THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO 101 OF 2010

HIGHLAND AGRICULTURE AND EXPORT LTD……..] PLAINTIFF

VERSUS

1. PRAFUL .R. PATEL]

3. BUDONGO SAW MILLS LTD……..] DEFENDANTS

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The Plaintiffs claim in the plaint against the Defendants jointly and severally is for recovery of Uganda shillings 75,000,000/=, interest at the rate of 25% thereon, general damages for breach of contract and costs of the suit. The Plaintiff alleges that on the 14th day of January 2007 the second and third Defendants purchased 3000 bags of cement from the Plaintiff at a total cost of Uganda shillings 75,000,000/=. Upon receipt of the cement, the first and second Defendants issued to the Plaintiffs a cheque of the third Defendant which was post-dated worth the suit amount dated 30th of June, 2007 and duly signed by the said Defendants. As a further security towards payment of the suit property, the first and second Defendants deposited with the Plaintiff the third Defendant's title comprised in LRV 502 Folio 17 plot 105. The Plaintiffs on the 24th day of April 2008 lodged a caveat on the said title to safeguard its financial interests. It is averred that when the cheque was presented for payment, it was returned unpaid with the remarks "refer to drawer". The Plaintiff contents that up to date the Defendants have failed to pay the Plaintiff its monies despite several

reminders. Notice of dishonour of the cheque was issued to the Defendants but they did not take heed.

In the written statement of defence, the Defendants aver that they had never ordered for the alleged 3000 bags of cement from the Plaintiff and that no such cement has ever been received at the factory premises. The first Defendant specifically avers that he was out of Kampala at the time of the said transaction and that he has never authorized the transaction. He only left blank cheques with the third Defendant's manager who may have connived with the Plaintiffs managing director to conduct the said transactions fraudulently without authority from the Defendants. The third Defendant's manager was the second Defendant Mr. Keyur Patel against whom the suit was later withdrawn. In the particulars of fraud in the written statement of defence, the Defendant avers that the contract relied on was a forged document. And that the second Defendant connived with the Plaintiff to defraud the first and Defendant Company. Mr. Keyur Patel surrendered the company's certificate of title to the Plaintiff without knowledge and permission of the first and third Defendant. The lodging of the caveat on the third Defendant's land was without the knowledge and consent of the first and third Defendants. The defence alleges loss and embarrassment. The prayed that the suit is dismissed with costs.

The written statement of defence was filed on behalf of all the three Defendants. In the course of the proceedings, the Plaintiff withdrew the suit against the second Defendant Mr Keyur Patel. Consequently, two Defendants remained namely Mr Praful Patel as the first Defendant and Budongo Saw Mills Ltd as the second Defendant. At the hearing the Plaintiff was represented by Kagoro Friday of Muwema Mugerwa and Co Advocates while the Defendants were represented by Moses Kuguminkiriza of Kuguminkiriza and Co Advocates who appeared together with Abu-Bakr Sebanja of Messrs Sebanja – Malende and Company Advocates.

Learned Counsels filed a joint scheduling memorandum in which the following facts were agreed.

1. The Defendants issued to the Plaintiff a STANBIC bank cheque number 005327 amounting to Uganda shillings 75,000,000/=

2. The Plaintiff presented a cheque for payment and the same was returned unpaid.

3. The cheque amount has never been paid to the Plaintiff.

The Plaintiff called one witness for cross examination after putting in a witness statement. The Defendant called two witnesses for cross examination after putting in written statements and also called a third witness from the Government Scientific Aids and Forensics Laboratory to testify about handwriting. At the close of the respective cases of the parties, learned Counsels opted to file written submissions.

I have duly considered the written submissions of Counsels for both parties, the evidence on record and the pleadings. In their written submissions, learned Counsels kept on referring to the third Defendant. Previously, the third Defendant was Budongo Saw Mills Ltd. The second Defendant was Mr Keyur Patel. While the first Defendant was Mr Praful R Patel. After the Plaintiff withdrew the suit against Mr Keyur Patel, the pleadings were not formally amended. However, two Defendants remained namely Mr Praful Patel as the first Defendant and Messrs Budongo Saw Mills Ltd as the second Defendant herein and may also be referred to as the Defendant Company.

The crux of the written witness statement of the Plaintiff's managing director Mr. Arvind Patel is that on the 14th of January, 2007 a director of the second Defendant company asked him to supply 3000 bags of cement valued at Uganda shillings 75,000,000/=. The director of the third Defendant Mr Keyur Patel informed the Plaintiffs managing director that he was going to pay for the cement by cheque drawn by the second Defendant. The second Defendant is the company after withdrawal of the suit against the former second Defendant Mr Keyur Patel. PW1 supplied the cement as requested and a delivery note/invoice was duly endorsed by the same director. He testified that the director told him

that money would be available on the second Defendant's account by 30 June 2007 whereupon he issued a post dated cheque for the second Defendant duly signed by Keyur Patel and the first Defendant. PW1 was further informed by Mr Keyur Patel that he had consulted the first Defendant. The transaction was further secured by the title of the second Defendant deposited with the Plaintiff. This is LRV 502 Folio 17 plot 105 sixth Street Kampala.

