

UGANDA / JUDGMENT

M/S Kots (U) Ltd v Woddamba Nathan (Civil Appeal No. 58 of 2001) [2002] UGCA 15 (1 March 2002)

[2002] UGCA 15

COURT

Court of Appeal of Uganda

BEFORE

Kitumba, JA, Mukasa-Kikonyogo, DCJ, Engwau, JA

CASE / FILE NUMBER

Civil Appeal No. 58 of 2001

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ HON. JUSTICE S. G. ENGWAU,
JA HON. LADY JUSTICE C. N. B. KITUMBA, JA

CIVIL APPEAL NO. 58 OF 2001

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M/S KOTS (U) LTD::::::::::::::::::::: VERSUS

<table> WODDAMBA NATHAN :::::::::::::::::::::::

(Appeal from a ruling of the High Court of Uganda at Mbale (Rugadya Atwooki J) dated 21-12-2000
in Misc. App. No. 69 of 2000.)

JUDGMENT OF C. N. B. KITUMBA, JA

This is an appeal against the ruling of the High Court in 20 Miscellaneous Application No. 69 of 2000 in which the learned trial judge allowed the respondent unconditional leave to appear and defend.

By way of summary procedure under Order 33 rules 3 and 4 and Order 48 Rule 1 of the Civil Procedure Rules, and section 101 of the Civil Procedure Act, the appellant filed Civil Suit No. 69 of 2000 against the respondent to recover Ug. Shs. \$137,725,000\$ being the value of cheque No. \$746243\$ dated 10th September, 1999. The cheque was drawn on the Bank of Baroda (Uganda) Ltd in favour of the appellant. It was dishonoured on 19th November 1999. The respondent

was served with a notice of dishonour but failed to pay. The respondent by Notice of Motion applied for leave to appear and defend the suit. The main grounds for his application were essentially two.

The first ground was that the respondent was not indebted to the appellant in the sum claimed for or at all. The second ground was that the plaint offended Order 33 because it sought among its prayers interest at the rate of 25oh yel no such interest was agreed upon.

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The respondent in his affidavit in support of the application averred that goods were supplied by a Kenyan company known as Midland Emporium Ltd to a Ugandan company known as Eastern Agrey Chemicals Ltd but not to the respondent. The goods had already been paid for. The cheque on which the respondent was being sued had been issued as security. When relations between the two companies soured, the supplier M/s Midland Emporium Ltd instructed the appellant which is its sister company to present the cheque so as to embarrass the respondent.

The learned trial judge found that the respondent had raised triable issues and granted him unconditional leave to appear and defend.

Dissatisfied with the court's decision, the appellant filed an appeal to this court on ten grounds, namely:

- ,1 The Learned Trial Judge erred in law and fact by applying generally the provisions of Order 33 of the Civil Procedure Rules and cases decided thereunder without taking into account the special provisions and qualifications of the Bills of Exchange Act Cap.76 on a suit brought on a cheque.
- 2. The Learned Trial Judge erred in law and fact when he granted the Defendant leave to appear and defend a suit brought on a cheque when the Defendant had no defence acceptable under the Bills of Exchange Act, Cap.76.
- 3. The Learned Trial Judge erred in law and fact when he held that where the Plaintiff fixes the amount of interest under Section 57 (af (ii) of the Bills of Exchange Act, this entitles the Defendant for leave to appear and defend.

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- 4. The Learned Trial Judge erred in law and fact when dealing with a matter brought under the Bills of Exchange Act, held that if the Defendant does not agree on the interest it takes the matter out of Order 33 of the Civil Procedure Rules.
- 5. The Learned Trial Judge erred in law and fact when he held to the effect that the Defendant has to agree

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to the rate of interest under the Bills of Exchange Act, Cap. 76.

- 6. The Learned Trial Judge erred in law and fact when he did not appreciate the fact that the Defendant admitted freely issuing the cheque in consideration for goods received.
- 7. The Learned Trial Judge erred in law and fact when he held to the effect that a claim for interest on ^a cheque puts it out of Order 33 of the Civil Procedure Rules.
- 8. The Learned Trial Judge erred in law and fact when he in effect held that a mere statement that the Defendant is not indebted to the Plaintiff affords ^a defence to a Suit brought on a cheque thus entitling the Defendant for leave to appear and defend.
- 20 9. The Learned Trial Judge erred in law by holding that if the Defendant claims to have paid his debts to the Plaintiff, this is a triable issue in a suit brought on a cheque and entitled the Defendant to leave to appear and defend under Order 33 Civil Procedure Rules.
- 10. The Learned Trial Judge erred in law and fact when he believed the Defendant's allegations that he had paid the Plaintiff without any evidence of payments."

