THE REPULIC OF UGANDA,

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CIVIL SUIT NO 143 OF 2009,

MAERSK UGANDA LTD} .....PLAINTIFF

VERSUS

FIRST MERCHANT INTERNATIONAL TRADING LTD}..... DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The facts of this case are that the plaintiff filed this suit against the defendant for recovery of **United States dollars 63,787** representing the face value of several cheques drawn by the defendant in favour of the plaintiff for payment of freight charges which cheques were returned dishonoured or which cheques "bounced". It is averred in the plaint that the cheques were presented to Citibank for payment whereupon they were dishonoured and returned to the plaintiff with the comments "refer to drawer. The plaintiffs then issued to the defendant, a notice of dishonour of cheques in a letter written by the plaintiffs lawyers to the defendant dated 20th of February, 2007. The plaintiff further claims for the return of its 48 containers held by the defendant together with a claim for United States dollars 409,500 being charges for use of containers for a period of time stipulated. On the other hand the written statement of defence of the defendant avers that it is not indebted to the plaintiff as it has paid for the sums claimed in the plaint by means of a telegraphic bank transfer to the plaintiffs account. As far as the claim for return of 48 containers is concerned the defendant pleads that the plaintiff is barred by the doctrine of estoppels from claiming those containers as it had filed a suit to recover from the defendant 2 containers in HCCS 108 of 2008. The defendant further denied receipt of any notice of dishonour of cheques it issued to the plaintiff. On the other hand the defendant counterclaimed for the sum of US $ 115,920 being damages for 1 container of dried goat skins allegedly confiscated by the plaintiff and US $ 24,114.20 being damages for cow hides in a fifty by twenty feet container, loss of profits, loss of good will general damages and costs of the suit.

Issues for determination:

1. Whether the defendant issued bouncing cheques to the plaintiff

2. Whether the defendant is detaining containers belonging to the plaintiff

3. Remedies available.

At the hearing the plaintiff was represented by Peter Musoke of Messrs Shonubi, Musoke and Company Advocates while the defendant was represented by Mr. Byaruhanga Dennis holding brief for Counsel Obed Mwebesa of Messrs Nuwagaba and Mwebesa Advocates. The suit

first came for scheduling on the 1st of February 2011 when the counsels were requested to agree to and file a joint scheduling memorandum. The suit was adjourned to the 24th of February 2011. When it came for scheduling the court pointed out that the amended written statement of defence of the defendant avers at paragraph 4 thereof that it is not indebted to the plaintiff at all as the moneys that were owing to it were paid directly on the account of the plaintiff by telegraphic transfer.

At this stage the court requested the defendant's counsel for purposes of expeditious disposal of the plaintiff claim against the defendant of USD 63,787 averred in the plaint, and to avoid wasting the time of court and the parties, to produce evidence of payment to the plaintiff by telegraphic transfer as far as this issue was concerned. Counsel Byaruhanga Dennis again holding brief for Obed Mwebesa informed court that Counsel Obed Mwebesa was appearing in another suit vide Court of Appeal Civil Appeal no. 15 of 2008. Counsel Musoke Peters informed court that if the defendant produced evidence of telegraphic transfer of the money in payment of the plaintiffs claim in the plaint, the plaintiff will concede this issue and drop the claim leaving only the claim for the return of its containers only. The suit was by consent further adjourned to the 21st of March 2011 by which time the parties should have filed their joint scheduling memorandum, exchanged the alleged evidence of payment and for hearing.

On the 21st of March when the matter again came for hearing, Dennis Byaruhanga again holding brief for Obed Mwebesa informed court that the defendant's case was being handled by Obed Mwebesa. He further informed court that the case could not proceed for hearing because Counsel Obed Mwebesa had given him instructions to notify court that due to his inability to get in touch with his clients and the failure of his client to get in touch with him, he had withdrawn from the conduct of the defendant's case. He emphasized that the defendant's counsel had tried and failed to contact the defendant and that the defendant does not have any address because they had changed physical addresses. Moreover counsel Mwebesa was investigating the status of the defendant company upon being informed that the defendant's shareholding could have changed. In any case he had withdrawn from the conduct of the suit in court.

