

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

HIGH COURT CIVIL SUIT NO 446 OF 2010

STEEL AND TUBE INDUSTRIES LTD}.....PLAINTIFF

VS

MWESIGWA TITUS}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The facts of this suit are sufficiently disclosed in the written submissions of the Plaintiff's Counsel and are not controversial. The Plaintiff filed this action to recover **51,394,101/= Uganda shillings** as the consideration for goods sold to the Defendant which allegedly remained unpaid including agreed interest, general damages for breach of contract, interest on all awards and costs of this suit. The Defendant denies the claims and avers in his written statement of defence that the cheques presented with the plaint and which were dishonoured were all paid and recovered by payment in cash to the Plaintiff.

This suit was initially heard ex parte after several adjournments on the ground of the absence of the Defendant or Counsel. Specifically this suit proceeded ex parte on 8 December 2011 and judgment was delivered on 20 April 2012 in favour of the Plaintiff. The Defendant was represented by Messieurs Kayanja and Company Advocates. Subsequently and after judgment the Plaintiff instructed Messieurs Alliance Advocates who applied to set aside the judgment which application was granted and the matter proceeded afresh. The Plaintiff and Defendant's Counsels filed a joint scheduling memorandum on the points of agreement and disagreement whereupon the Plaintiff called two witnesses but the Defendant did not call any witness.

As far as the Defendant is concerned, the scheduling memorandum executed by the parties and filed in court on 7 October 2013 sets out the agreed and disputed facts between the parties and the agreed issues for trial. It is an agreed fact that the Plaintiff supplied hardware goods to the Defendant on credit terms and upon acknowledgement, the Defendant was supposed to pay for the goods.

Issues for determination:

1. Whether the parties had contractual relations, and of what nature?
2. Whether the Defendant breached the contractual relationship?
3. Whether the Defendant was notified of the dishonour of the cheques?
4. Whether the Defendant is indebted to the Plaintiff as claimed or at all?
5. What remedies are available to the parties?

Plaintiff's submissions:

The respective testimonies of PW1 and PW2 is that they have known the Defendant for over five years and the Defendant used to take steel and iron products from the Plaintiff company on credit terms and would issue post dated cheques in respect of the goods taken. No attempts were made to rebut the testimony by the Defendant's Counsel during cross-examination. In the case of **R versus Sims [1946] KB 531 at page 539**, as a general rule, a Defendant who fails to deal with an allegation shall be taken to have admitted it because it amounts to a tacit acceptance of the witness's evidence in chief.

The written statement of defence giving the Defendant's answer at paragraph 5 is compelling as it avers that:

"In further reply to paragraph 4, the Defendant shall avail proof of payment of the actual amount by way of cash to cover the dishonoured cheques".

The pleading amounts to an admission of the existence of a contractual relationship with the Plaintiff. It is only qualified by the allegation that the Defendant paid for the dishonoured cheques which issue can be determined on the second issue of whether the Defendant breached the contractual relationship. Furthermore the Defendant does not deny issuance of the dishonoured cheques

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which form the basis of this suit. The Defendant cannot deny having dealt with the Plaintiff.

A cheque is a bill of exchange as defined by section 2 of the Bills of Exchange Act Cap 68 laws of Uganda. It is defined as an unconditional order of payment issued by one person to another. In the textbook "**The Law and Practice of Banking**" **Volume 1 Milnes Holden at pages 156 to 159** defines a cheque in the same terms as under section 2 of the Bills of Exchange Act Cap 68 laws of Uganda.

Because the cheque is a method of payment for something the inescapable conclusion is that the Defendant was involved in the relationships with the Plaintiff Company. The Plaintiff's witnesses Mr. Kasumba Aloysius who is the Plaintiffs Sales Manager testified as PW1 and Owinja George William, the Plaintiffs Client Relationship Officer testified as PW2. In the collective evidence the Defendant started dealing with the Plaintiff about five years before the hearing of this suit. The Defendant used to buy the goods of the Plaintiff and the Defendant operated a hardware shop in Kiwatule. The Defendant would take goods on credit against post dated cheques of the Defendant. In the premises paragraph 4 (a) of the plaint was proved through the uncontested evidence of the Plaintiffs witnesses.

At the hearing, invoices, account Ledger and cheques were identified by PW1 and admitted in evidence. The relevant invoices and their corresponding cheques are:

- Invoice of 26th of April 2010.
- Invoice of 23rd of May 2010.
- Invoice of 22nd of May 2010.
- Invoice of 27th of May 2010.
- Invoice of 27th of May 2010.

Corresponding original copies save for exhibit P2 were adduced in evidence. In respect to exhibit P2, Counsel prays that the court should admit it as the original could not be traced and there is overwhelming evidence of its nexus to the suit and the invoices were brought to show the contractual relationship of the Plaintiff and the Defendant which the Defendant does not deny.

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Regarding the account Ledger:

The account Ledger was admitted as an exhibit upon PW2 identifying that it was generated through the "Tally System" and it satisfied the requirements of the Electronic Transactions Act 2011.

