



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 281 OF 2003**

**BETWEEN**

AMRATLAL STORES LIMITED .....APPELLANT

AND

SHAH HIRJI MANEK LIMITED.....RESPONDENT

*(Appeal from the Judgment of the High Court at Nairobi*

*(Hon. Mr. Justice J. W. Mwera) dated 19<sup>th</sup> September 2003*

*in*

*HCCC No 552 of 2001*

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**JUDGMENT OF THE COURT**

The respondent's claim against the appellant, Bambi Agencies Limited and Harish Devani was for the sum of Kshs 29,095,500, in respect of nine dishonoured promissory notes (Notes), together with a further claim against the Harish Devani on his personal guarantee endorsed at the back of the Notes binding himself to pay. The respondent contended that, a request for payment was made on due date, but despite the notice of dishonor having been issued to the appellant, the notes remained unpaid. The respondent therefore demanded, the sum of Kshs 29,095,500 together with interest at the rate of 36% per annum from 10 September 1996 until payment in full.

In the amended written statement of defence, the appellant denied that the respondent was the holder or holder in due course for value of the Notes. The appellant contended that, when it made the Notes and delivered them to the Harish Devani they were inchoate and irregular on their face. They were neither payable on demand, nor did they provide for payment at a fixed or determinable future time and were not valid Notes within the meaning of the ***Bills of Exchange Act Cap 27 Laws of Kenya (the Act)***. Further the Notes were rendered void by apparent material alteration made on the face of Notes after they had been issue without the knowledge, consent or authority of the appellant, and further the appellant had not waived the irregularities. As a consequence, the appellant contended that it was discharged from all liabilities; the appellant refuted the contention that, notices of dishonor was issued, or that numerous demands were made in respect of each Note; that, at no time was it liable for the repayment of the Notes, as at all times the respondent sought payment from Bambi Agencies Limited and Harish Devani, and,

finally, that there had been an inordinate and inexcusable delay on the part of the respondent in bringing this action, and the respondent was estopped from claiming any amount or interest on the Notes.

On 19<sup>th</sup> September 2003 of Mwera, J. (as he then was), gave judgment in favour of the respondent in the sum of Kshs 29,095,500 together with interest at court rates.

Being dissatisfied with the judgment of the High Court the appellant filed this appeal which is before us.

Mr. Ngatia, learned Counsel for the appellant appeared before us, while there was no appearance by the respondent nor their Counsel, despite their having been served with a Hearing Notice.

Mr. Ngatia informed us that he would urge the grounds of appeal under the following headings:

1. The promissory were materially altered and therefore void;
2. There was no notice of honour issued, and consequently liability was discharge;
3. Delay between date of dishonor and date of commencement of the suit resulted in a delay of over 4 years and 6 months. The delay was inordinate and extinguishes the claim.

Before, we turn to the issues in contention, to begin with, it is imperative that we consider the question of whether the respondent was a holder in due course, as this will have a bearing on the issues that have been raised. According to the respondent, it was a holder of the 9 promissory notes in due course.

**Section 29 (1)** of the Act, (which is the same as the UK Bills of Exchange Act 1882) provides that, 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 it had previously been 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.”***

In other words, by Section 29, a holder in due course, is a person who takes a bill complete and regular on the face of it, in good faith for value, before it was overdue.

**Section 30 (2)** provides that,

***“Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill”.***

From the record of proceedings there is no evidence of fraud, duress, force or fear or any illegality, and therefore, it can be considered that the respondent was a holder in due course within the meaning of the Act.

With respect to the first issue as to whether the Notes were valid, or irregular, and therefore void within the meaning of the Act, Mr. Ngatia contends that, the Notes were rendered void by the material alterations made on the face of the Notes after issue, without the authority or consent of the appellant, that the alterations made, were firstly, the insertion of the due dates on the Notes in the column headed “Due Date”, and, the inclusion of the word “days” after the digits “...75, 80, 90, 110” on all the Notes, and secondly, the endorsement on the back of the Notes by Harish Devani without the authority or consent of the appellant.

