

UGANDA / JUDGMENT

Gundle v Sunderji (Civil Appeal No; 19/39) [1938] EACA 168 (1 January 1938)

[1938] EACA 168

COURT

East African Court of Appeal

BEFORE

Lucie-Smith, J. (Kenya)

CASE / FILE NUMBER

Civil Appeal No; 19/39

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

APPELLATE CIVIL

Before LUCIE-SMITH, J.

ISAAC GUNDLE, Appellant (Original Plaintiff)

 $\mathbf{v}$

MOHANLAL SUNDERJI, Respondent (Original Defendant) Civil Appeal No. 19/39.

Principal and agent—Indemnity—Indefinite instructions by principal— Discretion of agent— Authority of agent—Indent on manufacturer for very urgent shipment of various goods subject to acceptance by manufacturer—Agent appointed to confirm the indent and accept and pay for the goods indented for—Acceptance by agent of less goods than those indented for owing to manufacturer's inability to supply all the goods—Payment by agent— Delivery refused by principal—Action for money paid—Indian Contract Act, section 222.

Appellant, I. Gundle, described in the plaint as a merchant of 32 London Wall, London, sued the respondent, a merchant of Mombasa, in the Resident Magistrate's Court, Mombasa, for Sh. 170/75, the balance of money paid by the appellant to John Palmer Ltd., of Portsmouth, England, on behalf of and at the request of the defendant. The defence admitted the names and description of the parties but denied that the respondent ever owed any money, or requested the appellant to make any payment, to John Palmer Ltd., and without prejudice to the aforesaid defences stated that if there was any claim by John Palmer Ltd. it was in respect of damages for rejection of goods offered for delivery to the respondent and such claim was not transferable. On 30-12-37 respondent had forwarded through a local firm a *pro forma* indent (referred to in the judgment as Exhibit 1) on John Palmer Ltd. for a consignment of various goods ranging from

deck chairs to mouse traps to the value of £10-15-6 f.o.b. English port, shipment very urgent, payment to be by sight draft through Barclays Bank (D. C. & O.), Mombasa. The indent included one dozen each of beakers, egg-cups, pepper boxes, mustard boxes, salt boxes and plates, the price of these articles amounting to 16/-. The indent was subject to acceptance by John Palmer Ltd. and to confirmation on behalf of the respondent by "Messrs. I. Gundle & Co., 32 London Wall, London".

On 24-2-38 appellant wrote to respondent as follows: -

"John Palmer & Co., Ltd.: In this week's statement you will receive invoice No. 7948, and this firm wrote me on the 10th instant that they have given up stocking Bakelite Beakers, Eggcups, etc., and these items are therefore cancelled."

Meanwhile on or about 14-2-38 all the goods on the indent except the beakers, egg-cups, plates, salt, pepper and mustard boxes, were shipped. Respondent refused to accept delivery on the ground that the shipment was short of the goods ordered. The goods were sold by auction and the appellant sued for the amount of the balance of the price of the consignment paid by them on respondent's behalf.

The magistrate dismissed the suit finding that appellant had been appointed the agent of the respondent for the purpose of taking delivery and paying for the goods on the indent but that he had no authority to cancel the order for any goods on the indent or to accept or pay for anything less than a full delivery of all the goods on the indent.

Appellant appealed.

Held (25-11-39).—That appellant was justified, in the absence of fraud or negligence, in using his discretion and paying for the goods as supplied and that he was therefore entitled to be indemnified by his principal.

Bryson for Appellant.

A. B. Patel for Respondent.

JUDGMENT.—The plaintiff, appellant herein, by his plaint claims the sum of Sh. 170/75 being the balance of money paid by plaintiff to Messrs. John Palmer and Co. on behalf of and at the request of the defendant. The plaintiff sues in the name of I. Gundle of 32, London Wall, London, and in my opinion the defendant, the present respondent, is estopped by para. I of his defence from now raising, as he has tried to do in this appeal, any question as to whether "I. Gundle" of the plaint and "I. Gundle and Co." of Exhibit 1 is the same person. It would appear from the evidence and the learned Resident Magistrate has so found that the defendant in December, 1937, forwarded through Messrs. Townsend and Co. of Nairobi a pro forma indent on Messrs. John Palmer for a consignment of various goods ranging from deck chairs to mouse traps.

This pro forma indent (Exhibit 1) contains on the face of it "To be confirmed by"—(and this as the Resident Magistrate very properly noted is in print)—"Messrs. I. Gundle and Co., 32, London Wall, London".

It is further to be noted that Exhibit 1 sets out the various prices and the (to be) agreed price of each category. "Undermentioned prices are agreed by Messrs. John Palmers by their pro forma invoice No. E 4384 and 4385 of 21st December, 1937"—Exhibit 1 is dated 30th December, 1937. Exhibit 1 further bears at the bottom thereof the words "Subject to acceptance by manufacturers".

It would further appear from Exhibit 5 dated 22nd December, 1937, that Exhibit 1 was forwarded to the defendant by the plaintiff.

