PW3) and the defendant that show that it was an established practice in the company that when the money was collected from the bank it always went to the paying cashier and in this case that was Mr. Nuwagira Aloysius who would not sign anywhere to show that he had received the money.

It was Mr. Gumisiriza's (PW1) testimony that when he was reconciling with the account, he found a withdrawal of Shs.15,000,000/=. Upon inquiry, he found that it was the defendant that had withdrawn the money. When he went to inquire at the bank together with the defendant and the accountant, the defendant disappeared and was later found by the police in Mulago hospital after she had just given birth to a baby. However the defendant insists that she gave the money to Mr. Nuwagira Aloysius and she claims to have made an entry in the cheque register book marked exhibit P.3 in order to show that the money was given to Mr. Aloysius the cashier. The defendant

further testified that the reason for leaving the bank, on the day when she had gone with the Managing Director of the plaintiff company to verify who had withdrawn the money, was because she had got high blood pressure and had therefore gone to seek medical attention.

I have addressed my mind to the cheque register book, Exhibit P.3. It has several entries but the one that is most important to this case is made on the 9th of August 2004. It shows that Ug.Shs.15,000,000/= was withdrawn using cheque No.102016 by Maggie that is the defendant and signed by her however the post date and the payment voucher number column were not filled in. The remarks column was filled in with the “cash To Alloy” though the words are not clear. There is nothing else to show that the Ug.Shs.15,000,000/= was given to Mr. Nuwagira Aloysius as claimed by the defendant. Mr. Nuwagira Aloysius (PW3) testified that it was his duty to post vouchers in the system after the Managing Director and the Accountant of the plaintiff company had looked at them but that he did not post cheques. He also denied ever posting the transaction in issue. Another peculiar thing about the entry made in the cheque register book (Exhibit P3) is in regard to the markings that were supposed to be entered by the Managing Director and the accountant. The accountant Mr. Iguru Richard (PW.2) testified that he would enter the Letter “P” in the cheque register book after a posting had been made in the computer system. He admitted to having entered the letter “P” on the entry made on the 9th of August 2004 but he denied doing the reconciliation.

Mr. Gumisiriza (PW.1) testified that he ticks in the cheque register book in the column for payment of voucher number, when he enters a cheque in his computer for conciliation and that the tick meant that he had seen a cheque that had been issued. It was Mr. Gumisiriza testimony that, he made a tick on the entry made on the 9th August 2004 and also added a star with the presumption that the defendant had gone to the bank and withdrawn the money. He further testified, during cross examination, that the cheque register book was meant for purposes of tracing cheques and not cash and that a person receiving the money does not sign in this book but that they do not keep any other documentation to show that money had come into the company but rather it would generally be noticed by everyone when the money had been brought into the company.

These facts clearly show that the company did not have a good system of accounts and that there was no system established to show a systematic movement of documents and money in the company. The company accounts seemed to be run on the basis of good faith and trust of all its employees.

It would appear to me therefore, basing on the facts of the case and all the evidence adduced before court that the defendant withdrew Ug.Shs.15,000,000/= with instructions from the accountant using cheque No.102016 (Marked Exhibit P3) and delivered the said amount to Mr. Nuwagira Aloysius the cashier of the plaintiff company as was the established practice in the company and went ahead to make an entry in the cheque register book that “*cash To Alloy*”.

No other document other than the cheque register book was adduced in evidence to show the contrary. Mr. Nuwagira, Mr. Iguru and the Managing Director Mr. Gumisiriza all testified that they all do some kind of posting, some of them do so on computer but none of them attempted to show court their own records beside the said register. If they were so confident of their own records why did they not show them to court? I find that to have been odd.

It is therefore my finding that the defendant delivered the Ug.Shs.15,000,000/= (Fifteen million Uganda shillings) to the plaintiff.

Issue No. 1: Whether the defendant converted shillings 15,000,000/= withdrawn from the company accounts by herself.

The facts surrounding this issue are similar to those of the previous issue so that being the case, I shall not restate. Instead I shall now address the law relating to conversion.

Conversion is an act of deliberate dealing with a chattel or goods in a manner inconsistent with another’s right to its possession. As it is stated in **Clerk & Lindsell on Torts, 13th Edition, P.1079,**

“Anyone who without authority takes possession of another man’s goods with the intention of asserting some right or dominion over them is prima facie guilty of conversion.”

According to **Paget's Law of Banking, 12th Edition** it is generally agreed, in stating the requisite for a plaintiff in conversion, that the plaintiff must have been entitled to immediate possession of the chattel at the date of conversion.

I have reviewed the submissions on this issue and looked at the evidence on record. It is not contested that Ug.Shs.15,000,000/= was withdrawn by the defendant on the 31st August, 2004. The defendant herself admits to having withdrawn the amount on the 31st August 2004 and that she made an entry in the cheque register book that she gave the said money to Mr. Aloysius a cashier at the plaintiff company though the entry in the register is not very clear. Evidence before court also shows that it was the practice in the company for Mr. Aloysius not to sign for monies he had received. I need not emphasize that this is a critical accounting weakness.

In considering the law on conversion, one must have taken possession of another man's goods without authority and with the intention of asserting some right or dominion over them. Looking at the facts of the instant case the cheque was drawn in the names of Magdalene Aguti. This basically means that she was the payee/holder of the cheque and therefore the authorized person trusted the company to collect the money. She had done so before and after the 31st August 2004 as the register clearly shows. It would therefore be absurd to assert that she converted the said money since the cheque was drawn in her names and not the plaintiff company's name. How does conversion arise here? Further I have already found under issue No.2 above that the Ug.Shs.15,000,000/= was delivered by the defendant to the plaintiff company. There is therefore no doubt in my mind that by reason of the above the defendant did not convert the Uganda shillings 15,000,000/= withdrawn from the company Account by herself.

In answer therefore to the issue No. 1 I find that the defendant did not convert the Ug.Shs.15,000,000/= (Fifteen million Uganda shillings) that she withdrew from the plaintiff company's Account on the 31st of August 2004.

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

The plaintiff has prayed for the recovery of Ug.Shs.15,000,000/= (Fifteen million Uganda shillings), general damages for conversion and breach of trust with interests thereon at the rate of 28% Per annum from the date of judgment till payment in full plus costs of the suit.

Based on my findings in issue No.2, that the defendant delivered the Ug.Shs.15,000,000/= to the plaintiff, I decline to award the sum prayed for by the plaintiff.

As regards general damages, interest and costs, I note that the plaintiff has failed to prove conversion by the defendant of the Ug.Shs.15,000,000/= (Fifteen million Uganda shillings) that she withdrew from the plaintiff company's Account on the 31st of August 2004. In the circumstances therefore, I have seen no justification for an award of general damages, interest or costs to the plaintiff. I therefore decline to award the general damages or interest and I order that the plaintiff bears the costs of this suit.

I shall now address my mind to the prayers of the defendant.

The defendant counsel in the submission prayed for, general damages of Ug.Shs.5,000,000/= (Five million Uganda shillings), special damages for salary arrears and costs for the suit. However, the Defendant did not file a counter-claim and so this is a departure from the Pleadings which is not acceptable. I therefore decline to award the special damages as prayed for by the defendant.

I accordingly dismiss the plaintiff's suit as against the defendant with an order that the plaintiff bears the costs of this suit.

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Geoffrey Kiryabwire

JUDGE

Date:

15/09/09

9:40am

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

- G. Kandeebe for Plaintiff
- J. Kasozi for Defendant
- Rose Emeru - Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 15/09/2009