



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 285 OF 2015**

**ZINGO INVESTMENTS LIMITED.....PLAINTFF**

**VERSUS**

**MARTIN FRANCIS.....1<sup>ST</sup> DEFENDANT**

**WEST ASIA EXPORT LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. I am called upon to determine whether judgment should be entered in favour of **Zingo Investment Limited**, the plaintiff against the defendants **Martin Francis** (1<sup>st</sup> defendant) and **West Asia Export Limited** (2<sup>nd</sup> defendant) for USD 198,825.31. This amount is alleged through the plaintiff's claim to be the amount represented by 24 cheques issued by the 1<sup>st</sup> defendant under the bank account of the 2<sup>nd</sup> defendant.

2. The plaintiff is in the business of tannery and the supply of wet blue hides and skin. It is the plaintiff's case that the 1<sup>st</sup> defendant approached it and requested it to supply wet blue hide and skin to a company based in India called Blue Metal Imports hereinafter Indian Company which the 1<sup>st</sup> defendant informed it that he had an interest. That it was agreed the plaintiff would ship containers to the Indian company on the terms that 1<sup>st</sup> defendant would make some down payment and the balance would be made by cash against documents. On that understanding the plaintiff shipped 5 containers of those goods valued at USD 251,619.00. On 11<sup>th</sup> March 2015 when the goods reached their destination the 1<sup>st</sup> defendant requested the plaintiff to give the consignee (the Indian company) "free" documents to enable them clear the goods at the port. The plaintiff's managing director, **Robert Njoka Muthara**, stated that the procedure was that he would release to his banker, National Bank of Kenya, documents relating to the shipment and those would not be released to the Indian company until that Indian company made payment through its bank, **bank of Baroda**. Once payment was received by **National Bank of Kenya**, the plaintiff's banker, **National Bank of Kenya** would then release the shipment documents to the Indian Company to enable it clear the consignment.

3. In this case the plaintiff's managing director said that the 1<sup>st</sup> defendant approached him and requested him to authorize National Bank of Kenya to release the shipment document to the Indian company and in turn the 1<sup>st</sup> defendant issued the cheques, the subject of this suit and wrote a letter guaranteeing the plaintiff's payment by the Indian company. This letter is pivotal to this case and I will therefore reproduce it hereunder:

*"March 11, 2015*

*Martin Francis*

*P.O. Box 11638-00400*

*Nairobi – Kenya*

*The Director*

*Zingo Investments Ltd*

*Nairobi-Kenya*

*Dear Mr. Robert*

RE: Agreement to settle the payment for the below invoices/shipment document to Blue Metal Imports & Exports – Chennai India Value in USD 231,691/-

Kindly note as per our meeting I request your office to instruct our Bank in India Chennai, namely Bank of Baroda to release to Blue Metal Imports & Exports – Chennai, all the Import Documents for the below Five containers shipped through your company to Chennai.

This urgent request is being made to avoid further demurrage and other legal complications involved in not clearing the Wet Blue Leather containers which is in Chennai Port for the past two and half months.

I agree with Mr Robert that the bills/payments will be settled in 30 days' time. The payments shall flow from Blue Metal Chennai to Zingo Investments Ltd directly as telex transfers; I fully undertake and accept to ensure that the invoices are all settled. I have given my post-dated cheques as a guarantee to Zingo Investments Ltd. I hereby released 24 cheques Ksh 11,123,652/- which is equivalent to USD 231,619/-

**The details of the Five Invoices and the Amount due in USD are as below:**

Inv. 097/14 - USD 61,735.00

Inv. 103/14 - USD 31,255.00

Inv. 104/14 - USD 40,363.00

Inv. 106/14 - USD 39,150.00

Inv. 108/14 - USD 59,116.00

The balance total of USD – 231,619.00 – (USD Two Hundred Thirty One thousand Six Hundred Nineteen Only)

Agreed & signed by

Martin Francis

Nairobi

4. The plaintiff stated that the defendant then issued it cheques, in terms of that letter, 21 of which were signed by 1<sup>st</sup> defendant and 3 of which were unsigned. Those cheques were drawn under the bank account of the 2<sup>nd</sup> defendant. That those cheques on being banked by the plaintiff were dishonoured and out of the amount due the defendants has only made payment, to the plaintiff, USD 12,000.00 leaving a balance due and payable to the plaintiff of USD 219,619.00, which is the amount claimed in this action.

