

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HIGH COURT CIVIL SUIT NO 11 OF 2010**

**1. HANS ANDERSSON PAPER }
2. PONDEROSA LOGISTICS LTD}..... PLAINTIFFS**

VERSUS

CROWN CONVERTERS LTD}..... DEFENDANTS

BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The first plaintiffs claim is for a sum of **US\$347,317.26** being the unpaid price under a contract for the sale of goods supplied between the period of 14th January 2008 and 8th of May 2009 to the defendant. Details of the bills of lading for wood free paper, MG brown paper, and white top craft liner are given. In the plaint it is alleged that the goods were delivered to the defendant who only paid part of the price leaving the outstanding amount claimed in the plaint. The plaintiff's efforts to get paid were in vain and therefore the plaintiff alleges that the defendant breached the contract and claims the price of the goods unpaid of **US\$347,317.26**. The plaintiff also claims general damages, interest at 12% per annum from the date of each invoice till payment in full, any other relief that the honourable court may deem fit to grant and costs of the suit. The plaintiffs' plaint was subsequently amended to include the second plaintiff and its claim for US\$18,500 for the clearance and transportation of cargo of the defendant between 14th of January 2008 and the 8th of May 2009. The particulars of cargo cleared and transported are given. It is indicated in the plaint that the 2nd plaintiff issued invoices for the costs of freight and the defendant only paid part of the freight charges leaving an outstanding sum of **US\$18,500**. The second plaintiff also claims for general damages, interest at 12% p.a. and any other relief that this honourable court may deem fit to grant and costs of the suit.

In its amended written statement of defence, the defendant denies the claims of the plaintiffs and avers that most of the consignments claimed for by the plaintiffs were never delivered. Consequently the defendant avers that it is not liable for goods consigned to it but delivered to third parties. Secondly the defendant is not liable for transportation and clearing charges of goods consigned to it but delivered to third parties with the alleged knowledge and

participation of the plaintiffs. The defendant seeks for an order that the suit is dismissed with costs.

In reply to the written statement of defence, the plaintiffs contend that the goods were delivered to the defendant or authorised agents with the knowledge of the defendants.

The agreed issues for trial are;

- 1. *Whether the defendant is liable to pay to the plaintiff the price of the goods.***
- 2. *Whether the plaintiff is entitled to the remedies sought.***
- 3. *Whether the defendant is liable to pay the 2nd plaintiff's claim.***

At the hearing of the suit, the plaintiffs were represented by Mr. Faisal Mukasa while the defendant was represented by Mr. Terrence Kavuma. The plaintiffs called three witnesses Michael Weijerman (PW1), Newton Wang'oo (PW2) and Joram Nyanzi (PW3), while the defendant did not call any witnesses. The Counsels agreed to and filed written submissions. Because the defendant did not call witnesses, it was agreed that under order 18 rules 2 of the Civil Procedure Rules where a defendant does not call any witnesses, the defendant would address the court first and the plaintiff would reply and that would be the end of the submissions. This is founded on the interpretation of order 18 rule 2 (3) of the CPR which provides that "The party beginning may then reply generally on the whole case except that in cases in which evidence is tendered by the party beginning only he or she shall have no right to reply." In ordinary cases it is the plaintiff who has the right to begin and will also have a right of rejoinder. However where the plaintiff loses the right of rejoinder, it was appropriate for the defendant to begin since it had called no witnesses. Nonetheless at the scheduling conference some facts and documents were agreed to.

Counsels filed written submissions as agreed.

- 1. *Whether the defendant is liable to pay to the plaintiff the price of the goods.***

Counsel for the defendant submitted that the defendant would only be liable if the goods were ordered for and delivered to it, but in this case, although PW1 in cross examination confirmed that the agreement between the parties was in writing i.e. by email, for each consignment, the emails ordering for the consignments were neither produced before the court by PW1, nor could he recollect the dates when the orders for the consignments were placed. Furthermore, that the emails tendered as Exhibits E1, E2, E3 and E4 do not in any way relate to the consignments in issue and the inevitable conclusion drawn is that the defendant never ordered for the consignments in issue.

Counsel for the defendant submitted that even if the goods were ordered by the defendant, they were not delivered to the defendant by the 1st plaintiff. Under S. 27 of the Sale of Goods Act Cap 82, the duty is upon a seller to deliver the goods. In this case, if there is an agreement for sale of goods between the parties, a fact that is denied by the defendant, such agreement is not in writing, the parties did not agree to the terms relating to delivery of the goods and hence S. 27 of the Sale of Goods Act applied. He contended that whereas PW1 testified that the bills of lading for the consignments were delivered to the defendant by courier, he could neither identify the said courier nor adduce evidence to show that the bills of lading were actually delivered to the defendant and therefore, his testimony was irrelevant because no direct evidence was adduced to prove these facts as required under S. 59 of the Evidence Act. Furthermore, that all the plaintiffs witnesses testified that they did not personally deliver the goods to the defendant and therefore, there is no direct evidence to prove the delivery. Counsel for the defendant submitted that in view of these circumstances, the defendant cannot be held liable for the claims of the plaintiffs.

