**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.

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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.

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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**

*Selle v Associated Motor Boat Co* [1968] EA 123 – **F**

**Judgment**

**BYAMUGISHA JA:** On the 28 January 1998, the appellant filed a suit in the High Court of Uganda

against the respondent claiming a sum of US$ 15 000 or its equivalent in Uganda shillings; general

damages for breach of contract; interest on the sums at bank rate from the date of transfer till payment in

full and costs of the suit.

The facts that led to the institution of the proceedings as they can be gathered from the pleadings filed

by the parties appear to the following. In or around 1994 the appellant was introduced to the export

manager of the defendant, one Eddy Van Qudendijck for purposes of carrying on the business of

importing drugs in Uganda. It was alleged that the agreement between them was verbal in that the

appellant would verbally place orders with cash, which would be transferred, to the respondent’s bank

account in Europe. On receipt of the money, the respondent would in turn dispatch the drugs to Uganda.

On 12 January the appellant claimed that after a telephone discussion with the respondent through Eddy

Van Qudendijck he placed an order for drugs worth US$ 15 000 for the benefit of Cox Research

Laboratories. He dispatched the stated amount to the respondent’s bank account and same was received.

The respondent failed or refused to send the drugs hence the suit.

In its written statement of defence and counterclaim, the respondent denied the appellant’s claim. It

averred that the appellant never placed any order for drugs as it was claimed. Instead it was stated that

one time the appellant owed the respondent the sum of US$ 34 590-90 and that the US$ 15 000 paid by

the appellant to the respondent was in settlement of that debt. This left an outstanding balance of US$

19 590-90 which the respondent counterclaimed

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against the appellant. In reply to the written statement of defence and counterclaim, the appellant denied

the indebtedness. He contended that the counterclaim was raised because of the suit.

At the trial the following agreed issues were framed for the Court’s determination namely:

1. W hether there was a contract between the plaintiff and the defendant for the sale of drugs worth US$

15 000-00;

2. I f there was a contract, whether it was breached; and

3. T he remedies to which the plaintiff is entitled.

On the respondent’s counterclaim two issues were framed, namely:

1. W hether there was any debt owed to the defendant/counterclaimant by the plaintiff.

2. I f so, whether the payment of US$ 15 000-00 was meant to liquidate that debt.

The Learned trial Judge answered the first issue in the negative. She did not find it necessary to

determine the rest of the issues. The respondent did not adduce any evidence and the counterclaim was

dismissed with costs to the appellant. Being dissatisfied with the decision, the appellant filed the instant

appeal on the following grounds:

1. T he Learned trial Judge erred in law when she reached an erroneous conclusion that because there was

no written document, there was no legally binding contractual relationship between the parties.

2. T he Learned trial Judge erred in law and fact when she failed to appreciate the custom of trade

between the plaintiff and the defendant and or conduct of the parties.

3. T he Learned trial Judge ought to have entered judgment, in favour of the appellant upon the

respondent admitting receipt of US$ 15 000-00 from the appellant in its written statement of defence

and counterclaim.

4. T he Learned trial Judge erred in law and fact when she failed to award damages and interest to the

appellant upon the conclusion of the appellant’s case and submission thereof.

5. T he Learned trial Judge erred in law and fact when she failed to enter judgment in favour of the

appellant after he had proved his case and the respondant failed to rebut it.

6. T he Learned trial Judge failed in her discretion to direct the case to a fair conclusion thereby causing a

serious miscarriage of justice.

The appellant’s prayer was that the appeal should be allowed and the appellant be awarded the reliefs

prayed for in the plaint and the lower court’s decision be set aside.

When the appeal came before us, Mr *Ndyomugabe*, learned counsel for the appellant, argued grounds

3 and 5 of the appeal together and the rest of the grounds separately.

In his submission, counsel stated that not every agreement or contract should be written. He stated

that contracts are either oral, written or partly oral or partly written. He relied on the provisions of section

2(1) of the Contract Act (Chapter 73 Laws of Uganda) which enjoins courts in Uganda to apply the

Common Law of England when interpreting contracts. He referred to the elements that constitute a valid

contract as contained in *Halsbury’s Laws of England* (4 ed) paragraph 203. These elements are:

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1. T here must be two or more separate and definite parties to the contract;

2. T hose parties must be in agreement, that is there must be a consensus *ad idem*;

3. T hose parties must intend to create a legal relationship in the sense that the promises of each side are

enforceable simply because they are contractual promise; and

4. C onsideration, or some other factor which the law considers sufficient must support the promise by

each party.

