

THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 425 - 2003

DOSHI HARDWARE (U) LTD ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ALAM CONSTRUCTION LTD ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The Plaintiff company brought this suit to recover the sum of Shs.40,478,300/= as the outstanding sum due on account of hardware goods and materials, supplied to the Defendant under a credit facility account extended to the Defendant.

The case for the Plaintiff is that they had a business relationship with the Defendant and its affiliated companies in the Alam Group of Companies. As part of their business relationship, the parties had a credit relationship whereby the Defendant could take material up to about Ushs.60,000,000/= and pay later. It is also the case of the Plaintiff that the Managing Director of the Defendant Mr. Khalid Alam introduced to the Plaintiff one of his employees called Anthony Byaruhanga to act as a liaison officer for the said purchases. The Defendant then raised several Local Purchase Orders (LPOs) in the months of May 2003 for various items which the Plaintiff honoured. The total amount came to Ushs.67,490,800/=. The Defendant then in June 2003 deposited on to the Plaintiff's bank account cash on two different occasions amounting to Ushs.27,016,500/= thus leaving a balance of Ushs.40,475,300/=.

It is also the case of the Plaintiff that the Defendant also in June 2003 issued the Plaintiff three cheques in further settlement of the said outstanding amounts. However, when the cheques were dishonoured by the bank when presented for payment, the Defendant then told the Plaintiff that Anthony Byaruhanga and one Simon Kategere were responsible for making false orders on behalf of the Defendant and issuing the Plaintiff false cheques from the Defendant. The said two persons were charged in court by the Police but the Plaintiff still hold the Defendant liable for the said orders.

The Defendants deny that they are liable for the sums as claimed. The Defendants aver that there was no generalized credit available to them from the Plaintiff and that all credit transactions had to be documented on a standard credit authorization form signed by both parties which was not done in this case. The Defendants further averred that the alleged orders, deliveries and payments were the unauthorized actions of Anthony Byaruhanga and Simon Kategere. It is the case for the Defendant that the Plaintiff's acted in a negligent manner while dealing with Anthony Byaruhanga and Simon Kategere; for which the Defendant cannot be held to be liable.

The Defendant then raised a counterclaim against the Plaintiff (as first counter-Defendant) Anthony Byaruhanga (as second counter-Defendant) and Simon Kategere (as third counter-Defendant). In the counter-claim the Defendant (counter-claimant) avers that the Plaintiff's employees, Byaruhanga and Kategere continued to defraud the Defendant as a result of which the Defendant has suffered loss of business repute.

The parties agreed to following issues for trial;

1. Whether the Defendant is indebted to the Plaintiff
2. remedies

Mr. Peters Musoke appeared for the Plaintiff while Mr. Sharaj Ali appeared for the Defendant. The Plaintiff called one witness Mr. Moses Owori (PW1) the Sales Manager while the Defendant called two witnesses namely; Mr. Khalid Alam (DW1) and Mr. Roy Kairu (DW2).

Issues No. 1: Whether the Defendant is indebted to the Plaintiff

Counsel for the Plaintiff submitted that the Defendant had placed four orders with the Plaintiff. The orders LPO No. 0090 dated 2nd May 2003, another unnumbered one dated 5th May 2003, No. 0093 dated 13th May 2003 and another dated 15th May 2003 were adduced in evidence. The Plaintiff honoured these said LPOs and supplied the goods. In support of this supply delivery notes Nos. 41093, 41159, 41203, 41472 and 41505 were issued and adduced into evidence. The Plaintiff then raised ten Invoices No. 41065 dated 3rd May 2003, No. 41093 of the 7th May 2003, No. 41159 of the 13th May 2003, No. 41190 of the 15th May 2003, No. 41203 of the 15th May 2003, No. 41378 of the 30th May 2003, No. 41440 dated 15th June 2003, No. 41448 of the 16th June 2003, No. 41472 of the 7th June 2003 and No. 41505 of the 11th June 2003 all amounting to Ushs.67,494,800/=.