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Counsel written counsel together grounds for the appellant and for the respondent filed submissions. Mr. Geoffrey Mutaawe, learned for the appellant, argued all the ten grounds under one issue, and rightly so in my view, as the are repetitive. The issue was:-

"Whether what the Respondent raised in his application are grounds on which leave to appear and defend can be granted on a matter brought and governed strictly by The Bills of Exchange Act, Cap.76"

Counsel's arguments can be put into two categories. The first one is that the respondent had not raised any defence to the suit under The Bills of Exchange Act. The second one is that it was proper for the appellant to charge 257o interest though the suit was brought under summary procedure.

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In the first category, learned counsel criticised the learned trial judge for failing to appreciate the facts of the case. He argued that the respondent freely and willingly issued the cheque as a security for goods supplied by M/s Midland Emporium Ltd to M/s Eastern Agrey Chemicals Ltd. According to counsel it did not matter that the cheque which was given as security was issued in the appellant's name. He contended that the main suit was between the appellant as the payee of the cheque and the respondent as

a drawer of the cheque. The case was therefore between the immediate parties to the bill.

He contended further that the respondent in his application for leave to appear and defend and in the submissions before court did not raise or prove that the bill on which he was being sued was affected by either fraud, duress, fear, force or illegality within the provisions of section 30(2) of The Bills of Exchange Act so as to shift the burden of proof on the appellant.

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Counsel argued that the contract of sale of goods was different from the issuance of the cheque. He relied on *Nova Uersey Knit Ltd. Vs Kammgarn Spinnerei GMBH* 1L9771 2 All8R.463 Relying on *Cha-lmers and Guest on Bill of Exchange, Cheques and Promissory Notes* 14th Ed p.22a and other English authorities, learned counsel stated that the general rule is that when a summary suit is instituted in respect of a claim on a bill of exchange or a cheque or promissory note leave to appear and defend will not be given save in exceptional circumstances.

He dismissed as being untrue the respondent's assertion that the goods had been paid for because he did not produce evidence to prove the same, whereas the duty was upon him to do so.

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Counsel concluded that if the learned trial judge had appreciated the facts and the law, it would have been clear to him that the case before him was solely governed by The Bills of Exchange Act and that there were no triable issues of either law or fact entitling the respondent for leave to appear and defend. He relied on *Hassanali Issa and Co. Vs Jeraj Produce Store* [1967] E. A. 555

t0 In their written submissions, M/s Matovu and Kimanje Nsibambi Advocates, learned counsel for the respondents, supported the learned trial judge's ruling. Counsel submitted that the judge properly directed himself on the law and facts. The judge found that the respondent had raised triable issues of law and fact.

In his ruling the learned trial judge agreed with counsel for the respondent's submission that leave to appear and defend in a summary suit on cheque should be granted in exceptional circumstances. He stated, however, that the rules of procedure provided by Order 33 r.3 and 4 must be observed. He stated that in an application for leave to appear and defend, the applicant must show by affidavit or otherwise that they are bonafide triable issues of fact or of law. The applicant is not at that stage required to show that he has a good defence.

The learned trial judge found that the applicant had sworn in paragraph 6 of his affidavit that the goods had been paid

for. In his written statement of defence attached to the affidavit he had pleaded that he is not the right party to be sued. According to the judge the applicant had raised the issue of total lack of consideration.

From the foregoing it is evident that the learned trial judge was alive to the correct principles of law and applied them properly to the application. He considered both the provisions of the Civil Procedure Rules and The Bills of Exchange Act. With due respect to counsel for appellant, fraud, duress, force and fear or illegality are not the only defences and therefore triable issues which entitles an applicant who is sued on a cheque for grant of leave to appear and defend a summary suit. When a suit is brought on a cheque there must be consideration, and lack of it is a defence which the court may investigate. *Hassanali Issa & Co. Vs Jerai Produce Store* [supra] at 562 F Sir Charles Newbold P. stated as follows:

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10 "In other words once there is, in fact, consideration and once, in fact, a cheque has been given based upon some consideration, then in a suit upon that cheque the court cannot go into the question as to whether or not the consideration was sufficient. Let me make it clear that it can go into the question as to whether or not there was consideration (Underlining mine)

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I respectfully agree with the above statement. The learned trial judge, therefore, was right to find that as the respondent had pleaded total lack of consideration, a triable issue had been raised justifying the grant of unconditional leave to appear and defend.