Upon presentment of the cheque for payment it was returned unpaid with the words 'refer to drawer'. He has since been trying to demand for payment and his efforts yielded nothing. After failing to get the money he instructed his lawyers to use any legal means to recover the money from the Defendants after which the suit was brought. PW1 was cross examined on 6 March 2012. On cross examination he testified that he had ever supplied cement to the second Defendant in the years 2004, 2005 and 2006 on cash terms. The company policy on credit was that you give a post-dated cheque and security. The cement was supplied on 14 January and was picked from the goods shed by Mr Keyur Patel and his people in the presence of PW1. That they used Lorries to ferry the cement. He testified that he did not know where the cement was delivered.

He was further cross examined on who filled the invoice. He testified that Keyur Patel filled the particulars. That he signed on his own behalf and on behalf of the second Defendant on whose behalf he deposited the title deeds. Further testified that the signatory to the cheque was Keyur Patel and Mr P Patel the first Defendant. This cheque was signed in his presence by Keyur Patel but Mr P Patel had already signed. The witness testified that he dealt with Keyur Patel and the second Defendant Company. He knew the directors and their relationship with Keyur Patel which was good.

DW 1 was Mr Apollo Ntarirwa the handwriting expert whose report exhibit D1 was admitted in evidence. The evidence shows that the invoice/delivery note and the cheque were written by Keyur Patel. This evidence was not disputed by the Plaintiff.

Defendant witness number two was Mr P Patel the first Defendant in the suit. He testified that he personally knows Mr Arvind Patel, the Plaintiffs managing director for many years but had never transacted any business with him at all. He was unaware of the dealings between Mr Arvind Patel and Keyur Patel who was previously the second Defendant before the suit was withdrawn against him. That the second Defendant Company in which he is a director has never ordered or received the alleged 3000 bags of cement from the Plaintiff at all. In paragraph 6 of his written witness statement he further states that if there was an arrangement between the Plaintiffs managing director Mr Arvind Patel and Mr Keyur Patel, it must have been a false deal intended to cheat or defraud the first and second Defendants. He further testified that the third Defendant's main work and nature of business is joinery and timber works at its headquarters on plot 105 sixth Street industrial area Kampala and does not deal in selling cement. Lastly states that the annexure to the plaint are false documents made by the Plaintiffs managing directors Mr Arvind Patel in connivance with the said Keyur Patel to defraud and cheat the Defendants. Moreover no company resolution was made to that effect. On cross examination of Mr P Patel, the first Defendant herein, he confirmed his written testimony. He added that Mr Keyur Patel left the country and is no longer a director. The company passed a resolution to remove him in 2008. However he did not know why Mr Keyur Patel left the country. He confirmed that he knew Mr Arvind Patel and they were friends. He further confirmed that the company deals in timber business. He had signed blank cheques. He left the cheques with Mr Keyur Patel when he went out of the country. Mr Keyur Patel was an executive director at that time and had authority to do business with the cheque. He had given Mr Keyur Patel between 4 to 5 cheques. He never knew that the cheque had been returned unpaid. He admitted that it was his mistake to trust Mr Keyur Patel with blank cheques. He however trusted Mr Keyur Patel and did not know that he would use the blank cheques to buy cement. The company policy was to deal in timber and not cement. In re-examination, he stated that he signed the blank cheques because he was going to England. There were only two signatories namely Mr Keyur Patel and the first

Defendant. The cheques were to be used for the company's business such as buying and repairing machinery. The company had no need for cement.

The Defendants witness number 3 had a written witness statement. DW3 Mr Chris Asuma Pario is a manager of the second Defendant. The gist of his evidence was that at no time were 3000 bags of cement ever sold to the company by the Plaintiffs or delivered to the go **down of** the second Defendant on sixth Street industrial area Kampala in the years 2007, 2008 and 2009. As the person in charge of all deliveries and storage, he was unaware of the alleged transaction. He therefore contends that the allegations are false since he never received any cement in his capacity as a manager and keeper of the keys of the go down of the premises of the second Defendant as alleged by the Plaintiffs.

On being cross examined on his written testimony DW 3 testified that the second Defendant dealt in timber. He criticised the voucher/delivery note exhibit P1. According to him the papers show that it was Keyur Patel who received 3000 bags of cement worth about 75 million Uganda shillings. It was his testimony that for the last 27 years he had worked for the second Defendant Company, he had never received any cement. Whenever goods are received, the second Defendant gives the received goods notice showing that they had received the goods. If any cement was supplied he contended that it would have been received through him.