Cheques

The cheque dated 25th of June 2010 exhibit P6; the cheque dated 3rd of July 2010 exhibit P7; the cheque dated 22nd of July 2010 exhibit PE 8 and the cheque dated 31st of July 2010 exhibit P9 were adduced in evidence. PW1 and PW2 showed that a contractual relationship existed. In the account Ledger exhibit P10, evidence of payments of the Defendant before the invoices and cheques in issue was demonstrated. The Defendant was a good customer in the past until his cheques started bouncing. The Plaintiff's witnesses testified that the Plaintiff used to offer a credit grace period of about 30 days to the Defendant. It is furthermore established by evidence that the transactions were based on the credit arrangement in which the Defendant was expected to pay later after taking delivery of the goods. Delivery of goods was by the Defendant and evidence was led by PW1 through the invoices that the goods were taken by the Defendant or his authorised agents.

Consequently the court should find that the Plaintiff and the Defendant had a contractual relationship for the sale or purchase of goods on credit.

Resolution of issues 2, 3 and 4

The Plaintiff's Counsel reiterated submissions that a cheque payment is an unconditional payment under section 46 of the Bill of Exchange Act. Upon its dishonour by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder. In this case the holder is the Plaintiff. The cheques were presented for payment and returned with the inscription "R/D" meaning refer to drawer. The aggregate amounts on the dishonoured cheques are 47,098,000/= Uganda shillings.

PW1 and PW2 testified that the Defendant was on several occasions notified of the dishonour of the cheques and his indebtedness but he did not oblige by paying the Plaintiff. Furthermore exhibit P 11, the advocate's letter dated 16th of August 2010 was also additional or constructive notice. The Plaintiff's Counsel further submitted that there is no evidence to the contrary to discharge the obligation of the drawer of the dishonoured cheque to pay the amount dishonoured or to show that the money owed was paid to the Plaintiff in the cash or at all. The amount on the cheques has increased owing to the interest agreed upon on the basis of the credit arrangement. The interest is 3% being charged on the outstanding amount if not paid within the credit period. In conclusion the Defendant is in breach of contract and is liable on the unpaid amount of the dishonoured cheques and interest and other heads of damage considered on the remedies available to the Plaintiff.

Remedies available to the parties

The first remedy should be for the payment of the amount on the dishonoured cheques with interest of 3% per month agreed upon in the credit arrangement and this was 51,394,101/= Uganda shillings by 8 December 2010 when the Plaintiff filed this suit. The head of damage is in special damages and has been specifically proved at the trial on the second issue for determination by this court. The prayer for interest at 3% per month on the special damages is based on the grounds of the credit arrangement. It could also be founded on the discretionary powers of the court under section 26 of the Civil Procedure Act.

As far as general damages are concerned, they are awarded at the discretion of the court and the Plaintiff through witnesses has demonstrated that it has suffered and has been inconvenienced by the Defendant's non-payment. The Plaintiff proposes an award of Uganda shillings 10,000,000/=.

Lastly it has taken the Plaintiff time and resources to come to court to realise the fruits of its transactions with the Defendant seeking recovery of the consideration and it is fitting that the Defendant pays the costs of the action to the Plaintiff.

Defendant's submissions in reply:

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The Defendant's Counsel relies on the joint scheduling memorandum filed on 7 October 2013 for facts and documentary evidence.

Whether the parties had contractual relations and of what nature?

Following the agreed facts that the Plaintiff supplied hardware goods to the Defendant on a credit arrangement and upon acknowledgement, the Defendant was supposed to pay for the goods, it would follow very clearly that there was a contractual relationship between the parties i.e. the Plaintiff would supply goods on credit, the Defendant would acknowledge the goods, and pay for them at a later stage. The testimony of PW1 is that the Defendant would make payments against invoices raised and backed with post dated cheques. There is no doubt that there was a contractual relationship between the parties and the Defendant's Counsel considered the remaining issues 2, 3 and 4.

Resolution of issues 2, 3 and 4

It is an agreed fact that the Plaintiff supplied goods on credit to the Defendant. Invoices were raised and post dated cheques issued. An invoice is defined in **Longman Dictionary of Contemporary English** as a bill for goods received.

It is the Plaintiff's pleadings in paragraph 4 (b) of the plaint that the Defendant acknowledged receipt of goods and attached were invoices marked B1 – B5. The Plaintiff asserted by the pleadings that those were the goods received and acknowledged by the Defendant for which payment should be made. PW1 stated in cross examination that the Defendant acknowledged receipt of these goods by sending a driver to pick the goods. However some of the invoices were not signed for as received and no authority was shown to exist from the Defendants to the said drivers to receive the goods on his behalf. The particular invoices tendered in evidence as exhibit P6, P7, P8, P9 and P10 can be considered. The invoices are referred to in paragraph 5 of the witness statement of PW1. No other invoices were adduced in evidence and shown to have been acknowledged by the Defendant and for which payment should be effected. The invoices pleaded in the plaint and tendered in evidence were all in the sum of Uganda shillings **61,866,500/=** as follows:

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1. Invoice dated 26th of March 2010 for Uganda shillings 18,964,000/=.
2. Invoice dated 26th of April 2010 for Uganda shillings 20,032,400/=.
3. Invoice dated 22nd of May 2010 for Uganda shillings 7,902,000/=.
4. Invoice dated 23rd of May 2010 for Uganda shillings 2,060,000/=.
5. Invoice dated 27th of May 2010 for Uganda shillings 12,908,000/=.

