

COURT OF APPEAL IBADAN DIVISION
FRIDAY 6TH JUNE, 2014. CA/I/52/2013
CORAM:- H. S. TSAMMANI, M. N. ONIYANGI,
N. OKORONKWO, JJCA

NEW AGE BEVERAGE
COMPANY LIMITED APPELLANT
AND
MRS. ABIOLA ARAMIDE RESPONDENT

AGENCY - Principal & agent - Relationship - Arises where principal consents that agent shall act on his behalf - And agent consents so to act (H1)

CONTRACTS - Binding contract - Evidence of payments for the goods ordered and supplied - Are proof of a binding commercial transaction - And justify the finding in debt by the trial Judge (H2)

CONTRACTS - Evidence - Fact in issue - There is no misdirection in the matter - As evidence by appellant's witness was considered as admission of fact in issue - And not an issue of onus of proof (H3)

FACTS

Before the Oyo State High Court Ibadan, plaintiff/respondent instituted this action against defendant/appellant seeking inter alia for payment of outstanding balance of the contractual relationship between the parties. Appellant had initially engaged one Mrs. Abiola Odeyemi to procure sugar for its business. The said Mrs. Odeyemi procured some quantity of sugar from respondent and paid for the supply. Thereafter, appellant dealt directly with respondent in the transaction. In their further transactions between December 2009 and January 2010, appellant requested for and was supplied with 700 bags of sugar by respondent at the rate of N8,200.00 per bag totaling N5,740,000.00.

Appellant paid only N3,900,000.00 in three cheques (Exhibits D5, D6 & D7) issued to respondent, leaving an outstanding sum of N1,840,000.00. Upon failure to make payment for the outstanding, respondent briefed her solicitors and a demand letter was writ-

ten to appellant. The letter was not responded to. Hence, respondent filed the action. At the trial, appellant's contention is that it has no contractual relationship with respondent. It stated that payment for the outstanding sum had been made to the Mrs. Abiola Odeyemi. The court in its judgment found appellant liable to pay the outstanding sum. Aggrieved, appellant appealed to the Court of Appeal Ibadan Division.

ISSUES FOR DETERMINATION

(1) What was the jural relationship between the appellant and the respondent? How was the relationship created? By the parties or by operation of law?

(2) On who was the Primary onus of proof in this case, was the onus discharged?

(3) Did the respondent as plaintiff prove her case at the court below?

HELD (Unanimously dismissing the appeal per **OKORONKWO JCA**)

AGENCY - Principal & agent - Relationship

1. The common law principles of agency is encapsulated in the maxim "Qui Facit per alium, facit per se" He who acts by another acts by himself because the common law allows one man to authorize another to contract for and to bind him by an authorized contract. The relationship of principal and agent arises where one party, the principal consents that the other party, the agent shall act on his behalf and the agent consents so to act. The relationship need not be contractual, need not be expressed and could be implied.

In this case, the appellant constituted Mrs. Abiola Odeyemi an agent for the purpose of procuring sugar. The appellant appropriated and paid for the sugar.

At a point, the evidence disclosed, the respondent objected to payments to her being made through the agent Mrs. Abiola Odeyemi and Mrs. Abiola Odeyemi had to formally introduce the respondent to the appellant. From that point, the appellant, the evidence further disclosed, made direct orders

for additional 700 bags of sugar on the respondent and went ahead to issue cheques Exhibits D5, D6 and D7 to the respondent in payment and leaving the balance of N1,840.000 unpaid. From that point, the agent Mrs. Abiola Odeyemi having disclosed the principal drops out of the transaction and her principal i.e. appellant becomes directly responsible to the respondent in respect of goods directly ordered by it and supplied by respondent. This is a basic rule of agency (i.e. disclosed Principal) and it applies with full force in the transaction in this case. There is thus established a direct contractual privity between the appellant and the respondent entitling the respondent to sue the appellant in respect of such contract. (p. 170 F)

CONTRACTS - Binding contract

2. On issue No.2, there is evidence that the appellant ordered for bags of sugar which were supplied vide Exhibit P series. There were also Exhibits D5, D6, D7 and D8 which were cheque payments made directly to the respondent. These alone were sufficient to draw the conclusion of a binding commercial transaction between the respondent and the appellant and justify the finding in debt by the trial judge against the appellant. (p. 173 B)

Evidence - Fact in issue

3. Concerning the evidence of the appellant's witness promising to produce a Local Purchase Order which the appellant issued the respondent for the supply of 700 bags of sugar and the comment of the learned trial Judge on it, counsel for the appellant strenuously argued that the judge misplaced the onus on the respondent, placing it on the appellant and thus misdirected herself.

