IN THE COURT OF APPEAL AT NAIROBI

(Coram: Madan, Wambuzi & Law JJA)

CIVIL APPEAL NO 3 OF 1978

Between

KIRPAL SINGH .....APPELLANT

AND

QURBANLITE LIMITED.....RESPONDENT

(Appeal from the High Court at Nairobi, Chesoni J)

JUDGMENT

April 13, 1978 **Wambuzi JA** delivered the following Judgment.

The respondent, a limited liability company, was the plaintiff in the High Court in an action against the appellant, a business firm, to recover Kshs. 47,150:

> "…….being the amount due and payable to the plaintiff by the defendant in respect of goods sold and delivered to the defendant by the plaintiff at the defendant's request at agreed price at Nairobi during the year 1977, full particulars of the said claim are well known to thedefendant."

In its defence the appellant denied the claim and alleged that in addition to supplying the goods sued for, the respondent also supplied other goods being fluorescent light fittings. It was alleged these fittings were faulty.

The defence went on:

> **"3. Disputes and differences having arisen as to the price of the goods sued for and the defective 2 ft fluorescent light fittings supplied the parties met and it was agreed between them that the plaintiff would rectify the defects in the 2 ft fluorescent light fittings by supplying and fitting proper chokes therein and the defendants would pay to the plaintiff the sum of Kshs 41,490 being the amount rightly due for the goods sued for by three equal monthly installments of Kshs 13,830 each payable on 10th day of August, 1977, 10th day of September, 1977 and 10th day of October, 1977 respectively and the defendants drew and delivered to the plaintiff three cheques for the above amounts and payable on the above dates.**
>
> **4. The plaintiff, however, failed to carry out its part of the agreement in that it failed to fit new and proper chokes to the 2 ft fluorescent light fittings and the defendants were obliged**

to carry out the aforesaid work themselves the cost whereof to them was equal to the amount of the first cheque and therefore they countermanded payment of the first cheque.

5. The other two cheques are still to become due and will be paid on due dates and as such the plaintiff's present claim is premature and without any justification in fact or law."

There was a reply to the defence in which the respondent joined issue with the appellant on its defence except in respect of admitted averments. It was also pointed out that the claim of Kshs 47,150 had nothing to do with the alleged faulty lights which related to a different transaction.

By notice of motion dated September 17, 1977 under order 35 rule 1 and order 12 rule 6 of the Civil Procedure Rules the respondent applied-

"1. That final summary judgment be entered for the plaintiff against the defendant under order XXXV rule 1 of the Civil Procedure Revised Rules, 1948 as prayed in the plaint.

2. Alternatively judgment be entered against the defendant in the sum of Kshs 27,660 being the amount admitted in the defence with costs and interests thereon at court rates."

In respect of this application the High Court made the following order –

"(1) Judgment for the plaintiff against the defendant under order XII rule 6 for Kshs 27,660 being the amount admitted in the pleadings and in the affidavit in reply, plus costs and interest thereon at court rates.

(2) Application for final summary judgment is dismissed. Costs on that part of the application to be costs in the in the cause."

The appeal is against this order.

Before dealing with the appeal I think I should deal with the application by notice of motion made by the respondent,

"……for an order that the applicant do have leave to adduce additional evidence by affidavit of Kutubudin Kurbanhussein Karimbhai a Director of the applicant sworn on March 11, 1978 which affidavit is attached hereto on the grounds that the evidence therein contained could not have been obtained with reasonable diligence for use at the hearing before the Court below and that such evidence will have an important influence on the result of the appeal, same being worthy of belief."

Mr. D N Khanna, who appeared for the appellant, took objection to this application on the ground that the evidence sought to be adduced is inadmissible as on the respondent's case the alleged admission was contained in paragraph 5 of the written statement of the defence which alone must be looked at to determine whether or not there was an admission of any facts contained therein. We heard the appeal *de bene esse*. The evidence sought to be adduced was not relied on and I understood Mr. Nagpal, who appeared for the respondent, not to press the application although he did not withdraw it. I propose to deal with the application very briefly.

By rule 29 of the Rules of this court it is a matter of discretion of this court and for sufficient reason to take additional evidence. Mr. Nagpal swore in his affidavit, and I doubt whether this was necessary as the main matters sworn to were already on the record or in the knowledge of the respondent or matters of opinion.

"2. That in the affidavit in reply sworn by Kirpal Singh son of Thaker Singh on September 28 1977 he swore in paragraph 6 thereof that a letter "KK 5" attached to the said affidavit of Kutubudin Kurbanhussein Karimbhai sworn on September 17, 1977 had not been received by the

appellants.

3. That evidence to the effect that the said letter "KK5" which was posted by registered post was duly delivered by the Post Office was furnished by the Post Office on March 8, 1978.