On the other hand, the plaintiff's Counsel submitted that the contents of the emails marked Exhibits E 1 and E2 show a long standing business relationship between the 1st plaintiff and the defendant which include in the correspondence related emails and statements of accounts. Furthermore, that PW1 in his testimony stated that the defendant admitted in the email dated 9th November 2009 that the 1st plaintiff's accounts were fine and that it was preparing a payment plan, confirming the 1st plaintiff's claim for a sum of **USD 347,317.26**. Counsel for the plaintiffs further submitted that the defendant raised three defences in its written statement of defence namely that: (1) most of the consignments were never delivered to the defendant; (2) whatever was delivered to the defendant was paid for; and (3) the defendant is not liable to pay for goods consigned to it but delivered to other persons with the knowledge of the Plaintiffs, but did not adduce any evidence to prove these defences. From the language used in the defences, the defendant admitted the existence of contracts between the parties but disputed delivery of some of the goods and therefore, admitted liability to pay for only what was delivered. Counsel for the plaintiffs submitted that even during the scheduling, the defendant in its agreed facts admitted that there were agreements for the sale of goods between the parties, but disputed delivery of the goods. These admissions are inconsistent with the Defendant's submissions that there were no contracts for the sale of goods between the 1st plaintiff and the defendant. These submissions amount to a departure from their pleadings contrary to settled law as in the case of **Uganda Breweries Ltd V Uganda Railways Corporation [2002] 2 EA 634 Oder, JSC** at 643 for this submission.

Furthermore, the plaintiff's counsel relied on the testimony of PW2 and PW3 that the defendant contracted them to clear, handle and transport the suit goods upon arrival at Mombasa, and the original bills of lading and parking lists were endorsed to and delivered to

the clearing agents and the goods were duly cleared and handed over to the defendant who paid part of the charges. According to counsel for the plaintiffs, this testimony was indicative of the fact that the defendant bought the suit goods from the 1st plaintiff, and received the documents of title to the goods. Furthermore, that it also indicates that the goods were delivered to the defendant, because the defendant has never sued the clearing firms for non delivery.

With regard to the issue of whether there was delivery of the suit goods to the defendant, counsel for the plaintiffs submitted that the rules relating to delivery of goods are provided for under S.29 of the SOGA and not S.27 as submitted by the defendant. Counsel for the plaintiffs referred to S. 29 (2), 32(1), 19(f), and the meaning of the term delivery under S. 1 (1) (d) of the SOGA and submitted that delivery is effective when the seller delivers goods to a carrier, who will give the seller acknowledgement that he has received the goods, and then transmit them to the buyer. Counsel for the plaintiffs submitted that this is the practice in international buying and selling of goods and confirmed by the testimony of PW1. Counsel for the plaintiffs submitted that the moment the seller hands over the goods to the carrier, the property in the goods passes to the buyer who can sue the carrier for any non-delivery of the goods. Furthermore, that in this case, the bills of lading were issued by the respective carriers as acknowledgement that they had received the goods and the defendant was named on the bill of lading as the consignee, implying that the goods were to be transmitted to it as the buyer. Furthermore, that in paragraph 5 of the written statement of defence, the defendant admitted that the goods in dispute were consigned to it, and this was evidenced by the bill of lading marked Exhibit A1 to A14.

Counsel further submitted that the evidence of emails marked Exhibits E1 to E4 and F1 to F3, in which the defendant acknowledged the outstanding amounts and gave payment plans, the evidence of PW2 and PW3 who testified that they cleared the goods and that after clearance, SPEDAG Uganda Ltd delivered the goods in each consignment to the plaintiff's factory in Kawempe, the customs clearance documents, the proof of payment of customs taxes by the defendant, the delivery notes signed by the defendant's employees, the bills of lading endorsed by the defendant, the invoices and packing lists, all indicate that there was physical delivery of the goods to the defendant. On the basis of this, the defendant is liable to pay the 1st plaintiff a sum of USD 347,317.26 as the balance on the purchase price, and that the 2nd defendant is entitled to the sum of USD 18,500 as the balance for the services rendered to the defendant.

2. Whether the 1st plaintiff is entitled to the remedies sought.

In relation to this issue, counsel for the defendant submitted that the defendant's submissions in issue one above show that the 1st plaintiff is not entitled to the remedies sought.

On the other hand, counsel for the plaintiffs submitted that the defendant is liable for the unpaid price on the suit goods, under S. 48 (1) of the Sale of Goods Act, because, property in the goods had passed to the defendant the moment they were handed over to the carrier as stipulated in section 19 (f) and (e) of the Sale of Goods Act. Counsel further submitted that S.61 of the Contract Act further provides for the right of a party who has suffered loss or damage arising from breach of contract to receive the value of such loss, and therefore in this case, the 1st plaintiff is entitled to payment of the unpaid price of the suit goods as the loss suffered.

