



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 561 OF 1998

UNIVERSAL BANK LIMITED.....PLAINTIFF

VERSUS

**DOUBLE WHITELINE STATIONERY & PRINTERS & 2
OTHERS.....DEFENDANT**

J U D G M E N T

The Plaintiff's suit is against the Defendants for a sum of Shs.3,767,563.70 jointly and severally. The Plaintiff is confusing as the Plaintiff in paragraph 4 sets out particulars of the Promissory Notes on which the claim is based amounting to Kshs.1,772,663.70 and in paragraph 7 states that the 1st Defendant as maker of the same has failed or neglected to pay the same. I note that there appears to be no paragraphs 5 & 6 to the Plaintiff. In paragraph 10 there is a claim in respect of a further four Promissory Notes which total Shs.1,994,800 and states that the same were presented to the maker (1st Defendant) on due dates but which were dishonoured.

The second and third Defendants are companies owned by a person called Naker who left the country owing sums of money to various creditors and are unable to pay the sums awarded against them. The 1st Defendant is a business run by Mrs. Wanjiru who gave evidence on her own behalf.

The Plaintiff gave evidence through its manager Mr. Pratah Nagda. He produced the Bills Exh. 1 & 2. which he said had been discounted by the 2nd and 3rd Defendants. He produced Notices of Dishonour Exhibit 3 which he said were sent to the 1st Defendant as drawer of the Bills. They were sent on various dates but in each case the day after the due date for the payment of the respective bill to which the Notice related, All were addressed to the 1st Defendant at P.O. Box 70620, Nairobi. I shall deal with these notices later in this Judgment.

The witness produced as Exhibit 4 a letter of demand addressed to the 1st Defendant at the same address to which the Notices had been addressed. The notice was dated the 26.8.97 and was for a sum of Shs.1,772,663=70. On the 4 September 1997 the 1st Defendant's Advocate replied to two letters of the 26 August stating their client was surprised to receive the demand as she neither banked nor had any dealing with their client. On the 9th October, 1997 the Plaintiff's Advocate wrote to the 1st Defendant's advocate stating that if the 1st Defendant had paid the payee then they required evidence of this fact and if it was not forthcoming within seven days it would be assessed that no payment had been made. This last letter was in response to a letter from 1st Defendant advocates of the 6th October stating the total amount due under the Promissory notes were paid in full to the payees. On the 21st October the 1st Defendant's advocates sent statements to the Plaintiff's advocates in which the sums for which the Promissory Notes had been drawn had been paid in full. See Exhibit 8. These statements related to the sums claimed in the

Plaint in paragraph 10. On the 11th May 1996 the Plaintiff's advocate wrote again to the 1st Defendant advocate stating that the evidence given proved nothing and that in any event their clients were holders in due course without any notice of any defect and that they had instructions to proceed further in the matter.

In cross-examination the Plaintiff's witness said they had not contacted the 1st Defendant to inform her that they were discounting the Bills. He also said he was aware that the 2nd and 3rd Defendants had swindled a lot of banks. The 1st Defendant gave evidence of the transactions she had with the 2nd and 3rd Defendants whereby she received goods and in some cases paid by promissory notes

In late August 1998 she said Naker had fled the country.

In cases where she had issued promissory notes the 1st Defendant would pay in due date by cheque. Initially they gave her the promissory notes back but in the case of the promissory notes in this case she did not get them back as the 2nd and 3rd Defendants through Naker informed her that their factory had been burnt down and with the promissory notes.

She received the letter of demand Exhibit 4 but did not receive the Letter of Dishonour although apparently sent to her correct box number. However in late August 1997 a woman from the Bank telephoned her. She produced as Exhibit B evidence of payment of all of the Notes to the second defendant showing the same were paid on due date. When she paid she was unaware that the Notes had been discounted to the Plaintiff.

