



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 755 OF 1998

UNGA LIMITED PLAINTIFF

VERSUS

CRESCENT PROCUREMENT SERVICES (K) LTD. 1ST DEFENDANT

MUHIDIN MOHAMED SHEIKH 2ND DEFENDANT

JUDGMENT

The plaintiff's claim against the 1st defendant is for the sum of Shs.19,642,476/= being the value of goods alleged to have been sold and delivered by the Plaintiff to the defendant at the defendant's request. The plaintiff avers that in an attempt to pay the sum due, the defendant issued two cheques to the plaintiff in the total sum of Shs.13,845,000/=. The particulars of the cheques are given as:-

(a) Cheque No. 000039 dated 9.9.1998 for Shs.6,600,000/=.

(b) Cheque No. 000040 dated 19.8.1998 for Shs.7,245,000/=.

According to the plaintiff, those two cheques were dishonoured upon presentment to the bank with the remarks "*refer to drawer*".

The plaintiff therefore claims the sum of Shs.19,642,476/= which said sum includes the value of the two cheques together with interest thereon at commercial rates from the date of filing this suit until payment in full.

In its defence in which Muhidin Mohamed Sheikh is added as a second defendant in a manner which clearly does not comply with the requirements of either Order I or VIII Rules 7, 8 and 9 of the Civil Procedure Rules (an issue which was however not canvassed before me and in respect of which I should therefore express no opinion), the 1st defendant denies owing the plaintiff the sum claimed or any other sum.

With regard to the two cheques alleged by the plaintiff to have been dishonoured, the defendant states that they were in fact countermanded rather than dishonoured. And in a counter claim, the 1st defendant claims that he paid the plaintiff the sum of Shs.22,838,500/= for the supply of maize flour but only received from the plaintiff, flour worth Shs.20,655,000/= Accordingly, by way of counter-claim, the 1st defendant seeks the recovery of the difference between the sum it says it paid to the plaintiff and the value of the maize flour it received i.e. Shs.2,183,500/=. At the same time, it seeks the discharge of a charge held by the plaintiff over L.R. No. 209/13272 Nairobi held by the Plaintiff as security for the alleged debt.

But in a reply to the defence and defence to the counter-claim, the plaintiff joins issue with the defendants on their defences. At the same time it avers that the claim by the plaintiff against the defendant

is for the shortfall in respect of unpaid invoices after all receipts from the 1st defendant to the plaintiff have been taken into account. Consequently the plaintiff denies owing the defendant the said sum of Shs.2,183,500/= or any part thereof. As to the prayer for the discharge of the charge, the plaintiff contends that the charge was created as security for the 1st defendant's indebtedness to the plaintiff and the same it cannot be discharged when the debt remains unsatisfied.

As will have become obvious from the above summary of the respective positions taken by the two main sides in this matter the dispute between them centres on three principal issues. These are:

- (a) Whether the two cheques were dishonoured or countermarked and whether they were issued for a consideration which failed; and
- (b) Whether any goods were sold and delivered to the 1st defendant and if so how much; and
- (c) Whether any moneys are due from the Plaintiff to the 1st defendant or vice versa and if any money is due, how much.

Regarding the two cheques, the 1st defendant does not dispute that it issued them or that they were returned unpaid with the remarks "*refer to drawer*". In any case, the two cheques were produced in evidence and both have those words on them. But in spite of that evidence, the defendant maintained that the cheques were not dishonoured but countermanded by reason allegedly owing to the plaintiff's failure to supply the goods in respect of which the payment represented by the cheques was being made. Given that direct conflict between the two parties we have to establish what the return of the cheques with the words 'refer to drawer' means in the context by this case.

Section 47(1) (a) of the Bills of Exchange Act provides:

- "A bill is dishonoured by non-payment:- (a) when it is duly presented for payment and payment is refused or cannot be obtained.

and sub-section (2) enacts:-

"Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder."

In Byles on Bills of Exchange 24th Edition at page 340, the learned author states:-

"A bill or note as between immediate parties is evidence of money lent, but as between immediate parties only."

In my opinion effect of the above provisions of the law as stated in the Bills of Exchange Act and also in Byles on Bills of Exchange is that in a claim based on unpaid cheques, consideration is pressured and the onus shifts to the 1st defendant to prove that there was failure of consideration. Did the 1st defendant discharge that burden?

In an attempt to show that the cheques were counter-manded, the 1st defendant tendered in evidence two letters dated 21.8.98 and 11.9.98 purportedly written to its bankers stopping payment of the two cheques. There is however no evidence to show that the two letters were forwarded or received by the bank and for all we know the they could have been prepared for the purposes of this suit. It is also instructive and significant to note that when the two cheques were drawn on 19.8.1998 and 9.9.98, the 1st defendant's account at the bank did not have sufficient funds to meet the cheques. The evidence tendered for the plaintiff shows that on 27.8.1998 when the cheque for Shs.7,245,000/= was returned unpaid, the 1st defendant's account had a credit balance of only Shs.204,101.70. Similarly on 15.9.1998 when the cheque for Shs.6,523,938.30 was returned unpaid, the 1st defendant's account had only a Shs.76,061.70 in credit. The reason for the non-payment of the cheques is therefore self-evident. There simply were no funds to meet the cheques.