4. That I verily believe that the evidence contained in the attached affidavit of Kutubudin Kurbanhussein Karimbhai sworn on March, 11 1978 if admitted in evidence will probably have an important influence on the result of the appeal such evidence being in my belief worthy of credit."

The relevant parts of Karimbhai's affidavit read as follows:-

"3.That soon after September 29, 1977 I read the said affidavit in reply at the offices of the respondent's said advocate who particularly drew my attention to paragraph 6 thereof wherein the said Kirpal Singh denies that the appellants received the letter "KK5" referred to in paragraph 7 of my affidavit sworn on September 17, 1977 a copy of which letter was annexed to my said affidavit.

4. That on August 4, 1977 I instructed my brother Mohamed Karimbhai an employee of the respondent company to dispatch the letter "KK5" by registered post.

That on the same day he handed over to me, on his return from the Post Office at Kirinyaga Road, Nairobi, the Certificate of posting a registered postal packet issued by the said Post Office to my said brother in respect of the letter "KK5"."

Paragraphs 5, 7, 8 and 9 refer to a misfiling and subsequent discovery of the certificate of posting and to enquiries made at the Post Office for information of the fate of the registered letter. The affidavit goes on,

"10.That after daily visits by me to the General Post Office between March 2 1978 and March 8, 1978 the General Post Office issued me with a Certificate on March 8 1978 to the effect that the letter "KK5" was duly delivered on September 6, 1977. This Certificate is attached hereto and marked "KK9"."

Briefly it was alleged in the court below that the letter marked "KK5" was sent by the respondent's advocate to the appellant's advocates. The material part of the letter which was already in evidence acknowledges receipt of the three cheques referred to in paragraph 3 of he defence amounting to Kshs 41,490 and demands a cheque for the balance of Kshs. 5,660 to make up the sum of Kshs 47,150 which the respondent alleges the total sum due. The appellant's advocate denied receiving this letter. By order 12 rule 6 of the Civil Procedure Rules an admission of fact may be by "pleadings or otherwise". As far as I can see nothing turned on this letter in the court below and I am unable to say that it advances the respondent's case any further. The issue before the court was whether or not paragraph 5 of the defence amounts to an admission of fact. I would reject the application and grant costs of the application to the appellant.

I now turn to the appeal itself. The application in the court below was in two parts. One part was for summary judgment which was dismissed. In respect of this part this appeal is against the order that the costs shall be in the cause. The second part of the application was under order 12 rule 6 which related to the alleged admission. Mr. Khanna argued the appeal on a number of grounds. He submitted that paragraph 5 of the defence did not amount to an admission entitling the respondent to judgment. That the two post-dated cheques which had been accepted by the respondent cannot be sued on as they had not yet matured on the date of the action and their effect in law was to suspend the respondent's cause of action on the original debt until they were presented and dishonoured. If they were paid there would be no cause of action. On the other hand Mr. Nagpal, for the respondent, argued that on the appellant's pleadings as they stand, it is alleged there was one transaction or agreement under which the three cheques were given to satisfy one debt amounting to Kshs 41,490 in three equal installment. By countermanding the first cheque the appellant repudiated the agreement under which the three cheques were given and the respondent was entitled to treat the contract as at an end, and as the whole amount became due the

respondent could bring an action to recover the amount due and is entitled to judgment in respect of the two cheques, the amounts of which were admitted as owing.

On the pleadings as they stand there are a number of issues which are not strictly relevant to this appeal; for example the respondent alleges the amount due under the sale is Kshs 47,150. The sale is admitted but the appellant contends the amount due is Kshs 41,490. The appellant contends that it was agreed that the amount due would be paid in three equal installments which is denied by the respondent. The appellant alleges faulty goods in a different transaction which is denied by the respondent. However, as I understand the position, the respondent's case is that on the appellant's own pleadings the sum of Kshs 27,660 represented by the two cheques is admitted. On reading paragraphs 3, 4 and 5 of the defence which are set out earlier in this judgment, I think it is clear that the appellant admits the sale of the goods. It alleges that the amount due under the sale is Kshs. 41,490 and claims to be entitled to set off this amount, the sum of Kshs. 13,830 representing the sum for faulty goods supplied by the appellant leaving the balance of Kshs 27,660 which it is admitted is owing but the appellant alleges the amount is not due as the respondent agreed to accept post-dated cheques which had not matured at the date of the action. In my view the question is, what was the effect in law of countermanding the first cheque? Is this a question which had to go to trial or could it be resolved by the learned judge at that stage of the proceedings? The answer to this question will indicate whether or not paragraph 5 of the defence is an admission. The record shows that the question of the effect of countermanding the first cheque was argued by both sides in the court below. Neither party contended that it was a triable issue which should be reserved for the trial. The learned judge's finding on this point was as follows:-

> "Mr. Khanna contended that the plaintiff having accepted the three cheques drawn by the defendants and still holding the cheques which were not yet due for payment had suspended its right to sue on the claim.
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> With respect, I am unable to accept that contention, because as properly said by Mr. Nagpal, when the defendants countermanded the first cheque they nullified any implied agreement not to sue till the cheques are paid or dishonoured. They are entitled to a judgment under order XII rule 6 for Kshs 27,660."