In the cross-examination of both witnesses of the Plaintiff, it was proved that all these invoices were paid in full apart from the invoice dated 27th of May 2010 for Uganda shillings 12,980,000/=. This outstanding balance on the invoices of Uganda shillings 12,908,000/= is what should have been used for proving the claim of the Plaintiff. Furthermore a portion of the outstanding invoices of Uganda shillings 12,908,000/= has been settled.

As far as the Plaintiff relies on cheques exhibits P1, P2, P3, P4 and P5, the cheques had been issued as post dated cheques. Apart from the cheque dated 28th of June 2010 for Uganda shillings 12,908,000/= which was tendered as exhibit P1, and which was for the payment of invoice exhibit P4 dated 27th of May 2010, the rest of the cheques have no relation or connection with the invoices raised and adduced in evidence. Consequently the rest of the cheques were issued for no consideration at all.

No invoices were adduced in evidence as duly acknowledged by the Defendant in the sums stated in the bounced cheque i.e. exhibits P2, P3, P4 and P5 and the cheques are hanging in the air. No consideration was adduced in evidence for which payment was being made by the cheques. In the joint scheduling memorandum, it is a fact for the Defendant that he had a running account with the Plaintiff for which the cheques were issued as security. The cheques were not issued for goods actually supplied. No invoices were adduced in evidence to support the sums issued in the post dated cheques.

On the question of dishonour of cheques and the right of the holder in due course to have recourse against the drawer, section 47 of the Bill of Exchange Act provides that when a bill has been dishonoured by non-acceptance or by non-payment, notice of honour must be given to the drawer and each endorser and

any drawer or endorser to whom the notice is not given is discharged. No evidence of notice of dishonour has been adduced. Neither PW1 nor PW2 said anything about notice of dishonour. PW1 merely stated that efforts were made to reach the Defendant about the bounced cheque but all was in vain. Inasmuch as the cheques were issued for no consideration, there was also no notice of dishonour according to the requirements of section 47 of the Bills of Exchange Act. The Defendant is discharged under the said law from honouring the said cheques. The Defendant's Counsel concedes that this would leave the contract between the parties alive and based on the invoices in the matter. All the invoices were paid except for the sum of Uganda shillings 12,908,000/= exhibited as exhibit P4.

What remedies are available to the parties?

According to the Defendant's Counsel, the contract between the parties was for the supply of hardware goods by the Plaintiff to the Defendant. It was agreed during the scheduling conference and joint memorandum that the Plaintiff supplied hardware goods to the Defendant on a credit arrangement and upon acknowledgement the Defendant was supposed to pay for the goods. It was proved in court that the Defendant acknowledged five invoices namely exhibits P6, P7, P8, P9 and P10. According to PW1 the invoices indicate the items that were supplied to the Defendant on the respective dates for the amount stated. All original copies of the invoices are given to the client or any person who collects the products and the Plaintiff usually remains with duplicates. No other invoices were adduced in evidence to show other materials/goods that were supplied to the Defendant. PW2 tried to testify that the Ledger did refer to other invoices that were unpaid but these were not produced in evidence. The Ledger is a self generated document by the Plaintiff. The sky is the limit for what can be inserted in the said ledger. In any case the Ledger is not an invoice which shows that the Defendant acknowledged the goods. Of all the invoices in question only one was unpaid in the sum of 12,908,000/=. Both the Plaintiff's witnesses did confirm in cross examination that the rest of the invoices were settled by the Defendant. Since the filing of this suit, the Defendant made further payments of Uganda

shillings 3,000,000/= on 23 August 2012, Uganda shillings 4,000,000/= on 22 July 2013 and Uganda shillings 2,000,000/= on 9 September 2013, which all add up to Uganda shillings 9,000,000/=. The proof of the payment is attached to the ledger account marked "A" in the witness testimony of PW1 paragraph 12 thereof. Having effected further payment of Uganda shillings 9,000,000/= which is the outstanding amount due to the Plaintiff, the Defendant is willing to pay the balance of Uganda shillings 3,908,000/= and not Uganda shillings 51,394,101/= as claimed.

The Plaintiffs claim is based on bounced cheques which add up to Uganda shillings 51,394,101/= and under section 46 of the Bills of Exchange Act, the cheques have to be paid. However no evidence was adduced as to what the cheques were paying for, secondly there is no proof of consideration of the said cheques. The cheques were post dated and therefore issued as security and not for payment. However the quantity of goods supplied was well pleaded and known. The quantities of goods supplied are in the invoices attached to the pleadings which were tendered in evidence. It is only one of the invoices as earlier submitted that was not settled. Since the hearing began, the said invoices have partly been settled leaving a balance of Uganda shillings 3,908,000/=.

In the premises it is the Defendant's submission that the suit was unnecessary in the circumstances. If reconciliation had been done in the parties, the truth would have been established. Instead the Plaintiff sought to take advantage of the Defendant's apparent lack of records in the matter and went ahead to obtain an ex parte judgment for a colossal sum of money, which is now shown to have been paid by the Defendant. In those circumstances the Plaintiff is not entitled to general damages. In the premises the Defendant's prayer is that the Plaintiff's suit is dismissed with costs.