Both Counsels filed written submissions. The agreed issues for trial are:

1. Whether the Plaintiff supplied 3000 bags of cement to the third Defendant.

2. Whether the title comprised in LRV 520 folio 17 plot 105 and a cheque for Uganda shillings 75,000,000/= was issued as security for payment of 3000 bags of cement allegedly supplied to the third Defendant.

3. Whether the third Defendant is liable for the cheque that was issued to the Plaintiff.

4. Whether the first Defendant is personally liable for the cheque that was issued to the Plaintiff.

5. Whether the parties are entitled to the remedies prayed for.

I will consider the issues in the order in which they have been framed.

The first issue is whether the Plaintiff supplied 3000 bags of cement to the 2nd Defendant Company.

This is both a question of fact and a question of law. As a question of fact, it was only Mr Arvind Patel PW1 and managing director of the Plaintiff who testified about what could have happened. Mr Keyur Patel was never called to testify. According to Mr Arvind Patel PW1, it was Mr Keyur Patel a director of the Defendant Company who ferried away the cement in Lorries. The cement was in the possession of the Plaintiff. As far as facts are concerned, the Defendant's witnesses could not rebut the fact that Mr Keyur Patel collected cement from the facilities of the Plaintiff. This fact must be taken to be proved on account of the testimony of Mr Arvind Patel PW1, and the delivery note/invoice exhibited in court. This is exhibit P1. Mr Apollo N the handwriting expert and witness of the Defendant now referred to as DW 1 was able to prove that the invoice/delivery note was filled in by Mr Keyur Patel. The delivery note is exhibit P1. PW1 testified that Mr Keyur Patel signed the invoice in his office in the goods shed. He further testified that it made sense for someone taking credit to fill the invoice. All the Defendants could do was to doubt whether exhibit P1 is a genuine document. However, it is proven that it was signed for by Mr Keyur Patel a director of the Defendant Company. This corroborates strongly the testimony of Mr Arvind Patel that Mr Keyur Patel signed for 3000 bags of cement. This evidence is further corroborated by the cheque for the sum of Uganda shillings 75,000,000/= drawn by the Defendant company for the benefit of the Plaintiff and handed over to Mr Arvind Patel the managing director of the Plaintiff.

The Defendants on the other hand were able to prove that the Defendant Company never received the 3000 bags of cement in the company premises on

the sixth Street industrial area in Kampala. PW1 Mr Arvind Patel's testimony is restricted to the knowledge of how Mr Keyur Patel received from the Plaintiff 3000 bags of cement. So the matter before the court is whether delivery of the 3000 bags of cement to Mr Keyur Patel by the Plaintiff in the circumstances of the case was sufficient to establish a supply of cement to the Defendant Company.

Learned Counsel for the Plaintiff submitted that the cement was duly supplied to the Defendant company for the reason that Mr. Keyur Patel was a director of the Defendant company and who had ostensible authority to run the day to day affairs of the Defendant company and moreover his authority was not doubted at all by both by Mr. Praful Patel and Mr. Chris Asuma the witnesses of the defence in their sworn written statements and during cross examination. Learned Counsel relied on the indoor management rule formulated in the case of **Royal British Bank versus Torquand ALL ER [1856]**. He submitted that the indoor management rule protects innocent parties who are doing business with the company and are not in a position to know if some internal rule had not been complied with. On the other hand learned Counsel for the Defendants submitted that the alleged sale was between the Plaintiffs managing director Mr. Arvind Patel and Keyur Patel alone. He contended that there was no special resolution to that effect that cement be purchased. The exercise was done to defraud the Defendant Company. Learned Counsel relied on the doctrine in Solomon vs. Solomon and company (1887) AC 22 HL for the principle that a company is a separate legal entity from its members. The company could not transact any business without a resolution to that effect. So what Mr. Keyur Patel did and/or purported to have done without a resolution was for him alone. He was on a frolic of his own. Learned Counsel contended that the purported contract between Mr. Keyur Patel and the Plaintiff Company was a forgery. Lastly learned Counsel contended that the evidence was that the Defendant company deals in joinery and timber works and does not deal in cement at all.

In rejoinder learned Counsel for the Plaintiff submitted that the cement was delivered upon the signing of the delivery note/invoice at the Plaintiff's stores. That Mr. Keyur Patel had ostensible authority to transact business on behalf of

the Defendant Company. Under section 29 (2) of the Sales of Goods Act the place of delivery of goods unless there is any stipulation to the contrary is the Sellers place of business. As far as the nature of business of the Defendant Company's concerned, learned Counsel submitted that it was not the duty of the Plaintiff to know what kind of business the Defendant was involved in and its duty was to do business. In as far as the wording of the delivery note is concerned; learned Counsel submitted that the indoor management rule is clear and specific on that point. The Plaintiff is not under any duty to inquire into the affairs of the Defendant Company.