Earlier in his ruling the learned judge had said:-

> "The only argument that appear to have been raised about this sum is that the claim is premature but as pointed out by Mr. Nagpal for the plaintiff, and here I agree with him, whether premature or not is there a doubt that the defendants owe the sum of Kshs 27,660 when they say that the two cheques for Kshs 13,830 each will be paid when they become due !"

Before us Mr. Khanna attacked this finding on the ground that the learned judge misdirected himself and advanced more or less the same arguments as in the lower court supported by some authorities. In addition learned counsel argued that the dates of payment indicated on the two cheques could not be altered by any implied agreement so as to accelerate payment before maturity so as to give the respondent the right to obtain judgment. As I understood learned counsel, it was not part of his case that the effect of countermanding the first cheque was a matter for trial.

The broad principles of the law on the matter are stated in Volume 8 of the Third Edition of *Halsbury* at page 203. Paragraph 344 provides;

> "Repudiation. Where a contract is to be performed on a future day, or the performance is dependent on a contingency, and one of the parties repudiates the contract by showing that he does not intend to perform it, the other party is entitled to sue him for breach of the contract without waiting for the time fixed for performance and is absolved from further performance of his part of the contract, and if he elects to do this the party in default is not entitled to an opportunity of changing his mind. In such a case the contract is completely determined, and the party who is in default cannot insist upon the performance by the other party even of a stipulation which is collateral to the main purpose of the contract.

> In order to amount to repudiation there must be conduct showing clearly an intention not to fulfil the contract when the time comes, and a party is not bound before the time fixed for performance to give a definite answer as to whether he intends to fulfil the contract or not…….
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> The repudiation of the contract by one party does not of itself discharge the contract, but the other party has the option of treating the contract as at an end, or of waiting until the time for performance has arrived, before making any claim for breach of contract. The party to whom the right of election falls must signify his election to rescind in and unqualified manner and with every reasonable dispatch."

According to Anson's *Law of Contract* 22nd Edition at page 433, the presumption, where a negotiable instrument is taken in lieu of a money payment, is that the parties intend it to be a conditional discharge only so that the original rights are restored if the cheque is dishonoured. There are authorities to indicate that stopping a cheque or doing some other act by the drawer which is inconsistent with the giving of the cheque has the same effect. I will refer to two. In *Cohen v Hale* (1878) 3 QBD 371 a garnishee order was made attaching a debt. At the time the order was made the garnishees had given the judgment debtor a cheque for the amount of the debt. Upon service of the order on the garnishees they stopped payment of the cheque at the bank, the cheque not having been presented. It was held that upon the cheque being stopped it was as if it had never been given, and that there was therefore an existing debt capable of being attached, and the garnishee order was effectual. In *re Raatz* (1897) 2 QBD 80 the head note reads –

> "A petition in bankruptcy alleged as the petitioning creditor's debt a sum due for goods sold and delivered. Previously to the commission of the alleged act of bankruptcy, the debtor had given to the petitioning creditor bills of exchange for the price of the goods, which bills had not matured at the date of the presentation to the petition:-
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> > Held, that the only effect of taking the bills was to give the debtor a period of credit, that by the act of bankruptcy the period of credit was determined, and that the petitioning creditor's debt was correctly stated in the petition."

In my view paragraph 3 of the defence sets out a clear agreement between the parties to settle an outstanding debt of Kshs 41,490 by three cheques dated August 10, September 10 and October 10, 1977. Paragraph 4 of the defence alleges breach of a different agreement between the parties and quite clearly admits countermanding the first cheque. This is conduct which clearly shows that the appellant did not intend to honour the agreement in paragraph 3 of the defence and such conduct entitled the respondent to treat the agreement to pay the admitted debt in installments as at an end and to demand the full amount of Kshs 41,490. In these circumstances paragraph 5 of the defence is a clear and unequivocal admission that the sum of Kshs 27,660 represented by the two cheques is owing. I do not think that it makes any difference here that there were three cheques to be paid on different dates. They were all issued at the same time to settle one debt pursuant to one transaction. I think the learned trial judge came to the correct conclusion as far as this point is concerned, although for somewhat different reasons, and I find no reason to differ from his finding.