5. In defence the 1<sup>st</sup> defendant stated that he was a director of the 2<sup>nd</sup> defendant. He had been friends with **Robert Njoka Muthara**, the plaintiff's managing director, for a long time. 1<sup>st</sup> defendant also knows the director of the Indian company.

6. That in December 2015 Robert requested him to assist him to get the Indian Company to settle payment for a consignment of hides and skins that the plaintiff had sent but had not been paid for it by that Indian Company. Robert wanted 1<sup>st</sup> defendant to assist him get speedy settlement of that consignment. Robert informed him that the Indian Company had refused to accept delivery for the reason that the consignment was of poor quality, was wrongly packed and was of less measurement than required. 1<sup>st</sup> defendant stated that because of those short comings of the consignment he was aware the Indian company wanted a reduction on the price.

7. The 1<sup>st</sup> defendant stated that Robert informed him that the plaintiff's bankers was harassing the plaintiff to pay up a loan which the plaintiff had taken relying on the payment expected from the Indian Company to settle that loan. The 1<sup>st</sup> defendant then said:

**“He then pleaded with me to write to him postdated cheques to simply give an assurance to the bank that he was expecting money in due course and would settle the loan.**

**I duly informed Robert that I had no funds in the bank myself but he continuously pleaded with me and since he had been my long time friend, I opted to issue him with undated cheques but we agreed categorically that he was not to present the same to the bank for banking or payment, which he promised he would abide. I also promised him that I would try and push Blue Metal Imports & Exports to pay him as urgently as possible so that he could pay up whatever loan his company had.**

**In April 2015, I was surprised when I received a call from Kasarani Police Station to report to the station on account of a complaint by Robert at the police station that I had issued bouncing cheques and subsequently charged. Moreso I became aware that the same Robert had through his company sued me in a civil court when I was served with execution papers in the said case.”**

8. The 1<sup>st</sup> defendant denied guaranteeing the Indian Company and stated that he never procured nor purchased or received the consignment.

## ANALYSIS

9. A cheque is a bill of exchange. It is trite that a cheque drawn on a bank is payable on demand see section 55(1) of the Bill of Exchange Act Cap 27. Such cheque is due for payment on presentation.

10. In this case the 1<sup>st</sup> defendant stated that he issued the undated cheques to the plaintiff to assist the plaintiff to stay off pressure from its bank which was wanting settlement of a loan it owed the bank. He stated at no time did he expect these cheques to be banked. He said he did this because he was a friend of Robert.

11. What the 1<sup>st</sup> defendant is saying is that there was no consideration for the cheques he issued. If indeed that is correct payment is not due on those cheques. see the **Canadian case of Teixeira v Markgraf Estate 2017 ONCA 819(CanLII)**, which is persuasive, where it was stated:

***“Both total failure of consideration and complete absence of consideration (as, for example, where a gift is made by cheque of the donor but not completed by payment upon presentment) are defences to actions upon the engagements of immediate parties to a bill, cheque or note. A gratuitous promise of payment does not become binding at the suit of the immediate promisee merely because it is expressed formally in a negotiable instrument. [Emphasis added.][Footnotes omitted.]”***

12. I must begin by stating that I had the advantage of receiving the parties evidence and I formed the opinion that the 1<sup>st</sup> defendant was a truthful witness while I did not form the same opinion with regard to the plaintiff’s managing director. As I say so, I am very aware that demeanor alone cannot be the sole determinant of a case. This was made clear in the case **R v Barwich 2001 Bcsc 1623(CanLII)**, again a Canadian case, thus:

***“[11] The Ontario Court of Appeal also cited with approval another British Columbia Court of Appeal decision Faryan v. Chorney, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 at pp.356-7, quoting as follows:***

***If a trial Judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness...***

***The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...***

***The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge’s finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.”***

13. What then else persuaded me that the 1<sup>st</sup> defendant was telling the truth and not the plaintiff’s managing director.

14. When the plaintiff filed this case and attached his witness statement one got the distinct impression that he had not had any other contact with the Indian Company until he was introduced to it by the 1<sup>st</sup> defendant. He did later file a further witness statement.

