

UGANDA / JUDGMENT

Melson v Holm (C.C. No. 165/1935)

[1937] EACA 208 (1 January 1937)

[1937] EACA 208**COURT**

East African Court of Appeal

BEFORE

Webb, J

CASE / FILE NUMBER

C.C. No. 165/1935

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ORIGINAL CIVIL**Before WEBB, J.****PAUL MELSON, Plaintiff**

\$v\$.

A. HOLM, Defendant**C. C. No. 165/1935**

Debt due to firm—Parties—Sole proprietor can sue in his own name— Indian Contract Act, s. 29— Agreement to postpone payment void for uncertainty—Practice, pleading, counter claim.

Plaintiff, defendant and one P. T. were the proprietors of the Kenya Manufacturing Co. The defendant and P. T. retired and the plaintiff became sole proprietor of the firm from 1-1-1934 until it ceased to exist on 1-1-35. The plaintiff claimed Sh. 4,447/75 due by the defendant to the Kenya Manufacturing Co., in respect of advances made and purchases and accounts paid on behalf of and at the request of the defendant. By letter dated 1st June, 1934, addressed to the Kenya Manufacturing Co., and written in terms dictated by the plaintiff, the defendant agreed to pay back, "the amount of approximately Sh. 5,000 which he owed to the Kenya Manufacturing Co., as soon as his financial condition allowed it."

The defendant in evidence declared that he had a cross-claim for salary and goods supplied to the Kenya Manufacturing Co., but this defence was not raised on the pleadings.

- Held (29-1-36).—That, the amount claimed was due by the defendant who, in default of pleading, could not rely on a cross-claim for salary and goods supplied.
- Held further.—That, the plaintiff as sole proprietor of the Kenya Manufacturing Co., could sue in his own name.
- Held further.—That the provision that the defendant should only be required to pay "when his financial position allowed it" is void for uncertainty under Sec. 29 of the Indian Contract Act.

Slade for the plaintiff.

Malcomson for the defendant.

The facts were as stated in the head note and the following issues agreed on by the parties were tried— (1) Is the amount claimed or any amount due; (2) can the plaintiff sue in his own name; (3) was there an agreement to postpone payment; and (4) if so, was the defendant at any time able to pay?

Malcomson.—There is no privity of contract between the parties. The letter of 1-6-34 is to the Kenya Manufacturing Co., which ceased to exist in May, 1935. The action is brought by Paul Melson.

Slade in reply.—The debt has been proved and has not been seriously contested. The plaintiff as sole proprietor of the Kenya Manufacturing Co., can sue in his own name. *Cox v. Hubbard* (136 E. R. 529); *Kell v. Nainby* (109 E. R. 358); *Spurr v. Cass* (5 Q. B. 656).

The letter of 1-6-35 acknowledges an existing debt. There is no consideration to postpone payment. In any case the alleged agreement to postpone payment until the defendant's financial condition allows it is void for uncertainty under section 29 of the Indian Contract Act. It would be impossible to ascertain when the plaintiff's cause of action arose for purpose of limitation. The plaintiff allowed the defendant a reasonable time to pay.

JUDGMENT.—I have no doubt about this case. As regards the first issue it is clear in my opinion that the amount claimed is due: indeed the defendant admitted the correctness of the various items, merely claiming, as I understand him, that he had a cross-claim for salary and for goods supplied to the Kenya Manufacturing Co. There is, however, no plea raising this defence which is therefore not open to the defendant in these proceedings. As he may possibly wish to take independent proceedings, I will say no more on this point than that his letter of 1-6-1934 would seem to be apparently inconsistent with the existence of such a claim.

On the second issue, I am clearly of opinion that the plaintiff, who was the sole proprietor of the Kenya Manufacturing Co., from 1-1-1934 up to the time when it ceased to exist, is entitled to sue.

The third issue involves the consideration of the effect to be given to the stipulation, said to have been agreed to by the plaintiff, that the defendant should only be liable to pay, "when his financial position allowed it". In my opinion this provision is void for uncertainty: Indian Contract Act, section 29. A very little consideration shows that, if such a stipulation were to be held valid, it would be practically impossible for the plaintiff ever to prove that his right of action has arisen: it would depend upon a mass of circumstances which it would be impossible for him to prove and upon which a **Court** could come to no clear conclusion. The fourth issue, therefore, does not arise.

There will, therefore, be judgment for the plaintiff for Sh. 4,447/75 with costs and interest at Court rate on the decretal amount from this date until payment.

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Prepared on 14 October 2026 · Esheria