3. Whether the defendant is liable to pay the 2nd plaintiff's claim.

The Defendants' Counsel submitted that whereas PW2 testified that the 2nd plaintiff was authorised by the defendant to clear the goods in issue, no evidence of such authorisation was tendered before the court, and therefore, whatever was done by the 2nd plaintiff was done without authority and with persons not connected to the defendant. On the basis of that counsel contended that the defendant is not liable for the claims of the 2nd plaintiff.

Without prejudice the Defendant's Counsel submitted that the 2nd plaintiff did not perform the services on which its claim is based. This is because whereas PW2 testified that the 2nd plaintiff is licensed to conduct clearing business, no such license was produced in court. Furthermore, PW2 testified that the 2nd plaintiff owns a company "Brookevale Investments Ltd and APM logistics" which has a license and did the clearing of goods. Counsel for the defendant submitted that looking at the customs entries; it is true that the clearing was done by Brookevale Investments Ltd and APM logistics, which is a separate entity from the 2nd plaintiff. The 2nd plaintiff did not prove any assignment to show that Brookevale Investments Ltd and APM logistics had assigned to it any rights under the contract, which entitle the 2nd plaintiff to claim the clearance and transport charges.

On the other hand, counsel for the plaintiffs submitted that the 2nd Plaintiff is entitled to recover the balance of the charges for clearing, forwarding and transportation of nine consignments, by virtue of S. 61 of the Contract Act. Counsel for the plaintiffs submitted that PW2 testified that the 2nd plaintiff offered the said services, but the defendant only paid part of the price, leaving an outstanding balance. The emails exchanged by the parties shows that the defendant admitted liability and offered a payment schedule. Furthermore, the defendant never raised the issue of want of authority in its pleadings, therefore there was no specific form of authority required, and the fact that the defendant gave the 2nd plaintiff its documents of title by endorsing on the same to enable the clearing agent access and clear the goods is sufficient to prove the authority of the 2nd plaintiff. Counsel for the plaintiffs submitted that this endorsement was never disproved by the defendant. Furthermore, that PW2 testified that the 2nd plaintiff has subsidiary companies to perform the clearing and forwarding as is the practice

in the industry and that the 2nd plaintiff secures jobs and executes them through her network of companies and associates, ensures the jobs are properly performed and thereafter bills the client. Counsel for the plaintiffs submitted that if any of the subsidiary companies had sued the defendant, the defendant would probably be right to claim that it had no contract with them. Counsel for the plaintiffs further submitted that the contract does not specify the 2nd plaintiff's mode of execution of the work and it is not open for the defendant to refuse to pay on ground that in executing its duties, the 2nd plaintiff sub contracted a third party. Even if the defendant was right to argue that the 2nd plaintiff was not properly contracted by it, the argument cannot stand in view of the legal principle which entitles a person to recover quantum meruit on the basis of services rendered as held in the case of **Craven Ellis vs. Canons Ltd (1936) 2 KB 403** at 410.

Other remedies sought

On general damages, the plaintiff's Counsel submitted that the 1st and 2nd plaintiffs are entitled to general damages for breach of contract by the defendant, in failing to pay them the sums owed, thereby denying the plaintiffs the use of their income. Counsel referred to the decision of Justice Geoffrey Kiryabwire in the case of **New Alobo Limited vs Moyo Hardwares Limited** (HCCS No. 364. of 2007) for principles for the award of general damages.

On interest learned Counsel for the plaintiffs prayed for interest at the commercial rate from the date of each invoice till payment in full on the special damages and interest on general damages from the date of judgment till payment in full. Counsel also prayed for costs.

Judgment

I have carefully considered the evidence on record, the pleadings as well as the submissions filed on court record by both counsel. The first and third issues are interrelated. This is because the third issue deals with payment of the charges of the 2nd plaintiff for services of freight of goods allegedly supplied to the defendant by the first plaintiff and is relevant in proving a contractual relationship between the first plaintiff and the defendant.

Three agreed issues were submitted on by the parties.

- 1. Whether the defendant is liable to pay to the plaintiff the price of the goods.**
- 2. Whether the plaintiff is entitled to the remedies sought.**
- 3. Whether the defendant is liable to pay the 2nd plaintiff's claim.**

The first and third issues are interrelated in that the second issue concerns charges of goods allegedly supplied to the defendant by the first plaintiff. The first and 3rd issues will therefore be considered one after the other.

1. Whether the defendant is liable to pay to the plaintiff the price of the goods.
2. Whether the defendant is liable to pay the 2nd plaintiff's claim.

PW1 the Managing Director of the first plaintiff Mikael Weijerman testified that they had a running contract for the sale/purchase of various paper products. He produced for identification bills of lading A1 - A14, packing lists D1 - D14, 1 specification order, invoices C1 - C 14 which were eventually admitted in evidence. PW1 testified that there was a statement of accounts between the parties and acknowledgement as contained in e-mails admitted as E1 - E4. The contracts were concluded with the defendant's between the middle of May - April 2008 to 2009 for different types of paper specified in the plaint. Goods were delivered to the defendant at the carrier shipping lines and bills of lading were delivered to the defendants. PW1 made reference to the packing lists, corresponding bills of lading and corresponding invoices. After delivery of the goods, the defendant did not pay for them and correspondence by e-mail showed that the defendant admitted the claim and agreed to pay smaller amounts in instalments. One Krishna Kumar a director of the defendant admitted the plaintiffs account in the e-mails exhibited in evidence. The bills of lading were endorsed by the defendant. PW1 contended that where the ship docks at the port of destination, the title in the goods passed to the consignee.

