

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT KAMPALA

**(CORAM: ODOKI, CJ, KATUREEBE, KITUMBA,
TUMWESIGYE, KISAAKYE, JJ.S.C.)**

CIVIL APPEAL NO.16 OF 2009

BETWEEN

NAROTTAM BHATIA
APPELLANTS
HEMANTINI BHATIA

.....

AND

BOUTIQUE SHAZIM LTD.....
RESPONDENT

(Appeal from the decision of the Court of Appeal of Uganda at Kampala [Mukasa Kikonyogo ,DC], MPagi- Bahigeine and Byamugisah, JJ.A.] dated 8th October, 2009 in Civil Appeal No.36 of 2007)

JUDGMENT OF KITUMBA JSC

This is a second appeal. The appeal is from the decision of the Court of Appeal that dismissed the appellants' ground for affirming the decision of the High Court. The Court of Appeal held that High Court Civil Suit No 411 of 1998 disclosed a cause of action and ordered that the file be remitted to the High Court for hearing before another judge.

The facts of this appeal are as follows:

On 1st July 1995 the appellants' attorney, Mr. Nipun Bhatia executed a written agreement on their behalf to sell the property situated at Plot 12 Buganda Road for USD 117,300\$. The respondent paid 50,000\$ but failed to pay the balance. The appellants gave the respondent notice of the repudiation of the contract on the ground that they had failed to pay the balance within the stipulated time. The respondent filed HCCS No. 910 of 1995 against Nipun Bhatia, the appellants' attorney, seeking for specific performance of the contract of the sale of the property situated at plot 12 Buganda Road, Kampala.

The appellant later on filed Miscellaneous Application No 47 of 1997 under Order I rule 10 (2) and (4) and order 48 Rule 1 of the Civil Procedure Rules seeking to substitute Nipun Bhatia with the appellants who are the registered proprietors of the property as the defendants.

The application was heard and dismissed by Mukanza J (RIP) on 14th April 1998. In the same ruling the learned judge struck out the suit for not disclosing a cause of action. The respondent filed another suit No 411 of 1998 against the appellants. In that suit the respondent sought for the same relief of specific performance.

On 29th June 2004 in Miscellaneous Application No 505 of 2004 the appellants filed chamber summons under Order 7 of rule 11 seeking the rejection of the plaint for being statute barred on the ground of being *res judicata*.

The application was heard by Aweri-Opio J, on 27th September 2005 who struck it out for being *res judicata* in view of the earlier decision by Mukanza J (RIP). The respondent was dissatisfied with the decision and appealed to the Court of Appeal on one ground only; namely whether HCCS No 411 of 1998 was *res judicata*.

The appellants filed a notice of ground affirming the decision of the High Court under Rule 92 of the Judicature (Court of Appeal Rules). Directions- S 1 No, 13-10. The ground filed was that the plaintiff does not disclose a cause of action.

The Court of Appeal ruled that the suit was not *res judicata*. The Court dismissed the appellants' ground of affirming the decision of the High Court. The Court of Appeal held that a cause of action was disclosed from the pleadings and ordered that the file be remitted to the High Court and the suit is tried by another Judge. The appeal was allowed with costs to the respondent.

The appellants were dissatisfied with the decision of the Court of Appeal and filed their appeal to this Court on the following ground:

“The learned Justices of Appeal erred in fact and law when they held that the suit in HCCS No 411 of 1998 disclosed a cause of action when the plaintiff contained no allegation of any act or omission by the defendants or their disclosed attorney that allegedly breached the contract”.

The appellants were represented by learned counsel Mr. Ebert Byenkya of Byenkya, Kihika and Co. Advocates and learned counsel Mr. Nelson Nerima of Nambale, Nerima and Co. Advocates appeared for the respondent.

Counsel for both parties had already filed written submissions and only made a few clarifications when they appeared in court.

Submitting on the sole ground of appeal, learned counsel contended that in order to constitute a cause of action for a breach of contract some breach of the terms of the contract must be alleged by the plaintiff in the plaint. He submitted that no breach of the contract had been alleged in the instant appeal. He argued that the court has to look at the plaint and annexures thereto to decide whether a cause of action has been established. Counsel made his submissions on the basis of the plaint and annexures thereto.