The last ground of appeal was that costs of the summary judgment application should in any event have been awarded to the appellant. It was argued by Mr. Khanna in the main that the application was made after the defence was filed and with full knowledge of the contentions in the defence which were such as to entitle the appellant to unconditional leave to defend; that the respondent could not have sworn in the affidavit in support of the application for summary judgment with full knowledge of the defence put up, that there was no defence to the claim in respect of which the respondent had joined issue; that the application wholly failed and should never have been made and accordingly pursuant to order 35 rule 8 (b), on dismissal of that part of the application the respondent should have been ordered to pay the costs forthwith. The sub-rule provides:-

> "8(b) If the plaintiff makes an application under this order where the case is not within the order, or where the plaintiff in the opinion of the court, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with

costs to be paid forthwith by the plaintiff."

The rule is permissive and the making of the order as to costs is accordingly in the discretion of the court. On this question the learned judge observed:-

> "I am not satisfied in this case that the defendants have no defence and that they have no fairly arguable point to be argued on their behalf. In my opinion there is a triable issue, and there may well be more than one triable issue. In the circumstances, the defendants have shown that they should have leave to defend the balance of the claim."

It would appear that the learned judge may have taken into account the fact that the respondent was partially successful in his claim against the appellant although part of the application had failed. Only one application was made with two alternatives, either summary judgment or judgment on admissions. In these circumstances I would not say that the learned judge erred in exercising his discretion by ordering that costs of that part of the application relating to summary judgment, be costs in the cause.

I would dismiss the appeal with costs.

Madan JA. I agree that this appeal and the motion to adduce additional evidence be dismissed with costs in terms proposed by Wambuzi, JA whose judgment, I have had the advantage of reading in draft.

I would add that the main burden of the argument before us, as also in the second ground of appeal, was that paragraph 5 of the defence was misconstrued as containing an admission of debt. There is no warrant for focusing the light only on paragraph 5. The respondent's application in the High Court was for judgment in the alternative to be entered in the sum of Kshs 27,660 being the amount admitted in the defence the whole of which document was therefore open for scanning to see whether there was a clear and unequivocal admission of the debt of Kshs 27,660. When read together with paragraphs 3 and 4 of the defence, there was, in my opinion, such an admission. These three paragraphs read:

> 3. Disputes and differences having arisen as to the price of the goods sued for and the defective 2 ft fluorescent light fittings supplied the parties met and it was agreed between them that the plaintiff would rectify the defects in the 2ft fluorescent light fittings by supplying and fitting proper chokes therein and the defendants would pay to the plaintiff the sum of Kshs 41,490 being the amount rightly due for the goods sued for by three equal monthly installments of Kshs 13,830 each payable on the 10th day of August, 1977, 10th day of September, 1977, and 10th day of October, 1977 respectively and the defendants drew and delivered to the plaintiff three cheques for the above amounts and payable on the above dates.
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> 4 The plaintiff, however, failed to carry out its part of the agreement in that it failed to fit new and proper chokes to the 2ft fluorescent light fittings and the defendants were obliged to carry out the aforesaid work themselves the cost whereof to them was equal to the amount of the first cheque and therefore they countermanded payment of the first cheque.
>
> 5 The other two cheques are still to become due and will be paid on due dates and as such the plaintiff's present claim is premature and without any justification in fact or law.

As regards the contention that the right to sue and obtain judgment for Kshs 27,660 was suspended because the respondent agreed to accept payment by two cheques of Kshs 13,830 each dated September 10, and October 10, 1977, it seems to be overlooked that according to the appellant's own version the three cheques totaling Kshs 41,490 were given for the amount of an admitted debt rightly due for the goods sued for the benefit of which the appellant had. As the rule of law is that a bill given on account of a debt must be taken to be a conditional payment by the debtor (Per Williams J in *Bottomley v Nuttall*, (1859) 28, Law Journal, N S 110 at p 118), the debt was revived as a result of countermanding payment of the first cheque for reasons unconnected with and extraneous to the manner alleged to have been agreed for payment of the amount due which was one whole debt.

> "The title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that a negotiable security given for such a purpose is conditional payment of the debt, the condition being that the debt revives if the security is not realized."

Per Lush J, in *Currie v Misa* 10 L R Exchequer, 153 at p 163.

For the reason that an admission on pleadings has to be clear and unequivocal the respondent was entitled to judgment for the amount of two cheques only which he rightly obtained.

As Law JA, also agrees, the appeal is dismissed and there will be an order in the terms proposed by Wambuzi JA.

Law JA . I have read in draft the judgment prepared by Wambuzi JA. I agree with it in every respect, and I concur with orders proposed therein.

Dated and delivered at Nairobi this 13 day of April , 1978.

C.B MADAN

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JUDGE OF APPEAL

S.W WAMBUZI

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR