

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT No. 0478 OF 2021

5 **INDUSTRIE ROHSTOFFE GMBH** **PLAINTIFF**

VERSUS

1. MATIYA GOLDEN }
2. SEMPUMA PATRICK MUGAGA } **DEFENDANTS**

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Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

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The Plaintiff is a company incorporated in Austria, dealing in the manufacture of chemical products. By this suit, it seeks to exercise its right as an unpaid seller, to regain possession of chemical products (Poly aluminium chloride) shipped in eighteen (18) containers, now in custody of the Uganda Revenue Authority, in transit to the defendants. The basis of the plaintiff's claim is that during or around December, 2020 the defendants holding out as M/s Bristol Water Plc., UK expressed interest in purchasing eighteen (18) containers full of Poly aluminium chloride to be delivered in Uganda. After shipping the goods and sending its invoice to the second defendant, which invoice remains unpaid, the plaintiff sought verification of the transaction by M/s Bristol Water Plc., UK only for the latter to deny having placed the order. Upon discovering that it was the victim of identity fraud, the plaintiff now seeks to regain possession of the consignment of goods before they pass into the hands of the defendants. Although duly served with summons to file a defence, the defendants did not file any written statement of defence, hence hearing of the suit proceeded *ex-parte*.

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b) The issues to be decided;

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Two issues arise from these facts, namely:

1. Whether the plaintiff is entitled to an order of stoppage of the goods *in transitu*.
2. What remedies are available to the plaintiff?

c) The decision;

In all civil litigation, the burden of proof requires the plaintiff to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each
5 element of its claim, or cause of action, in order to recover. To succeed in a suit of this nature, the plaintiff must prove that; (i) it is an unpaid seller; (ii) that the goods are still in transit; and that (iii) it is apparent that the buyer will not perform a substantial part of his or her obligations.

1st issue; whether the plaintiff is entitled to an order of stoppage of the goods *in transitu*;

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a. The plaintiff being an unpaid seller; either wholly or partially.

As proof of the underlying transaction, the plaintiff relies on a series of email correspondences between the defendants and the plaintiff starting on 6th December, 2020 with an expression of
15 interest to purchase of the goods and ending on 23rd March, 2021 (exhibit P. Ex.1) with the notification of delivery of the consignment in Kampala. The correspondences are corroborated by a bill of lading dated 11th March, 2021 (exhibit P. Ex.2) naming the plaintiff as consignor and M/s Bristol Water Plc. (Africa) as consignee. They are further corroborated by a purchase order dated 21st December, 2020 (exhibit P. Ex.4), an invoice dated 9th March, 2021 (exhibit P. Ex.3) in the
20 sum of US 148,495.88, and a DHL delivered notification of delivery of the goods dated 5th August, 2021 (exhibit P. Ex.5).

Poly aluminium chloride is used in the treatment of drinking water, waste water, process water, effluent, swimming pool water and in the manufacture of paper. P.W.1 Ms. Andrea Kemeny, the
25 plaintiff's exports Manager, testified that upon dispatch of the goods, the plaintiff lost contact with the defendant and has not been paid to-date. There being no evidence to controvert the documentary and oral evidence adduced by the plaintiff, I find that the plaintiff has proved on the balance of probabilities to be an unpaid seller.

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b. The goods are still in transit.

According to section 56 (1) of *The Sale of Goods and Supply of Services Act, 10 of 2018*, goods are taken to be in the course of transit from the time when they are delivered to a carrier by land,
5 air or water, or other bailee for the purpose of transmission to the buyer, until the buyer or his or her agent for the purpose takes delivery of them from that carrier or other bailee. This means that goods should be neither with the seller nor with the buyer nor with their agent. The goods have to be within the custody of a carrier as an intermediary. At that time, the carrier needs not to be either a seller's agent or consignee's agent. Thus, the transit continues as long as the goods are not
10 delivered yet to the consignee or his agent. Delivery refers to the transfer of possession under the contract of carriage at a place where the goods are physically handed over to the buyer. This right is to be exercised in a window of time between the seller's handing over the goods to the carrier (under sale of goods law) and the carrier's handing over to the consignee (under the contract of carriage).

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The essential feature of a stoppage in *transitu*, as has been remarked in many of the cases, is that the goods should be at the time in possession of a middleman, or of some person intervening between the vendor, who has parted with, and the purchaser, who has not yet received them. This means that so long as the goods are with a carrier, the transit continues. The position was thus
20 explained by Cave, J. in *Bethell v. Clark* 19 QBD 553, at p. 561, thus;

In all cases of stoppage in transit, it is necessary first of all to ascertain what is the *transitus* or passage of the goods from the possession of the vendor to that of the purchaser. The moment that the goods are delivered by the vendor to a carrier to be
25 carried to the purchaser the *transitus* begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser and no longer as carrier only, the *transitus* is at an end. The destination may be fixed by the contract of sale or by directions given by the purchaser to the vendor. But, however, fixed, the goods have
30 arrived at their destination and the *transitus* is at end, when they have got into hands of someone who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor.