Judgment

I have carefully considered the claim and defence as reflected in the pleadings as well as the evidence adduced, submissions of Counsel and authorities cited. The Plaintiff's suit initially proceeded ex parte after a defence had been filed by the

Defendant but due to failure to attend court and upon satisfaction of the court that the Defendant was duly notified of the court proceedings on 8 December 2011 and neither the Defendant nor his Counsel appeared for the scheduled hearing of the suit. The matter proceeded ex parte under Order 9 rule 20 (1) (a) of the Civil Procedure Rules and the case was heard on 28 February 2012. On the basis of the cheques the Plaintiff was awarded a sum of Uganda shillings 47,098,000/=. The Plaintiff was also awarded interest at 3% per month from August 2010 up to the date of the filing of the action in December 2010. Additional interest was awarded at 8% per annum from the date of filing the suit up to the date of judgment. Finally the Defendant was awarded interest at 21% per annum from the date of judgment till payment in full and costs of the suit.

Subsequently the Defendant filed Miscellaneous Application Number 395 of 2011 to set aside the order issued on 8 December 2012 to proceed ex parte on the ground that no evidence was adduced on that day. The application was allowed following the case of **Kanyabwera versus Tumwebaze [2005] 2 EA at page 86**. The gist of the Supreme Court judgment is that Order 9 rule 17 (1) (a) which is now revised and cited as Order 9 rule 20 (1) (a) of the Civil Procedure Rules is not intended to allow a party to have indefinite ex parte hearings without making the other party aware of the proceedings. Where a Plaintiff wants his suit to be heard, he cannot at the same time after obtaining an order to proceed ex parte apply for it to be adjourned. The Defendant would be entitled to notice of subsequent hearing dates.

That notwithstanding, the Plaintiff's witnesses were cross examined after setting aside the ex parte proceedings and judgment and the Defendant did not adduce any additional evidence of his own. The Defendant's Counsel only exercised the right of cross examination of the Plaintiff's witnesses. Secondly certain documents of the defence were admitted by consent of the parties on 29 October 2013. The documents admitted are the following:

1. Acknowledgement of 3,000,000/= dated 16th of August 2012 exhibit D1.
2. Receipt of Uganda shillings 4,000,000/= dated 27th of July 2013 exhibit D2.

3. Another receipt dated 9th of September 2013 for Uganda shillings 2,000,000/= exhibit D3.

The Plaintiff's witnesses had written testimonies admitted in evidence as their testimony in chief and were cross examined. The Defendant neither filed witness statements nor appeared to give evidence in rebuttal. The defence relies on the cross examination and the joint scheduling memorandum for their defence.

I have carefully considered the evidence adduced. Starting with the joint scheduling conference memorandum filed on court record on 7 October 2013 and endorsed by Counsel for both parties it is agreed that the Plaintiff supplied hardware goods to the Defendant on a credit arrangement and upon acknowledgement, the Defendant was supposed to pay for the goods. However the controversy between the parties as reflected in the points of disagreement contained in the joint scheduling memorandum include whether the Defendant issued cheques drawn in the Plaintiff's favour which on being presented for encashment by the Plaintiff were dishonoured and returned with the inscription "refer to drawer". Secondly it is in controversy whether the Defendant was notified of the dishonour and made several promises to pay in vain. Thirdly it is in controversy whether the credit arrangement included an agreement that failure to pay after two weeks upon the sale to the Defendant would attract interest of 3% per month. It is in controversy whether a sum of Uganda shillings 30,000/= was agreed as a penalty on any dishonoured cheques.

The facts asserted by the Defendant which are in controversy and disputed by the Plaintiff included whether the Defendant paid for all the hardware goods that he was supplied with. Secondly whether the Defendant did not receive and/or acknowledge receipt of the goods the subject matter of this suit. Thirdly it is in dispute whether the cheques in issue were security because the Defendant had a running account with the Plaintiff. Lastly whether the Defendant did not at any one time receive any notice of dishonour.

I have duly considered the claim in the plaint, it is true that the Plaintiff's action is for recovery of Uganda shillings 51,394,101/=, general damages for breach of

contract, interests and costs of the suit. In paragraph 4 of the plaint the Plaintiff's action is partly founded upon acknowledgement of receipt of goods according to invoices attached as annexure B1 – B5. Secondly it is averred that the Defendant in paying for the goods sold issued various cheques which was subsequently admitted in evidence. The Defendant's defence on the other hand primarily denies the claim and alternatively asserts that the Defendant shall avail proof of payment of the actual amount by way of cash to cover the dishonoured cheques.

Issue number 1 of **whether the parties had contractual relationships and of what nature** is resolved by the submissions of the Defendant in reply. The Defendant's submissions amount to an admission that there was a contractual relationship between the parties. The basis of the admission is the agreed fact that the Plaintiff supplied hardware goods to the Defendant on a credit arrangement and upon acknowledgement the Defendant was supposed to pay for the goods. The Defendant was supposed to make payment against invoices raised and backed up by post dated cheques. Consequently the remaining issues are issues number 2, 3 and 4. These are:

- Whether the Defendant breached the contractual relations?
- Whether the Defendant was notified of the dishonour of the cheques?
- Whether the Defendant is indebted to the Plaintiff as claimed or at all?