From the materials before us, there was significant discourse between the parties as to whether the Notes

were altered by the inclusion of the due dates and the word “days”. What is agreed is that the appellant as the Drawer drew the Notes, but did not specify the Due Dates or include the word “days[[Gatembu K1](#)]”. It was at the time of discounting the Notes, that the respondent included these wordings in order to complete the Notes. In his judgment the learned Judge stated that,

***“This court was not satisfied with evidence tendered that there were such material alterations to the bills that amounted to discharging the defendant. The parties knew what 75 stood for. Even the 1<sup>st</sup> Defendant is witness (Thakar DW2) told the court that once parties trading together established and practiced a usage or understanding that facilitated their business, then what they did bound either. DW2 went so far as to count 75 days as days on bill 281 and found the arithmetic correct in that regard. It was this court’s view that whatever the parties did after negotiations e.g. Inserting the number of days and the due date, was all in the process of completing but not altering a valid bill which was then discounted and value enjoyed.”***

Our attention has also been drawn to the case cited in the Superior Court by the Respondent to support the contention that, the insertion of the date in the bill is not a material alteration, ***Geometra E.A. Ltd vs Road Sea Link Limited (2001) 2 EALR page 378***. Section 64 provides that where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against the party who has himself made, authorized or assented to the alteration. In order to determine whether a bill has been materially altered, will depend on whether the legal basis of contract as between the parties has been altered, so as to alter the rights and obligations of the parties.

However, in the case before us, in order to arrive at the due date or the date when the Notes would become operational, it was necessary that the period of credit be specified, that is, whether the period of credit referred to days or months. At the time of discounting of the Notes, Harish Devani and the respondent inserted the word days, and thereafter computed and inserted the due date in respect of each Note. Would these insertions result in a material alteration of the Notes?

Having regard to the circumstances of this case, we are of the considered view that, the insertion of the word “days” or the due dates would not result in an alteration of the legal obligations as agreed between the parties, when they set out to negotiate the Notes. We say this for reasons that, there was no alteration to the basic tenets of the Notes, as what remained after the alterations was the unconditional promise to pay, there was no interference with the sum of payment, or the title acquired by the holder. Provided that the alteration did not interfere with the parties’ agreed intentions, then the alteration would not be considered material. We therefore agree with the learned Judge that, the insertion of these wordings was only for the purpose of completing the Notes, and thus could not be considered a material alteration.

The appellant contended that, there was further alteration of the Notes was without its authority and consent, which concerned the addition of Harish Devani as an endorser of the Notes. It is not disputed that, during the negotiations with the respondent, Harish Devani sought to include a further endorsement at the back of the Notes, stating that:-

***“I, Harish Devani hereby bind myself as surety in solidum and co-principal debtor for the payment of this bill on due date”.***

In the case of ***Gardener vs Walsh 1855 5 E & B 83***, the addition of a new maker to a joint and several note without the consent of the original maker, was considered to be a material alteration.

Conversely, the inclusion of Harish Devani as an indorser without the appellant’s consent, unequivocally altered the Notes, as well as the respective obligations of the parties. This alteration was unknown to the appellant, which remained the position, until the respondent made demanded for payment on the Notes, following the demise of Harish Devani. As such, we consider that, the Notes were altered beyond that which had been consented to by the appellant, and they could not therefore be considered to be Notes as drawn by the original maker, the appellant in this case. In the circumstances, we find that, the Notes were materially altered by the respondent and Harish Devani, with the result the Notes could be avoided by the

appellant.

We turn now to the second issue, the notice of dishonor. The Notes were due to mature sometime in January 1997. The respondent stated that, presentment of Notes was made to appellant, Bambi Agencies and Harish Devani on due date, but were dishonoured. According to the appellant, however, no notice of dishonor was issued to it by the respondent, and that, at all times, communications on the repayments were carried on between the respondent and Harish Devani. Indeed, on 17<sup>th</sup> January 1996 (read 1997), Bambi Agencies and Harish Devani wrote to the respondent under letter referenced “**BILLS PAYMENT**” stating,

***“.....We are fully aware of our liability to be paid to M/s SHAH HIRJI MANEK and do take full responsibility for the same.....”***

***“..... It is unfortunate that there has been a delay. If you can bear with us, we would pay up the amount, but if you still very impatient, then you can go ahead and take whatever action you may wish.”***

The appellant was not issued with any demands for payment until 19<sup>th</sup> March 2001, when the respondent’s counsel issued a demand for Note no.281. Thereafter, the respondent filed its suit on 17<sup>th</sup> April 2001 seeking payment of the bill in the sum of Kshs 2,899,500, which was later amended to a claim for Kshs 26,095,500 in respect of 9 promissory Notes. By this time Harish Devani had died on 18<sup>th</sup> April 2001.