15. It is important to note that interlocutory judgment was entered against the defendants but on an application being made the court permitted the defendants to defend the suit.

16. When the defendants filed their defence, documents and witness statement it became clear that the plaintiff had prior dealings with the Indian company, independent of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant does concede that it was he who introduced the plaintiff to the Indian Company because of his friendship with the plaintiff’s managing director.

17. The defendants provided, through their bundle of documents emails exchange between the plaintiff’s managing director and representative of the Indian Company which clearly showed that there had been that business relationship between the plaintiff and the Indian Company. This is obvious from the content of the emails where the representative of the Indian Company even refers to plaintiff’s representative perhaps an agent based in Chennai in India called Raju.

18. But perhaps what leads more credence to the testimony of the 1<sup>st</sup> defendant is the fact that those emails show that the Indian Company was unwilling to receive the consignment until the plaintiff gave it substantial discount and credit for a consignment that was dissatisfactory to them. Those emails between the plaintiff’s managing director and the representative of the Indian Company are at the time when the plaintiff’s managing director, Robert, went to the 1<sup>st</sup> defendant seeking his assistance which culminated with the 1<sup>st</sup> defendant issuing cheques to assist the plaintiff reduce the pressure from its banker.

19. Even though the plaintiff’s case is that it was owed USD 231,619.00 by the Indian Company the 1<sup>st</sup> defendant attached a copy of a letter, written by the plaintiff to its banker National Bank of Kenya Limited dated 5<sup>th</sup> March 2015, where the plaintiff was confirming to its banker

that the Indian Company owed the plaintiff USD 25,000.00. The plaintiff by that letter requested its banker to collect this amount from the Indian Company. There is an obvious discrepancy there on what is claimed in this case and what the plaintiff informed its bankers it was owed.

20. It should be noted that the plaintiff not only did it institute this Civil case against the defendants but filed a complaint with the police and as a result the 1<sup>st</sup> defendant was arrested and arraigned before a criminal court where he faces two counts relating to the issuance of those cheques.

21. 1<sup>st</sup> defendant stated for reasons he could not understand that case attracted undue press coverage and because he feared it would affect his employment when the 1<sup>st</sup> defendant offered to withdraw the complaint on receipt of Ksh 2 million from the 1<sup>st</sup> defendant the 1<sup>st</sup> defendant paid him.

22. I can only say that in my view the plaintiff used both the civil and criminal process to exert maximum pressure on the 1<sup>st</sup> defendant and he succeeded when he was paid Ksh 2 million. I find and hold that the explanation given by the 1<sup>st</sup> defendant on those payments is the more plausible explanation.

23. I reject the submission that there was an admission of liability, by the 1<sup>st</sup> defendant through his then advocate, when this matter was before **Justice Ochieng** for interlocutory application. One only needs to read the learned judge's Ruling of 29<sup>th</sup> September 2016 to confirm that what the plaintiff submitted was inaccurate. The learned Judge stated:

*“26. Much as the law firm of Alphonse Mutinda & Co. Advocates had actual authority to represent the Defendants, I find it more probable than not, that when Advocate Nyangoro told the court that the Defendants admitted liability and also that they could pay the sums claimed within 30 days he did not have the authority of his client to do so.*

*27. I find so because the affidavit sworn by martin in support of the application dated 22<sup>nd</sup> December 2015, was inconsistent with admission of liability, and commitment to settle the sums claimed.”*

24. In the end I am not satisfied on a balance of probability that the 1<sup>st</sup> defendant gave the cheque in payment of the consignment sent to the Indian Company. I also make a finding that the letter written by 1<sup>st</sup> defendant dated 11<sup>th</sup> March, 2015, reproduced above, for the reasons set out herein above was not intended to be a guarantee or an undertaken. In my view the plaintiff's managing director took advantage of his friendship with the 1<sup>st</sup> defendant to recover for the consignment which was rejected by the Indian Company.

## **CONCLUSION**

25. For the reasons set out above the plaintiff's case fails and is dismissed with costs to the defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 30th day of APRIL, 2020.**

**MARY KASANGO**

**JUDGE**

## **ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **30<sup>th</sup>** day of **April, 2020**.

**MARY KASANGO**

**JUDGE**