Counsel for the Plaintiff further submitted of the above amount the Defendant made two payments (Exh. P.15 and 16) amounting to Ushs.27,016,500/=. Three other payments by cheque (Exh. P.18, 19 and 20) were dishonoured leaving an outstanding balance of Ushs.40,478,300/=.

Counsel for the Plaintiff submitted that court reject the testimony of the defence witnesses that this was a fraud being perpetuated on the defence by one Byaruhanga who was employed by them. Counsel for the Plaintiff submitted that there was evidence on record to show that Byaruhanga was an employee of the Defendants. In particular, I was referred to following legal pleadings;

- a) An affidavit in Miscellaneous Application No. 510 of 2003 **Alam Construction (EA) Vs Doshi Hardware (U) Ltd** whereby affidavit dated 22nd August 2003 Mr. Khalid Alam affirmed in paragraph 2(d) that the

“...orders, deliveries and payments were independent actions of the Applicants former employees by the names of Kategere Simon and Byaruhanga in connivance with staff of the Respondent...” (emphasis added)

Clearly here the Managing Director refers to these two people as his former employees.

- b) The written statement of defence and counterclaim which refer to Anthony Byaruhanga and Simon Kategere as former employees of the Defendant in paragraphs 4(9), 5, 5(e) and 11(i).
- c) The charge sheet which is annexure “A” to the written statement of Defence clearly describes Anthony Byaruhanga as a purchasing officer with Alam Construction (EA) Ltd”.

Counsel for the Plaintiff further submitted that Mr. Owori testified that it was Mr. Khalid Alam who introduced Mr. Byaruhanga to the Defendants. He further submitted that it was not denied that Mr. Kategere worked for the Defendants as an Accountant.

Counsel for the Plaintiff submitted that this evidence of employment created an agency relationship between Byaruhanga and Kategere (as agents) on the one hand and the Defendant (as principal) on the other hand. He submitted that the Defendants were liable under this principle of agency because an agency relationship is fiduciary in nature and the actions and words of an agent exchanged with a third party bind the principal.

Counsel for the Plaintiff submitted that an agency could be implied for the conduct of the parties. In such a case a principal need not expressly consent to the agency relationship. In this regard I was referred to the case of

Biggar V Rock Insurance Co. (1902) K.B. 510.

Counsel for the Plaintiff submitted that the conduct of Mr. Khalid Alam introducing Mr. Byaruhanga to the Plaintiff as a person who could take the Defendant’s deliveries created such an implied agency.

Counsel for the Plaintiff further submitted that another agency by estoppel had also been created. In this regard I was referred to the case of

Freeman & Lockyer V Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 for the proposition that a person who allowed another to believe that a state of affairs exists with the result that there is reliance upon such belief cannot afterwards be allowed to say that the state of affairs was different if to do so would involve the other person suffering some kind

of detriment. He further submitted the principle of estoppel is also codified in Section 114 of the Evidence Act.

Counsel for the Plaintiff submitted that even where there was no actual authority to act from the principal by a consensual agreement, apparent or ostensible authority could be created by representations made by the principal to a third party. Such representations would be of the kind that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. In this regard I was referred to the test laid down by **Lord Diplock** (as he then was) in the **Freeman & Lockyer** case (supra) at P. 506 which are;

- “1) *That a representation that the agent had authority to enter on behalf of the company into a contract of a kind sought to be enforced was made to the contractor (or in other words a third party – addition mine)*
- 2) *That such representation was made by a person or persons who had “actual” authority to manage the business of the company either generally or in respect of those matters to which the contract relates.*
- 3) *That he (the contractor) was induced by such representations to enter into the contract, that is, that he in fact relied upon it and*
- 4) *That under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent..”*

Counsel for the Plaintiff submitted that the tests had been met because Mr. Khalid Alam the Managing Director of the Defendant company who had the company’s actual authority introduced Mr. Byaruhanga as the Defendant’s purchasing officer authorized to collect goods from the Plaintiff; and that the two companies had a history of business.