On cross examination, the witness did not have invoices from the defendant ordering for the goods but stated that they were available in his computer which was not in court. The other orders were placed by Mr Patel the managing director of the defendant. Bills of lading were delivered by Courier and the plaintiff has evidence through tracking delivery on the Internet. The couriers were either UPS or DHL. The goods were destined for Mombasa Kenya.

On re-examination, the PW1 testified that the plaintiff had sold similar goods to the defendant between the years 2003 and 2004 and they were paid for it. The statement of affairs admitted by the defendant is the e-mail exhibit E1 dated 5th of February 2009.

PW2 Mr. Newton Wang'oo the operations manager of the second plaintiff testified that between January 2008 and 2010, the defendant gave them various consignments of from the first plaintiff for clearance and delivery to them in the period 14th of January 2008 and May 2009.

The method of operation was that the defendant would give the second plaintiff original bills of lading to enable the second plaintiff clear the goods. When the goods arrived in Mombasa, the second plaintiff would register it with the Kenya Revenue Authority. The second plaintiffs presented original bills of lading to the shipping line which gave them delivery orders releasing the goods. The delivery order and form T810 is given to the Kenya Ports Authority and after payment of charges, the second plaintiff makes an entry called T8112 which has the container

number and truck number which are stamped. The truck delivers the goods to the defendants go down in Uganda. A series of documents were admitted in evidence with each batch of documents relating to the consignment and the included the following:

1. An export invoice;
2. Export consignment note;
3. Bill of lading;
4. T810;
5. Delivery order;
6. Kenya Ports Authority Invoice; and
7. T812.

PW2 further testified that the defendant never made a claim for non-delivery of goods. The statement of account between the second plaintiff and the defendant was admitted in evidence.

On cross examination PW2 testified that Messrs Brokevale investment limited cleared the consignments on instructions of the second plaintiff. Sometimes they instructed ABM Logistics to clear consignments on their behalf. The second plaintiff was a transporter and charged for freight services. Goods were delivered to the defendant in Kampala.

In the re-examination PW2 testified that the second plaintiff's relationship with Messrs Brokevale investments Ltd and ABM Logistics was because they shared the same directors. However it was the second plaintiff who would transport the goods. The employees of the second plaintiff such as truck drivers and turn boys were responsible for physically delivering the goods.

Subsequently PW2 was recalled to produce documents namely exhibits PM1, PM2, PM3, PM4 and PM5. The documents concerned several consignments and where admitted in evidence. PW2 further testified that the plaintiff's charges were in respect of Bill of lading A 7, Bill of lading A8 and the statement of account PM4 an e-mail demanding payment PM5. On cross examination he testified that the defendant paid for all consignments save for only four which remained unpaid. On re-examination he testified that the bills of lading were sent to the second plaintiff by the defendant using couriers. The bills of lading were endorsed by the defendants.

PW3 Joram Nyanzi was the managing director of SPEDAG Uganda limited. He testified that they used to transport goods by road for the defendant for Mombasa. They handled cargo clearance and transportation for the defendant. He also referred to a series of transactions reflected by bills of lading, delivery notes, Stanbic bank acknowledgement of payment of taxes, customs receipts of taxes, customs release of goods and exit notes.

On cross examination he testified that the containers were delivered by drivers and delivery clerks. One delivery was stamped by a director of the defendant with a director's stamp and another delivery was stamped with the defendant's company stamp. Some charges were paid but the others were outstanding. He further testified that Crown Converters never challenged the authority to clear the goods. The defendant had not paid an outstanding amount of US\$25,000.

Starting with the written statement of defence of the defendant, the defendant does not deny that goods were consigned to it.

The gist of the defendant submission is that the e-mail exhibits do not indicate that they relate to the consignments in issue and the inevitable conclusion is that the defendant never ordered for the consignments in issue. Secondly, even if the goods were ordered by the defendant, they were not delivered to the defendant by the first plaintiff. Counsel contended that under section 27 of the Sale of Goods Act cap 82 it is the duty of a seller to deliver the goods. Thirdly, the parties did not agree with any terms relating to delivery of goods and therefore section 27 of the Sale of Goods Act applied. Fourthly there was no evidence showing that the bills of lading were actually delivered to the defendant. Section 59 of the Evidence Act required direct evidence to prove such facts. Consequently the defendant submitted that it was not liable for the claims of the plaintiffs.