As proof of delivery to a carrier, the plaintiff relies on a bill of lading dated 11th March, 2021 (exhibit P. Ex.2) naming the plaintiff as consignor and M/s Bristol Water Plc. (Africa) as consignee. The DHL delivered notification of delivery of the goods dated 5th August, 2021 (exhibit P. Ex.5) shows that the 18 containers arrived in Kampala on 23rd March, 2021 into the custody of the Customs Officers of the Uganda Revenue Authority. There being no evidence to show that the consignee has claimed, cleared and taken possession of the goods, I find that the plaintiff has proved on the balance of probabilities that the goods are still in transit.

c. It is apparent that the buyer will not perform a substantial part of his or her obligations.

At common law, a party has the right to suspend the performance of his or her obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his or her obligations as a result of either: (i) a serious deficiency in that party's ability to perform or in his or her creditworthiness; or (ii) his or her conduct in preparing to perform or in performing the contract. The right of stoppage does not require an actual breach of the contract to have occurred in order for the innocent party to exercise the right. The right requires that it must be apparent that one party to the contract will not ultimately fulfil its obligation due to that party's insolvency or similar reason.

According to section 57 (1) of *The Sale of Goods and Supply of Services Act, 10 of 2018*, an unpaid seller may exercise his or her right of stopping goods in transit either by taking actual possession of the goods, or by giving notice of his or her claim to the carrier or other bailee in whose possession the goods are. This provision enacts the right of contracting parties to suspend performance upon an anticipatory breach. Thus, the breach of contract needs merely to be anticipated. The right of stoppage entitles the seller to resume possession of the goods, and retain them until payment of the purchase price, even if the documents of title or ownership have already been transferred to the buyer. The plaintiff as potential victim must assess the likelihood of a future breach, based only on the facts and circumstances at hand.

In the instant case, it is the defendants' creditworthiness that has been cast in serious doubt. P.W.1 Ms. Andrea Kemeny, the plaintiff's exports Manager, testified that after shipping the goods and sending its invoice to the second defendant, the plaintiff sought verification of the transaction by M/s Bristol Water Plc., UK only for the latter to deny having placed the order. It later transpired
5 that the defendants had impersonated M/s Bristol Water Plc., UK, claiming that the company was undertaking a project under M/s Bristol Water Plc. (Africa) that required the chemical products. Upon discovering that it was the victim of identity fraud, the plaintiff cause an injunction to be issued stopping the clearing of the goods from the customs officers.

10 Documents obtained from the Uganda Registration Services Bureau (exhibit P. Ex.6) indicate that M/s Bristol Water Plc. (Africa) was incorporated on 29th March, 2021 and that the first defendant is its sole shareholder and director. By its email dated 19th July, 2021 (exhibit P. Ex.8) M/s Bristol Water Plc., UK denied having any business dealings with or links to M/s Bristol Water Plc. (Africa). It categorically advised the plaintiff that the plaintiff was a victim of a fraud by the
15 defendants. The 1st defendant by a letter dated 3rd November, 2021 (exhibit P. E.x7) sought to give the plaintiff assurances that he was willing to carry the transaction though by amicable settlement but did not offer any concrete terms. This clearly is a transaction involving impersonation and identity theft.

20 To prevent or suspend a stoppage *in transitu* on account of assurances given by the buyer, the assurance must be sufficient to offer security to the seller that its performance will not lead to detriment and damages. Thus, the assurance must cover the value of outstanding payments or goods, and / or the damages anticipated in connection with the anticipated breach of contract; mere promises will not suffice. Sufficient and adequate assurance will ordinarily take the form of a bank
25 guarantee, pledge or bond. None of the defendants has offered such assurance.

The above mentioned behaviour of the defendants offers a good ground for the plaintiff to conclude that the defendants will not perform their obligation to pay for the goods under the contract. This is uncontroverted circumstantial evidence of the defendants' apparent serious deficiency in their
30 creditworthiness or ability to pay for the goods. I therefore find that the plaintiff has proved on the balance of probabilities that the defendants are unable to pay for the goods under the contract.

2nd issue; what remedies are available to the plaintiff.

i. Order of possession and re-delivery / export.

5 The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. When a notice or an order of stoppage is given by the seller to the carrier or other bailee in possession of the goods, the carrier or other bailee must redeliver the goods according to the directions of the seller. After a proper notice has been duly received by the carrier, he has a duty
10 not to deliver the goods to the buyer but to redeliver them to the seller failing which he can be made liable for conversion. For example in *Litt and another v. Cowley and others (1816) 2 Marsh 45; 129 E.R. 68* after the receipt of the notice to stop the goods, the carriers by mistake delivered the goods to the buyer. It was held that the assignees of the insolvent buyer were bound to restore back the goods to the seller, or be liable for damages. It is thus hereby ordered that the goods be
15 restored to the plaintiff. The expense of redelivery must be borne by the seller though.

ii. Costs.

The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain
20 an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendants jointly and severally, as follows;

- a) An order granting the plaintiff leave to take possession of the eighteen (18) containers of Poly aluminium chloride.
- 25 b) An order that the goods be re-exported to the plaintiff at the plaintiff's cost, which cost and that of storage while in Uganda is to be reimbursed by the defendants jointly and severally.
- c) The defendants jointly and severally meet the costs of the suit.

30 Delivered electronically this 17th day of January, 2022

.....Stephen Mubiru.....
Stephen Mubiru
Judge,
17th January, 2022.