He argued that paragraph 3(d) of the amended plaint reads:

“On 1st July 1999, a sale agreement was entered into between the plaintiff company and the defendant through their attorney Nipun Bhatia and the agreement was drawn by M/S Byenkya, Kihika and Co Advocates and executed in their presence”.

Counsel submitted that according to the above quoted paragraph the appellants were the principal party to the agreement as vendors, Mr. Nipun Bhatia was their attorney and

the firm of Byenkya, Kihika and Co. Advocates acted as solicitor in the transaction by drafting the sale agreement and attesting to it. He argued that, therefore, M/S Byenkya Kihika and Co. Advocates were not agents of the appellants in the performance
5 of the contract. The firm of advocates did not have either express or general authority to act for the appellants. In support of his submission on the point of agency counsel relied on **Halsbury's Laws of England, 3rd Edition Vol 1 page 208.**

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Counsel argued that in its paragraph 3(e) of the plaint the respondent averred.

"The first payment was made on 7th and 10th July respectively leaving a balance payable to the defendants by the plaintiff of US \$ 67,300 sixty seven thousand three hundred united states dollars to be paid on or before the 14th day of September 1995".

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Counsel submitted that the respondent's averments that the
20 deadline for payment of the balance is not borne out by the contract Annexure D to the plaint which reads:

"The balance of 67,300 (United States dollars sixty seven thousand three hundred) to be payable within 75 days of the date of execution PROVIDED that the said payment shall carry an interest of one and a half per cent on reducing balance per month which shall be paid along with the principal on the date of effecting payment. For the AVOIDANCE OF DOUBT if the payment is not effected within 75 days of the date of

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execution, this Sale Agreement shall be deemed to have lapsed and the property shall revert to the Vendor who shall be under no obligation save for effecting a **full refund of any payments** made at the time under the agreement”.

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Counsel submitted that as the agreement was executed on 1st July 1995 and stipulated time for payment of the balance was within 75 days, the final date for effecting payment was 12th September 1995. In case payment was not effected the agreement would automatically lapse and the vendor’s only obligation would be to refund the money deposited under the agreement.

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In paragraph 3 (g) the plaintiff averred:

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*“ On the 13th September 1995, Mr. Azim Kassam who was at the time in Canada called on phone **Ebert Byenkya** in Kampala to **ascertain for him the Bank Account Number** of the defendants in order to remit money to the same as the plaintiff did not have the details. He was not given details as **Mr. Ebert Byenkya did not have the details himself** and asked Mr. Azim Kassam to call back the next day. When Mr. Azim Kassam called Mr. Ebert Byenkya the next day; 14/9/1995, Mr. Byenkya refused to give him the details...”*

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Counsel submitted that the respondent did not contact either the appellants who were principals to the contract or Mr. Nipun Bhatia who was their attorney. It contacted Mr. Byenkya who was a stranger to the contract. Counsel argued that there is no

reason pleaded in the plaint why they had done so. Besides, there was no covenant in the contract specifying that the appellants were obliged to receive late payment or that they needed the advocate's assistance to effect payment. However, 5 on 7th and 10th July 1995 they had paid a sum of US \$ 50,000 without any assistance from the advocate.

In paragraph 3(h) of the plaint the respondent allege.

10 ***“The next day 15th September 1995, M/S Byenkya, Kihika and Co. Advocates acting on behalf of the defendants notified the plaintiff of the lapse of the sale”.***

Counsel argued that no breach of the terms of the contract is indicated in that paragraph because what the appellants 15 instructed counsel to do is what is provided in the agreement.

In paragraph 3(i) (j) of the plaint it also avers

(i) ***The plaintiff was willing and ready to pay and offered the money directly to Byenkya, Kihika and Co. Advocates to pass on the Nipun Bhatia.*** 20

(j) ***The Plaintiff offered to pay the money to the defendant in Uganda about the 23rd September 1995 but both Nipun Batia and M/S Byenkya Kihika and Co. Advocates refused to accept payment.***

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Counsel contended that by the time the respondents attempted to pay in Uganda, due time to pay even by their alleged time of payment, i.e. 14th September 1995, had already elapsed. The

respondent had by then received the notice that the contract had elapsed.