I have carefully considered the evidence on record. In this particular case it is not in dispute that Mr. Keyur Patel was in possession of cheques of the Defendant Company and he was also a signatory to the account of the Defendant Company. It is admitted that he was the executive director of the Defendant Company and director who was expelled by resolution of the company after the transaction. Mr. PRAFUL Patel also testified that he left Mr. Keyur Patel to run the affairs of the Defendant Company. He entrusted Mr. Keyur Patel with several blank cheques for management of the company. Whereas learned Counsel for the Defendant submitted that the evidence showed that the Defendant Company dealt in timber and joinery, no attempt was made to produce the objects of the Defendant Company. The question of whether the Defendant Company could transact the business of the purchase of cement must initially be considered against the memorandum and articles of association of the Defendant Company. None of the learned Counsels or the witnesses referred to any memorandum of association. In other words it is assumed that the objects of the Defendant Company as contained in its memorandum of association enables the Defendant company to deal in the business of buying cement. However, the court was not advised about the objects of the Defendant Company neither was evidence led about what objects the company had in its memorandum of association. In the circumstances it was not sufficient to assert that the Defendant Company dealt in timber and joinery only.

In those circumstances the issue is whether Mr. Keyur Patel had ostensible authority of the company to transact the business. The evidence which was attacked by the Defendants is the delivery note/invoice. PW 1 testified that Mr. Keyur Patel signed the delivery note and the goods were loaded on a lorry brought by Mr. Keyur Patel from the goods shed of the Plaintiff. In other words Mr. Keyur Patel was put in possession of the goods at the Plaintiff's premises. Section 1 (d) of the Sale of Goods Act provides that "delivery" means "voluntary transfer of possession from one person to another". From the evidence on record voluntary transfer of possession occurred when the goods were loaded on to the Lorries brought by Mr. Keyur Patel. Secondly, section 29 of the Sale of Goods Act cap 82 gives guidelines about the place of delivery. It provides as follows:

> 29. Rules as to delivery.
>
> (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties.
>
> (2) Apart from any such contract, express or implied, as referred to in subsection (1), the place of delivery is the seller's place of business, if he or she has one, and if not, his or her residence; but if the contract is for the sale of specific goods which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.
>
> (3) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.
>
> (4) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer until the third person acknowledges to the buyer that he or she holds the goods on his or her behalf; but nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(5) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour.

(6) What is a reasonable hour is a question of fact.

(7) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

In this particular case the relevant provision is section 29 (2) of the Sale of Goods Act. DW 1 the handwriting expert confirmed that Mr. Keyur Patel signed the delivery note. In those circumstances the evidence of the Defendant's witnesses as to the procedure for the receipt of goods at the premises of the Defendant are not relevant because the place of delivery of the goods was the premises of the Plaintiff/seller. The issue therefore remains as to whether Mr. Keyur Patel had ostensible authority to act on behalf of the Defendant Company and therefore bind it. As I have noted above, Mr. Praful Patel confirmed that Mr. Keyur Patel was an executive director of the Defendant Company. PW 1 Mr. Arvind Patel testified that he knew the directors of the company and used to deal with them. In the absence of direct evidence from any other source, the court has to critically assess the document in evidence. What is peculiar about the transaction and the delivery notes exhibit P1, the cheque leaf exhibits P2 and the registered title of the Defendant Company? Contrary to the submissions of Counsels for both parties, the worst case scenario if PW1 is to be doubted is that the inference from the facts are that this is the case of the Plaintiff advancing monies or goods to Mr. Keyur Patel on credit against the security of the post dated cheques or the registered title of the Defendant company. However, there is simply no conclusive other evidence to that effect other that testimony of PW1 and exhibit P1. PW1 did not fill in exhibit P1. It was filled in by Mr Keyur Patel according to the testimony of DW 1 Mr Apollo. Mr Arvind Patel however witnessed Mr Keyur Patel signing the delivery note. The handwritten notes show that the goods were received on a "long-term" credit facility against the security of land title of the company plot number 105 sixth Street and against a cheque number 005327 of Stanbic bank dated 30th of June 2007. The handwriting expert confirmed that Mr Keyur Patel signed acknowledging receipt of the goods. The typed notes on the

delivery note show that the goods were received in good order. He states: "I Keyur Patel at my own and behalf of Budongo sawmills". The delivery note is addressed to Mr Keyur Patel of the Defendant Company.

The express words of the director of the Defendant Company show that the goods were received on behalf of the director and company. It is not indicated which portion belonged to the company and which portion belonged to Mr Keyur Patel. A cheque issued for Uganda shillings 75,000,000/= was however issued by the Defendant company and comprises the entire amount invoiced. Contrary to the testimony of Mr Arvind Patel, Mr Keyur Patel expressly signed that he received the cement on his own behalf and on behalf of the Defendant Company. There was absolutely no need for him to write that he was a receiving it on his own behalf if it was solely meant for the company business. The conclusion is that there is documentary proof that Mr Keyur Patel and executive director of the Defendant Company received 3000 bags of cement from the Plaintiff Company on his own behalf and on behalf of the Defendant Company. He did not however deliver the cement to the Defendant Company. He had ostensible authority to transact business on behalf of the company. This is because he was a director and he went ahead to sign a cheque which required two signatories or two directors to sign.