Finally counsel for the Plaintiff submitted that a principal must be liable for the fraud of his agent committed in the course of the agent’s employment and not beyond the scope of his

agency; whether the fraud be committed for the principal's benefit or not. In this regard he referred me to the speech of **Lord Macgathen** in case of

Lloyds V Grace Smith & Co. [1912] AC 716 at 731 which was followed with approval by lady **Justice Stella Arach Amoko** in **Active Automobile, Spares Ltd V Pearl Merchantile Co.** Ltd HCCS 693 of 2000.

Counsel for the Defendant in reply submitted that Defendant was not liable as alleged. He submitted that the goods in question had been obtained by Byaruhanga in connivance with the employees of the Plaintiff using forged LPOs and cheques purportedly signed by Mr. Khalid Alam.

Counsel for the Defendant submitted the evidence given by Mr. Owori the Plaintiff's Sales Manager that Mr. Alam had introduced Mr. Byaruhanga to Mr. Parish Patel (the Plaintiff's Chief Accountant) as Defendant's Purchasing Officer was hearsay and not admissible. He referred to the testimony of Mr. Alam that Mr. Byaruhanga was not an employee of the Defendant but rather an independent contractor who was used by the Defendant from time to time on specific construction projects. He further submitted that Mr. Alam had testified that Mr. Byaruhanga was not on the Defendant company's pay roll or National Social Security records.

Counsel for the Defendant submitted that Mr. Byaruhanga was not an agent of the Defendant and that no implied agency could be imputed between them. He submitted that implied authority could only be exercisable by an agent where there exists an express agency and that no evidence had been adduced that the Defendant gave Byaruhanga any express authority to receive goods on its behalf.

Counsel for the Defendant further submitted that agency by way of apparent authority also had not been established within the tests of the **Freeman & Lockyer** case (supra). He submitted that the testimony of Mr. Alam and Mr. Roy Kairu was clear that Byaruhanga had merely gone along with Mr. Alam to collect the materials they need.

He further submitted that no representations had been made to the Plaintiff but that the whole transaction was a scam. In this regard Mr. Alam on learning about the scam quickly notified Mr. Roy Travis the Plaintiff's Managing Director to intervene. Mr. Travis then approached Byaruhanga about this and Byaruhanga tried to pay back the money but failed and then was arrested. Counsel for the Defendant submitted that actions of Mr. Travis in dealing directly with Byaruhanga shows that he knew Byaruhanga was acting on his own.

I have perused the evidence in this case and the submissions of both counsel.

This dispute revolves around the issue of agency. It is the case for the Plaintiff that one Byaruhanga and Kategere acted as agents of the Defendant company but the Defendant company denies this.

The Defendant in particular denies that Anthony Byaruhanga (who appears to have been at the centre of dispute) was their employee and so could not be their agent. The position appears to be different for Mr. Kategere because it is not contested by the Defendant that he was their accountant.

A review of the pleadings and evidence on this point is quite confusing. As Counsel for the Plaintiff submitted, the written statement of defence refers to both Byaruhanga and Kategere as "former employees" of the Defendant and yet Mr. Khalid Alam in his evidence strongly denies this. Clearly to my mind the pleadings and evidence on this point by the Defendant is inconsistent. It is a cardinal rule of evidence that a party is bound by his pleadings

Pushpa Patel V Fleet Transport Co. Ltd [1960] EA 1025 (refers).

In the case of **Interfreight Fowarders (U) Ltd V EADB** Civil Appeal 33 of 1993 (SC) **Justice Order** (JSC as he then was) held

"...a party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at trial to change his case or set up a case inconsistent with what is alleged in his pleadings except by way of amendment of pleadings..."

In this case it is strange that if the Defendant company took the strong position that Byaruhanga was not its employee why it did not amend the pleading.

