



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC. NO. 501 OF 2014

QUAKERS VENTURES LIMITEDPLAINTIFF

VERSUS

EQUITY BANK LIMITEDDEFENDANT

BURRELL INTERNATIONAL LIMITEDTHIRD PARTY

JUDGMENT

1. The legal effect of a letter dated 29th January 2013 and intituled “irrevocable letter of authority” is under debate. Quakers Ventures Limited (Quaker or the plaintiff) claims a sum of Kshs.17,000,000.00 on the basis of that letter from Equity Bank Limited (the Bank or the Defendant).
2. Patrick Kisia is a Quantity Surveyor and a Director of Quaker. It is his case that he offered certain consultancy services to Burrell International Limited (Burrell) with regard to arbitration proceedings between Burrell and the Ministry of Transport and Public Works. As part payment of his fees, Kshs.17,000,000.00 was to be payable from the proceeds of the Arbitral proceedings upon recovery.
3. So as to assure him of fees, Burrell issued a letter dated 29th January 2013 to its bankers, the Bank. The letter is central to this dispute and is reproduced below:-

"Burrell International Ltd

NAIROBI

29th January 2013

General Manager

Equity Bank Ltd

Community Branch

NAIROBI

Dear Sir,

RE: IRREVOCABLE LETTER OF AUTHORITY A/C 0180290902987

Kshs. 17,000,000/=

The above refers.

Further to the professional services fees rendered on the Arbitral matter between Ministry of Public Works and ourselves as per attached correspondence copy, we hereby wish to issue irrevocable Authority that upon receipt of the Anticipated Final Award on cleared effects to immediately Transfer Electronically amounts not Exceeding Kshs.17,000,000 (Kenya Shillings Seventeen Million) to:-

QUAKER VENTURES LTD

TRANSNATIONAL BANK LTD

KIRINYAGA ROAD BRANCH

A/C NO. 0082143001

Please acknowledge and confirm receipt of instructions.

Thanking you in advance for your due co-operation.

Yours faithfully

Macharia P. Mwithaga

4. It is common cause that Burrell succeeded in the Arbitration proceedings and certain sums were paid into its A/C No. 0180290902987 at Equity. The Account which was the subject matter of the letter of 29th January 2013. The money received from the Ministry of Transport and Public Works was Kshs.216,534,505.30 on 10th January 2014 and Kshs.16,920,000.00 and Kshs.18,450,000.00 on 21st January 2014.
5. The Bank did not pay the Kshs.17,000,000.00 to Quaker because ,on 1st February 2013, just three days after the first letter, Burrell cancelled the instructions to pay. The second letter is also reproduced below:-

Burrell International Ltd

NAIROBI

1st February 2013

General Manager

Equity Bank Ltd

Community Branch

NAIROBI

Dear Sir,

RE: CANCELLATION OF IRREVOCABLE LETTER OF AUTHORITY A/C 0180290902987

Kshs. 17,000,000/=

The above refers.

We hereby forthwith revoke the Irrevocable Authority Instructions in favour of Quaker Ventures Ltd as instructed on the 29th January 2013 by ourselves (See copy attached).

The purpose for which this Letter was issued has since lapsed, and consequently our instructions to take the contents of the same letter as withdrawn by ourselves. Our instructions herein are THAT YOU SHOULD NOT EFFECT the transfer of the said Kshs.17,000,000/= or any amounts whatsoever from our Account Nos. 0180290902987 to Quaker Ventures Ltd or to any other persons without seeking confirmation from us.

Please acknowledge and oblige.

Yours faithfully

Macharia P. Mwithaga

6. Quaker asserts that the Bank was legally obligated to carry out the instructions contained in the letter of 29th January 2013. The Bank retorts that it had no privity of contract with Quaker and was only bound to honour its customer's instructions. It argues that in view of the revocation of the instructions of 29th January 2013, it stood discharged from its obligation to transfer the sum of Kshs.17,000,000.00 into account of Quaker.