Learned counsel submitted that all the four essential elements of a contract existed in the instant case. He

also referred us to section 4(1) of the Sale of Goods Act that provide as follows:

“Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing

(either with or without seal) or by word of mouth or partly in writing and partly by word of mouth, or may be

implied from the conduct of the parties”.

He pointed out that the Learned trial Judge erred in law to hold that since the contract was not in writing,

there was no binding legal relationship. It was his contention that the Learned Judge made a correct

observation when she stated that the appellant and the respondent had some dealings with each other. But

he criticised her for contradicting herself by stating that it was not clear whether such dealings were

meant to create a legal relationship binding at all. He contended that the parties chose to deal with each

other in that manner. He cited the case of *Bhogal v International Computers* EA Ltd [1972] EA 55 where

the requirements of a trade usage or custom were judicialy explained. Learned counsel further contended

that the appellant gave a detailed account of how he imported drugs. He invited us to apply the provisions

of section 4(1) (*supra*) and *Bhogal*’s case to the facts of this appeal.

In his response to the above submissions, Mr *Muganwa*, learned counsel for the respondent, stated

that a contract has four basic elements namely:

1. O ffer and acceptance.

2. C onsideration.

3. I ntention to create a legal relationship.

4. P arties.

He claimed that counsel for the appellant in his submission did not bring out the four elements. He stated

that the submissions stated the nature of a contract that is partly oral or partly in writing. But there was

no evidence to prove a binding contract. It was his contention that the conduct of the parties can be used

to determine the nature of the contract. He supported the finding of the trial Judge in that there was no

evidence on which an inference could be made that there was a valid contract between the parties.

Generally 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 as it was when the plaintiff’s cause of action arose; whether the

contract was express or implied; whether it was oral or written and if written the dates and the names of

the parties must be stated. The appellant in pleading the contract now under dispute stated in paragraph 4

of the plaint as follows:

“The plaintiff’s claim arises under and upon the following facts:

(*a*) In or around 1994 the plaintiff was introduced to the export manager of the defendant one Eddy Van

Qudendijck for purposes of carrying on business with the defendant whereby the plaintiff would

import drugs from the defendant in Uganda.

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(*b*) The plaintiff and the defendant verbally agreed that the plaintiff would always place an order with cash

which would be transferred to the defendant’s bank account in Europe and by telegraphic transfer

before the defendant dispatched the goods to the plaintiff in Uganda as evidenced by transaction

vouchers hereto attached in one bundle and marked ‘A’.

(*c*) In the same year (1994) the plaintiff was verily recognised and appointed distribution agent of the

defendant’s products in Uganda Manufacturers Association Trade show at Lugogo in Uganda as

evidenced by annexture ‘B’ herewith annexed in one bundle.

(*d*) On 12 January 1996 after a telephone discussion with the defendant through the said Eddy Van

Qudendijck, the plaintiff placed an order for goods worth 15 000 (Fifteen thousand United States

Dollars) for the benefit of Cox Research Laboratories and as per the terms of the agreement the

plaintiff dispatched the said money by telegraphic transfer to the defendant’s bank account and the

defendant acknowledged receipt thereof. The transaction voucher is hereto attached and marked ‘E’”.

In pleading the breach, the appellant stated in paragraph six thereof as follows:

“Despite several demands and reminders and in breach of contract the defendant has refused and/or neglected

to send the goods worth the stated sum or any part therefore or to refund the said sum of US$ 15 000 thereby

necessitating the Court action”.

The terms of the alleged contract as pleaded state the parties and the consideration. The terms neither

stated the type of drugs that were supposed to be delivered and the quantities nor when the breach of

breaches occurred. The provisions of Order 7, rule 1(*e*) require a plaint to state the particulars

constituting a cause of action and when it arose. It was however submitted that there was a custom or

trade usage between the parties and the appellant relied on *Bhogal*’s case for that assertion. The facts of

that case were that the plaintiff was employed by the defendant on a work permit, and towards the end of

his contract the defendant asked the plaintiff to leave on its expiry. The plaintiff claimed to be entitled to

be paid compensation at the rate of one month’s salary for every year of service with the plaintiff, firstly

on the basis of an award of the Industrial Court made between the employers and employees in the motor

trade, and alternatively on the basis that there was a custom to pay such benefits. In dismissing the claim

of a custom the High Court of Kenya relied on the case of *Harilal v Standard Bank* [1967] EA 512 where

at 516 Sir Charles Newbold P said:

“As a trade usage may be described as a particular course of dealing between parties who are in a business

relationship, which of course the dealing is generally known to all persons who normally enter into that

relationship that they must 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.

