IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KWACH, TUNOI & PALL JJ.A.)
CIVIL APPEAL NO.111 OF 1994

BETWEEN

KARAMSHI & COMPANY LIMITED.....APPELLANT

AND

CREDIT AND COMMERCE FINANCE LIMITED.....RESPONDENT

(Appeal from a Judgment/Decree of the High Court of Kenya
at Nairobi (Justice Shields) dated 14th February,
1992

in

H.C.C.C. NO. 3736 OF 1991)
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JUDGMENT OF THE COURT

This appeal arises in the following circumstances. On or about 23rd May, 1989 Karamshi & Company Ltd (the appellant) bought goods worth 348,500/= from Imara Import and Export (K) Ltd (Imara). In payment for the goods the appellant made two promissory notes the first one dated 23rd May, 1989 promising to pay Shs.200,000/= 120 days after date to Imara or order and the second one dated 6th June, 1989 promising to pay 148,500/- 120 days after date to Imara or order. Imara endorsed the said promissory notes before the maturity date in blank and delivered them to Credit and Commerce Finance Ltd (the respondent). The respondent accepted and discounted the said promissory notes at the request of Imara.

Criminal Investigation Department (C.I.D) collected the said goods from the appellant as they were suspected to be stolen goods. However C.I.D. closed their investigations in due course and decided to take no further action in the matter and returned the goods to Imara although the goods belonged to the appellant and were collected by the C.I.D. officers from the appellant's premises. The appellant requested Imara to return the goods to them but Imara did not do so. The appellant then refused to pay the said promissory notes and contended that as the goods for which they had made the promissory notes had not been returned by Imara to them there was total failure of consideration and they were not obliged to pay.

The respondent then sued the appellant and Imara for the recovery of the amounts made payable under the promissory notes together with interest and costs. An exparte judgment was entered against Imara as it chose not to resist the respondent's claim. The appellant however filed a defence.

Thereafter the respondent applied under O.VI rule 13 and Order XII r 6 to strike out the defence as being

vexatious frivolous and an abuse of the process of the court. It further prayed for judgment against the appellant as prayed in the plaint. The appellant opposed the application and filed lengthy grounds of opposition attacking the application on several grounds. On 14.2.1992 Shields J having heard the parties gave the following four line judgment:

"I see no merit whatsoever in Mr Joshi's objections to the application, the Plaintiff is entitled to judgment for Shs.200,000 with interest at court rates from 19.12.89 and Shs.146.500/- with interest at court rates from 18.1.1990 and costs."

The appellant has appealed to this Court against the said judgment.

Mr Joshi who appeared before us for the appellant has submitted that as there were several bonafide triable issues raised by the appellant's defence and that the learned Judge erred in striking out the defence and entering judgment in favour of the respondent. He argued that the trial Judge erred in law and fact in concluding that no evidence was required to prove failure of consideration. But if the respondent was a holder in due course, are its rights under the promissory notes affected by any failure of consideration of which it had no notice at the time the promissory notes were negotiated to it? S.29(1) the Bills of Exchange Act (Cap 27) (the Act) defines a holder in due course as follows:

"29(1) A holder in due course is a holder who has taken a bill complete and regular on the face of it under the following conditions

(a)that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if that was the fact

(b)that he took the bill in good faith and for value and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

S.29(1)(a) has no bearing on this appeal as there is no allegation in the defence filed by the appellant that the respondent became the holder of the promissory notes when they were overdue or they had already been dishonoured. However S.29(1)(b) is relevant but then there is no allegation in the defence of the appellant which could disentitle the respondent of its rights as a holder in due course. Under S.29(2) of the Act every holder of a bill is prima facie a holder in due course unless it is proved that the acceptance issue or subsequent negotiation of the bill is affected with fraud, duress or force or fear or illegality. There is again no pleading to that effect in the defence.

Here the promissory notes were made in consideration of the goods which had been delivered by Imara to the appellant.

Thus the title in the goods had already passed in favour of the appellant. Subsequently the goods were taken away by the C.I.D. officers as they were suspected to have been stolen. However the C.I.D. after investigating decided to close the file and we think mistakenly returned the goods to Imara although they belonged to the appellant. The appellant cannot say that the original transaction became illegal or that there was a total failure of consideration as the goods were subsequently taken away by the C.I.D. after they had already become the property of the appellant. Even if we suppose that the Imara sold stolen goods and in which event there would be total failure of consideration, the appellants defence can only prevail against Imara if it sues the appellant for payment of the goods. It cannot be a defence against a holder in due course. See Chalmers on Bills of Exchange 11th Edition at p.100.

Another defence pleaded by the appellant was that the promissory notes were never presented for payment and therefore the appellant was discharged from every obligation to pay. Under S.88(1) of the Act, however unless a promissory note in the body of it is made payable at a particular place, presentment for payment is not necessary to render the maker liable. Here no particular place had been appointed for payment of the promissory notes. Again under S.89 the maker of a promissory note by making it engages that he will pay the bill according to its tenor. Also the maker is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

Another issue proferred for our consideration was that the promissory notes had certain unauthorised alterations.

The only alteration which each promissory note has is that the due date of payment had been altered. In the case of the first promissory note for Shs.200,000/- it was altered from 19th September, 1989 to 19th December, 1989 and in the case of the other promissory note it was altered from 3rd October, 1989 to 1st January, 1990. Under S.64(1) of the Act it is only a material alteration made without the assent of the parties which will invalidate a bill. By paragraph 8 of his affidavit Shaun Warren Barreto credit manager of respondent sworn on 3rd January, 1992 deponed that it was the appellant who requested the respondent to extend the maturity dates of the notes for a further period of 90 days and the respondent accepting the request extended the period by 90 days. The appellant did not deny that it had requested the respondent for extension of the maturity dates by a period of 90 days. Thus the alteration was with the assent of the appellant and also even if it was not, the alteration was not material as it was for the benefit of the appellant. It got another 90 days to pay the promissory notes.

Mr Joshi also argued that the plaint did not show a cause of action as it failed to say when the promissory notes were payable and it did not aver that the promissory notes were duly presented for payment. It is true that the plaint did not disclose the dates of the promissory notes from which the period of 4 months could be calculated but the appellant requested for particulars and admittedly the respondent gave the particulars. As particulars when supplied do form part of the pleading we do not agree that there is any substance in Mr Joshi's submission that the plaint did not disclose a cause of action.

As we have already held, the presentment for payment was not necessary in this case. There was therefore no need to plead that presentment was not necessary. Only if presentment was necessary, it would have been pleaded.

The appellant in its defence denied that Imara endorsed the said promissory notes in favour of the respondent. It is no more than a general denial. Moreover by their letter dated 7 August, 1989 m/s Velji Devshi & Bakrania who were the then advocates of the appellant wrote as follows to the respondent:

"The above promissory notes were drawn by our clients m/s Karamshi & Co. Ltd in favour of Imara Import & Export (K) Ltd who then endorsed them over to you."

It was a clear admission on behalf of the appellants that these two promissory notes were endorsed by Imara in favour of the respondent. In the end we do not find any merit in this appeal which is hereby dismissed with costs.

Dated and delivered at Nairobi this 8th day of Nov 1996.

R.O. KWACH

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL