**Kibalama v Alfasan Belgie CVBA**

[2004] 2 EA 146 (CAU)

**Division:** Court of Appeal of Uganda at Kampala

**Date of Judgment:** 2 June 2004

**Case Number:** 19/02

**Before:** Mukasa-Kikonyogo CJ, Kitumba and Byamugisha JJA

**Sourced by:** LawAfrica

**Summarised by:** M Adriko

*[1] Civil procedure – Admission – Judgment upon admission – Meaning of admission – Order 11, rule*

*6, Civil Procedure Rule – Damages – Contract – Assessment of damages – Whether damages should be*

*assessed by court even when the plaintiff has lost the suit.*

*[2] Civil procedure – Pleadings – Contract – Pleading contents of a contract in pleadings – Contract –*

*Trade custom – Meaning of trade custom – When trade custom can be pleaded by a party to the contract.*

**Editor’s Summary**

The appellant, in 1994 was introduced to the export manager of the respondent for the purposes of

carrying on the business of importing drugs in Uganda. It was alleged that a verbal agreement was made

between the parties pursuant to which the appellant verbally placed orders together with payments in

cash which would be transferred to the respondent’s bank account in Europe. The respondent would

dispatch the drugs to Uganda. Appellant claims to have had a telephone discussion with the respondent’s

export manager during which he placed an order for drugs worth US$ 15 000. The respondent did not

send the drugs.

In a civil suit, the appellant claimed a sum of US$ 15 000 or its equivalent in Ugandan Shillings;

general damages for breach of contract, interest on the sum at the bank rate from the date of transfer until

payment in full and costs of suit.

Page 147 of [2004] 2 EA 146 (CAU)

At trial, the appellant relied on pleadings which, among other omissions, did not include any

documents showing the type of drugs ordered, whether any dispatchments of drugs were made and the

unit costs of the drugs, if any. He then tried to plead a trade custom to the effect that transactions of the

kind referred to in this suit would be made in a verbal form and that this was common in the drugs trade.

The trial Judge dismissed the suit.

The appellant appealed.

**Held** – In suits based on contract, the plaint must allege the contract and then its breach. The plaint must

also state the terms of the contract, the time when the cause of action arose, whether contract was express

or implied, whether it was oral or written; the dates and names of the parties thereto.

The plaint in this case did not state the type of drugs that were supposed to be delivered, the quantities of

the drugs nor when the breaches occurred. Thus it did not satisfy the provisions of Order 7, rule 1(*e*) of

the Civil Procedure Rules which require a plaint to state facts constituting a cause of action and when it

arose.

A trade usage is a particular course of dealing between parties who are in a business relationship. The

usage must be known to all persons who normally enter into that relationship and must thus be presumed

to have intended to adopt that course of dealing and to have incorporated it into their contractual

relationship unless by agreement it is expressly or impliedly excluded. For a course of dealing to become

a usage, it must be so well known by the parties affected by it, it must be certain, it must be reasonable

and it must not be contrary to legislation or a fundamental principle of law. A trade usage may be proved

by a calling witnesses with clear, convincing and consistent evidence that the usage exists as a fact, is

well known and has been practiced by those affected by it. (Newbold P in *Harilal v Standard Bank*

[1967] EA 512 quoted with approval, *Bhogal v International Computers (EA) Ltd* [1972] EA 55 cited).

In order to rely on trade custom or usage, the appellant had to show a consistent course of dealing in

which the terms of the verbal agreement between himself and the respondent had been incorporated in

the past. He also had to show that he and the respondent knew of those terms in question. Under

section 47of the Evidence Act (Chapter 6), the Court may need the opinion of persons having the means

of knowledge on usage or custom if it has to form an opinion about it.

The appellant did not adduce evidence from any source other than himself on which the Court could

have made an inference of the trade usage or custom that he was claiming. He thereby failed to prove the

existence of the contract for the supply of drugs.

Under Order 11, rule 6, judgment can be entered at any stage of the suit where an admission of facts

had been made. Such an admission, however, must be unequivocal in order to entitle the party to

judgment without waiting for the determination of any other question between the parties.

Although the respondent company admitted receiving US$ 15 000 from the appellant, this did not

amount to an admission under Order 11, rule 6 Civil Procedure Rules since it explained that his money

was a partial payment of a debt the appellant owed it.

Page 148 of [2004] 2 EA 146 (CAU)

Damages are awarded for breach of contract after proof that the terms of the contract were breached.

However, even when the plaintiff fails to prove breach of contract, it is a prudent judicial practice for the

trial Judge to assess the damages the successful party would otherwise have been entitled to, had he

succeeded in the suit. This is vital in saving time when, the appellate Court orders that the case be

remitted to the trial court for the assessment of damages. (*Sell v Associated Motor Boat Co* [1968] EA

123, *Mute v Elikana* [1975] EA 201, *AKPM Lutaaya v Attorney-General* civil appeal number 10 of 2002

(UR) followed).

The trial Judge should have assessed the damages although the plaintiff’s suit had been dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Bhogal v International Computers* EA Ltd [1972] EA 55 - **APP**

*Harilal v Standard Bank* [1967] EA 512 – **APP**

*Lutaya v Attorney-General* civil appeal number 10 of 2002 (UR) – **F**

*Mute v Elikana* [1975] EA 201 – **F**

*National Enterprises Corporation and others v Nile Bank Ltd* civil appeal number 17 of 1994 (UR) – **F**