On the basis of the above submission Counsel Peter Musoke prayed that judgment be entered for the plaintiff. He contended that the suit having been called in the presence of the defendant's counsel, judgment should be entered for the plaintiff under order 9 rule 21 or 23 of the Civil Procedure rules. He submitted that the fact that the defendant's counsel was present the last time the case came up was ground to hold that the defendant's counsel ought to have obtained instructions and that the defendant in any case is deemed to have been aware of the hearing date. Secondly counsel submitted that one of the prayers in the plaint was for payment of US $ 63,787 US$ pursuant to the issuance of cheques by the defendant which cheques were dishonored. He prayed that the defendant is ordered to pay sum in addition to all the prayers in the plaint. He contended that there were two issues in the plaint. These were payment in lieu of bounced cheques and return of the defendant's 48 containers. As long as the plaintiff can trace the containers, it seeks courts indulgence for an order that the containers be collected. Counsel further maintained that this matter arose in 2007. Since it

was filed there has never been a person from the defendant even in mediation. He prayed that the containers be released to the plaintiff.

Because the defendants counsel had withdrawn from the conduct of the suit on account of inability to trace the defendants, the I directed that the defendants should be served personally for appearance in court at the next hearing date through a widely circulating newspaper whereupon the court may consider the prayers of the plaintiff depending on the response from the defendants. Thought the suit was adjourned for hearing on the 4th of April at 10.00 am the hearing did not commence because the advertisement of the hearing date still gave notice to the defendant's Counsel and not to the defendant personally. Hearing notices were re-advertised in the newspapers for the 2nd of May 2011.

Evidence on court record is that the next hearing date was advertised in both the New Vision of the 7th April 2011 at page 42 and the daily Monitor of the 8th of April 2011 at page 35. On the 2nd of May 2011 despite notice in the said newspapers for the defendant's representative to appear personally in court, no body turned up. Consequently, Counsel Peters Musoke prayed that the suit proceeds ex parte under order 9 rule 20 of the Civil Procedure Rules. The suit accordingly and by order of court proceeded ex parte under the provisions of order 9 rule 20 (1) (a) of the Civil Procedure Rules.

The plaintiff called one witness Mr. Richard Nyiiro a claims officer of the plaintiff who was examined in chief and closed the plaintiff's case. There being no body from the defendant's side, counsel for the plaintiff filed written submissions in support of the plaintiff suit.

I have carefully considered the written submissions of the plaintiff's counsel filed on court record on the 22nd of June 2011 and reviewed the evidence on record. Firstly counsel for the plaintiff prayed that I dismiss the counterclaim of the defendant under order 17 rule 5 of the Civil Procedure Rules. The counterclaim of the defendant is accordingly dismissed with costs under order 17 rule 5 of the Civil Procedure Rules for want of prosecution.

1. Whether the defendants issued bouncing cheques to the plaintiffs amounting to 63,787 US$.

This is a question of fact and its consequences a matter of law. PW1 Mr. Richard Nyiiro a claims officer for the plaintiff testified that he lives in Kitebi Mutundwe, Rubaga Division of Kampala District and is an employee of Messrs DAMCO Logistics Uganda Ltd formerly known as Maesrk Uganda Ltd. He worked as a claims officer since 2008. Previous to that he was an exports and trucking manager of the plaintiff. He had worked with the plaintiff in trucking since 2007 and as export manager since 2006. The issuance of cheques by the defendant to the plaintiff was within his knowledge. He testified that the defendant issued 7 cheques which upon presentation to the bank were returned with the words "Return to drawer". The cheques were for payment of freight and demurrage charges. The cheques were forwarded to him by the plaintiff's management in his capacity as the claims officer of the plaintiff. PW1 produced the cheques all of which had the words "return to drawer" and the cheques were exhibited in evidence as follows:

1. A cheque dated 11th January 2007, No. 590047 drawer being the defendant and drawn in favour of plaintiff for a sum of 9,370 US$. Exhibit P1

2. A cheque dated 11th January 2007 No. 590048 drawn by the defendant in favour of the plaintiff, for 9,370 US$ with the remarks “refer to drawer dated 6th February 2007 and marked ExP2.

3. A cheque 7th February 2007, No. 555984 drawn by the defendant in favour of the plaintiff for US$ 9,620 with remarked “return to drawer”, Exhibit P3.

4. A cheque dated 7th Feb 2007 No. 55985 dated 7th with drawer as defendant and plaintiff in whose favour it was drawn for US $ 9,620 with remarks refer to drawer and exhibit P4.

5. A cheque dated 25th January 2007 No. 555981 drawn by defendant in the plaintiff’s favour for US$ 9,620 which also bounced and was exhibited as P5.

