**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF NUGANDA AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**CIVIL SUIT NO. 156 OF 2003**

**BRITISH AIRWAYS PLC::::::::::::::::::::::::::::::::::::PLAINTIFF**

**VERSUS**

**LONDON FRUITS & VEGETABLES LTD::::::::::::::::DEFENDANT**

**BEFORE HON.LADY JUSTICE HELLEN OBURA**

**JUDGMENT**

The plaintiff, an international air passenger and cargo company has brought this suit to recover freight charges incurred in transporting the defendant's cargo comprising of fruits and vegetables by air from Entebbe to London during the period of June 2001-January 2002 in the sum of **US$ 120,903.5**. The plaintiff also seeks general damages for breach of contract, interest and costs of the suit.

The plaintiff alleged that it was contracted by the defendant company to transport the latter's cargo on credit terms and the defendant in breach of the contract failed; and or neglected to pay the outstanding sum of **US$ 120,903.05.** In its amended written statement of defence, the defendant denied the claim and more specifically the existence of any contract with the plaintiff or that it owes the plaintiff the said amount or any part thereof. The defendant averred in the alternative that no monies is recoverable as the same had been paid in full on account of the endorsements on the airway bills attached to the plaint.

The plaintiff exhibited a number of Air Waybills to show the transactions during this period which the defendant did not contest and they were collectively marked as Exhibit P1. The invoices issued by the plaintiff to the defendant and the statement of account as at 15th March 2002 showing that the total amount owed is **USD $120,903.05** were also not contested by the defendant so they were marked as Exhibits P2 and P3 respectively.

The defendant mainly relied on the airway bills and in particular the endorsement "PP" thereon which means prepaid by cash to support its contention that the services had been paid for as per that endorsement. The plaintiff disputed having received any payments for its services as it did not issue any receipts.

At the scheduling conference it was agreed that between June 2001 and January 2002 the plaintiff carried the defendant's good to the UK for a price. The following issues were agreed upon;

1. *Whether the defendant is indebted to the plaintiff as alleged in the plaint.*
2. *Remedies available.*

The plaintiff was at first represented by Mr. Tuma when the case was part heard before another judge. When I took over in 2011, Dr. Allan Shonubi appeared for the plaintiff meanwhile Mr. Fredrick Samuel Ntende has consistently appeared for the defendant. Upon closure of hearing evidence, both counsel filed written submissions which I have considered in this judgment.

**Issue 1: Whether the defendant is indebted to the plaintiff as alleged in the plaint.**

It was submitted for the plaintiff on this issue that according to the evidence of Tony Snell (PW1), Belhiz Kitibwa (PW2), Miriam Abanji (PW3) and Morris Ongwech (PW4), the endorsement **"PP"** on each airway bill stands for **"prepaid"** which means that the Air Waybills is payable at the point of shipping/loading or at the point of origin which was, in the present case Entebbe. It was emphasized that **"PP"** was no proof of payment. Counsel for the plaintiff submitted that all the plaintiff's witnesses were consistent even during cross examination on this point. He pointed out that the defendant brought no evidence in the form of receipts, bank statements or any other form of acknowledgement to show that the amount on the invoices of **USD 120,903.05** was ever paid in part or in full.

It was also submitted that the International Air Transport Association (IATA) issued TACT Rules that are used as guidelines by the plaintiff (Exhibits P52 and D2) and clause 5.1 of the rules thereof gives lee way for the carrier to deviate from it by extending credit. It was contended that the plaintiff did that in the instant case

by extending credit to the defendant by formal agreement up to **USD 30,000** as per Exhibit P51 and informally up to **USD 120,903.05**.