This inconsistency is further perpetuated by the affidavit of Mr. Khalid Alam himself dated 22nd August 2003 where he refers to both persons as his former employees. The charge sheet preferring charges against Anthony Byaruhanga dated 26th June 2003 describes him as a “*Purchasing Officer with Alarm (sic) Construction E.A. Ltd*”.

That being the case, I find that the Defendant cannot be allowed to change his case or set up a case inconsistent with what is alleged in the pleadings. Clearly there was some form employment relationship (albeit formal or informal) between the Defendant and both Byaruhanga and Kategere.

It has also been alleged that Mr. Alam introduced Mr. Byaruhanga to Mr. Vijay the Plaintiff’s General Manager as a Purchasing Officer authorized to collect goods from Plaintiff on behalf of the Defendant. Mr. Owori testified that he was told of this by his bosses Mr. Patel and Vijay in the presence of Mr. Alam and that Mr. Byaruhanga would collect materials on behalf of the Defendant.

This is denied by Mr. Alam who testified he did not introduce Mr. Byaruhanga to the management of the Plaintiff company to collect goods on credit but that may have asked Byaruhanga on one occasion to collect goods that were already paid for on his behalf. Mr. Alam testified that all the LPOs adduced in court as coming from the Defendant were forged save for Exhibit P.22. A look at this LPO (Exh. P.22 No. 0017 dated 31st October 2002) to M/s Doshi Hardware (U) Ltd has the following wording

“Please issue the following materials to Anthony B. as per invoice/cheque No. 100060 dated 30th November 2002...” (emphasis mine).

The reference to “Anthony B.” therein on this uncontested LPO based on the evidence before court (even the other LPOs alleged to be forged all refer to a “Anthony B.”) can only mean Anthony Byaruhanga. It was also signed by Mr. Khalid Alam. That being the case it is not true that Byaruhanga was never authorized to collect materials on credit by the Defendant as the cheque referred to therein is also postdated by about one month.

That to my mind is sufficient to create an agency relationship between the Defendant and Byaruhanga. The scope of that agency is stated therein namely to be issued with the materials indicated in the LPO. The contested LPOs from the evidence show that they were faxed from M/s Casements Africa Ltd's (a sister company of the Defendant) fax machine. Mr. Alam testified that the Alam Group of Companies have common employees (actually Mr. Kategere the Accountant was one of them) and resources. The contested LPOs only did not indicate the number of the post dated cheque against which it was being issued.

So Byaruhanga did not actually present the LPOs to the Plaintiff company because they had already been faxed to them. All Byaruhanga did was to go to the Plaintiff's to collect the goods against invoices/delivery notes (Exh. P.5 – P.14). This in my finding was in the scope his actual and or apparent authority within the tests of the **Freeman & Lockyer** case test (supra). I do not think however that the position would have been material different if Byaruhanga had taken the LPO himself as happened in the uncontested instance involving LPO No. 0017 which was paid.

In such a situation the Defendant is bound by the deliveries taken by his agent Byaruhanga.

The issue of fraud has been raised by Defendant. Indeed in the counterclaim both Byaruhanga and Kategere have been added as parties to establish the case for fraud. Mr. Khalid Alam in his testimony went to great lengths to show how Byaruhanga who he called an independent contractor was only used from time to time with the possible assistance of Kategere had internally within the Defendant company and with the possible connivance of persons from the Plaintiff company were responsible for the orders which he denies.

Evidence of this fraud can be seen from the post-dated cheques that were used to secure order because Mr. Alam says they were drawn against a dormant account of the Defendant company at Crane Bank Ltd. Mr. Alam cannot account for how the said cheques or the company stamp on them were accessed by Byaruhanga and Kategere. He however says his signature on the three cheques was forged. Actually the bank identified one of the three cheques as different from the mandate they had, while for the rest the bank indicated that funds had not been arranged for. Furthermore, the LPOs that were faxed to the Plaintiff did not show the cheque numbers that were securing the orders as was the practice between the parties.