6. Cheque dated 25th January 2007 No. 555980 drawn by the defendant and in favour of plaintiff for US $ 5,567 US$ which bounced and is exhibit P6.

7. A cheque No, 558976 dated 29th January 2007 drawn by the defendant in favour of the plaintiff for US$ 9,620 which cheque bounced and is marked Exhibit P7.

The total amount in the seven cheques is US $ 63,787 which remained owing to the plaintiff because all the cheques bounced. Cheques exhibits P1 – P7 prove that the defendant issued cheques in favour of the plaintiff which remained unpaid. PW1 further testified that the plaintiff’s lawyers wrote a letter dated 20th of February 2007 to the defendant being a letter of notice of dishonour of cheques. This letter is exhibited in evidence as exhibit P8 and is addressed to the defendant by the plaintiffs lawyers Messrs Shonubi Musoke and Company Advocates. PW1 testified that the defendant never responded to the demand to make good the cheque value and the amounts written in the cheques remain due and owing to date.

As a question of fact I find that the defendant issued cheques to the plaintiff for a total sum of US$ 63,787, which cheques were dishonoured with remarks “Refer to drawer”. As to the legal consequences of issuing payment by cheques which bounce Counsel for the defendant referred to sections 72, 2, and 26 of the Bills of Exchange Act cap 68 and submitted in summary that a cheque was a bill of exchange payable on demand as an “unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer." It was therefore payable on demand. As far as consideration was concerned the evidence of PW1 was that it was for freight and demurrage charges. He submitted that the cheques were issued by the defendant to the plaintiff in payment of a debt (freight charges) and what was owing to the plaintiff from the defendant is a total sum of **United States dollars 63,757**. He relied on the

case of **Naris Byarugaba vs. Shivam M.K.D Ltd [1997] HCB 71** where it was held that a bill of exchange constitutes prima facie evidence of the sum of money printed on it and due to the person in whose favour it is drawn. In that case the court further held that in law such a debt is only discharged when the bill of exchange is honoured. Counsel further submitted that a cheque is said to be dishonoured under section 46 of the Bills of Exchange Act when it is duly presented for payment and payment is refused or cannot be obtained. He relied on the case of **Kotecha vs. Mohammad [2002]** 1 EA 112 for the proposition that a bill of exchange is normally treated as cash and the holder is entitled in the ordinary course to judgment. Counsel further referred to the case of **Redfox Bureau De Change vs. Anke Alemayehu and Another [1997 – 2001] UCLR 359** where the court held that the cause of action arises when the cheques are dishonoured. He noted that as far as the facts and evidence shows the cheques were duly presented for payment and dishonoured which gave the plaintiff a cause of action against the defendant. Last but not least counsel referred to the case of **Sembule Investments Ltd vs. Uganda Baati Ltd MA 0664 of 2009** being the judgment of my sister judge of the Commercial Court Hon. Lady Justice Irene Mulyagonja Kakooza, where she held that it is implied from the definition of a bill of exchange and therefore a cheque that a cheque is by its nature unconditional. A cheque cannot be issued on any conditions unless those conditions are notified to the banker. She further held that where a cheque had been dishonoured and returned with the words "refer to drawer" and upon giving to the drawer notice of dishonour, the only recourse for the plaintiff was to file a suit. A cheque constitutes a promise to pay and the defendant becomes liable to make good the amount written on the cheque.

I agree with the position of the law as spelt out in the authorities cited above. For purposes of precedence the case of **Kotecha vs. Mohammad [2002] 1 EA 112** doubly establishes the law as binding precedence on me. In that case there was an application for leave to defend a suit under order 33 (Now 36 of revised the Civil Procedure Rules). The Court of Appeal of Uganda at Kampala held that a bill of exchange is to be treated as cash and unless exceptional grounds are shown when it is dishonoured, the holder thereof is entitled to judgment. The decision of the Court delivered by Berko J.A. at page 118 holds as follows:

> "The position, is however, different where the Plaintiff sues under a cheque or Promissory Note or Bills of Exchange. The law in that regard; as stated by the learned authors of Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes; is:
>
> "Order 14 Proceedings: where an application is made for a summary judgment in respect of a claim on bill of exchange, cheque, or promissory note the general Rule is that leave to defend will not be given save in exceptional circumstance".
>
> The English authorities, particularly James Lamont and Company Limited v Hyland Limited [1950] 1 KB 585; Brown, Shipley and Company Limited v Alicia Hosiery Limited [1966] Rep 668, establish that a Bill of Exchange is normally to be treated as cash. The holder is entitled in the ordinary way to judgment. If he is a seller who has taken bills for payment, he is still entitled to judgment: no matter that the Defendant

has a cross claim for damages under the contract of sale or under other contracts. The buyer must raise those in a separate action. ...".