According to Gower's Principles of Modern Company Law fourth edition London, Steven and sons 1979 page 184 a third party was entitled to assume that the director had authority. The learned author states as follows:

> "This rule was manifestly based on business convenience, for business cannot be carried on if everybody who had dealings with the company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf."

The learned author could not have stated the principle in clearer terms. I agree with the rationale for the principle that not everybody who deals with a company has to go to the company registry to examine whether the directors they deal with have actual authority. It is much more difficult for a business person or enterprise to inquire about a company resolution from a customer who has come to purchase goods. Mr Arvind Patel the managing director of the Plaintiff knew Mr Keyur Patel. He also knew Mr Praful Patel a co-director with Mr Keyur Patel. It was proper for him to infer that Mr Keyur Patel had actual authority of the company to transact business with him. The deal was secured by the deposit of a post dated cheque of the Defendant Company and its title deeds. The cheque was duly signed by Mr Praful Patel and Mr Keyur Patel. In those circumstances, the consent of Mr Praful Patel to the transaction is inferred from the perspective of the Plaintiff. The presence of the two items, namely the cheque and the title deeds of the Defendant Company's property, can only be explained in terms of the testimony of PW1. Neither party called Mr Keyur Patel as a witness. This is because he is the only other person referred to who would have had actual knowledge of what transpired when the cheque leaf and the title deeds were handed over to the Plaintiff's managing director. It is therefore my conclusion that Mr Keyur Patel had authority to bind the Defendant Company. The fact that he might have intended to cheat the company does not affect the third-party in the absence of direct evidence implicating the third-party. The third-party, namely the Plaintiff was entitled to accept the cheque leaf of 75,000,000/= shillings and the title deed of the Defendant company as security in the circumstances of the case. It is contrary to the principles of natural justice to allege fraud against a party who is not a party to the suit. Fraud is a serious allegation and the standard of proof is higher than that on the balance of probabilities. In the Supreme Court case **of Kampala Bottlers v Damanico (U) Ltd SCCA No.22/92** Justice Platt JSC held at page 5 of his judgment in that:

> "Had that been the Respondent's case, he should have brought the land office officials and Town Council officials before the court. It is important that before some ones reputation is besmirched, he has had an opportunity

to defend himself. The officials here might have explained the confusion in their action. Even incompetence might not have been fraudulent.

In this case, the Plaintiff withdrew the suit against Mr Keyur Patel. The particulars of fraud pleaded in the written statement of defence are that the Plaintiff connived with Mr Keyur Patel to defraud the Defendant Company. However, upon the Plaintiff withdrawing the suit against Mr Keyur Patel, the Defendant did not deem it fit to bring an action against Mr Keyur Patel himself. It was Mr Keyur Patel who had the certificates of title of the Defendant Company and was in possession of blank cheques duly signed by Mr Praful Patel a co-director.

I do not agree that Mr Praful Patel was negligent in leaving Mr Keyur Patel with blank cheque leaves to manage the company's affairs with. It was simply a vote of confidence in Mr Keyur Patel. If Mr Keyur Patel went on a frolic of his own, the company has a right to follow him up for breach of duty. In the absence of any evidence implicating Mr Arvind Patel, the Defendant Company is bound by the acts of Mr Keyur Patel. The second issue is:

> Whether the title comprised in LRV 520 Folio 17 plot 105 and a cheque for Uganda shillings 75,000,000/= was issued as security for payment of 3000 bags of cement allegedly supplied to the third Defendant.

The second issue can only be answered in the affirmative in view of my findings in the first issue. Secondly, Mr Keyur Patel as an executive director had ostensible authority to transact business on behalf of the company. Mr Keyur Patel was left with blank cheques to do business with. Thirdly, the Plaintiff's managing director and the directors of the Defendant Company knew each other for many years. On the strength of that the Plaintiff accepted the securities advanced by Mr Keyur Patel on a question of fact. Fourthly the exhibit P1 stipulates that the goods were received on the long term credit facility against the security of the land title of the company plot number 105 sixth street and the second Defendant company cheque number 005327 of STANBIC bank dated 30th of June, 2007. However, the securities could not have been used on behalf of Mr. Keyur Patel the director in

question but on behalf of the Defendant company in the absence of the written authority of the company to use them otherwise.

Before I take leave of the matter, this transaction on the face of it may not give the actual story of what transpired on 14 January 2007. Today and in the commercial court there are cases where the actual written agreement of the parties may hide what actually transpired as in loan transactions. The court cannot go behind the written agreement or documents of the parties to establish the actual facts of the transaction. This being an imperfect way of doing business, it may only be challenged on the ground of illegality. In the absence of any evidence showing that the paper on which the parties showed their commitment and explained the transaction is not what actually transpired, it is the best evidence that the court has to accept and meets the standard of a civil suit.