Counsel for the plaintiff urged court to reject the claim by the defendant that pursuant to rule 6.2 of TACT Rules pertaining to completion of an Air Waybills **"PP"** which are given the code charges **"carrier use only"** and is coded **"all charges prepaid by cash"** means that the defendant had paid in full. He submitted that the codes are for **carrier use only** and cannot be relied upon as evidence of payment by the defendant. On this position, counsel referred court to the decision of Egonda-Ntende J (as he then was) in ***British Airways PLC v Fresh Grown Uganda Limited and another HCCS No. 0157 of 2003*** where it was held that:

> ***"Conceptually an airway bill is a document that in effect acknowledges receipt of goods by an airline, and contains shipment information as to point of origin, shipper, destination, quantities of the goods, and so on. It is not a receipt. A receipt is an accounting document that acknowledges receipt of a particular item such as cash, and indicates the sum received and mode of payment. An airway bill is no receipt for charges in respect of shipment of goods for which it is issued".***

It was further submitted for the plaintiff that the best evidence would have been a receipt or any other form of acknowledgement of payment and that it is unbelievable even on a balance of probabilities that a company would pay over **USD 120,000** and not get a receipt. Counsel prayed that court finds that indeed the defendant is indebted to the plaintiff in the sum of **USD 120,903.05** since there was no proof or direct evidence by the defence of payment.

Conversely, it was submitted for the defendant that it is inconceivable that the plaintiff could act contrary to the commercial agreement (Exhibit D1) by extending credit beyond the agreed limit of US$ 30,000 instead of ceasing to offer credit. It was contended that PW1 and PW3 were not present when the transactions were being concluded and no evidence was led to show the volume of sales during the period in question to justify the assertion that the defendant was a good customer. Further, that no documentary or other evidence was led to justify the allowing of the accumulation of credit to the amount of **USD 120,903.05**.

It was submitted that the TACT Rules which are a comprehensive set of Rules do not show any other document in any form than can be deemed necessary to prove transactions between the parties to an Air Waybills and that there is no evidence that the plaintiff shared information regarding TACT Rules with the shipper (defendant). Counsel for the defendant also submitted that on careful observation of the Air Waybills endorsed **"PP"** having been completed by PW4 after he perused the information for dispatch of goods (IFDOG) and was duly instructed by Charles Wafula or the plaintiff's staff DW1 the sole defence witness was the person who signed them in the name of the shipper.

Citing sections 101 and 102 of the Evidence Act, counsel also submitted for the defendant that the burden of proof was on the plaintiff to prove the liability of the defendant in the sum claimed. Counsel for the defendant also sought to distinguish the case of **British Airways PLC v Fresh Grown Uganda Limited** (supra) relied upon by the plaintiff from the instant case. He submitted that whereas the decision in that case still stands, it is only of persuasive application to this court and that it is distinguishable from the instant case because in this one the plaintiff sought to rely on the absence of receipts to prove the alleged defendant's non payment/settlement of invoices.

According to him, there is no sample receipts that may have been issued by the plaintiff in any other transaction and in the absence of a sample court cannot make a determination whether on a balance of probabilities such receipts really existed or were ever issued during the period in question. He stated that in the ***British Airways PLC v Fresh Grown Uganda Limited*** (supra) the trial judge did not direct his mind to that aspect.

It was also submitted for the defendant that the clauses of the TACT Rules have to be read conjunctively and not separately in order to derive the proper meaning and applicability to the instant case. Counsel submitted that it is strange that the plaintiff opted to emphasize clause 5.1 of the TACT Rules and ignored 5.2.6 and 5.2.7 which ought to have given them sufficient leverage to either document the so called credit arrangement to a good customer or to even show proof that the defendant was indeed indebted to the plaintiff in the sum claimed.

Counsel for the defendant referred to Black's Law Dictionary 8th Edition, and submitted that the Air Waybill is not only a document acknowledging receipt of goods by a carrier but also a contract for the transportation of those goods and that a contract consists of terms and conditions of the dealing between the parties. He submitted that in the instant case, the said Air Waybills which formed the series of transactions between the parties contained specialised codified information best known to the airline staff. Counsel submitted that the issue of payment was handled by the defendant's officials and one Wafula Charles who was never brought by the plaintiff to support its claim. It was therefore submitted for the defendant that they prepaid by cash within the terms of the said series of contracts.