Issue two: Whether the Defendant breached the contractual relations?

The primary question of fact to be resolved is whether the Plaintiff supplied the said goods and the Defendant failed to pay for them as agreed. PW1 Mr Kasumba Aloysius relied on copies of invoices attached to the Plaintiff's trial bundle. These invoices were admitted as part of exhibit P5 which gives the ledger account with the attachments of invoices. He testified that all the invoices were acknowledged by whoever would be sent by the Defendant to take the products and that those who were sent were usually the transporters. The role of the transporters was to take the materials from the Plaintiff's factory to the Defendant's hardware at Kiwatule. He testified that the Defendant would come to the offices before the goods are supplied to him and sign post dated cheques in favour of the Plaintiff.

The cheques were admitted as exhibits P1 - P4. Upon entering the credit arrangement with the Plaintiff and prior to delivery of the goods, the Defendant issued cheques in favour of the Plaintiff and it was agreed that the cheques would be presented by the Plaintiff for payment on their respective dates. The witness also testified that they kept a ledger account for the Defendant and the most recent of which was exhibit "A".

PW1 was extensively cross examined on the invoices. Some invoices were not acknowledged. Some invoices had motor vehicle registration numbers and there was no acknowledgement from the Defendant personally. He testified that the Defendant used to confirm by making a phone call. Furthermore he testified that some of the invoices were not paid. All the invoices presented in evidence were not paid.

I have carefully considered the submission of the Defendant's Counsel that the Plaintiffs witnesses admitted that out of the 5 invoices, all of them were paid in full except for the invoice dated 27th of May 2010 for Uganda shillings 12,908,000/=. In cross examination PW1 testified that the second invoice dated 26th of March 2010 has a cheque received for the amount and the cheque was paid. The transaction is reflected in exhibit P5 which is the ledger account of the Defendant indicating that on 26th of March 2010 item number 3983 for shillings 18,954,000/= was debited. The dishonoured cheque for this transaction is not part of the cheques tendered in evidence.

Secondly the third invoice of second of May 2010 for Uganda shillings 7,902,000/= had a cheque received for the invoice and the cheque was not paid. The bounced cheque is not among the 4 bounced cheques. I have checked the four bounced cheques admitted in evidence and none of them is for the amount of 7,902,000/= Uganda shillings.

PW1 further testified that the next invoice is for a sum of Uganda shillings 2,060,000/= and dated 22nd of May 2010 for which a cheque was received and paid. Again there is no cheque for the above amount exhibited in court. He further testified that the invoice dated 27th of May 2010 for a sum of Uganda

shillings 12,908,000/= has a cheque received and the cheque was bounced and is exhibit P1. It further cross examination PW1 testified that exhibit P1 was issued for invoice dated 27th of May 2010. Whereas the cheque exhibit P2 is for 10,960,000/= but the relevant invoice is not attached. Exhibit P3 is the cheque for the sum of Uganda shillings 11,140,000/= but the relevant invoice is not attached and it is only reflected in the ledger account. Exhibit P4 is a cheque of 10,090,000/= Uganda shillings but no invoice was attached. It is reflected as paid in the ledger account of the Plaintiff. He testified that the ledger is prepared by the accounting system and the tally system is controlled by the Finance Department.

PW2 George William Owinja on cross examination testified that he banked the cheques and they bounced. He confirmed that the invoice of 26th of March 2010 of about 18,000,000/= Uganda shillings had a cheque and it was paid. The next invoice of Uganda shillings 20,032,500/= was also paid. Another invoice of second of May 2010 is for Uganda shillings 7,902,000/= which was paid. The invoice of 22nd of May for Uganda shillings 2,260,000/= was paid. The last invoice of 27th of May 2010 for Uganda shillings 12,908,000/= was not paid. Furthermore he confirmed that every cheque issued corresponded with an invoice.

I have cross checked exhibit P5 and this information is reflected therein. The evidence demonstrates clearly that only one invoice of Uganda shillings 12,908,000/= was not paid. This invoice is covered by exhibit P1 which is a cheque dated 28th of June 2010. The rest of the invoices disclosed in paragraph 4 (b) of the plaint is not proved in evidence. This amount is acknowledged by the Defendant as being unpaid save for subsequent receipts of money from the Defendant which will be considered later. The Defendant's contention is that the amount of money claimed amounting to Uganda shillings 51,394,101/= is not covered by invoices and therefore there was no consideration for the cheques.

The facts concerning the cheques are pleaded in paragraph 4 (c) of the plaint where the Plaintiff avers on the facts giving rise to the suit that: *The Defendant in paying for the goods sold, issued various cheques with the following amounts:* The details of the cheques are given inclusive of the cheque dated 28th of June 2010