In paragraph 3(k)

5 ***“An attempt by the defendants to refund part of the purchase price to the plaintiff was rejected by the plaintiff as it was in the breach of contract”***

10 It was counsel’s argument that what the appellants did was not in breach of terms of contract because that was stipulated in the agreement.

Mr. Byenkya contended that the appellants did not breach the terms of the contract. He criticized the learned Justices of the Court of Appeal for overlooking the basic principle endorsed by
15 the Supreme Court in the ***Attorney General Vs Major General David Tinyefuza***, Constitutional Appeal No 1 of 1997 that in order to constitute a cause of action there must be some act done by the defendant. If there is no such an act the cause of action does not accrue.

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Counsel for the respondent opposed the appeal. He argued that it is trite law that in deciding whether or not a plaint discloses a cause of action one looks, ordinarily at the plaint and assumes that the facts alleged in it are true. In support of his submission
25 counsel relied on **Attorney General V Major General David Tinyefuza, (Supra).**

Counsel reiterated some of the contents of paragraph 3 of the plaint and stated as follows.

“There was an agreement of sale of land between the parties and a first instalment was paid. The agreement was drawn by Byenkya, Kihika & Co. Advocates and executed in their presence.

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Just before the second instalment fell due, the plaintiff’s director, who was then in Canada, called the defendants’ advocate, Mr. Byenkya, for an account number to which to remit the balance. Mr. Byenkya, counsel for the defendants, asked the plaintiff’s director to call the next day.

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The plaintiff was ready and willing to pay and offered the money directly to the defendant’s attorney Nipun Bhatia and to their advocates but they refused to accept payment. The defendants purported to rescind the agreement through Byenkya, Kihika and Co. Advocates.”

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20 Counsel argued that in their plaint paragraph 4 the plaintiff avers that the defendants are in breach of contract for failure to furnish the plaintiff with the details of the mode of payment and refusal to accept payment. Counsel stated that in paragraph 5 the plaintiff pleads estoppel, and in paragraph 6 the plaintiff
25 pleads that it has the option to purchase the property by paying the balance.

He contended that the pleadings in paragraph 3,4,5 and 6 disclose a cause of action based on breach of contract which is the refusal by the seller to receive the balance.

5 Respondent's counsel argued further that there are triable issues of law and fact raised; for example whether time was of the essence, mode of remitting the balance, whether Ms Byenkya, Kihika and Co. Advocates were agents of the defendants, whether property passed on execution of contract,
10 among others. He submitted that for a contract of sale of immovable property, upon payment of a deposit, property passes to the purchaser who acquires an equitable interest in that property. In support of his submission he relied on, **Sharif Osman V Haji Haruna Mulangwa Civil Appeal No 38 of 1995** (Supreme Court.)
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He submitted that counsel for the appellants had raised issues which can only be resolved upon hearing evidence. Respondent's counsel argued further that the cause of action is
20 disclosed. He argued in the alternative that if there is a deficiency in the plaint it can be cured by amendment and the appellant can also seek for further and better particulars. In support of his submission he quoted the Supreme Court decision **Tororo Cement Ltd, Vs Frokina International Ltd S.C.C.A No 2 of 1997.**
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In reply, Mr. Byenkya criticized the respondent's counsel for failing to specify any act which the appellant had committed in breach of contract. According to counsel this was not in

agreement with the definition of cause of action as stated in **Major General Tinyefuza Vs Attorney General** (Supra)

Appellant's Counsel contended that the reference by the respondents' counsel to triable issues is misconceived and meant to mislead the court. According to counsel triable issues are determined by looking at the pleadings of both parties and not just the plaint. To decide whether the plaint discloses a cause of action one looks only at the plaint. Appellant's counsel submitted that there was no issue whether time was of the essence of contract because the time within which to pay the balance was clearly stated in the contract. The authority **Sharif Osman Vs Haji Haruna Mulangwa** (supra) stated that time is of the essence of the contract if the contract states that it is so. He agreed with the submission by the respondent's counsel that striking out a plaint for failure to disclose a cause of action should be done in very obvious cases. In his view, the instant appeal was one of these obvious ones.