7. Burrell who were joined to these proceedings as Third Parties take the position that the irrevocable letter dated 29th January 2013 was not directed or copied to the Quaker but the Bank and Quaker has no legal capacity to sue on it. It also gives reasons why it countermanded the instructions. It asserts in Paragraph 6 of its defence of 26th February 2016;

6. In respect to paragraphs 4 and 5 of the Plaintiff, the third party avers that the said instructions was countermanded by it upon realizing that it was being misled by a director of the Plaintiff, Patrick Kisia, that such an amount would be due upon receipt of the proceeds of arbitration award. The said director who is a Quantity Surveyor was a witness in the arbitration process.

8. As will be apparent shortly, details of the controversy between Burrell and Quaker are unnecessary in resolving the dispute between Quaker and the Bank. In regard to that dispute the parties agreed that only two issues need to be determined:-

a) Whether the said letter herein marked as "irrevocable letter of authority" is an irrevocable legal instrument which binds the bank; or mere instructions by a customer to the Bank which could be revoked without reference to the beneficiary.

b) Whether the said letter was revoked by the letter dated 1st February 2013.

9. For a start the lawyers for Quaker invite this Court to find that the letter of 29th January 2013 which pronounces itself to be an irrevocable letter of instructions is a Bill of Exchange falling within the definition of Section 3(1) of The Bills of Exchange Act (Chapter 27 Laws of Kenya) and cannot be revoked or countermanded.

10. So is the letter dated 29th January 2013 a bill of exchange? Section 3(1) of the Act defines a Bill of Exchange and provides:-

3 (1)

A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.

11. Quaker suggests that the letter of 29th January 2013 fits the definition of a Bill of Exchange as contemplated in Section 3(1). And that may be so because on looking at the letter (reproduced in paragraph 3), it is an unconditional order made in writing, addressed to Equity Bank and duly signed on behalf of Burrell, requiring the Bank to pay Quaker Kshs.17,000,000.00 upon receipt of sums in the anticipated Final Award from the Arbitral matter between the Ministry of Public Works and Burrell.

12. Further if it is taken that the receipt of the Award was certain to happen and was not a contingency then the instructions would be payable at a determinable future time. In this regard the letter could be said to fall within a Bill payable at a future time in terms of Section 11 of the Act which provides;

S.11. Bill payable at a future time

(1) A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

(a) at a fixed period after date or sight;

(b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

(2) An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

13. Yet the Bill will be of no effect unless accepted by the drawee. This is because the drawee, generally, is under no obligation to accept the Bill. But on acceptance the drawee signifies his assent to the order of the drawer and agrees to pay the bill accordingly. Section 17(2) then sets out the requisites of acceptance as follows:-

17 (2) An acceptance is invalid unless it complies with the following conditions, namely—

(a) it must be written on the bill and be signed by the drawee; the mere signature of the drawee without additional words is sufficient;

(b) it must not express that the drawee will perform his promise by any other means than the payment of money.

14. In discussing Section 17(2) of the English Bill of Exchange Act 1882 which is *pari materia* Section 17(2) of our Statute, the authors of "Law of Bank Payments" 4th Edition, characterize one requisite of acceptance in Section 17(2) as being positive and the other negative. And

perhaps I should add that the conditions are conjunctive. Both must be met.

15. On Section 17(2) (a) which is the positive condition the authors comment;

Positive condition

The positive condition is that the acceptance must be written on the bill and signed by the drawee. The requirement of writing and a signature has already been considered in the context of the drawing of the bill. The acceptance is usually written on the front of the bill, but there seems to be no reason why it should not be valid if it is written on the back of the bill. In each case, it would be "written on the bill". The wording of S. 17(2) is very similar to the wording of S.32 (1), which sets out one requirement of a valid indorsement.

16. On Section 17(2) (b) they state;

Negative condition

The negative condition is that the acceptance must not express that the drawee will perform his promise by any other means than the payment of money. As is apparent from the statutory definition of a bill of exchange, the essence of liability under a bill is the payment of "a sum certain in money". Acceptance of an obligation to perform an obligation in some other form would prevent the document from taking effect as a bill of exchange.

17. Quaker posits that by endorsing the Bill, the Bank accepted the Bill unconditionally and without qualifications. I understand Quaker to be arguing that there was acceptance which complied with the conditions set out in Section 17 of the Act. Let us interrogate this.