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for Uganda shillings 12,908,000/= exhibit P1. There are three other cheques which are not related to any of the invoices in paragraph 4 (b) of the plaint. The submission is problematic for the simple reason that if the amounts in the cheques namely cheque dated 31st of July 2010 for Uganda shillings 12,090,000/= exhibit P4; cheque dated 3rd of July 2010 for Uganda shillings 10,960,000/= exhibit P2 and the cheque dated 22nd of July 2010 for Uganda shillings 11,140,000/= exhibit P3 are added to the invoice amounts which were admitted as paid by the Plaintiffs witnesses, the figures involved would be more than the amount claimed in the plaint of Uganda shillings 51,394,101/=. By a simple deduction the amounts in the cheques in total is Uganda shillings 47,098,000/=. Out of this amount can be subtracted the cheque exhibit P1 for Uganda shillings 12,980,000 giving a total of Uganda shillings 34,190,000/= for the three cheques not covered by any invoice in paragraph 4 (b) of the plaint. The amounts on the invoices which were paid included an invoice dated 26th of April 2010 for 20,032,500/=. The invoice of 26th of March 2010 is for 18,964,000/=. Another invoice dated 22nd of May 2010 is for Uganda shillings 7,902,000/= and lastly an invoice dated 23rd of May 2010 is for Uganda shillings 2,060,000/=. If these amounts are added to Uganda shillings 34,190,000/= one gets a total of Uganda shillings 83,148,500/=. In other words the total amount claimed in the plaint of 51,394,101/= obviously does not include the amounts in the invoices and is only consistent with the amounts written on the face of the cheques which bounced.

In the premises the submission that the amount claimed in the plaint lacks consideration because it does not arise from the invoices has no merit. It is only true that only one of the invoices dated 27th of May 2010 for Uganda shillings 12,980,000/= is also covered by a post dated cheque exhibit P1 for the same amount which cheque is dated 28th of June 2010. On the other hand the amounts on the cheques do not correspond to the amounts in the invoices which have been paid. Secondly PW1 made it clear that the amounts on the relevant invoices were paid on the basis of different cheques which are not before the court. Whereas the total amount in the cheques is 47,098,000/=:, there is only a small difference in the amount claimed with the total claim in the plaint. This is the same amount that was allowed in the previous judgment issued ex parte and

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which has since been set aside. Paragraph 4 (b) in which the question of invoices is raised only gives facts about supply of goods to the Defendant but does not give any amounts involved. Only one invoice is also covered by a post dated cheque. The rest of the amounts in the invoices were admittedly paid. However the amounts paid are not the amounts on the cheques which bounced and are pleaded in paragraph 4 (c) of the plaint.

In paragraph 5 (a) of the plaint it is averred that upon failure to pay on the credit arrangement for a period of two weeks, there would be an interest of 3% per month on the outstanding amount. It is further averred that the amount had been accumulating since January 2010. Furthermore the Plaintiff claimed in paragraph 5 (b) that an amount of 30,000 Uganda shillings was payable on any dishonoured cheque as in the instant case. The conclusion is that the Plaintiffs claim is based entirely on the face value of the dishonoured cheques. This is evident from the prayers in the plaint showing that the amount of 51,394,101/= Uganda shillings was an outstanding amount as at 8th of December 2010. Additional interest is claimed and the outstanding amount at 3% per month from 9th of December 2010. Consequently the total amount claimed includes interest at 3% per month from January 2010 up to 8 December 2010.

Finally the question of whether there was a breach of the contractual relationship between the parties has been answered by PW1 and PW2 who testified orally on the basis of the accounting details that certain payments had not been made by the Defendant. One of these payments is conceded to by the Defendant's Counsel and relates to the invoice dated 27th of May 2010 and also cheque exhibit P1 both of which documents disclose the amount Uganda shillings 12,908,000/=.

I have additionally considered exhibit P5 which is the Ledger account of the Defendant with the Plaintiff for the period 1st January 2010 and 1st of January 2011. Furthermore the transaction for Uganda shillings 12,980,000/= and admitted by the Defendant is reflected in exhibit P5 under the date 27th of May 2010 for particulars of sales trading and tax invoice head office 4820.

Secondly exhibit P4 which is the cheque for Uganda shillings 12,090,000/= in the cheque dated 31st of July 2010 is reflected in the accounts dated 10th of August 2010 as unpaid cheque. It is also reflected on 5 August 2010 and "stil" receipt head office 087/08/10. Thirdly Exhibit P2 is the cheque dated 3rd of July 2010 for Uganda shillings 10,960,000/= is reflected and tax invoice head office 4927 dated 2nd of June 2010. The evidence is consistent with the fact that a post dated cheque was issued in respect of the tax invoice 4927 dated 2nd of June 2010. Fourthly exhibit P3 is a cheque dated 22nd of July 2010 for Uganda shillings 11,140,000/= and is in respect of Ledger account dated fourth of August 2010 for unpaid the cheques. The same amount is reflected on 21 June 2010 under tax invoice head office 5214.