In his submission, Mr. Kipkorir for the defendants stated that the fact that there were no sufficient funds in the 1st defendant's account did not necessarily imply that the cheques were returned unpaid for lack of funds. He argued that banks usually provide various financial accommodations amongst which are overdraft facilities, and that one did not have to have actual money in his account for his cheques to be honoured. That may well be so but in the context of the instant case, the onus was upon the 1st defendant to show that there were in fact such arrangements in place. It is also my view that having regard to banking practices in this country, the 1st defendant's bank would not have put the remarks "*refer to drawer*" on the two cheques if any such arrangements or accommodation were in place; instead the bank would have stated "*cheques countermanded*" or 'no arrangements' or such like words.

The claim that the cheques were countermanded, in each case, hardly two days after their date of issue for alleged failure to supply the goods paid for does not sound true. Considering that the two parties had been involved in a long business relationship which according to the defendant was worth billions of shillings, I am unable to see what circumstances (and none were put forward) that would justify such a precipitate action only a few days after the issue of the cheque. There was no indication that the 1st defendant had contacted the Plaintiff to find out why the goods had not been delivered to the alleged countermand. The fact that no evidence was tendered to show exactly in respect of what goods the payments were being made and when the relevant goods were ordered shows that the alleged countermand is a mere afterthought. Accordingly, I find that the 1st defendant has wholly failed to discharge the onus placed upon it. I further find that the two cheques were issued in payment of goods sold and delivered by the plaintiff to the 1st defendant and that the 1st defendant is liable to the plaintiff in the sums of Shs.13,845,000/= being the value of the two cheques.

As regards the balance of the claim, it was the 1st defendant's contention that it neither received the goods alleged to have been supplied to it nor did it know the firm known as Rodolo (Uganda). In my view however the contention does not however have any substance and is clearly unsustainable. As pointed out by Mr. Kembi – Gituru (learned counsel for the plaintiff) in his submissions, both the plaintiff and the 1st defendant had a long business association prior to the dispute leading to this case. The 2nd defendant admitted that he had been dealing with the plaintiff for the last 15 years in transactions running into billions of shillings. Also, in an attempt to prove its counter-claim, the 2nd defendant produced on behalf of the 1st defendant several cheques covering the period January to August 1998 which establish payments worth Shs.22,838,500/=. Against that payment, the 1st defendant alleges that he was supplied goods worth only Shs.20,655,000/= hence its counter-claim against the plaintiff for Shs.2,183,500/=.

Though the plaintiff acknowledges receipt of the payments amounting to Shs.22,838,500/=:, its evidence was that the value of the trade between it and the 1st defendant was much bigger than what the 1st defendant thinks; for the period in question it was in excess of Shs.40 million. Details of the cheques and of the relevant invoices were tendered through the evidence of the plaintiff's witness John Ndai Mworira, the plaintiff's Assistant Credit Controller. He produced a Schedule (c) showing all the cheques paid by the 1st defendant totalling as aforesaid Shs.22,838,500/=. At the same time he produced another Schedule showing all the paid invoices (Nos. 26 to 47). Just like the invoices comprising the balance of the claim, those paid invoices (Nos. 26 to 47) bear the name Crescent Procurement Services C/O Rodolo (Uganda). There is ample evidence to show that the 1st defendant paid them without any demur. In view of the fact that the 1st defendant paid the said invoice without complaining that Rodolo (Uganda) was unknown to it, it is now estopped from raising the defence now. By seeking to repudiate invoices similar in all respects to previous ones which it honoured, the 1st defendant is attempting to set up a sham defence which is not supported by any credible or cogent evidence. I therefore reject the 1st defendant's contention that it does not know the firm known as Rodolo Uganda. There is in my view sufficient evidence to show that the goods were supplied to the 1st defendant and that it was liable to the plaintiff for the claim.

With regard to the value of the claim, the plaintiff has produced ample evidence through the unpaid invoices summaries in Schedule A to show that invoices totalling Shs.19,642,476/= still remain unpaid. The 1st defendant did not tender any evidence to challenge that evidence and consequently I must find the claim by the plaintiff proved on a balance of probabilities.

The 1st defendant's counter-claim is based on a misunderstanding of the accounts and there is no substance whatsoever in it. It is rejected. It also follows from the foregoing that the prayer seeking the discharge of the charge cannot be granted as long as the 1st defendant's liability remains undischarged.

Concerning the interest that is to be allowed on the amounts claimed, I am of the opinion that the rate of 35% per annum sought by the plaintiff in this matter is in all the circumstances on the higher side. In my view the correct rate or rates applicable are the commercial rates obtaining from the dates of presentment of the cheques till payment in full as to which, if the parties cannot agree, I shall hear argument from counsel. In any case that is what is sought in the prayers. Obviously the court cannot grant prayers not sought in the plaint.

For the above reasons, there will be judgment for the plaintiff against the 1st defendant for the sum of Shs.19,642,476/= together with interest thereon at commercial rate from the date of filing suit till payment in full.

The defendant will bear the plaintiff's costs of this suit.

Dated at Nairobi this 4th day of May, 2001.

T. MBALUTO

JUDGE