Before a course of dealing can acquire the character of a trade usage it must first be so well known to the

persons who would be affected by it that any such person when entering into a contract of a nature affected by

the usage must be taken to have intended to be bound by it; secondly, be certain in the sense that the position

of each of the parties affected by it is capable of ascertainment and does not depend on the whim of the other

party; thirdly, be reasonable, that is, that the course of dealing is such that reasonable men would adopt it in

circumstances of the case; and finally, be such as is not contrary to legislation or to some fundamental

principle of law”.

In this same case Sir Newbold stated the standard of proof when he said:

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“A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent,

that the usage exists as a fact and is well known and has been acted on generally by persons affected by it”.

The *Bhogal* case is not binding on this Court having been decided by the High Court of Kenya. However,

the principles relied upon were set out in the decision of the East Africa Court of Appeal and therefore

the said principles can be relied upon by this Court to determine the facts of this case.

In rejecting the appellant’s claim of a verbal contract together with the alleged trade usage or custom

the Learned trial Judge at 99 of the record said:

“Even if it is granted that the parties did agree that the terms governing their relationship was to remain

verbal, one would nevertheless, expect that there would be some documents or record of the transaction

considering that they are supposed to have been transacting with each other for at least a year. One would

have expected some proforma invoices of the drugs involved in each transaction. One would have expected

some record of the type of drug, the quantity and the cost per unit and total cost of drugs involved in each of

the transactions involved in 1995. One would have expected shipping documents as well as clearing

documents to be available”.

I entirely agree with the conclusions reached by the Learned trial Judge. Whereas it is quite acceptable

for parties to enter into a verbal contract and perform their obligations arising out of that contract in a

manner they deem fit, I do not think that when it comes to the contract now under consideration, the

Court should accept wholesale the evidence as presented. The contract was allegedly entered into

verbally and it was conducted on telephone. There was no harm in that. The advances that have been

made in information technology has made it possible for many people across the globe to conduct

business with each other in the manner described by the appellant. It is, however, inconceivable that the

appellant had no documentary evidence of his transactions with the respondent to prove the dealings. He

attached bundles of some documents involving drugs that was sent to him by the respondent. Those drugs

were used in the trade fair of Uganda Manufacturers Association at Lugogo. He had no documents to

show that the respondent sent him any drugs for the money he transferred to it in 1994/95. The alleged

drugs could not have been sent to him by telephone. He adduced documentary evidence from Uganda

Commercial Bank to prove the transfer of money to the respondent’s bank account. He should have gone

further to prove that when he sent the money in previous dealings the goods were also sent using the

means verbally agreed upon.

It probably explains why the appellant did not plead the means by which the respondent was supposed

to send the goods because no drugs were supposed to be sent. To be a good contract, there must be a

concluded bargain, and a concluded contract settles everything that is necessary to be settled and leaves

nothing to be settled by agreement between the parties. The contract pleaded by the appellant with

respect, did not settle everything to create a binding relationship.

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

which the same terms have been regularly if not invariably incorporated in the past. He had also to show

that he and the respondent knew of those terms in question. In my view, previous dealings as is being

claimed in this appeal were relevant in order to prove actual knowledge and consent those terms by both

parties. If previous dealings show that a man or woman knew of and agreed to a term on say 99

occasions, there would be a basis for saying that the term was incorporated in the contract.

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In the matter now before us, although the respondent did not testify at the trial, in its written statement

of defence, it acknowledged receipt of the money. It was averred that the money was meant to repay a

debt owed by the appellant. In his testimony, the appellant acknowledged that he had owed the

respondent some money but he had repaid it. He did not adduce evidence of that payment. There was also

evidence that the appellant had sent bank drafts to the respondent on behalf of some people and that those

drafts were dishonoured. As the Learned trial Judge rightly observed in my view, the possibility that the

appellant sent the money in question on behalf of other people could not be ruled out. The appellant did

not prove on a balance of probabilities the purpose for which he sent the money in question.

In any case, the provisions of section 47 of the Evidence Act (Chapter 6 Laws of Uganda) requires

that before a court forms an opinion as to usages, tenets, etc, the opinion of persons having special means

of knowledge is relevant. The section states as follows:

“When the Court has to form an opinion as to:

(*a*) the usage and tenets of anybody of men or family;

(*b*) the Constitution and government of any religious or charitable foundation; or

(*c*) the meaning of words or terms used in particular districts or particular classes of people, the opinion of

persons having the means of knowledge thereon are relevant facts”.