Objection was made to the admissibility of exhibit P5 which was however tendered in as records of the Plaintiff under its "Tally System". The tally system is an electronic record under section 2 (1) of the Electronic Transactions Act, Act 8 of 2011 which defines "electronic record" as follows:

"electronic record" means data which is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device and includes a display, printout or other output of that data;"

It is my finding that the objections of the Defendant's Counsel on the admissibility of exhibit P5 go to the weight of the electronic record and not on the question of admissibility. Firstly the document has already been admitted in evidence and is marked exhibit P5. Secondly section 8 (1) of the Electronic Transactions Act 2011 provides that in legal proceedings, the rules of evidence shall not be applied so as to deny admissibility of data message or electronic record on the ground that it is constituted by an electronic record among other things. However it further provides under section 8 (2) that the person seeking to introduce a data message or electronic record in legal proceedings has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. Consequently PW1 and PW2 testified about the "tally system" which is an electronic record with the Plaintiff containing a record of

transactions including details of credit and debit of the client. It is retrievable from the computer after data is entered. In other words the only thing objectionable about the document is not its admissibility but the weight to be attached to it. The question of the weight to be attached to an electronic record on data message is provided for under section 8 (4) of the Electronic Transactions Act 2011. The weight of evidence has nothing to do with admissibility. Admissibility is based on authenticity according to section 8 (2) of the Electronic Transactions Act. Under subsection 4 of section 8 of the Electronic Transactions Act when assessing the evidential weight of an electronic record the court will have regard to the reliability of the manner in which it was generated, stored or communicated. Secondly the reliability of the manner in which the authenticity of the data message was maintained. Thirdly the manner in which the originator of the data message or electronic record was identified and any other relevant factor is considered. None of the Defendant's objections related to any of the three factors stated above. Secondly the objection is presumptuous and is based on the assumption that the Plaintiff can enter any data or record. That presumption is rebutted by the cheques which cheques are cross-referenced with exhibit P5. Secondly the exhibit was used by the defence partially to prove payment of Uganda shillings 9,000,000/= after the filing of the suit by the Defendant. Apart from the Defendant being barred by the doctrine of estoppels to contest this document, the payments reflected therein which take away from the suit show a more likelihood of truth than fabrication.

There is further no need to make a presumption about the authenticity of the electronic record admitted in evidence on the grounds of section 8 (5) of the Electronic Transactions Act which deals with authenticity of electronic records system in which an electronic record is recorded or stored. Because the Plaintiff adduced evidence through PW1 about the tally system which is generated automatically at the end of the month after certain transactions entered and given to the client/the Defendant in this case on a monthly basis, there was a basis for admissibility of the electronic record without relying on presumptions of law under section 8 (5) (supra). Finally the document having been admitted, it is too late to object to it for purposes of admissibility. Whether rightly or

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erroneously admitted the document was proved in evidence and supports evidence of the cheque leaves also adduced in evidence. It supports the testimonies of the Plaintiff's witnesses and is consistent with the overall case of the Plaintiff in terms of the contractual arrangement of the parties. It is consistent with partial payment by the Defendant after filing the suit of Uganda shillings 9,000,000/= . In the premises exhibit P5 has been considered and proves again together with the cheque leaves signed by the Defendant that the Defendant is indebted to the Plaintiff for goods supplied and not paid for and therefore the Defendant is in breach of contract. Issue number two is answered in the affirmative.

Whether the Defendant was notified of the dishonour of the cheques?

The witness statement of PW1 on this issue is paragraph 14 and is as follows:

"These payments were made against the invoices raised backed with post dated cheques. The debit side shows the invoices and the bounced cheques and the credit side shows the payments. Unless otherwise, most payments are done through cheques. Efforts were made to reach the Defendant about the bounced cheques but all was in vain until about 16th of August, 2010 when we contracted the Plaintiff's lawyers to help and recover the outstanding monies from the Defendant. A copy of the said letter is on record marked P6 and the same is admitted by the Defendant."

PW1 was not cross examined about paragraph 14 of his witness statement. PW2 testified that he had a meeting with the Defendant on several occasions to find ways of settling his indebtedness but all was in vain. In paragraph 8 he testified that he was informed that exhibit P1 dated 28th of June 2010 which he had banked had bounced and upon notifying the Defendant the Defendant asked him to bank the same cheque again on 8 July 2010 but regrettably it bounced for the second time. Secondly the rest of the cheques issued by the Defendant in favour of the Plaintiff equally bounced. (See paragraph 8 of the witness statement). In paragraph 9 he testified that: "I later visited him at his outlet and we agreed that

he makes good his debt but all was in vain forcing us to forward his case to the Plaintiff's lawyers." This is evidently after all the four cheques had bounced.

I have carefully considered the evidence of PW2 in cross-examination and it is quite apparent that when he was cross examined on paragraph 8 of his witness statement, he just confirmed it. He was not cross examined about notice of dishonour of the cheques. The Defendant's Counsel submitted that there was no evidence adduced by the Plaintiffs witness PW2 of the notice of dishonour of the cheques being given to the Defendant. However the evidence of PW2 is that the Defendant was notified about exhibit P1 and asked the Plaintiff to bank it a second time. Subsequently the other cheques bounced and PW2 went to the Defendant to discuss his indebtedness pursuant to the bouncing of the cheques. He also testified that the Defendant accepted the figures and dates in exhibit P5 generated from the electronic record of the "tally system" giving the ledger account of the Defendant. PW1 also referred to exhibit P6 which is a letter of KSMO advocates dated 16th of August 2010 addressed to the Defendant. In that letter the lawyers write that the records of Defendant given them by their client show that the Defendant had an outstanding balance for goods sold to him and unpaid for of Uganda shillings 46,394,101/=, the facts of which were within the Defendants full knowledge. The letter does not however refer to any cheques.