In rejoinder, it was submitted for the plaintiff that the defendant's contention that the amounts should not be payable as they were in excess of the credit limit is untenable in law because to do so would amount to punishing the plaintiff for not ceasing credit and giving excess credit to the defendant yet there is overwhelming evidence which were not disputed. Counsel for the plaintiff singled out as an example, the testimony of PW3 to the effect that the plaintiff continued to give credit to the defendant beyond the agreement by oral arrangement because of the good relationship existing between them. It was also submitted that even on ***quantum meriut*** basis, the plaintiff would be entitled to claim money due to it, since it claims to have provided the services and the fact that services were in fact provided is not disputed by the defendant

On the defendant's claim that the plaintiff has failed to discharge its burden of proof, it was submitted that it is trite law that the burden of proof in civil cases lies on a party alleging the existence of a fact. It was submitted that the plaintiff claimed that the stated amount were not paid and evidence were led to prove the same.

On the defendant's attempt to distinguish the ***British Airways PLC v Fresh Grown Uganda Limited*** (supra) from the instant case on the ground that the plaintiff did not adduce some sample receipts in court to prove payment, it was submitted that because no payments were made by the defendant, there were no receipts but in any case it was not for the plaintiff to tender in receipts but for the defendant to prove its case by showing receipt of payment by the plaintiff.

On the defendant's submission that the plaintiff did not bother to bring Wafula Charles to testify, it was submitted for the plaintiff that according to the defence and the scheduling notes, the said Wafula was listed as the defendant's witness and the plaintiff wondered why the defendant never brought him to testify. On the whole, the plaintiff counsel reiterated his earlier submissions and the prayers therein.

I have carefully considered the pleadings, the exhibits, the testimony of witnesses and submissions of counsel in this matter. It is not in dispute that by commercial account agreement dated 5/07/2000 (Exhibit D1) the parties entered into a contract of freight services and according to clause 1 thereof it was agreed that the credit limit would be up to USD 30,000/=. It is also not disputed that the plaintiff offered freight services to the defendant by lifting its goods from Entebbe to London. What is disputed however is payment.

PW1 who was the plaintiff's Financial Analyst testified on Exhibit P3 that it was a document generated from the finance system of the plaintiff stating an outstanding amount of **USD 159,384.05** and an unallocated credit of **USD 38,481** leaving the sum of **USD 120,903.05** unpaid. According to PW1, Exhibit P3 shows the state of account relating to the defendant. He also testified that when money is paid a receipt is raised, a copy of which is given to the payee, another copy is kept with cargo sales and a third copy is used with banking documents. He explained that the money received is banked and a schedule is produced which refers to receipt and this would be used as part of bank reconciliation statement.

PW1 further testified that if money was received from the defendant, it would have been receipted and banked and would have gone through bank reconciliation process which would finally be evidence by the finalisation of the double entry process in the bank account. He stated that you could be sure money was received from the defendant from the plaintiff's system and the banking system but both show the defendant did not pay.

PW1 also testified that an Air Waybill is purely a shipping document so the endorsement **'PP'** on it is not proof of payment. He stated that it is a receipt which is proof of payment. Although I did not have the benefit of observing his

demeanour when he was testifying, I find his evidence on record consistent even in cross-examination. I would therefore have no reason to doubt him.

The testimony of PW1 was corroborated by that of PW2 who worked as the plaintiff's cargo account manager at the time. She testified that the amount owing is reflected on the statement of account (Exhibit P3) as **USD 120,903.05** which is backed up by invoices and Air Waybills. She tendered in evidence the Invoices Nos. 414400, 414216, 414505, 414518, 414538, 414561, 414578 which were marked as Exhibit P2.

I have carefully totalled the amount indicated on each of the invoices and they indeed tally with the total amount in Exhibit P3, that is, **USD 159,384.05** and if you deduct the **USD 38,481.00** indicated in the statement as having been paid you get a balance of **USD 120,903.05** which is claimed by the plaintiff. The plaintiff also called PW3 and PW4 whose evidence by and large supported the ones of PW1 and PW2.

The defendant called one witness, the Operations Manager of the defendant Mr. Ismail Mukiibi (DW1). He stated in his evidence that at all material times the credit limit to the defendant was **USD 30,000** and there was no provision for its extension. He further testified that at all material times payments were determined and paid either by one Wafula Charles and PW2 who convinced them that as long as the Air Waybill was filled in with the necessary endorsements with reference to payments, their cargo would be airlifted to the destination and that was done.