This view is not justified by the entire judgment. A cursory reading of the judgment particularly at page 9 thereof would show instead that the learned trial judge considered such evidence by the appellant witness to produce a Local Purchase Order which the appellant issued the respondent as an admission of a fact in issue raised by the respondent that

such local purchase order was issued to her but was misplaced. It was a straight admission of fact by appellant's witness and not an issue of onus of proof. This issue encompassing all similar questions raised by the appellant is also resolved against the appellant. (p. 173 D)

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REPRESENTATION

Modupe Balogun, for the Appellant

Olusina Osunlakin, for the Respondent

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CASES REFERRED TO

R. v. Kent Justices (1875) LR 8

Amadiume v. Ibok (2006) 6 NWLR (pt. 915) 158

Anyaoarah v. Anyaoarah (2001) 7 NWLR (pt. 711) 158

D Essang v. Aureol Plast Ltd. (2002) 17 NWLR (pt. 795) 1515

STATUTES REFERRED TO

Evidence Act, s. 169

E

BOOK REFERRED TO

Chitty on Contract vol. 2 (24th ed.) p. 2002

LEAD JUDGMENT BY OKORONKWO JCA

F

The appeal in this case, arose from the judgment of Hon. Justice F.I. Oyelaran of the Oyo State High Court delivered at Ibadan on 6th December, 2012.

The brief facts of the case leading to the appeal are as follows:-

G The appellant - New Age Beverage Company Ltd, in the course of its business, engaged one Mrs. Abiola Odeyemi to procure sugar for its use in its manufacturing business.

The said Mrs. Abiola Odeyemi procured some quantity of sugar from the respondent and paid for the supply.

H Subsequently, the respondent insisted on direct payment of supplies made to the appellant by the issuance of cheques direct to the respondent and in consequence, further supplies procured from the respondent by the same Mrs. Abiola Odeyemi were paid for by cheques issued in favour of the respondent and no longer Mrs. Abiola Odeyemi.

Between December 2009 and January 2010 the appellant requested for and was supplied with 700 bags of sugar by the respondent at the rate of N8,200.00 per bag amounting to N5,740,000.00 (Five Million, seven hundred and forty thousand Naira only). Of the amount, the appellant issued three cheques in payments totally N3,900,000.00 (Three million nine hundred thousand naira only i.e. Exhibit D5, D6 and D7 in the Proceedings to the respondent leaving an outstanding sum of N1,840,000.00 (One million eight hundred and forty thousand Naira) B

When the outstanding balance was not paid as expected, the respondent through her solicitors wrote the appellant demanding payment for the sum outstanding. The appellant did not respond to the letter which prompted the respondent to sue the appellant at the Oyo State High Court at Ibadan. C

In court, the appellant contended that although it had issued D some cheques in favour of the respondent, it (appellant) has no contractual relationship or privity with the respondent and that it had paid the aforesaid Mrs. Abiola Odeyemi the outstanding balance.

The High Court per F.I. Oyelaran (Judge) gave judgment in favour of the respondent adjudging the appellant liable to pay the sum of N1,840,000.00 as claimed. E

It is against this order that the appellant has appealed to this court as per Notice of Appeal which raised five grounds which (shorn of Prolix Particulars) are as follows:-

1. *"The trial judge erred both in law and facts adduced before her by holding that there is a contractual relationship between the claimant and the defendant."* F

2. *"The trial Judge erred in fact when she held that the payments of money through Exhibit D5, D6, D7 in January, 2010 by G the defendant only go to show that the defendant paid for the goods supplied in Exhibit P1 - P4."*

3. *"The learned trial Judge erred in law when she admitted and relied on P3 & P4 in arriving at her decision."*

4. *"The learned Judge erred in law and thus misdirected herself H when she held that the failure of the defence witness who earlier said he could produce the Local purchase order but was unable to produce same should be resolved against the defendant."*

5. *The learned Judge erred in fact and misdirected herself by*

holding that “if the total sum in Exhibit D5, D6 and D7 which adds to N3,900.00 (Three million, nine hundred thousand Naira) is deducted from the sum in Exhibit P4, the outstanding balance is N1,840,000.00 (One million eight hundred and forty thousand naira) would remain unpaid by the defendant.”