Lastly, cash payments made by Byaruhanga on the orders paid for instead of using the post dated cheque. The standard of proof of fraud in civil trials is higher than that of “*a balance of probabilities*” but not as high as that in a criminal case. I am satisfied that Byaruhanga and Kategere were involved in fraudulent activities that led to these orders being made. Their activities go beyond this particular case. It appears that a similar scam took place in case before my brother **Justice Egonda Ntende** (as he then was) namely;

Hardware Deals (U) Ltd V Alam Construction (EA) Ltd HCCS No. 658 of 2003

The difference between that case and this one is that here there is evidence that Byaruhanga was authorized to collect materials on behalf of the Defendant (Exh. P.22). The question of whether a principal should be held liable for the acts of his agent were well discussed by **Lady Justice Stella Arach-Amoko** in the case of **Active Automobile Spares Ltd V Pearl Merchantile Co. Ltd and Alexander Lujemwa** HCCS No. 693 of 2000.

She held that a principal can be liable for the fraud of his/her agent committed in the course of the agent’s ostensible authority. In this regard she followed with approval the speech of **Lord Machaghten** in the case of

Lloyds V Grace Smith & Co. [1912] AC 716 at 731 where he stated

“...And I think it follows from the decision and on the ground on which it is based, that in the opinion of the court, a principal must be liable for the fraud of his agent committed in the course of his agents employment and not beyond the scope of his agency, whether the fraud be committed for the principal’s benefit or not...”

I too agree with that position of the law. The test here is not the fraud itself when established but rather what an ordinary person dealing with the agent can reasonably assume, in the absence of any notice to the contrary, to be his authority (see judgment of **Spry J.A.** as he then was in case of **Edmund Schluster & Co. (Uganda) Ltd V Patel** [1969] EA 239 at P. 241.

I find that in the absence of notice to the contrary the Plaintiff ordinarily would have assumed the said orders to be legitimate and so the Defendant is liable for the fraud that has been committed.

Issue No. 2: Remedies.

Having found as I have above, I hold that the Defendant is liable to pay the Plaintiff the sum of Ushs.40,478,300/= as prayed.

The Plaintiff has also prayed for general and exemplary damages. The Plaintiff and his counsel did not address court on the quantum for the general damages. I therefore exercise my discretion in light of the facts of this case to give nominal damages of Ushs.1,000,000/=. As for exemplary damages I held in the case of **Afro Motors Ltd V Uganda Revenue Authority** HCCS No. 355 of 2000, that these should not just be pleaded in the plaint as a remedy but particulars of such exemplary damages also should be shown. This was not done here and so I disallow them as not proved.

The Plaintiff also prayed for interest on the various awards in damages at 25% p.a. from the date of filing until payment in full. I will award interest at 21% p.a. on the Shs.40,478,300/= from the date of filing until payment in full and 8% p.a. on the nominal damages from the date of judgment until payment in full.

As to the counterclaim, I hereby dismiss the counterclaim against the Plaintiff/1st counter-Defendant with costs. The second and third counter-Defendants did not file a defence and so I enter judgment against them in favour of the counter claimant/Defendant. The counterclaimant sought general damages against the counter-Defendants for fraud. Unfortunately like in the main suit court was not addressed as to what the quantum should be. Damages as a general principle are compensatory in nature (see judgment of **Newbold V.P**) as he then was in the case of **Visram and Kassar V Bhatt** [1965] EA 796). In the matter of a proven fraud which is quantifiable, I find that the money lost through the fraud should be the value of the compensation. I accordingly exercise my discretion to award the counter-claimant the sum of Ushs.40,478,300/= as general damages against the second and third counter-Defendants jointly and severally.

I also award interest on that amount at 21% p.a. from the date of filing the counterclaim until payment in full. I also award costs against the second and third counter-Defendants.

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Geoffrey Kiryabwire
JUDGE

Dated: 12/11/09

12/11/09

9:30am

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

- Okecha for Plaintiff
- R. Iga for Defendant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date: 12/11/09