I have carefully perused the record of appeal and the written submissions of counsel. Counsel for the appellant has relied on the statements of the Justices of the Supreme Court in **Attorney General Vs Major General David Tinyefuza** (Supra). Wako Wambuzi CJ as he then was cited with approval the following statement from **Mulla's Code of Civil Procedure**:

“A cause of action means every fact which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of

the Court. In other words it is a bundle of facts which, taken with the law applicable to them gives the plaintiff a right to claim relief against the defendants. It must include some act done by the defendant since the absence of such an act, no cause of action can possibly accrue....Everything which if not proved, would give the defendant a right to an immediate judgment must be part of the cause of action... the cause of action must be antecedent to the institution of the suit.,,

I respectively agree with that statement that such facts must be alleged in the plaint to decide that the cause of action has been disclosed. One must also look at the plaint and annexures thereto. One must also assume that the facts as alleged are true.

In paragraph 3 of the plaint it is pleaded that on 13th September 1995 Mr. Azim Kassam called from Canada Mr. Byenkya to ascertain the appellant's bank account. Mr. Byenkya told him to call the next day. When Mr. Zim Kassam called he failed to give him the details. Instead on 15th September Mr. Byenkya wrote a letter to the respondent on the appellants' behalf repudiating the contract

The respondent pleaded its readiness and willingness to pay. The respondent averred that the appellants were in breach of the contract because they failed to furnish it with the details of mode of payment.

Counsel for the appellants has raised arguments that there was no agency relationship between the firm of the advocates and the appellants. He has also made submissions about the date of payment that it was 12th September and not 14th September as
5 is pleaded by the respondent. He has argued that the respondent had previously paid twice without his assistance.

I am of the considered view that all these submissions are matters of evidence which counsel was going into. Additionally,
10 the contract does not specify how payment had to be effected. It is, therefore, impossible to determine at this stage whether the respondent needed the lawyer's assistance to pay or not.

I appreciate the argument by the respondent's counsel that if
15 there is any deficiency in the plaint it could be cured by the amendment. This was the holding of this court in ***Tororo Cement Co. Ltd Vs Frokina International Ltd*** (*Supra*).

In that case the appellant was the defendant in the High Court
20 and the respondent was the plaintiff. The plaintiff averred in its plaint that the defendant's truck and its trailer had rammed into the plaintiff's premises and extensively destroyed its doors and walls.

25 In another paragraph the plaintiff pleaded that the accident was caused by the negligence of the driver. However, no particulars of the negligence were pleaded in the plaint.

When the case came up in the High Court counsel for the defendant raised a preliminary objection on the ground that the plaintiff was defective and did not disclose a cause of action and should be rejected under Order 7 Rule 11(a) of the Civil Procedure Rules. The High Court overruled the objection and on appeal to the Court of Appeal by the defendant the appellate court upheld the decision of the High Court.

On a second appeal the Supreme Court unanimously upheld the lower courts' decision. Tsekooko JSC, who wrote the lead judgment quoted with approval the following statement by Spry V.P. in ***Auto Garage & another Vs Motokov (No.3) (1971) EA.514*** at page 519

“ I would summarise the position as I see it by saying that if a plaintiff shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment”.

In the appeal before this court, the issues of estoppel, passing of title in the property and calculation of the 75 days can only be determined at the trial. I am unable to fault the first appellate court on its finding that a cause of action is disclosed.

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I would confirm the order of the Court of Appeal that this file be remitted to the High Court and be placed before another judge for hearing. I would dismiss the appeal with costs to the respondent in this court and courts below.