18. In the letter of authority Burrell ask the Bank to "*please acknowledge and confirm receipt of instructions*". On the letter is a receipt stamp dated 30th January 2013 of Equity Bank Community Branch. Counsel for the Bank does not share the view of his counterpart that this is an endorsement. Counsel takes the position that by marking the letter as received, the Bank was simply showing that the letter had been indeed received as it would do with all other routine correspondence sent to it.

19. Evidently no additional words other than "received" are affixed by the Bank on the letter. But the law, and this is from the express language of Section 17(2) (a), is that additional words are not necessary. As to whether the stamp of the Bank plus the signature on the stamp amounts to "a signature of the drawee", I would start by setting out the provisions of section 92 of the Act;

92. Signature

(1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his

authority.

(2) In the case of a corporation, where by this Act any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

(3) Nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

20. What this Court is not told by the Bank and is indeed not proved is that the stamp of the Bank and signature thereon were insufficient to bind the Bank. Given the provisions of section 92 (3), the Court is inclined to find that the Bank duly assented to the order of the drawer as contained in the instructions of 29th January 2013. In other words, by accepting the Bill, the Bank undertook to the drawer to pay according to the letter of the acceptance, in this case in accordance with the letter of instructions.

21. Yet that by itself does not make the Bank liable to Quaker. This is because of the provisions of Section 21(1) of the Act which reads;

21(1) Every contract on a bill, whether it be the drawer's, the acceptor's or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto:

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

22. But before discussing the effect of that provision, it is important to understand who a drawer, acceptor, or endorser is because these words are not defined in the Act or the Interpretations and General Provisions Act. For this I turn to Halsbury's Laws of England 4th Edition (2002) Reissue on the meaning of the words:-

"309. Necessary parties to bill of exchange: The necessary parties to a bill of exchange are; (1) the party giving the order, who must sign it, and who is called the drawer; (2) the party to whom the order is given, who is called the drawee, and who on assenting to the terms of the order and signing it is called the acceptor; and (3) the party to whom the money is to be paid, who is called the payee, or, if the bill be expressed to be payable to bearer, the bearer".

23. In the matter before Court the drawer is Burrell and the acceptor is the Bank.

24. The purport of Section 21(1) is that as a general rule a contract on a bill is incomplete and revocable until the delivery of the instrument. As to what amounts to delivery, Halsbury's Laws of England (*supra*) at paragraph 343 states;

“343. What amounts to delivery. ‘Delivery’ means transfer of possession, actual or constructive, from one person to another. However, where an acceptable is written on a bill, and the drawee gives notice to or according to the direction of the person entitled to the bill that he has accepted it, the acceptor’s contract then becomes complete and irrevocable. Where the drawee has accepted a bill, but given no intimation of acceptance to the drawer, he is entitled to revoke his act, and this is so even where a bill has been deposited with the drawee for acceptance, and the holder on calling for the bill is told that the bill has been mislaid and is requested to call again on the following day.

So, too, a note is incomplete and revocable until delivery to the payee, and such a note cannot be issued to the payee by an executor after the maker’s decease”.

25. In the case at hand there was no delivery of the instrument to Quaker nor did the circumstances contemplated in the proviso to Section 21(1) exist. Although Quaker produced a copy of the instrument, it did not tell Court how it came into possession of it or that at any rate it was delivered to it before the letter revoking it had reached the Bank. The result is that the contract on the Bill was incomplete and revocable at any time before delivery. The countermanding of the Bill by Burrell on 1st February 2013 was therefore lawful and the Bank cannot be held liable on it.

26. Let me turn to another matter raised by Quaker as against the third party. Quaker argues that Burrell is estopped from going back on its irrevocable instrument. The claim here is by Quaker against the Bank. It is not a claim by Quaker against Burrell. As this Court has not found the Bank liable, it holds that these proceedings are not a proper forum for the dispute between Quaker and Burrell to be resolved. If Quaker has such claim then it ought to have sued Burrell directly.

27. The upshot is that the Plaintiff’s case is dismissed with costs to the Defendant. As between the third party and the Defendant, each party shall shoulder its own costs on the 3rd Party proceedings. This is because the 3rd Party supported the Defence and identified with it.

Dated, Signed and Delivered in Court at Nairobi this 6th Day of December, 2019

F. TUIYOTT

JUDGE

PRESENT;

Lubulellah for Plaintiff

No appearance for Defendant

No appearance for 3rd Party

Court Assistant: Nixon