

THE REPUBLIC OF UGANDA

AT THE HIGH COURT OF UGANDA KAMPALA

COMMERCIAL DIVISION

HCT - 00 - CC - CS - 315 - 2007

1. Rajeev Jain
2. Rajesh Jain
3. Sanjeev Jain (t/a R&R Bikes)

}
..... PLAINTIFF
}

VERSUS

Kansiime Denis DEFENDANT

BEFORE: HON JUSTICE GEOFFREY KIRYABWIRE

JUDGMENT

The plaintiffs who are Indian nationals based in India brought this suit for the recovery of US \$ 94,029.30 being the value of goods sold and delivered to the defendant but not paid for.

The plaintiff further seeks recovery of the above sum of money against the defendant as an acceptor of a bill of exchange drawn by the plaintiff upon the defendant's company "DMK Enterprises Ltd" made on M/s Standard Chartered Bank but which on presentation was dishonoured.

The case for the plaintiffs is that based on previous transactions between the parties (the defendant being represented by his company DMK Enterprises Ltd) the plaintiffs in 2005 consigned bicycle parts worth US \$ 94,029.30 (hereinafter referred to as "the goods") to the defendant on credit against a bill of exchange drawn on DMK Enterprises Ltd and accepted by the defendant. The said goods were then supplied to the said company. The bill of exchange on presentation was dishonoured by the drawee's Bank Standard Chartered for which the plaintiffs hold the defendant personally liable as acceptor.

The defendant denies the claim and avers that he had no business dealings with the plaintiffs as alleged. The defendant further avers that he only had dealings with one Manish Thanki who he knew as the owners of R&R Bikes and that all their transactions were paid for cash on delivery. The defendant further avers that the said goods were cleared by the said Manish and released to him from the customs bond at Interfreight Uganda Ltd but not to the defendant.

At the scheduling conference of the 9th May 2011 the parties agreed to the following issues for trial:-

Whether the defendant is liable on the bill of exchange dated 26th March 2005 as acceptor?

However during the submissions both parties widen the issues to the following

1. Whether the defendant is liable to the plaintiffs in the sums claimed?
2. Remedies

Court will under Order 15 rule 5 of the CPR merger the two versions in order to ascertain and resolve the real issues between the parties.

At the trial the plaintiffs was represented by Mr. Fred Ntende while the defendant was represented by Mr. Brian Otheino. The plaintiff called witnesses namely Mr. Rajeev Jain (of Ludhiana India the exporters PW 1); Mr. Manish Thanki (PW2); and Mr. Cornelius Padde (a banker with Standard Chartered PW 3). The defendant testified on his own behalf.

ISSUE No 1. Whether the defendant is liable to the plaintiffs in the sums claimed and also on the bill of exchange dated 26th March 2005 as acceptor?

Mr Jain testified that he got to know the defendant in 2004 and used to deal with him as DMK Enterprises Ltd. He supplied the defendant four containers of goods but the last consignment valued at US \$ 94,029.13 was not paid for.

The last consignment was sold on credit against a bill of exchange dated 26th March 2005 drawn on DMK Enterprises Ltd payable by Standard Chartered Bank 90 days from the Bill of Lading date on demand to the order of the State Bank of India for value received.

Both Mr Jain and Manish testified that the said goods were handed over to the defendant at the clearing depot in their presence.

However when the shipping documents were sent by the State Bank of India to Standard Chartered Bank in Uganda for payment collection it was returned unpaid.

Counsel for the plaintiffs submitted that under Section 27 of the Sale of Goods Act (hereinafter referred to as the "SGA") once a buyer accepts goods they have to pay for them in accordance with the terms of the contract of sale. Counsel for the plaintiff further submitted that the plaintiffs were now unpaid sellers within the meaning of Section 38 (1) (a) of the SGA.

Counsel for the plaintiff submitted that the defendant does not deny having signed as acceptor to the bill of exchange that was returned unpaid. He further submitted that the said acceptance was not qualified and therefore he was legally liable and bound under section 22 of the Bill of Exchange Act (hereinafter referred to as “BEA”).

Counsel for the plaintiff further submitted that it was the defendant who obtained the bill of lading which is a document of title and even though it is transferable it would not relieve the defendant as an acceptor of the bill of exchange.