The third issue is whether the third Defendant is liable for the cheque that was issued to the Plaintiff. I will answer this question together with the fourth issue which is whether the first Defendant is personally liable for the cheque that was issued to the Plaintiff. On the issue of whether the Defendant Company is liable for the cheque, learned Counsel for the Plaintiff submitted that the managing director of the Defendant Company is estopped from denying having issued the cheque to the Plaintiff. He relied on section 114 of the Evidence Act cap 6 laws of Uganda. Learned Counsel referred to the indoor management rule for the assertion that the indoor affairs of the company are the company's problem and there is no need for an outsider to look into the company's internal workings. He relied on **Nis Protection (U) Ltd vs. Nkumba University HCCS 604 of 2004** where his Lordship Justice Bamwine applied the indoor management rule. As far as Mr Praful Patel is concerned, learned Counsel for the Plaintiff submitted that Mr Praful Patel had admitted during cross-examination that he was negligent to leave signed cheques with his co-director to transact businesses while he was away. He contended that the admission of negligence made Mr Praful Patel liable for the acts and omissions of his co-director whom he had a duty of care to protect innocent parties from. He further contended that the law of negligence imputes a duty of care to others on the said co-director.

On the other hand, learned Counsel for the Defendant submitted that there is no resolution of the company to enter into a transaction involving huge sums of money i.e. 75,000,000/=. Secondly, he contended that Mr Arvind Patel the managing director of the Plaintiff Company had connived with Mr Keyur Patel to defraud the company and the question of liability of the Defendant Company could be considered. In other words the Plaintiff had come to court with dirty hands and the issue should be resolved against the Plaintiff. Learned Counsel submitted that the Defendant Company and particularly Mr Keyur Patel did not have authority to transact the business on behalf of the Defendant Company. He cited several authorities for the court to consider namely **Irvine versus Union Bank of Australia (1877) 2 Appeal Cases 266 PC** where directors borrowed money in excess of the authorised limit in the articles of Association. He contended that Mr Arvind Patel the managing director of the Plaintiff Company knew Mr Keyur Patel and Mr Praful Patel very well and he was aware that Mr Keyur Patel did not have authority or power to enter into any such transaction beyond the limits of his powers in the company. He further referred to the case of **Freeman Lockyer versus Buckhurst Park Properties Ltd (1964) 1 All England Law Reports 630**. Lastly referred to Gower's Principals of Modern Company Law for the assertion that an agent who enters a transaction on behalf of his principal binds the principal only if he acted within the scope of the authority conferred to him prior to the transaction or by subsequent ratification or secondly on the apparent ostensible scope of his authority. He contended that Mr Keyur Patel did not fall into any of the two categories.

As far as the liability of Mr Praful Patel co-director of the Defendant Company is concerned, he was not aware of the transaction and cannot be held personally liable for any loss if any incurred.

In rejoinder learned Counsel for the Plaintiff submitted that there is no doubt that the cheque had been issued to the Plaintiff and was drawn by the Defendant Company. There is no denial that Mr Praful Patel and Keyur Patel work as directors of the Defendant Company and they appended their signatures the cheque. Lastly that Mr Praful Patel testified that he was negligent for having

signed the cheque and left it in the possession of Mr Keyur Patel to transact business on behalf of the Defendant Company. He contended that this is clear testimony that there is no doubt that the Defendant Company is liable for the cheque that was issued to the Plaintiff.

As far as Mr Praful Patel is concerned, learned Counsel for the Plaintiff reiterated his submissions that he had admitted having been negligent to sign the cheque with his co-director in the Defendant Company. He is therefore personally liable for the acts of his staff.

As far as the submissions of the Defendants learned Counsel is concerned, I have already found that the evidence shows that Mr Keyur Patel had ostensible authority of the company. This is because he was armed with a cheque and title deeds of the Defendant Company. Secondly he was a director of the Defendant Company known to the Plaintiff. The question of liability will further be examined when considering the issue of remedies. As far as cheques are concerned, the general rule is that the Defendant Company which is the company which drew the cheque is liable. The general principles are stated in the Court of Appeal case of **Kotecha vs. Mohammad [2002] 1 EA 112 at page 118** the Court of Appeal of Uganda held:

> 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. There may be exceptions to the rule and the Respondent claim that this case is an exception.

It is therefore sufficient as has been proven in this case for the Plaintiff to show that the Defendant issued cheques in favour of it and these cheques were dishonoured when presented for payment. However, though exhibit P2 is the

unpaid cheque, exhibit P3 which is supposed to be the letter giving notice of dishonour is not on record. It is not even attached to the pleadings. It is only referred to and marked in the joint scheduling memorandum of the parties. Mr Praful Patel in cross-examination by the Plaintiff's Counsel admitted that he had received a notice of dishonour from the lawyers of the Plaintiff. This corroborated by the testimony of Mr Arvind Patel that his lawyers sent a notice of dishonour to the Defendant Company. On cross examination Mr Arvind Patel testified that the cheque was for 30 June 2007 and after the dishonour he went to Mr Keyur Patel and sometimes demanded for the money from him on telephone. He testified that he had asked Mr Praful Patel about the claims but nothing was done. They made arrangements for the money verbally but they never paid.