The learned Resident Magistrate has found and I agree with him that the defendant eventually appointed "I. Gundle" his agent for the purpose of taking delivery of and paying for the goods set out in Exhibit 1 at the prices set out therein.

There is unfortunately no evidence as to what are the duties of a confirming agent according to the usages or custom of the trade but it would appear from Invoice No. 7948 (which for convenience I have marked with a red "A") that the charges set out in that Invoice were paid for, presumably by I. Gundle, on the 15th February, 1938. A comparison of that invoice with Exhibit 1 shows that six items in Exhibit 1 were omitted from the consignment as shipped. The value of these six items amounted to the sum of Sh. 16.

It is to be further noted that that invoice \$(A)\$ states "Shippers order No. A4735", while Exhibit 1 bears in blue pencil "A4735".

The goods were shipped in the Llandaff Castle about the 14th February, 1938.

By letter dated 24th February, 1938 (Exhibit 6) Gundle informed his principal that John Palmer had given up stocking bakelite beakers, eggcups, etc., and that those items had therefore been cancelled.

On the arrival of the goods the defendant refused to take delivery or meet the sight draft drawn on him on the ground that the goods were not according to his order.

The goods were eventually sold and the plaintiff brought the present action.

The learned magistrate has held that section 31 (1) of The Sale of Goods Ordinance applies to this transaction. That sub-section lays it down that "where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate".

Now what are the facts in this case?

The seller was undoubtedly John Palmer and Co., Ltd., while the buyer was the defendant whose agent for the purpose of this transaction was the plaintiff.

That being so I hold that section 31(1) does not apply as between the plaintiff and defendant. See also section 59(2). Section 222 of The Indian Contract Act says that "the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him". If this section is applicable to the present case, and I am inclined to think that it is, we have to consider two questions: (1) Was the payment by Gundle to Palmer a lawful act, and (2) was such payment in exercise of the authority explicit or implied conferred upon Gundle by the defendant?

The answer to the first question is clearly in the affirmative.

As regards the second question the learned Resident Magistrate has found as facts that: \$-\$. .

- (1) Defendant did make Gundle his agent in London.
- (2) Did consent (even tacitly but with understanding of a common trade practice) to Gundle buying the goods on defendant's behalf.
- (3) Did agree to pay Gundle $2\frac{1}{2}\%$ per cent commission.
- (4) Did agree that Gundle should take (delivery of?) the goods on behalf of the defendant.

In my opinion the case of *Johnston v. Kershaw*, L. R. (1886) 2 Exch. 82, is distinguishable from the present case though most useful as a guide to general principles in certain cases of principal and agent. Nor is the decision in *Service v. Bain*, 9 T. L. R. 95, of much assistance.

In the present case the only guide we have as to what authority the agent had is in Exhibit 1 which states that Gundle is the confirming agent and that the indent is subject to acceptance by manufacturers and shipment is very urgent.

We also have the evidence of Hasham Abdalla who was accepted by the Resident Magistrate. He says: "I explained to defendant that Palmers were not in the habit of sending on sight draft. I said the order must be confirmed by confirming house. Defendant understood what that meant. Defendant understood that Gundle were his agents in London. That they were to buy the goods on his behalf. That agency meant Gundle were to take these goods on behalf of defendant. This is very common practice. Everybody in Mombasa knows it"; and in re-examination: "The question of confirming agency was discussed before the contract was signed". Unfortunately the witness did not enlarge on such discussion. It may be significant that the witness was not asked anything as regards the defendant's subsequent statement: "I told him the goods should be according to statement. That if not according to order I would not accept them".

Neither fraud or negligence are alleged against the plaintiff.

It was laid down in *Ireland v. Livingstone*, 5 Eng. and Ir. Appeals 395, that where a letter of orders which constitutes a contract from a merchant to his commission agent is so worded as to be capable of two interpretations, if the agent fairly and honestly assumes it to bear one of those interpretations, and acts on that assumption, the merchant cannot be released from his contract on the ground that he intended it to bear the other. As the error arose from his own

indistinctness of expression, he must bear the loss. See also *Boden v. French*, 138 E. R. 351. *Cobridge S. S. Co. v. Bucknall. etc.* (1910) Comm. Cases, 138 C. A. *Veigall and Co. v. Runciman and Co.* (1916) 85 L. J. K. B. 1187. *Loring v. Davis* (1886) 32 Ch. D.625.

In the present case in view of the expressions contained in Exhibit 1 of "subject to acceptance by manufacturers" and "shipment very urgent" and taking into consideration the nature of the order and the very slight discrepancy in the filling of the order I have come to the conclusion that the plaintiff was justified, in the absence of fraud or negligence, in using his discretion and paying for the goods as supplied and that he is therefore entitled to be indemnified.

The appeal is allowed. There will be judgment for the plaintiff as claimed with costs here and in the lower Court.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/aa/judgment/eaca/1938/168/eng@1938-01-01>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/gundle-v-sunderji-civil-appeal-no-1939-1938-eaca-168-1-january-1938-unknown-topic-unknown-court-1938>

Prepared on 14 October 2026 · Esheria