The defendant testified that at all material times he dealt with Manish and not the plaintiff. He further testified that he had no contract with plaintiffs and did not even meet them until the case was filed against him.

The defendant further testified that while the bill of lading was in his name it was a transferable document of title and the goods in this case were transferred to Manish and that is why Manish had control over the goods.

The defendant also testified that the goods were consigned to M/s DMK Enterprises Ltd against whom the suit had been withdrawn but not him as an individual therefore he is not liable for the goods.

The defendant further testified that he had nothing to do with the bill of exchange as Manish had requested him to transact through his account in respect of the goods. The defendant testified that the bill of exchange he signed was not explained to him and bank asked him to sign them and he handed the said documents were handed to Manish.

Counsel for the defendant submitted that there was no contract between the defendant and the plaintiff.

Counsel for the defendant further submitted that the plaintiff failed to adduce evidence that the goods were handed over to the defendant at M/s Interfreight Ltd. He submitted that it was improbable that the defendant could have taken possession of the goods of that value without documentation.

Counsel for the defendant submitted that the defendant in signing the bill of exchange did not do so as acceptor. He further submitted that the ICC Uniform Rules for Collections could not apply to this transaction because they had not been incorporated into the contract. In this regard he relied on the text of SCHMITTHOFF’S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE at p396.

Counsel for the defendant submitted that the acceptor of the bill was the drawee namely DMK Enterprises Ltd not the defendant who did not even have an account at Standard Chartered Bank. In this regard he referred Court to the text of ELLINGER'S MODERN BANKING LAW by E.P. ELLINGER et al 4th Edition at page 388 where they write

"...The drawee incurs liability on the bill if he accepts it. "Acceptance" is defined as the signification by the drawee of his assent to the order of the drawer.' To be valid, the acceptance has to be written on the bill and signed by the drawee. His mere signature is inadequate..."

Counsel for the defendant further referred to Section 16 of the BEA which provides

"...16(i) the acceptance of a bill is the signification by the drawee of his or her assent to the order of the drawer.

(ii) An acceptance is invalid unless it complies with the following conditions;

a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

b) It must not express that the drawee will perform his or her promise by any other means than the payment of money..."

Counsel for the defendant submitted that on the above authorities it was DMK Enterprises that was the acceptor of the bill not the defendant. He further submitted that there is no evidence that the defendant signed the bill in assumed name within the meaning of Section 22 of the BEA either. He suggested that if the defendant signed the bill in any capacity then it was that of an endorser.

I have considered the pleadings the evidence before me and the submissions of both counsel for which I am grateful.

It would appear to me that it is not in doubt that the goods were supplied by the plaintiffs but there is contest as to who the goods were supplied to or who ultimately took them.

There is no written contract that was adduced in court to provide guidance on the matter. However it is the case of the plaintiffs that the goods were part of Bill of Lading No MSCUMU 787700 dated 26th March 2005 shipped on the SS Aurora-180 from Mumbai. An examination of that bill of lading shows it comprised 3 containers of 20 feet each with numbers MSCU 1588317 MSCU 1920273 and MSCU 2654049. The bill of lading shows that it was consigned to DMK Enterprises Ltd. This consignment was secured by a bill of exchange (styled as DRAFT) dated

26th March 2005. The drawer of that bill is stated as R&R Bikes. It is drawn on DMK Enterprises Ltd and signed by the defendant with the words “accepted”. Court was also presented with a release order from the warehouse of M/s Interfreight (U) Ltd dated 14th June 2005 showing that the consignee of the goods was “DMK Ent” and that the goods were released to Manish.

It is the case of the defendant that that though the goods were reflected in the shipping documents as for DMK Enterprises Ltd they actually belonged to Manish (which he denies) and the bill of lading was assigned/endorsed to him. There was no evidence shown to court of the actual assignment and /or endorsement. The question then arises from the framed issue as to who is liable for the sums claimed?