Section 46 of the Bills of Exchange Act cap 68 provides in subsection 2 thereof that where a bill is dishonoured by non-payment an immediate right of recourse against the drawer and endorser accrues to the holder subject to the provisions of the Act. A "holder" is defined by section 1 (i) as "the payee or endorsee of a bill or note who is in possession of it, or the bearer of the bill or note;" a cheque is defined by section 72 of the Bills of Exchange Act as a Bill of exchange drawn on the banker payable on demand. A Bill of exchange is defined by section 2 (1) 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 or to the order of a specified person or to bearer."

Section 47 of the Bills of Exchange Act provides that where a bill is dishonoured by non-payment, notice of dishonour must be given to the drawer. Under section 48 (a) the notice must be given by or on behalf of the holder or by or on behalf of an endorser. Section 48 (e) permits a notice to be given in writing or by personal communication. It should indicate that a particular bill identified has been dishonoured by a non-acceptance or non-payment. Under section 48 (h) a notice of dishonour may be given to the party himself or herself or through his or her agent for that purpose. Lastly a notice of dishonour is supposed to be given under section 48 (l) as soon as the bill is dishonoured. It must be given within a

reasonable time thereafter. In the absence of special circumstances, notice is not deemed to have been given within a reasonable. A reasonable time is about two days depending on whether the person giving the notice and the person to receive reside in the same place, or whether the reside in different places and whether there is a post.

In this case there is no clear evidence as to when the notice of dishonour was given. The letter of the Plaintiffs lawyers exhibit P3 which is said to be the notice of dishonour and which was not disputed has not been put on record. PW1 testified that the cheque was returned to him around 7 July and he simply asked Mr Keyur Patel what they should do about the dishonour. He then wrote a letter to his lawyers. For purposes of the documentary evidence admitted the cheque is dated 30th of June 2007 and was banked on 28 June 2007 with the bank of Baroda. Exhibit P2 which is the cheque and notes from the bank of Baroda indicate that by 4 July 2007 the cheque was still being negotiated. In the circumstances, evidence shows that the notice of dishonour was communicated to Mr Keyur Patel. This was around 7 July 2007. Additionally, a written notice of dishonour was admittedly communicated to the Defendant Company by the Plaintiff's lawyers out of time. The learned Counsel for the Defendant submitted that the cheque was unpaid with the remarks "refer to drawer" on 2 July 2007 but the Plaintiff took a period of about 2.5 years after 29 January 2010 in a notice of intention to sue to demand for 75,000,000/= Uganda shillings. I do not agree. The testimony of PW1 shows that there was a verbal communication about the dishonour of the cheque between PW1 and Mr Keyur Patel a director of the Defendant. A verbal communications complied with section 48 (e) of the Bills of Exchange Act which caters for personal communication as opposed to written notice. Secondly, dishonour of a cheque cannot be communicated until after it has been brought to the notice of the holder thereof. In the absence of any evidence to the contrary the evidence shows the managing director got to know about the dishonour around 7 July 2007.

In the circumstances exhibit P2 is an undertaking of the Defendant company to pay the Plaintiff a sum of Uganda shillings 75,000,000/= around 30 June 2007. In

terms of section 46 of the Bills of Exchange Act, where a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorser accrues to the holder. The question therefore is whether the suit was brought within time. This is based on the right to sue accruing to the holder after the notice of dishonour has been communicated within a reasonable time as defined by section 48 of the Bills of Exchange Act cap 68. Last but not least the right of the Plaintiff to sue the Defendant Company is crystallised by section 54 of the Bills of Exchange Act. Under that section by drawing a bill the drawer warrants that if it is dishonoured he would compensate the holder.

In the case of **Sembule Investments Ltd vs. Uganda Baati Ltd MA 0664 of 2009** the Commercial Court in the judgment of Hon. Lady Justice Irene Mulyagonja Kakooza, she held that it is implied from the definition of a bill of exchange which includes a cheque that it is by its nature unconditional. Where a cheque had been dishonoured and returned with the words “refer to drawer” and upon giving to the drawer notice of dishonour, the recourse of 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.

In the circumstances the cheque exhibit P2 operates as a promise to pay and in the absence of Mala fides on the part of the Plaintiff's managing director which Mala fide has not been proved to the satisfaction of the court, the Defendant Company is liable?