She also produced as Exhibit C which was a letter from First National Finance informing her that they had received bills from the 2nd Defendant and asked her to pay to them which she did.

In assessing the 1st Defendant's evidence I formed the view that she was a thoroughly truthful and reliable witness. She appears to have conducted her affairs in a business like way and did not strike me as the sort of person who would not honour her debts. I accept her evidence as truthful and that she did not receive the Notice of Dishonour which the Plaintiff allegedly sent to her. I cannot say why they were not sent but had she received them, I am sure she would have consulted her advocates, which she did as soon as she received letter of demand of the 20.8.1997, Exhibit 4. She clearly believed that she had by paying the 1st Defendant relieved herself from the debt and had no reason to disregard the Notices of Dishonour. The Notices of dishonour were allegedly sent over the period from 24 January 1997 to the 12 March, 1997. It is significant that the Plaintiff waited until the 26 August 1997 before making the demand it did through its advocates. The Plaintiff has not explained why this delay of nearly six months occurred. Perhaps had they taken steps earlier they could have obtained payment from Naker who did not leave Kenya until August 1997. Why also did the Plaintiff only give Notice of Dishonour to the 1st Defendant although it alleges in paragraph 10 of the plaint that the Defendants were each given Notice of Dishonour. A fact which I do not believe.

Section 48 of the Bills of Exchange Act states as follows;-

“Subject to the provisions of this Act, when a bill has been dishonoured by non -acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged.”

Again the Plaintiff produced no evidence that it had sent a letter of demand to 2nd and 3rd Defendants. Was this because it knew that Naker had gone and it would be futile pursuing his companies.

Section 45 of the Bills of Exchange Act states

(1) Subject to the provisions of this Act, a bill must be duly presented for payment; and if it be not so presented, the drawer and endorsers shall be discharged.

2(a) where the bills is payable on demand, then, sub ject to the provisions of this Act. presentment must be made within a reasonable time after its issue in order to render the

drawer liable, and within a reasonable time after its endorsement, in order to render the endorser liable, and in determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.”

Section 46(1) of Bills of Exchange Act states as follows:-

“Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence; but when the cause of delay ceases to operate, presentment must be made with reasonable diligence.”

It appears that the Promissory Notes were not presented for payment on the due date and I see no excuse for the Plaintiff not having done so. By waiting so long before sending the letter of demand smacks of negligence.

The due dates for payment of all of the notes ranged from the 23 January 1997 to the 11 March, 1997 being 90 days after the Notes were dated. It therefore appears that taking the last date, the demand for payment was over five months later. Had payment been demanded for example in respect of the first bill due namely on the 23.1.97 the 1st Defendant even if she had paid that bill to the 2nd Defendant would have been put on notice that the 2nd Defendant had lied to her about the Notes being burnt in the factory fire.

In this case there are two innocent parties namely the Plaintiff and the first defendant. It is true that the 1st could only get a good discharge for payment by receiving the notes when paid. In this case she asked for the same and was given a reason why they were not available which she believed. In the case of *Lichborrow V. Mason* 1975 to 1802 ALL E.R. (Report) page 3 where Ashurst C.J. said;-

“We may lay it down as a broad general principle that whenever one of two innocent persons must suffer by the acts of a third he who has enabled such third person to occasion the loss must sustain it.”

It seems to me that this is a fair and accurate statement of the law which I intend to follow.

In the present case I am of the view that the loss in this case was occasioned by the inactivity of the Plaintiff in failing to seek payment of the Notes on due date and that had they done so then the lie told to the 1st Defendant, as to the whereabouts of the Notes, would have been discovered in good time.

In the result, I dismiss the Plaintiff’s claim against the 1st Defendant but enter judgment for the Plaintiff against the 2nd and 3rd Defendants. The costs of the Plaintiff and 1st Defendant will be paid by the 2nd and 3rd Defendants.

Dated and delivered at Nairobi this 22nd day of March, 2001.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.