In this case the defendant issued to the plaintiff seven cheques for freight and demurrage charges. The cheques were all dishonoured and returned with the words "refer to drawer". The defendant had counterclaimed in its written statement of defence but the counterclaim was dismissed for want of prosecution and the case proceeded ex parte. In any case the authorities show that the cheques should be honoured and the defendant is liable even if it has a cross claim which could be raised as a separate action or claim. I wish to add that the issuance of a cheque which bounces is a serious economic crime under the penal laws of Uganda and should not be taken lightly even in a civil case. A cheque is supposed to be as good as cash and even though its use is likely to diminish with the introduction and/or adoption of electronic modes of payment, the courts will fault any person who issues a cheque for presentment to a bank by the holder thereof knowing or not caring whether it will be dishonoured. The situation is grave when, and as is often the case, the cheque is issued as payment for goods or services. For the reasons stated above I find that the defendant is liable to pay the plaintiff a **sum of US$ 63,787** in lieu of the face value of the dishonoured cheques together with interest at 18% per annum with effect from March 2007 till the date of judgment. Further interest is awarded to the plaintiff on the decreed sum immediately stated above at 14% from the date of judgment till payment in full.

2. Whether the defendant is detaining the containers belonging to the plaintiff.

The plaintiff avers that the plaintiff brings the suit for the sum of 409,500 US$ being detention charges for approximately 910 days at a rate of USD 10 per day. The plaintiff further avers in paragraph 4 (l) that the plaintiff on diverse occasions released 48 containers to the defendant and that the defendant has admitted being in possession of the said containers. That the plaintiff demanded for release of the containers but the defendant has refused to release the same. Paragraph 5 of the plaint seeks detention and demurrage charges for the containers. The written statement of defence of the defendant denies possession of the said containers. The defendant further counterclaimed for 115,920 US $ alleging that the plaintiff confiscated two forty feet containers containing dried goat skins.

As far as the second issue is concerned, PW1 testified that the 48 empty containers were given to the defendants for their business of the export of hides and skins. The containers were given on various dates between October 2006 and March 2007. PW1 further testified that the defendants own correspondence admitted and confirmed that they have the claimed containers. Court was referred to email dated 19th March 2007 sent to the export team by one Mr. Kateeba of the defendant. PW1 testified that the export team of the plaintiff was composed of a number of about 8 people who were sent the email and he was one of the 8 people. The email from FMIT fmit@infocom.co.ug dated 19th March 2007 at 12.55 and addressed to KPALOGEXP attention of Rebecca was exhibited in evidence as exhibit P9. The email reads as follows:

"The following is the list of maersk containers we have in our loading yard. Kindly check you records and reconcile...."

The email lists 45 containers with their numbers.

PW1 further testified that the plaintiff has not yet got its containers back from the defendant. The last time PW1 went to check on the containers they were still at 6th street with the defendant. He testified that the containers were normally given by the plaintiff to exporters who are exporting goods to other countries and the plaintiff earns revenue from it. The plaintiff also ships the goods to their destinations. He testified that containers are valued for use at US$ 10 per day and this amounted to 480 USD per day for 48 containers.

Counsel for the plaintiff submitted that the continuous holding of the containers by the defendant amounted to the tort of detinue after the plaintiff demanded their return and the defendant refused to return the same. Counsel further submitted that the plaintiff was entitled immediate possession of the said containers. He prayed for an order for the return of the containers and losses occasioned by the detinue and general damages. He prayed that court awards the plaintiff a sum of US$ 10 per container for 910 days for 48 containers. For the definition of tort counsel relied on the case of **Quick Cargo Handling services Ltd vs. Iron and Steel Wares Ltd Civil Suit No. 328 of 2002.** I have however not had the benefit of reading this case as it was not availed by counsel and the court which decided it is not indicated. Counsel further relied on the cases of **Khalid Walusimbi vs. Jamil Kaaya and AG [1993]1 KALR 20** and **Sajan Singh vs. Sardara Ali [1960] AC 16.**

In **Sajan Singh v Sardara Ali [1960] 1 All ER 269** being an appeal from Malaysia to the Privy Council and in the lead judgment of the court read by Lord Denning, the court defined the essential ingredients of detinue at page 272:

> "In order to succeed in detinue, it was essential for the respondent to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it: see Bullen & Leake's Precedents Of Pleadings (3rd Edn), p 312.