The rules governing notice of dishonour of cheques are found under section 48 of the Bills of Exchange Act. For the notice of dishonour to be valid and effectual, the notice must be given in accordance with the rules under section 48. The notice may be in writing or by personal communication and may be given in terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment. It follows that verbal communication of the dishonour of the cheque may be sufficient communication. Secondly the return of the dishonoured cheque to the drawer or endorser of the bill is deemed to be sufficient notice of dishonour. Thirdly the notice of dishonour is to be given within a reasonable time immediately after the cheque is dishonoured. Where the person giving the notice resides in a separate place from the drawer or endorser of the cheque, notice is given or sent off a day after the dishonour of the cheque

coming to the notice of the drawee or reasonably soon thereafter. There are certain details which are not in evidence. What is in evidence is that exhibit P1 was specifically communicated to the Defendant when it was dishonoured. Exhibit P1 is dated 28th of June 2010. It was returned about 12 July 2010. Exhibit P2 was handled around 16 August 2010 by Diamond trust bank. Exhibit P3 was also handled around 4th of August 2010 by Diamond trust bank. Exhibit P4 was handled around 10 August 2010 by Diamond trust bank. All of the cheques have the endorsement "refer to drawer "or R/D. The Plaintiff has proved on the balance of probabilities that discussions were held between the parties after dishonour of the cheques. When the discussions were in vain, the matter was referred to the Plaintiff's lawyers. The only issue is whether the notice of dishonour was given within a reasonable time to the Defendant.

The Defendant's defence is that there was no notice of dishonour and not that there was no notice within a reasonable time to the Defendant of the dishonour of the cheques. The Defendant was not only notified by the statement in the ledger account but also through discussions with PW2. In those circumstances the Plaintiff has proved on the balance of probabilities that there was notice of dishonour of the cheques and that the full indebtedness of the Defendant was also the subject matter of discussion between PW2 and the Defendant after the cheques had bounced.

Whether the Defendant is indebted to the Plaintiff as claimed or at all?

On this issue it is an admitted fact by the Plaintiff's witnesses that the Defendant paid some monies. Certain documents of the defence were admitted by consent of the parties namely:

1. Acknowledgement of 3,000,000/= dated 16th of August 2012 exhibit D1.
2. Receipt of Uganda shillings 4,000,000/= dated 27th of July 2013 exhibit D2.
3. Another receipt dated 9th of September 2013 for Uganda shillings 2,000,000/= exhibit D3.

The amounts acknowledged as having been paid total to Uganda shillings 9,000,000/=. These amounts were paid after the Plaintiff's suit had been filed on

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16 December 2010. The payments confirm the indebtedness of the Defendant. The Defendant's Counsel wanted to limit this indebtedness to the face value of exhibit P1 which is 12,908,000/= Uganda shillings less what was paid after the suit was filed. However the Plaintiff has proved in evidence as at the time of filing the suit that the face value of the cheques amounting to 47,098,000/= was outstanding and owing to the Plaintiff from the Defendant. If Uganda shillings 9,000,000/= is subtracted from the above amount what remained outstanding is Uganda shillings 38,098,000/=. In the premises the issue of whether the Defendant is indebted to the Plaintiff as claimed is qualified and answered in the affirmative. The Defendant is indebted to the Plaintiff in the sum of Uganda shillings 38,098,000/=.

Remedies available.

I have considered the legal doctrine that cheques are payment and not security. (See decision of Lady Justice Irene Mulyagonja Kakooza in **Sembule Investments Ltd vs. Uganda Baati Ltd HCMA 0664 of 2009; Kotecha vs. Mohammad [2002] 1 EA 112** of the Court of Appeal of Uganda and **Maersk Uganda Ltd vs. First Merchant International Trading Ltd High Court Civil Suit No 143 of 2009**)

The Plaintiff is entitled to payment of the amount of Uganda shillings 38,098,000/= which is the price of products supplied on credit terms to the Defendant backed by cheques exhibits P1, P2, P3 and P4 less amount paid.

Secondly on the question of whether the Plaintiff should be paid interest of 3% per month on the outstanding sum, the conditions of sale in the tax invoice issued by the Plaintiff to the Defendant is that 3% per month would be charged on any outstanding amount if not paid within the credit period. However the invoices tendered in evidence do not relate to the invoices for which the cheques founding the cause of action of the Plaintiff were issued. It is not proven that all the cheques had the same terms as in exhibit P1 which is covered by an invoice. In the premises the Plaintiff would be awarded reasonable interest. It is a principle of common law that upon breach of a contract to pay money due, the amount recoverable is usually limited to the amount of the debt together with such

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interests from the time when it became payable under the contract or as the court may allow (See In **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 1063 at page 484).

It is my considered judgment that a reasonable interest under section 26 of the Civil Procedure Act and in the circumstances of this case would be 21% per annum from the September 2010 up to the date of judgment.

Additional interest is awarded at the same rate from the date of judgment till payment in full on the decreed amounts.

As far as the claim for damages is concerned, I do not agree with the Plaintiff's Counsel that additional damages should be awarded. The award of interest is sufficient compensation to the Plaintiff and general damages are disallowed. In accordance with section 27 of the Civil Procedure Act, costs would follow the event and the costs of this suit are awarded to the Plaintiff.

Judgment delivered in open court 17 October 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsels Mulema Mukasa for the Plaintiff and Brian Othieno for the Defendant

Parties absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

17/10/2014

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