B From the grounds of appeal, the appellant formulated the following five issues for determination viz-

Issue No. 1

C “Whether from the facts and evidence led by the parties at the trial, there existed contractual relations capable of giving rise to binding right and obligation, liabilities or privileges between the appellant and respondent.”

Issue No. 2

D “Whether the learned trial Judge was right to have held that payment through Exhibit D5, D6 and D7 in January 2010 by the appellant is an indication of indebtedness to the respondent.”

Issue No. 3

“Whether the learned trial Judge was right to have admitted and relied upon documents not before it in arriving at her decision.”

E Issue No. 4

F “Whether the learned trial Judge was right to have held that the total amount in Exhibit D5, D6 and D7 in the sum of N3,900.00 (three million nine hundred thousand naira only) made in favour of different drawers on the instruction of Mrs. Odeyemi make the appellant to be indebted to the respondent in the sum of N1,840,000.00 (One million eight hundred and forty thousand Naira only)”

Issue No. 5

G “Whether the learned trial Judge was right to have held that the failure of the Appellant’s witness to produce the document which forms the basis of the respondent’s claim and which is in the custody of the respondent is fatal to the appellant’s case.”

Or

H “Whether the learned trial Judge was right to have held, contrary to the time hallowed Principle of law that the onus of proof is on who asserts by holding differently that failure of the appellant to prove the respondent case for her should be resolved against the appellant.”

The Respondent also formulated three issues thus:

(1) *“Whether or not the learned trial Judge was right based on the evidence before the lower court that there existed a contract for the supply of N700 (seven hundred) bags of sugar between the appellant and the respondent and whether such finding can be said to be perverse having regards to the facts, circumstances and evidence before the trial court.”* B

(2) *Whether or not the trial court was right in admitting Exhibit P3 and P4 and placing reliance on same.*

(3) *Whether or not in the peculiar facts and circumstance of this case, the presumption of withholding evidence could be invoked against the appellant under Section 167(d) of the Evidence Act 2001.”* C

All these issues, whether raised by the appellant or by the respondent could be narrowed into two or three at the most viz.

(1) What was the jural relationship between the appellant and the respondent? How was the relationship created? By the parties or D by operation of law?

(2) On who was the Primary onus of proof in this case, was the onus discharged?

(3) Did the respondent as plaintiff prove her case at the court below? E

I believe the above 3 issues I have raised from those of the parties encompass all issues raised in this appeal by the appellant and respondent. I will consider this appeal in that Order.

The first issue raised above which also subsumes issue No.1 of F the appellant relates to whether there was any contractual privity between the appellant and the respondent. The appellant’s counsel had contended in his brief that there was no contractual relationship between the appellant and the respondent as will enable the respondent maintain an action in debt against the appellant. The appellant G contends that from the evidence, the only contract that existed (if any) was between the respondent and Mrs. Abiola Odeyemi and not the appellant. Several cases were cited by counsel in his brief on the point.

H The transaction in this case, reduced to its bare facts can be explained in the following scenario:-

The appellant, an industrial concern needed sugar, its basic raw material component. It (i.e. the appellant) requested Mrs. Abiola Odeyemi to source and procure sugar for it and issued Mrs. Abiola

Odeyemi its Local Purchase Order. The Local Purchase Orders, themselves created a jural relationship between the appellant and Mrs. Abiola Odeyemi. With the Local Purchase Orders Mrs. Abiola Odeyemi went to the respondent and procured the required quantities of sugar for the appellant which was delivered by agents of the respondent.

B The purchase price was paid by Mrs. Abiola Odeyemi.

Later in the course of dealing, the respondent for her own purpose, insisted on cheques for consignments of sugar supplied being issued in her name. Consequently, subsequent supplies made were paid for in name of the respondent after Mrs. Abiola Odeyemi had introduced the respondent to the appellant.

C It was thus that Exhibit D5, D6 and D7 were issued in favour of the respondent for the sum of N3,900,000.00 leaving an outstanding sum of N1,840,000 unpaid in respect of the supply of 700 D bags of sugar.

What then is the jural relations created by the above facts which are not disputed in evidence.