He stated that in line with the rules of completion of the airway bills prevailing at the time and as per the various codes provided, in almost all instances, their Air Waybills were indicated to have been paid for by cash. He added that they did not insist much on cash acknowledgement receipts given the fact that they dealt with the Cargo Manager at the time. According to the witness, it is therefore possible that the cash paid to the plaintiff's officials at Entebbe Airport may not have reached the plaintiff's system.

On cross examination he stated that apart from being told by his boss that the defendant paid the plaintiff there was no other way he could know about payments because his work was to take cargo to the airport.

Upon reviewing the above evidence, I do agree with the plaintiff's submission that mere endorsement on the airway bill **"PP"** is not conclusive evidence that payment has been effected in the absence of the payment receipt. I am persuaded by the holding in the case of ***British Airways v. Fresh Grown Uganda Ltd*** (supra) and I wholly adopt the wise reasoning of the trial judge. Surely an Air waybill is intended to serve another purpose altogether other than proof of payment. It is no receipt for charges in respect of shipment of goods for which it is issued.

The defendant elected to center its argument on the interpretation of the Air Waybill instead of adducing evidence to counter what the plaintiff had adduced. I find the argument that it should have been the plaintiff to produce sample receipts to show that the same were issued in other transactions at the time rather evasive and not based on the well settled principle of law that he who alleges must prove.

The plaintiff alleged that it transported the defendants goods for which it was not paid. Both the Air Waybills and the invoices were adduced as proof. The burden at that point shifted to the defendant to produce proof of payment as alleged by it. That burden does not shift to the plaintiff until such proof is produced by the defendant. The argument of the defendant that the endorsement **"PP"** on the Air Waybills is proof that payments were made, in my view, was adequately explained by the plaintiff's witnesses and I am inclined to believe their version. The fact that TACT Rules allow parties to agree in advance to extend credit negates that argument.

I have also looked at the commercial account agreement relied upon by the defendant to support the argument that credit limit was not supposed to exceed **USD 30,000** and so there is no way the plaintiff could have allowed the credit to accumulate to the amount claimed without invoking its rights under the contract to withdraw the credit facilities. Indeed it is true that the credit limit under the written contract was **USD 30,000**. However, from the evidence adduced by the plaintiff, the parties appeared to have abandoned that contract in preference to another arrangement whereby the credit limit was extended and the defendant took advantage of it.

Under common law, where a person derives a benefit from another like in the instant case and retains it, that person is not allowed to retain that benefit without compensation on the grounds that it is outside the terms of the contract.

In the case of ***Fibrosa Spolka v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at 61, Lord Wright*** held that:-

> ***"…it is clear that any civilized system of law is bound to provide remedies for… unjust benefit… Such remedies in English law are generically different from remedies in contract or in tort and are now recognized to fall within a third category of common law which has been called quasi – contract or restitution…"***

In the premises, I would be inclined to agree with the plaintiff that credit was extended beyond the agreed limit moreover for the benefit of the defendant. The defendant cannot be allowed to retain that benefit without compensation to the plaintiff. On the whole, I find that the plaintiff has proved its case on a balance of probabilities that it extended credit facilities to the plaintiff and the sum of **USD 120,903.05** remains outstanding. The defendant is therefore indebted to the plaintiff as alleged in the plaint. This answers the 1st issue in the affirmative.

**Issue 2**: **Remedies available**

In view of my finding on issue one, judgment is entered for the plaintiff for the sum of **USD 120,903.05** and interest is awarded on that amount at the rate of 10% per annum from the date of filing the suit till payment in full. This award of interest will take care of losses incurred by the plaintiff due to the delay in payment and so I decline to award any general damages.

Costs of the suit are awarded to the plaintiff.

I so order.

Dated this 29th day of May 2013.

Hellen Obura
**JUDGE**

Judgment delivered in chambers at 3.00 pm in the presence of Ms. Jamila Apio who was holding brief for Dr. Allan Shonubi for the plaintiff and Ms. Irene Sheila Namutamba who was holding brief for Mr. Frederick Samuel Ntende for the defendant.

**JUDGE**
29/05/13