The gist of the plaintiff's submission on the other hand is that the e-mail exhibits show a long time relationship that existed between the first plaintiff and the defendant. Secondly the defendant admitted in the e-mail dated 9th of November 2009 that the plaintiff's accounts were correct and it was preparing to make a payment plan. The sum acknowledged was **US\$347,317.26**. On the contrary the written statement of defence advances the defence that the consignments in issue were never delivered; and if they were delivered the defendant paid for them and thirdly the defendant was not liable because goods were consigned to it but delivered to other persons with the knowledge of the plaintiffs. Counsel contended that the defendant did not call any evidence to prove these defences. It was therefore inconsistent with the defendant's written statement of defence to assert that there was no contract from the sale of goods between the first plaintiff and the defendant. The defendant should not be permitted to depart from its pleadings. Counsel submitted that the evidence was clear that the original bills of lading were endorsed by the defendant and delivered to the defendant's agents who duly cleared and handed over the goods to the defendant. The defendant never sued for non-delivery of the goods. Counsel contended that delivery to the defendant was effective when the seller delivered the goods to the carrier who gave the seller acknowledgement that it had received the goods and transmitted them to the buyer. It was international practice supported by the provisions of the Sale of Goods Act quoted by learned counsel for the plaintiff that the

moment the seller hands over the goods to the carrier, property in the goods passes over to the buyer who can sue the carrier for non-delivery of goods. The bills of lading admitted in evidence were acknowledgement that they had received the goods and the defendant was named as the consignee. Furthermore the defendant admitted that the goods in dispute were consigned to it. Additionally the defendant acknowledged consignment of the goods in the exhibited e-mail referred to by learned counsel in the submissions above. There was evidence of clearance of the goods given by PW2 and PW3.

I agree with the submissions of learned counsel for the plaintiff that the written statement of defence admits that the goods were consigned to the defendant. I also agree with the statement of law which is supported by the statutory provisions of the Sale of Goods Act. By the admission in the written statement of defence it is a proven fact that the first plaintiff consigned the goods the subject matter of the various bills of lading to the defendant. Secondly, the defendant's counsel attempted to cross examine the plaintiff's witnesses but did not call any evidence in support of the defences averred in the written statement of defence. Thirdly, the Sale of Goods Act explicitly supports the claim of the first plaintiff.

The first provision is section 19 (f) which deals with when property in the goods passes over to the buyer and the rules for ascertainment thereof. It provides as follows:

“19. Rules for ascertaining intention as to time when property passes.

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—

(f) where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he or she is deemed to have unconditionally appropriated the goods to the contract.

The plaintiff appropriated the goods to the contract and as we shall see had delivered the goods to the defendant. According to the textbook, **Sale of Goods by P. S. Atiyah 9th Edition**, at page 95, the seller may transfer possession to the buyer by handing over to him a means of control over the goods. Goods may be delivered by the delivery of documents of title thereto. Documents of title include a Bill of lading under the definition section of the Sale of Goods Act. According to the learned author, the peculiar feature of documents of title is that the mere transfer or endorsement of the document, if accompanied by the necessary intention, suffices to transfer the possession and the property in the goods, even without attornment. When goods are shipped, the ship owner or his agent delivers to the shipper a bill of lading, which document in law represents the goods. Possession of the bill of lading places the goods at the

disposal of the purchaser after the bills of lading are transferred to it by the seller. Finally delivery of the goods to the carrier is prima facie deemed to be delivery to the buyer.

All the bills of lading have the defendant named as the consignee. Secondly it is admitted in the written statement of defence that the defendant is the consignee in the bills of lading proved in evidence. Thirdly, the evidence of PW1 is that the bills of lading were delivered by Courier to the defendant. PW2 testified that it had received several bills of lading from the defendant for purposes of clearing the consignments. These had been endorsed by the defendant. I have examined exhibits A 1 – A14 and together with the corresponding exhibits produced by PW2, the bills of lading bear the endorsement of the defendant with a stamp and signature. In any case goods cannot be cleared without the endorsement for that purpose by the consignee. These were the original bills of lading thereby corroborating evidence of PW1 the managing director of the first plaintiff. Upon delivery of the bills of lading to the defendant, and upon the defendant instructing the second plaintiff and Messieurs SPEDAG Uganda limited to clear the goods and convey the same to Uganda, the goods had been delivered to the defendant. Possession to goods was delivered by sending the bills of lading to the defendant. Secondly, delivery of the goods is deemed to have occurred when the first plaintiff delivered the goods to the carrier for shipment to Mombasa, Kenya. Prima facie delivery of goods to the carrier is delivery to the buyer. I agree that the relevant section for delivery of goods is section 32 (1) of the Sale of Goods Act. Section 32 (1) of the Sale of Goods Act provides as follows:

“32. Delivery to carrier

(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.”

Learned counsel for the defendant submitted that there was no evidence of delivery of the bills of lading to the defendant by the first plaintiff. PW1 testified that the bills of lading were delivered by Courier namely UPS and DHL to the defendant. This was tracked on the Internet by the first plaintiff. PW2 and PW3 testified that the defendant gave the 2nd plaintiff instructions to clear several consignments of goods the subject matter of the suit. The instructions were accompanied by original bills of lading for purposes of clearance with the Kenya Revenue Authority and Kenya Ports Authority. These bills of lading were endorsed by the consignee and it would have been illegal and fraudulent for goods to be cleared without endorsement by the consignee authorising delivery to the 2nd plaintiff or SPEDAG Uganda Ltd.