Regarding interest, counsel for the appellant contended that according to section 57 (a) (ii) of The Bills of Exchange Act, the appellant was entitled to sue the respondent under summary procedure for the amount of money on the cheque and for 25% interest. Counsel argued that the case fitted squarely under Order 33 Rule 2(a) (1) of the Civil Procedure Rules and the trial Court had no discretion to refuse the appellant to proceed summarily.

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Learned counsel contended that even if the rate of interest had not been agreed upon the appellant was entitled to reasonable interest. In counsel's view 25% was reasonable interest. In support of his submission he relied on *Lawrence & Sons V Willcocks* 1892 QBD 696, in which the creditor was allowed to recover interest of 5% on a bill. He submitted that the learned judge should have withheld interest but awarded the appellant the sum of the cheque if he sought that the interest of justice so required.

In reply counsel for the respondent supported the learned trial judge's ruling that there was no agreed rate of interest. The appellant was not allowed by section 57, (a) (ii) of The

Bills of Exchange Act to fix his own interest and claim that it is fixed by statute.

I am unable to appreciate Mr. Mutaawe's submission. Order 33 provides for the plaintiff to sue under summary procedure where the sum demanded is liquidated. The interest which had not been agreed upon, offends the said Order 33. Interest of 25ok may appear reasonable to the appellant but may not be so to the respondent. Section 57 (a) (f) (ii) of The Bills of Exchange Act provide:

"57 Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:-

- (a) if the holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer or from a prior endorser:-
- (i) the amount of the bill;

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(ii) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;"

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The above section provides for interest but does not lay down the rate. I am of the considered view that interest on cheque would be liquidated damages where the rate of interest is fixed by agreement or by statute. I agree with the trial judge that the appellant is not allowed to fix his own rate of interest.

In the result all the ten grounds of appeal must fail

t0 I would dismiss the appeal with costs to the respondent.

Dated at Kampala this day of 2002.

Cr{-(C\ r--*---I- C. N. E KITUMBA,

JUSTICE OF APPEAL**THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA**

CORAM: HON. LADY JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ. HON. MR. JUSTICE S. G. ENGWAU, JA. HON. LADY JUSTICE C. N. B. KITUMBA, JA.

CIVIL APPEAL NO. 58 OF 2001**BETWEEN**

\$M/S\$ KOTS (U) LTD ===== APPELLANT

AND

WODDAMBA NATHAN=====RESPONDENT

(An appeal from the ruling of the High Court of Uganda at Mbale (Rugadya Atwooki, J.) dated 21.12.2000 in Misc. Civil Application No. 69 of 2000).

JUDGEMENT OF HON. JUSTICE S. G. ENGWAU, JA.

I had the benefit of reading in draft the judgment of my sister C. N. B. Kitumba, J. A and I agree with her reasons and order that this appeal must fail. I have nothing more to add.

Dated at Kampala this ----- day of ----- 2002.

Inascel HON. JUSTICE S. G. ENGWAU JUSTICE OF APPEAL.

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA THE REPUBLIC OF UGANDA**CORAM:**

HON. LADY JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ HON. MR. JUSTICE S. G. ENGWAU. JA
HON. LADY JUSTICE C. N. B. KITUMBA, JA

CIVIL APPEAL NO. 58 OF 2001

rv/s KOTS (u)LTD APPELLANT

VERSUS**WODDAMBA NATHAN RESPONDENT**

(Appeal arising from the Ruling and Order of the Honourable Mr. Justice Rugadya Atwoki delivered on the 21st day of December, 2000 at Mbale in Miscellaneous Application No. 69 of 2000)

JUDGMENT OF L. E. M. MUKASA-KIKONYOGO, DCJ

I have had the opportunity of reading in draft the judgment prepared by C. N. B. Kitumba J. A. and I agree that this appeal must fail ^I have nothing useful to add.

Since Engwau J. A. also agrees the appeal is dismissed with costs to the Respondent.

Dated at Kampala this Day of March... .. 2002

L. E. M. M k*r- UKAS4XIKONYOGO DEPUTY CHIEF JUSTICE

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Prepared on 14 October 2026 · Esheria