My humble view is that Mrs. Abiola Odeyemi started out as an agent of the appellant in the procurement and payment of the consignments of sugar from the respondent. Later when the respondent objected to continue dealing with Mrs. Abiola Odeyemi as a kind of go-between, Mrs. Abiola Odeyemi then introduced the respondent to the appellant as the Principal for whom she was acting and thereupon dropped out of the transaction. What then are the jural relations involved in this rather uncomplicated transaction?

The common law principles of agency is encapsulated in the maxim "Qui Facit per alium, facit per se" He who acts by another acts by himself because the common law allows one man to authorize another to contract for and to bind him by an authorized contract. See R VS. KENT JUSTICES (1875) LR 8, QB 305. The relationship of principal and agent arises where one party, the principal consents that the other party, the agent shall act on his behalf and the agent consents so to act. The relationship need not be contractual, need not be expressed and could be implied. CHITTY ON CONTRACT VOL 2 (24th ED) p. 2002.

In this case, the appellant constituted Mrs. Abiola Odeyemi an agent for the purpose of procuring sugar. The

appellant appropriated and paid for the sugar.

At a point, the evidence disclosed, the respondent objected to payments to her being made through the agent Mrs. Abiola Odeyemi and Mrs. Abiola Odeyemi had to formally introduce the respondent to the appellant. From that point, the appellant, the evidence further disclosed, made direct orders for additional 700 bags of sugar on the respondent and went ahead to issue cheques Exhibits D5, D6 and D7 to the respondent in payment and leaving the balance of N1,840.000 unpaid. From that point, the agent Mrs. Abiola Odeyemi having disclosed the principal drops out of the transaction and her principal i.e. appellant becomes directly responsible to the respondent in respect of goods directly ordered by it and supplied by respondent. This is a basic rule of agency (i.e. disclosed Principal) and it applies with full force in the transaction in this case. There is thus established a direct contractual privity between the appellant and the respondent entitling the respondent to sue the appellant in respect of such contract.

Although the Legal basis was not explained in the judgment, the learned trial judge demonstrated a profound understanding of the facts involved and based her decision upon such foundation. At pages 11-13, she said:

“The main issue formulated for determination is that with the waybills Exhibit P1, P2, P3, P4 that it is clear that there is a privity of contract entered into between the Claimant and the Defendant.

The payment of which was made to the Claimant via Exhibits D5 to D7. These facts and pieces of evidence were not contradicted and are to be believed. The amount on D5 - D7 are N1,000,000.00, N1,400,000.00 and N1,500,000.00 and the fact that the Defendant's stamp are not found Exhibits P3 and P4 does not mean that the goods were not supplied.

The total amount in D5, D6 and D7 is N3,900,000.00 while the total sum of goods in P1 and P2 with Defendant's stamp is N3,280,000.00 at Eight Thousand, Two Hundred Naira (N8,200.00) at the unit price in Exhibit P4.

It is my view that from the above scenario, there is privity of contract between the Claimant and the Defendant. It is also in issue that the payment of money through cheques D5 and D7 in January

2010 by the Defendant to the Claimant only go to show that the Defendant paid for the goods, supplied in P1 - P4.

In the light of the foregoing, if the total sum in Exhibit D5, D6 and D7 which adds to N3,900,000:00 (Three Million, Nine Hundred Thousand Naira) is deducted from the sum in Exhibit P4, the outstanding balance of N1,840,000:00 (One Million, Eight Hundred and Forty Thousand Naira) would remain unpaid by the Defendant. The date on the invoice is the same with that on P3.

It is my view that the Exhibits P1, P2, P3 and P4 which were all admitted as exhibits during trial, were the documents forming the contractual relationship between the two parties. Defence witness Fadi Raad in his testimony, said he would bring the Local Purchase Order at the next adjourned date, which he did not do as he said he could not find them."