I see the second crux of the defendants defence as the assertion that there was no evidence of a contract between the first plaintiff and the defendant. The defendants counsel relied on the

provisions of section 27 of the Sale of Goods Act Cap 82 laws of Uganda which provides that it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale. As far as legal doctrine is concerned, delivery of the goods to the carrier who issues bills of lading amounts to delivery to the buyer. The foundation of the terms of the contract would be the contract itself and the dispute as to the existence of the contract goes to the core of the claim.

PW1 testified about the existence of the contract between the first plaintiff and the defendant. His testimony is supported by documentary proof of bills of lading, packing lists, vouchers, and evidence of clearance of goods in the names of the defendant. The e-mails exhibits E1 - E4 is a series of correspondences between PW1 and the defendants Krishna Kumar. Other e-mails are signed by Aniket/K2 on behalf of the defendant. This evidence has not been contradicted as the defendant did not call in any official to rebut the evidence of correspondence between the parties. In the e-mail dated 11 February 2009, K2 who is Krishna, according to PW1, wrote to the plaintiff's managing director PW1 indicating that they would settle all the overdue payments within the next 4 to 5 months. He further writes that the defendant would agree on whatever discussions they would make on the second term order.

On 5 February 2009 PW1 wrote to K2 (Krishna) that the defendant had incurred about US\$260,000 and another US\$60,000 falling due between 21st of February and 17th of March 2009. He further notes that the defendant had promised US\$68,000 that February. In a reply to PW1 Aniket/K2 wrote that they would be transferring payments on Friday 6th of February 2009. He goes on to give the requirements for the second time for shipments between February and March and April 2009. On 13 February 2009 he again writes that they had transferred US\$20,051.50 and were in the process of transferring another US\$26,000 to the plaintiff. E2 is an e-mail from the defendant to PW1 dated 24th of February 2009 from aniket@crowconverters.com indicating to PW1 that the defendant would definitely keep its commitments. PW1 replied that it was an indefinite e-mail 'and requested for further advice on the actual needs of the defendants. In the reply Aniket wrote that they will be able to complete payment of US\$105,000 between March/April/May. Again PW1 thanks the defendant's officer and says they will be waiting for payment as it belongs to the very old outstanding amounts. After the payment is made he would be able to discuss future requirements. On 4 November 2009 Krishna wrote to PW1 for details of the opening balance of US\$189,189.93. Secondly he asked the plaintiff to check the statement for the payment of US\$30,131.28 dated 21st of August 2008.

On 3 March 2010 Krishna wrote to PW1 making enquiries about the availability of brown envelope paper and terms and brown envelope paper balance to be filled in 20 metric ton. PW1 notes that must be a joke because they were supposed to be meeting in a court through the

lawyers and the defendants had filed a defence stating that they had never received any shipments so how could they place an order? The various exhibits showing clearance of goods to Crown Converters Ltd of Kampala Uganda or support the existence of the contract between the parties. This contract is evidenced by exhibits of documents admitted in evidence. These include e-mail exchanges on the terms of payment, bills of lading, packing lists, receipts showing payment of revenue, clearance by the Ports Authority in Kenya etc. Consequently the only plausible and logical conclusion is that there was a contract between the parties and the bills of lading though not the contract itself are prima facie evidence of the terms of the contract. They indicate the consignor and the consignee and the party to be notified. It gives the description of the goods, the cargo weight. It shows that the freight is prepaid and the place of final delivery of the goods is Mombasa Kenya. Why would anybody consign goods to the defendant and pay the freight thereof? I therefore believe the testimony of PW1 who testified about how the defendant would order for goods and they would deliver the same to the carrier for transportation to the place of final delivery by the carrier.

In the premises the first issue is answered in the affirmative in that the defendant is liable to pay for the price of the goods in terms of section 48 (1) of the Sale of Goods Act.

As far as the third issue is concerned, learned counsel for the defendant submitted that PW2 testified that the 2nd plaintiff was authorised by the defendant to clear and transport the goods in issue. However no evidence was adduced to prove such authorisation. He submitted that whatever was done by the plaintiff was done without authority and the defendant was not liable for the claims of the second plaintiff. Alternatively the second plaintiff did not perform the services on which its claim was based because it was not licensed to conduct clearing businesses and no licence was produced in court. Because the documents show that APM logistics and Brookevale Investments Ltd did the clearing, there was no evidence to show that they assigned any rights under the contract to the plaintiff to claim clearance and transport charges on their behalf.

Learned counsel for the plaintiff submitted that by virtue of section 61 of the Contract Act, the second plaintiff is entitled to the balance of the charges of clearing, forwarding and transportation of nine consignments. The defendant only made part payment leaving an outstanding balance. In the e-mails exchanged by the parties, the defendant admitted liability. The fact is that the defendant gave the second plaintiff documents of title by endorsing on the same to enable them clear goods and that was sufficient proof of authority.