PW1 established that the containers belonged to the plaintiff. This was acknowledged or admitted by the defendant in an email of its official as per exhibit P8. The testimony of PW1 is that the plaintiff demanded the return of the exhibits but the defendant has not returned the same. The plaintiff can be said to be entitled to immediate possession of the said containers demanded for. The testimony of PW1 however lacks clarity as to when the plaintiff demanded the containers. This is made more difficult by the fact that it came out from the testimony of PW1 that there was another suit in which a consent judgment was entered between the same parties in this suit namely in HCCS 105 of 2008. The same lawyers represented the parties and the consent judgment is dated 6th of July 2009 signed between the plaintiff who is also the current plaintiff and the defendant (also the current defendant). The consent judgment which is on court record reads as follows:

1. The plaintiff withdraws the above suit and in return the defendant released the plaintiff's containers in its possession, to wit No. MSKU 3588439 and No. TTU 3332645.

2. The above steps be taken by each party immediately.

3. Each party bears its own costs."

The court takes judicial notice of the said consent judgment. The plaintiff's current suit was filed on the 20th of October 2009 after the consent judgment. The natural question would be why the containers were not all demanded or agreed to in the consent order in July 2009 prior to the filing of the current suit. Secondly the PW1 testified generally that the plaintiff also transports goods for clients in the containers but did not clarify whether this had been done. The email admitting possession of the plaintiff's containers is dated 19th March 2007 well before the two suits mentioned above were filed in court. The suit in which a consent judgment was entered is of 2008 while the current suit is of October 2009. To a question for clarification put by court to PW1 as to when PW1 last saw the containers, PW1 answered that it was in 2007.

Be the above as it may the plaintiffs plaint paragraph 4 (l) lists the 48 containers. Container No. TTNU 3332645 and MSKU 3588439 which are specified as No. 1 in the first column and No. 1 in the second column are the very containers which are the subject matter of the consent judgment. Last but not least the admitted list contains 45 containers and not 48 as listed in paragraph 4 (l) of the plaint. Out of the 45 containers in exhibit P8, the two are consented to in the consent judgment as the numbers of the containers in the consent judgment correspond with serial numbers 1 and 2 in exhibit P8.

For the above reasons the plaintiff cannot be awarded damages for detinue for 910 days as prayed for which days commenced in the year 2007 to the filing of the current suit on the 20th of October 2009. Paragraph 6 of the original written statement of defence of the defendant was filed on the 10th of November 2009 and denies being in possession of the containers. The defendant avers therein that save for two containers which the plaintiff sued for in an earlier suit, the plaintiff always collected all containers that came into possession of the defendant. Consequently the defendant is deemed to have refused to return the containers from the date of filing of the written statement of defence in court.

It should be noted that at the beginning of this matter counsel Peters Musoke prayed that the plaintiff be assisted with an order for recovery of containers it can trace. All containers are marked according to exhibit P8. Consequently what remains is for the plaintiff to identify the containers with the numbers stated in exhibit P8. These are deemed to be specific containers that may be traced by their markings alone. The plaintiff having proved on the balance of probabilities that the defendant is still in possession of at least 43 of its containers to date, it is awarded damages for loss on account of detinue of 43 containers by the defendant at the rate of 10 US $ per container from the date of filing the defendants written statement of defence on the 10th of November 2009 till the date of this judgment. The containers in issue are the containers listed in serial numbers 3 – 45 in exhibit P8 totalling to 43 containers. The defendant is further ordered to hand over to the plaintiff the said containers listed in exhibit P8 immediately it is served with this judgment and as may be reasonably practicable and provided the containers have been positively identified. Last but not least failure to hand over

to the plaintiff the said containers within a week after service of this order on the defendant will incur additional damages at 10 US $ per container until the container/s is/are handed over. For the avoidance of doubt the plaintiff will serve this order on the defendants within one week from the date of judgment for the timelines spelt out above to become operational. The plaintiff is awarded costs of the suit.

Judgment delivered in court this 23rd day of September 2011

Hon. Mr. Justice Christopher Madrama

Delivered in the presence of

No parties present

Ojambo Court Clerk

Hon. Mr. Justice Christopher Madrama