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Dated at Kampala this 17th day of August, 2010

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**C.N.B. KITUMBA
JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGANDA

**IN THE SUPREME COURT OF UGANDA
AT KAMPALA**

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**(CORAM: ODOKI, CJ, KATUREEBE, KITUMBA, TUMWESIGYE AND
KISAAKYE, JJ.SC)**

CIVIL APPEAL NO 16 OF 2009

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BETWEEN

- 1. NAROTTAM BHATIA }**
- 2. HEMANTINI BHATIA } :::::::::::::::::::::::::::::::APPELLANTS**

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AND

BONTIQUE SHAZIM LTD) ::::::::::::::::::::::::::::::: RESPONDENTS

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[Appeal from the decision of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ; Mpagi Bahigeine and Byamugisha, JJA) dated 8th October 2009, in Civil Appeal No 36 of 2007]

JUDGMENT OF ODOKI, CJ

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I have had the benefit of reading in draft the judgment of my learned sister, Kitumba JSC, and I agree with her that this appeal should be dismissed with costs in this Court and Courts below.

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As the other members of the Court also agree there will be judgment and orders in the terms proposed by the learned Justice of the Supreme Court.

Dated at Kampala this 17th day of **August** 2010

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B J Odoki
CHIEF JUSTICE

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

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(CORAM: ODOKI, CJ, KATUREEBE, KITUMBA, TUMWESIGYE AND
KISAAKYE, JJ.SC.)

CIVIL APPEAL NO. 16 OF 2009

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BETWEEN

NAROTTAM BHATIA }
HEMANTINI BHATIA } APPELLANTS

15

AND

BONTIQUE SHAZIM LTD RESPONDENTS

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*[An appeal from the decision of the Court of Appeal of Uganda at Kampala
(Mukasa-Kikonyogo, DCJ; Mpagi-Bagugeube and Byamugisha, JJ.A) dated 8th
October 2009, in Civil Appeal No. 36 of 2007]*

JUDGMENT OF KATUREEBE, JSC.

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I have had the benefit of reading in draft, the judgment of my learned
Sister, Kitumba, JSC and I fully agree that this appeal be dismissed. I
also support the orders proposed.

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Dated at Kampala this 17th day of **August** 2010

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Bart M. Katureebe
Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

5 **(CORAM: ODOKI, CJ; KATUREEBE; KITUMBA; TUMWESIGYE
KISAAKYE, JJ.S.C)**

BETWEEN

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NAROTTAM BHATIA } :::::::::::::::::::::::::::::: APPELLANTS

AND

BOUTIQ SHAZIM LTD :::::::::::::::::::::::::::::: RESPONDENTS

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*(Appeal from the decision of the Court of Appeal of Uganda at Kampala
[Mukasa Kikonyogo, DCJ; Mpagi-bahigeine and Byamugisha, JJ.A) dated 8th
October 2009, in Civil Appeal No. 36 of 2007]*

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JUDGMENT OF TUMWESIGYE JSC

I have had the opportunity of reading in draft the judgment of my learned
sister, Kitumba JSC, and I agree with her judgment and the orders she
25 has proposed.

30 **JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

5 **(CORAM: ODOKI, C.J., KATUREEBE, KITUMBA, TUMWESIGYE,
KISAAKYE, JJ.S.C.)**

CIVIL APPEAL NO. 16 OF 2009

10 **BETWEEN**
1. NAROTTAM BHATIA }
2. HEMANTINI BHATIA } APPELLANTS

15 **AND**
BOUTIQUE SHAZIMI LTD RESPONDENTS

*{Appeal from the decision of the Court of Appeal of Uganda at Kampala
(Mukasa Kikonyogo, DCJ., Mpagi-Bahigeine and Byamugisha, JJ.A dated 8th
October, 2009 in Civil Appeal No. 36 of 2007}*

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JUDGMENT OF DR. E. M. KISAAKYE, JSC

I have had the privilege to read in draft the judgment of my learned sister, Justice
Kitumba, JSC.

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I concur with the orders she has proposed and I have nothing useful to add.

30 **Dated at Kampala this 17th day of August, 2010.**

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DR. ESTHER M. KISAAKYE
JUSTICE OF THE SUPREME COURT

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