From the evidence adduced in court there is a discrepancy as to the true Status of DMK Enterprises Ltd as shown on the shipping documents. However exhibit P 10 shows that the correct name is DMK Enterprises which was registered as a business name on the 19th October 2001. It shows the present defendant and two others as partners of the enterprise and there is a partnership deed in the names of DMK Enterprises dated 18th October 2001 with the same defendant and two others as partners. The bank documents with Standard Chartered bank also show that A/c No 01050075066 is held in the names of DMK Enterprises not DMK Enterprises Ltd though the same bank in some of their correspondence also refer to DMK enterprises Ltd. The reference to DMK Enterprises Ltd as a limited liability company may in my view be a misnomer. What we are dealing with in this dispute is actually a partnership known as DMK Enterprises. It is my finding that it is to this partnership based in Uganda that the goods from India were consigned.

I find it difficult to believe that the defendant had no personal dealings with the plaintiff otherwise how else would he have got in touch with them to sign and accept the bill of exchange dated 25th March 2005 drawn on DMK Enterprises after which the defendant took it to Standard Chartered? I find it difficult to believe that the defendant only physically met the first plaintiff for the first time after this case was filed yet the first plaintiff made regular business trips to Uganda from India and there was a course of previous dealings between the parties prior to 2005 which was not contested.

Whereas it is true that Manish got the goods from the warehouse as shown in the release order both the first plaintiff and Manish testify that the goods were then given to the defendant who loaded them on to his truck and took them. Manish testified that the goods were released to him because it was him who cleared the goods from the warehouse on behalf of the defendant because he had more experience in this area. The defendant denies this but leaves it at that. The consistent evidence before court is that these goods were consigned to DMK Enterprises as shown in all shipping and clearing documentation. The customs documentation attached to Exhibit D4 also show that a total of Shs 66,248,413/= was paid in taxes to the Uganda Revenue Authority by DMK Enterprises and a release order made to them on the 7th July 2005. Goods under customs control may be transferred to another person under Regulation 71 of the East African Community Customs Management Regulations, 2006. If the bill of lading had been endorsed to Manish by

this time then this change of ownership would have been reflected in the customs documentation but was not. It is incredible therefore to believe that the defendant in those circumstances without more just allowed Manish to take the three containers that were consigned to his company for which he had paid taxes.

It has been argued for the defence that the goods were consigned to DMK Enterprises (which was removed from the suit) and not to the defendant in his personal capacity so the defendant should not have personal liability in the matter. With the greatest of respect that argument may have held if we were dealing with a limited liability company but all the evidence points to the fact that we are dealing with a partnership.

Paragraph 6 (c) of the partnership deed of DMK Enterprises shows that the defendant is the Chairman and Managing Partner of the partnership and the sole signatory of all the partnership's bank accounts. Furthermore, looking at the mandate card of DMK Enterprises at Standard Chartered shows that the defendant was indeed the sole signatory of that account.

Section 6 of the Partnership Act 2010 provides

“... Partners bound by act on behalf of firm.

(1) An act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm by any person authorised to bind the firm, whether a partner or not, is binding on the firm and all the partners.

(2) Subsection (1) does not affect any general principles of law relating to the execution of deeds or negotiable instruments..”

Section 9 of the Partnership Act further provides that

“... Liability of partners.

(1) A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner...”

Liabilities of partners are both joint and several when it comes to business and obligations executed in the firm name. I therefore find that the defendant as a partner is liable for payment for the goods.

As to the bill of exchange both counsels correctly pointed to the position of the law with regard to the liability of an acceptor of a bill of exchange as in section 61 (1) of the BEA. The drawee incurs liability on the bill if he accepts it. In this case the drawee on the bill (M/s DMK

Enterprises) accepted liability on the bill when its partner, the second defendant signed it. Since the bill of exchange was dishonoured by Standard Chartered Bank then DMK Enterprises is liable on the bill and likewise its partners for the said debt.

I accordingly find that the defendant is liable to the plaintiffs in the sums claimed and also on the bill of exchange dated 26th March 2005 as acceptor.

ISSUE No 2. Remedies.