The appellant did not adduce evidence from any other source on which the Court could have made an

inference of trade usage or custom that he was claiming. Such evidence would have come from people

with knowledge of trade in drugs that the appellant was supposed to import from the respondent. In my

humble opinion, the Judge was right to reject his evidence.

The above discussion disposes of the first and second grounds of appeal, which ought to fail.

The third ground of appeal complained that the trial Judge erred in not having entered judgment in

favour of the appellant upon admission that it received US$ 15 000-00. It is correct that the respondent

admitted receiving the stated amount in paragraph 5(iv) of its written statement of defence and

counterclaim.

Under Order 11, rule 6 of the Civil Procedure Rules, judgment can be entered at any stage of the suit

where an admission of facts has been made. Normally admissions are admissible against the maker. Such

an admission must be unequivocal in order to entitle the party to judgment without waiting for the

determination of any other question between the parties. In this case the respondent did not

unequivocally admit receiving the said money and the purpose for which it was sent. Instead it averred

that the appellant sent the money because he owed it the sum of US$ 34 590-90 and in an attempt to

settle the debt, he sent the stated amount, leaving a balance of US$ 19 590-90. This amount was claimed

in the counterclaim that was dismissed for want of prosecution. The trial Judge cannot be faulted for not

entering judgment on admission. This ground was not well founded and it ought to fail.

The rest of the grounds can be dealt with summarily. The fourth ground complained that the Learned

trial Judge erred in law when she failed to award damages and interest. Damages are normally awarded

for breach of contract

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after proof that the terms of the contract were breached. In view of may own findings that the appellant

failed to prove his case, he was not entitled to any damages.

However, I would like to observe that there is a growing tendency among members of the High Court

bench who fail or omit to assess damages they would have awarded the plaintiff, had the action

succeeded. I shall refer to some authorities to illustrate why there is need for this practice to be observed.

This first case is *Selle v Associated Motor Boat Co* [1968] EA 123. The Court counselled that it is

desirable and advisable for a judge of first instance to decide all issues raised in the case so that further

expenses and delay may be avoided in the event of the appellate court having to adopt a course of

remitting the file to the High Court for assessment of damages. The file was remitted to the High Court to

do the needful. The second case is *Mute v Elikana* [1975] EA 201 where the Court of Appeal for East

Africa (as it then was) had occasion to comment on the need to assess damages even though judgment is

given in favour of the defendant. At 202 Law Ag P said:

“Where the judgment is, with respect less satisfactory, is in the almost complete lack of specific

findings on the allegations of negligence pleaded on both sides, and the Judge’s failure to make findings

as to damages to which the appellant would have been entitled had he been successful. *This should*

*always be done in a suit for damages, even though judgment is given for the defendant*”. (emphasis

added)

The file was remitted to the High Court to assess damages due to the plaintiff.

In a recent decision of the Supreme Court in the case of *Lutaya v Attorney-General* civil appeal

number 10 of 2002 (UR) Tsekooko JSC who wrote the lead judgment with which other members of the

Court agreed, had occasion to comment on failure by the trial court to assess damages. At page 19 of the

judgment he said:

“It is a well established judicial practice that in this type of case, a trial court should indicate what it would

have awarded as damages if the plaintiff had established his claim: See *National Enterprises Corporation and*

*others v Nile Bank Ltd* civil appeal number 17 of 1994 (UR). The Supreme Court remitted the record to the

trial Judge to assess damages. The observations made in those cases were of course orbiter. But the practice

must be observed by the lower courts”.

In the instant appeal, the appellant failed to prove his claim and therefore the trial Judge did not err in not

awarding him any damages although she should have assessed them. Failure by the trial Judge to enter

judgment in favour of the appellant in my view did not occasion any miscarriage of justice

notwithstanding failure by the respondent to adduce any evidence.

All in all, the appellant failed to prove his case and his appeal to this Court ought to fail. I would

uphold the judgment and orders of the judgment and orders of the High Court. The appeal would

accordingly, be dismissed with costs to the respondent.

Mukasa-Kikonyogo CJ and Kitumba JA concurred in the judgment of Byamugisha JA.

For the appellant:

*D Ndyomugabe* instructed by *Davis Ndyomugabe and Co*

For the respondent:

*CS Muganwa* instructed by *Mwesigwa Rukutana and Co*