The defendant never called any witnesses to rebut the testimony of PW2. Secondly no attempt was made to secure an opinion from a forensic expert upon the endorsements by the defendant company. Learned counsel for the defendant was left with the option of cross

examination only. This in most cases is no substitute for calling witnesses who may be able to prove the defendants defence.

I have carefully reviewed the testimony of PW2 and the documents adduced when he was recalled namely exhibits PM1, PM2, PM3, PM4 and PM5. The documents concern several consignments and were admitted in evidence. PW2 testified that the 2nd plaintiff's charges were in respect of Bill of lading A 7, Bill of lading A8 and the statement of account PM4 and demanding payment PM5. The defendant had paid for all consignments save for only four which remained unpaid. Most of the correspondences are e-mails addressed to the defendants by the second plaintiff's manager Mr Newton Wang'oo. The correspondence shows that there was a long overdue balance of **US\$18,500** owed by the defendant to the second plaintiff. PW2 wrote several emails to Mr. Gopal/Krishna/Aniket. The only reply dated 5th of May 2009 is written to one Mitesh by Aniket and says that they have discussed about the container transport and agreed to the payment terms of 45 days. They would issue post dated cheques in the office in Kampala and asked to be sent quotations for 40 feet and 20 feet containers according to the terms proposed.

PW2 testified that the second plaintiff was paid for other services and the claim of US\$18,500 only relates to 4 outstanding invoices according to the statement of account. Out of the 4 outstanding invoices one was partially paid in the sum of US\$2000. Payment on the containers covered by the Bill of lading which are outstanding are B.O.L No. TSTZ54775, exhibit A7 being an outstanding sum of US\$4900 out of which they paid US\$2000 leaving an outstanding balance of US\$2900. Then concerning container covered by B.O.L No. TSTZ54774 and B.O.L No. TSTZ54773 balance outstanding on both is US\$5800. Container covered by B.O.L No. TSTZ54917 exhibit A9 has an outstanding balance of US\$4900 while container covered by B.O.L No. TSTZ54916 exhibit A8 as an outstanding sum of US\$4900 giving a total of US\$18,500 which was due to the second plaintiff. The statement of account of the second plaintiff dated 31st of December 2009 was admitted in evidence as PM 4. The emails demanding for payment by the 2nd plaintiff were exhibited as **PM5**

On cross examination, PW 2 admitted that the second plaintiff did not have a licence for clearing goods but that the goods were cleared by other sister companies. Learned counsel for the defendant contended that the second plaintiff did not even have authority of the companies which cleared the goods to claim charges for the services rendered. He therefore submitted that the defendant was not liable for the sum of US\$18,500 claimed in the plaint. The written statement of defence of the defendant concerning the second plaintiff is the effect that it is not liable to pay the second plaintiff for transport and clearing charges for goods consigned to it but delivered to other third parties with the full knowledge and active participation of the plaintiffs. Secondly the defendant asserts in the written statement of

defence that it paid the second plaintiff for the transportation and clearing charges for the containers delivered to it. In other words the assertion of the defendant is that the second plaintiff delivered the goods to third parties and therefore it could not be held liable to pay for the transportation and clearance charges for the goods. The defendant does not deny that the second plaintiff delivered certain goods to it and admits that it paid for it. No evidence was adduced to differentiate between the goods for which the defendant paid the second plaintiff and those allegedly delivered to third parties. It must be noted that the claim of the second plaintiff is in respect to particular consignments delivered to the defendant. The submissions of learned counsel for the defendant did not specify which of the consignments were paid for and which were not. This is presumably because as noted above, the defendant did not call any witnesses. Consequently the submissions of learned that counsel for the defendant is based on the documentary evidence showing who cleared the goods. A7 was cleared by Brookevale Investments Ltd. A8 was cleared by Brookevale Investments Ltd. Finally, A9 was also cleared by Brookevale Investments Ltd.

The evidence of PW2 remains unchallenged that he is a director of Brookevale Investments Ltd. Secondly he admitted that the second plaintiff did not have a licence to clear the goods. Thirdly he testified that they used third parties to clear the goods. In other words the testimony is that there was an arrangement between the second plaintiff and Brookevale Investments Ltd for the clearance of goods. However, PW2 also testified that the defendant gave it the original bills of lading for the clearance of the goods. These documents were endorsed. By the same token learned counsel for the plaintiff submitted that by handing over original bills of lading to the second plaintiff, the defendant gave it sufficient authority to clear the goods. I agree with that submission. It is an admitted fact that the defendant cleared goods in respect of other consignments. All the other consignments were cleared either by Brookevale Investments Ltd or APM Global Logistics. The defendant cannot therefore assert that the second plaintiff had no authority to clear the goods or transport the goods. Furthermore PW2 is very explicit that it transported the goods the subject matter of its claim and delivered them to the defendant. The arrangement between the second plaintiff and Brookevale Investments Ltd or APM Global Logistics was explained by PW2. There is no evidence to the contrary led by the defendant. In those circumstances, the second plaintiff has proved its case on the balance of probabilities and the defendant is liable to pay the outstanding charges/fees of the second plaintiff. The third issue is therefore answered in the affirmative.