As far as the liability of Mr Praful Patel the first Defendant is concerned, there is no evidence whatsoever that he was either negligent or irresponsible. Mr Keyur Patel was his co-director and because there was a need to have two signatories on each cheque, he signed blank cheques to enable his colleague continue on with the operations of the company while he was away in England. He exercised his responsibility properly and there is no cause of action against him personally. He acted in the best interest of the company to ensure that its operations do not come to a halt on account of his absence. A director is not liable for acts done in good faith for the benefit of the company. His admission that he could have been negligent by leaving the cheques at the hands of Mr Keyur Patel is not an

admission of legal liability or legal negligence but a regret that he ought to have known better. He cannot be faulted for not having the foresight that his co-director may become errant. The suit against Mr Praful Patel is accordingly dismissed with costs.

Remedies

On the last issue learned Counsel for the Plaintiff submitted that the Plaintiff is entitled to the remedies prayed for. He contended that there was no doubt that the Plaintiff supplied the cement to the Defendants at Uganda shillings 75,000,000/= which amount has not been paid to date. Secondly the Plaintiff did not utilise this suit amount for a long time resulting in loss of business income. Lastly the Plaintiff has incurred costs to hire lawyers represented in the suit and many other costs incidental thereto. Learned Counsel prayed for the remedies prayed for in the plaint.

In reply learned Counsel for the Defendants submitted that the Plaintiff is not entitled to the remedies prayed for and this suit against the Defendants should be dismissed with costs. He prayed for orders for the return of the title of the Defendant company and the original cheque leaf for Uganda shillings 75,000,000/=. The Defendant also prayed for a refund of all monies paid to the Plaintiff when it obtained an ex parte judgment against the Defendant and executed it. In rejoinder learned Counsel for the Plaintiff reiterated earlier prayers.

The question for remedies has not been substantially addressed by Counsels for both parties. In the plaint, the Plaintiff sought Uganda shillings 75,000,000 = for goods supplied to the Defendants. The Plaintiff also sought interest at 25% per annum from 30 June 2007 till payment in full. The date of 30 June 2007 is the time for presentment of the cheque. The cheque was dated 30th of June 2007. Lastly the Plaintiff prayed for general damages and costs of the suit.

I have carefully considered the submissions of both parties and the evidence on record. First of all the sum of Uganda shillings 75,000,000/= is the amount indicated in the delivery note/invoice dated 14th of January 2007 exhibit P1. This

document shows that the goods were received on behalf of Mr Keyur Patel and on behalf of the Defendant Company. The evidence adduced shows that the goods were never delivered physically to the Defendant Company. In law there were delivered at the Plaintiffs goods shed to Mr Keyur Patel and the Defendant Company. By a roundabout argument of law, on the basis of the cheque exhibit P2 issued by the Defendant company and signed by the directors of the Defendant company, and also the title deed for plot number 105 sixth Street being the title deed of the Defendant company's property, it was argued that the Defendant company is liable.

As far as remedies are concerned, the Plaintiff withdrew the suit against Mr Keyur Patel a principal party in the transaction. Exhibit P1 clearly indicates that the cement was supplied on behalf of the Defendant Company and also on behalf of Mr Keyur Patel. The suit against Mr Keyur Patel was withdrawn. As far as the supply of cement is concerned, Mr Keyur Patel had a joint responsibility to pay for the same. This situation is only complicated by the issuance of the cheque drawn by the Defendant Company. The evidence is however very clear that the cheque was only security for payment. Similarly the land title of the Defendant Company was only security for payment. This stipulation is expressly made on exhibit P1 which was relied upon by the Plaintiffs. In the circumstances, the Defendant Company's liability is based on a guarantee to pay and not on the supply of cement. It undertook to pay a sum of Uganda shillings 75,000,000/= in default of payment. There was a default of payment. In the premises, it is upon the Defendant company if it so wishes to seek indemnity from Mr Keyur Patel. It is liable to make good the value of the face of the cheque which is a sum of Uganda shillings 75,000,000/= by paying the same to the Plaintiff.

The Plaintiff is entitled to interest at 21% from August 2007 till the date of judgment.

The Plaintiff is additionally entitled to interest at commercial rates from the date of judgment till payment in full.

I was not particularly addressed about how much money the Plaintiff would have lost due to failure to pay by 30th June 2007 in general damages. Secondly the Plaintiff withdrew the suit against Mr Keyur Patel who was jointly responsible for the cement and failure to pay. In the circumstances the Plaintiffs claim for general damages is without sufficient evidence and is disallowed.

Additionally, the cheque leaf exhibit P1 in the original form and the Defendant companies land title comprised in LRV 502 folio 17 plot 105 sixth Street industrial area at Kampala shall be returned to the Defendant Company.

The Plaintiff is awarded costs of the suit.

Ruling delivered in open court this 11th day of May 2012

Hon. Mr. Justice Christopher Madrama

Delivered in the presence of

Yiga Roscoe holding brief for Kagoro Robert for the plaintiff

Moses Kuguminkiriza and Abu – Bakr for the defendants

Prafu Patel 1st Defendant in court

Ojambo Makoha Court Clerk

Hon. Mr. Justice Christopher Madrama

11th May 2012