The plaintiff prayed for several remedies. First is for an order to pay US \$ 94,029. This is the value of the unpaid bill of exchange. Counsel for the defendant in his submissions noted that whereas the bill of exchange was for US \$ 94,029 the invoice value on the customs documentation Exb D4 showed the invoice value of the goods to be US \$ 37,065.16. Counsel for the defendant further submitted that customs valuations can be used to ascertain the value of goods and referred court to the case of **Karim Hirji V Kakira Sugar Works HCCS 84 of 2004** for this proposition. He therefore invited court to find that the correct value of the goods imported was US \$ 37,065.16. Counsel for the plaintiff did not submit on this particular point. Counsel for the plaintiff however submits that the acceptance on the bill of exchange was general and not qualified and therefore should be paid.

The law relating to acceptance of a bill of exchange is fairly settled. The author **Kibaya Imaana Laibuta** in his book **Principles of Commercial Law** 2006 P 265 writes

“...a general acceptance assents without qualifications to the order of the drawer while a qualified acceptance in express terms varies the effect of the bill as drawn...”

Suits regarding bills of exchange were recently discussed by the **Hon justice Irene Mulyagonja** (as she then was) in the case of **Sembule Investments Ltd V Uganda Baati** MA 0664 of 2009. In that case she referred to the judgment of **Denning M.R.** in **Brown Shipley & Co Ltd V Alicia Hosiery Ltd** [1966] 1 Lloyds Rep 668 at 669 where he held

*“...For many years the courts in this country have treated bills of exchange as cash. In **James Lamont & Co. Ltd. v. Hyland Ld** [1950] **KB 585**, this court declared that where there is an action between the immediate parties to a bill of exchange, then in the ordinary way judgment should be given upon that bill of exchange as for cash and it is not to be held up by virtue of some counterclaim which the defendant may assert, even, as in that case, a counterclaim relating to the specific subject-matter of the contract. Here the counterclaim is in relation to a different contract altogether from that which initiated the bill of exchange...”*

Justice Mulyagonja also referred to the Court of Appeal decision which also applied **the Brown Shipley and James Lamont Cases** (supra) in **Kotecha V Mohammed** [2002] 1 EA 112 where it was 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] (Lloyds) 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...”

Applying the above authorities to this case it would appear to me that the bill of exchange given in this case was accepted in general and was not qualified. There is no allegation of fraud or other limiting factor on the bill itself. It would appear to me that this bill, and I so find, must be paid according to its tenor. Any dispute on the underlying contract to the bill of exchange must be sorted out in a separate suit. I accordingly award the plaintiff the sum claimed on the bill of exchange of US \$ 94,029.

The plaintiff also prayed for expenses like Air tickets worth 4 trips (at US \$ 900 per trip) totalling US \$ 5,400; living expenses at US \$ 100 per day and visa charges for 6 entries (at US \$ 30 per entry) which amount to US \$ 180.

The evidence in this area was quite scanty during the trial and even though some receipts for a travel agent and E-tickets were attached to the original plaint (non to the amended plaint) joint scheduling notes (stamped 6th May 2011) these were not testified upon. A claim for expenses such as these is one for special damages that have to be strictly proved. The first plaintiff on the question of these expenses only testified that

“...I have made more than 10 trips to Uganda to pursue this at an average of US \$ 1,500 per trip (air fare and accommodation)...”

This was a very general testimony and certainly not particularised. As it is it is impossible for court to ascertain without specific evidence that these expenses can only be attributable to this particular transaction with the defendant given that the first plaintiff regularly visited Uganda on business trips. I accordingly disallow this claim for special damages.

The plaintiff also prayed for general damages. Counsel for the plaintiff submitted that Ug Shs 50,000,000/= would suffice as compensation for inconvenience suffered as a result of non payment. Counsel for the defendant did not address court on the submissions of general damages. I think Ug shs 50,000,000/= is excessive and that Ug Shs 15,000,000/= would be sufficient.

The plaintiff also prayed for interest at 24%p.a. from June 2005 until payment in full. Some of the awards are in dollars while others are in Uganda Shillings. For the value of the bill of exchange I award interest at 3%p.a. from June 2005 until payment in full. I further award interest on general damages Uganda shillings at 21%p.a. from the date of this judgement until payment in full.

I award the plaintiffs the costs of this suit.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 25/03/13

25/03/13

10:15 a.m.

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

- J. Walabyeki for h/b for both Mr. Ntende for Plaintiff and Othieno for Defendant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 25/03/2013