Concerning such relationships, the Supreme Court in OSIGWE VS. PSPLS (2009) 3 NWLR (Pt.1128) 378 observed thus:-

"Where a person in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make it, he is not, as a matter of general principle, liable on the contract to the other contracting party. Indeed, an agent acting on behalf of a known and disclosed principal incurs no personal liability even where the disclosed principal is a foreigner. In other words, a contract made by an agent acting within the scope of his authority, a disclosed principal is, in law, the contract of the principal, and the principal and not the agent is the proper person to sue and be sued upon such contract." See also NIGER PROGRESS LTD. VS. EZENWA (2002) 13 NWLR (Pt.784) 319; NIGER PROGRESS LTD. VS. NORTHEAST LIVE CORP (1989) 3 NWLR (Pt.107) 68; CARLEN NIG. LTD. VS. UNIVERSITY OF JOS (1994) 1 NWLR (Pt.323) 631; KONAM VS. JOHN (1939) 15 NLR 12; See also VINZ INTERNATIONAL LTD. VS. MOROHUNDIYA (2009) 11 NWLR 562.

Another rationalization of the transaction and a basis for the decision of the learned trial judge would be on the principle derived in equity - estoppel which now is now statutorized in Section 169 of the Evidence Act thus:-

"When one person has either by virtue of an existing court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing

to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing"

On this issue, the learned trial judge has every justification in arriving at the conclusion she reached that there was privity of contract between the appellant and the respondent. This issue therefore is resolved against the appellant. B

On issue No.2, there is evidence that the appellant ordered for bags of sugar which were supplied vide Exhibit P series. There were also Exhibits D5, D6, D7 and D8 which were cheque payments made directly to the respondent. These alone were sufficient to draw the conclusion of a binding commercial transaction between the respondent and the appellant and justify the finding in debt by the trial judge against the appellant. C D

Concerning the evidence of the appellant's witness promising to produce a Local Purchase Order which the appellant issued the respondent for the supply of 700 bags of sugar and the comment of the learned trial Judge on it, counsel for the appellant strenuously argued that the judge misplaced the onus on the respondent, placing it on the appellant and thus misdirected herself. E

This view is not justified by the entire judgment. A cursory reading of the judgment particularly at page 9 thereof would show instead that the learned trial judge considered such evidence by the appellant witness to produce a Local Purchase Order which the appellant issued the respondent as an admission of a fact in issue raised by the respondent that such local purchase order was issued to her but was misplaced. It was a straight admission of fact by appellant's witness and not an issue of onus of proof. This issue encompassing all similar questions raised by the appellant is also resolved against the appellant. F G H

On the 3rd issue raised whether the respondent proved her case in the lower court, I adopt the reasoning I considered in relation to issue No.2 above and hasten to answer the question in the affirmative. Yes! The respondent by preponderance of evidence proved

her case in the court below and was entitled to the judgment as entered by the trial Judge.

On the whole the appeal lacks merit and is accordingly dismissed.

B

TSAMMANI JCA

I read in advance the judgment delivered by my learned brother, Nonyerem Okoronkwo, JCA.

C I agree that the appeal has no merit and is hereby dismissed.
The judgment of the court below is hereby affirmed.

ONIYANGI JCA

D I have had the privilege of reading in draft the judgment just delivered by my Lord Nonyerem Okoronkwo JCA. I agree with my learned brother that the respondent by preponderance of evidence proved her case in the court below and entitled to the judgment as entered by the trial judge.

E In this case the respondent opted to deal directly with the appellant who was the principal of the agent, Mrs. Abiola Odeyemi. The said agent willfully introduced the respondent to her principal and thereafter stepped aside. Subsequently the appellant started dealing directly with the respondent by making subsequent orders.

F At a stage the appellant was dealing with the respondent through her agent. The law is he who does an act through another is deemed in law to do it himself.

The act of introducing the respondent to the appellant, is an act of disclosing his principal to the respondent. By that singular act the agent has made known and disclosed her principal to the respondent. An agent acting on behalf of a known and disclosed principal incurs no liability. This is because acts done by the agent is the act of the principal. See the cases of Amadiume v. Ibok (2006) 6 NWLR (Pt.915) 158, Anyaorah v. Anyaorah (2001) 7 NWLR (Pt.711) 158.

H An agent acting on behalf of a known and disclosed principal incurs no liability. This is because the act of the agent is the act of principal. It was the principal who did or omitted to do what the agent did or omitted to do. See *Essang v. Aureol Plast Ltd.* (2002) 17

NWLR (Pt. 795) 1515.

I see no reason in disturbing the finding and conclusion of the learned trial judge.

I answer the question formulated by my learned brother in the affirmative. The respondent by preponderance of evidence proved her case in the court below and is entitled to judgment. **B**

I am therefore hasten to declare that the appeal lacks merit and same be and is hereby dismissed.

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