The learned Judge held in respect of presentment of the notices, that;

***“The court was satisfied that this was done, and there was nonpayment. It was not shown that the Plaintiff had defaulted on this point.....”***

The question that arises is, was the appellant entitled to be issued with a notices of dishonor as required by the Act, and were they in fact all issued with notices of dishonor for non-payment of the Notes?

Mr. Ngatia cited **Sections 45 to 49** of the Act and made reference to ***Caunt vs Thompson (1849) 7 CB 400*** , ***Re Fenwick, Stobart & Co Limited 1902 1 Ch 507*** and ***Nanji Khodabhai vs Sohan Singh and Another 1957 EALR 291***, all of which specify an elaborate procedure that **must** be followed when a bill is dishonoured for non-payment.

**Section 45** provides that a bill must be duly presented for payment, and if it is not presented, the drawer and the endorsers shall be discharged.

At **Section 47 (1)** stipulates that a bill is dishonoured by non-payment when it is duly presented for payment, and payment is refused or cannot be obtained; or when presentment is excused and the bill is overdue and unpaid. **Sub-section (2)** states that, when a bill is dishonoured by non-payment, an **immediate** right of recourse against the drawer and endorsers accrues to the holder. Whilst **Section 48** provides that 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.

However where promissory notes are concerned, **Part IV** of the Act would be applicable. **Section 90 (1)** states that,

***“Subject to the provisions of this Part and except as provided by this section, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.”***

Whilst, **section 52(3)** is clear that in order to render the acceptor of a bill liable it is not necessary to

protest it, or that notice of dishonour should be given to him.

In the case of *African Overseas Trading Co. v Bhagwanji Harjiwan (1960) E.A. 417* where it was held:-

***“in view of the terms of Section 52(3) and Section 90 (2) of the Bills of Exchange Ordinance it was not necessary for notice of dishonour of the promissory note to be given.***

As such, we agree with the learned Judge, and accordingly hold that, in the respect of the Notes, no notice of dishonor is necessary or mandatory to be issued to the maker of the Notes, in this case the appellant.

The third issue for determination is, the question of unreasonable and inexcusable delay in pursuing the repayments, after the Notes were dishonoured.

Mr. Ngatia submitted that, following the respondent’s failure to issue the appellant with a notice of dishonour, the respondent did not subsequently pursue the repayments from all the parties with a reasonable period thereafter. The repayments became due sometime in January, 1997, but, no demand was made on the respondent until March, 2001, following the demise of Harish Devani. This was nearly four years after the Notes were dishonoured.

**Section 45 (2) (a)** specifies that, where bills are payable on demand, presentment must be within a reasonable time after its issue in order to render the drawer liable.

In the case of *Lickborrow & Another vs Mason & Others (1775-1802) All ER Rep 1*, which was cited with approval in *Universal Bank Limited vs Double Whiteland Stationary & Printers and 2 Others HCCC No 561 of 1998* Ashhurst C.J. stated,

***“We may lay it down a broad general principle that whenever one or 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.”***

In *Universal Bank Limited vs Double Whiteline Stationary & Printers*, the Plaintiff did not make demand on the drawer of the promissory notes for six months. The Court held that:-

***“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 the due date and that had they done so, then the lie told to the 1<sup>st</sup> Defendant, as to the whereabouts of the notes, would have been discovered in good time.”***

We consider that, having regard to the provisions of the Act, the nature of the bill and the usage of trade, the Notes were time bound, and the inordinate delay of over four years, to pursue the claim against the appellant was unreasonable. As a consequence, we find that the appellant should not have to suffer loss for the inactivity of the Respondent.

Consequently, we find for the appellant, in that it was discharged from repayment of the Notes for reasons that, the Notes were materially altered, and, arising from the unreasonable and inexcusable delay on the part of the respondent in claiming the repayment from the appellant.

For the foregoing reasons, we allow the appeal, with costs to the appellant.

***Dated and delivered at Nairobi this 20<sup>th</sup> day of September, 2013.***

***R. N. NAMBUYE***

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***JUDGE OF APPEAL***

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

/jkc

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