Remedies

On this ground the defendant maintains his prayers that the first plaintiff's suit should be dismissed with costs. Counsel for the plaintiffs submitted that the plaintiff is entitled to the unpaid price of the goods under section 48 (1) of the Sale of Goods Act.

The court has already held that the first plaintiff is entitled to the price of the goods. As far as the second plaintiff is concerned, the court has held that the defendant is liable to pay the second plaintiff US\$18,500 for services rendered and not paid for. An action for the price of goods is enabled by section 48 (1) of the Sale of Goods Act. It provides as follows:

“48. Action for price.

(1) 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 an action against him or her for the price of the goods.”

The provision is wide enough to cover a situation where the property in the goods is passed to the buyer even though delivery has not been made i.e. by delivery of bills of lading to the buyer. It also includes a situation such as the defendant's case where the property passed both by delivering to the carrier, by delivery of the bills of lading to the buyer coupled with physical delivery of the goods to the buyer/defendant. In either case if the buyer refuses to pay for the goods according to the terms of the contract, the seller may maintain an action for the price of the goods. Whether the goods are actually delivered to the defendant the duty of the first plaintiff stopped by delivery of the bills of lading to the buyer and the goods to the carrier. He could maintain an action for the price of the goods even if the goods were subsequently delivered to a third party by the carrier contrary to the express consignment of the goods in the Bill of lading to the defendant. The remedy of the defendant would be against the carrier.

The plaintiff's action is a simple case for failure to pay for goods delivered by the seller to the buyer. It is not a situation where the buyer has refused delivery of the goods or contests the price of the goods. No arguments have been raised about the price of the goods and the price is taken to be that proved by the plaintiff in its statement of accounts. In the circumstances, the price of the goods as pleaded in paragraph 4 of the plaint is a liquidated amount of **US\$347,317.26**.

The first plaintiff is awarded US\$347,317.26 being the unpaid price of goods supplied to the defendant by the first plaintiff.

In view of my findings on the third issue the second plaintiff is awarded US\$18,500 being the charges for clearance and transportation of the defendant's goods from Mombasa to Kampala.

General damages.

I was scantily addressed on the question of general damages. Counsel for the plaintiff relied on the case of **New Alobo Ltd versus Moyo Hardwares Ltd** HCCS number 364 of 2007 where

honourable justice Geoffrey Kiryabwire held that the general damages is the pecuniary compensation given on proof of the wrong or breach and is intended to restore the wronged party into a position he would have been if they had been no breach of contract. See also **Okello James V. Attorney General HCCS No 574 OF 2003**, where it was held that general damages are compensatory in nature, and are intended to make good to the sufferer as far as money can do so, the losses he or she suffered as the natural result of the wrong done to him. According to Halsbury's laws of England, 4th Ed Vol. 12(1) paragraph 812 general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are presumed to be the natural or probable consequence of the wrong complained of; with the result that the plaintiff is required only to assert that such damage has been suffered.

In this case the plaintiff has maintained an action for the price of the goods. The question of probable or natural consequence of failure to be paid is a presumption and is based on the testimony of PW1 the Managing Director of the first plaintiff who claimed travel expenses, interests, damages and costs. First of all the plaintiff has been restored by an award of the price of the goods. Secondly, there is a claim for interest on the principal amount. Thirdly travel expenses are recoverable as costs. Damages for inconvenience cannot be quantified. Because no precise figures were given as estimates, the first plaintiff is awarded general damages for inconvenience of US\$10,000.

The second plaintiff is awarded general damages of US\$2000.

I agree with the authorities cited on the question of interest and I do not need to repeat them here. Suffice it to say that interest on the principal amount is also compensatory in that it deals with any loss in the value of the price of the goods and assumes that if the money had been invested in a bank account it would earn some interest. The power of the court to award interest is provided for by section 26 of the Civil Procedure Act which provides as follows:

26. Interest.

(1) Where an agreement for the payment of interest is sought to be enforced, and the court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just.

(2) Where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate

sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(3) Where such a decree is silent with respect to the payment of further interest on the aggregate sum specified in subsection (2) from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 percent per year.

Unless explicitly refused by the court, the law presumes that the plaintiff who has succeeded in an action has to be awarded interest. Where the decree is silent interest is at 6% per annum. Section 26 (2) provides that the court may award reasonable interest on the sum adjudged from the date of the decree or from an earlier date. In the circumstances, both plaintiffs are awarded interest at 10% per annum on the principal sum adjudged for each party from the date of filing the action up to the date of the decree and interest at 10% per annum from the date of the judgment till payment in full.

The plaintiffs are awarded costs of the suit.

Judgment delivered in open court this 4th day of December 2012

Hon. Christopher Madrama

Judge

Judgment delivered in the presence of:

Serunjogi Nasser for the plaintiff

Defendant's representative or counsel not in court

Hon. Christopher Madrama

Judge

4th December 2012