

THE REPUBLIC OF UGANDA
IN THE HIGH COURT AT KAMPALA
(COMMERCIAL COURT)

CIVIL SUIT NO. 244 OF 2003

1. JOHN MWELUKA
2. TOM MULEGI..... PLAINTIFFS

VERSUS

MUSTAFA KATENDE STAR..... DEFENDANTS
BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

JUDGEMENT

The Plaintiffs sued the Defendant in both contract (breach) and tort (deceit). Briefly, the facts of the case were stated to be as follows. That on 24/09/2001, the Defendant represented to both Plaintiffs that he had won a tender from Mpigi District Administration for the construction of a school and pit latrines; and for the making of school desks. He invited the Plaintiff to join him in this tender by contributing Uhs.35m/= towards its implementation (Purchase of building materials), which contribution would entitle them to one half of the profits from that project. (Stated to be 35m/=).

The Plaintiffs agreed to the Defendant's invitation; and commenced to make series of Payments towards their allotted contribution. In all, they made payments amounting to UShs.5, 000,000/=. These payment which were made between 25/09/2001, were duly acknowledged by the Defendant in writing (see receipts marked Exh. P1-P3). Thereupon the

Defendant assured the Plaintiff that work was going to start on the sites in October, 2001.

In October 2001, the Plaintiffs made up to 5 visits to the sites to gauge Defendant's progress on the project - however, they found no sign of any work at all - though the Defendant continuously assured them that all was well. Ultimately, in November, 2001, the Plaintiffs decided to check with the District Administration officials as to the existence of the Defendant's alleged tender. They found no name of the Defendant among the names of tenderers listed on the District's notice board. The District officials confirmed to the Plaintiffs that indeed the Defendant was not one of the Districts' tenderers. When challenged by the Plaintiffs to prove the existence of his alleged tender, the Defendant promised, but failed, to appear at the District Headquarters on the agreed date. Later, thoroughly embarrassed by all this, Defendant promised to cancel the "first business" with the Defendants, and to refund them their money. He did not honour his promise. In August 2002, the Defendant once more promised a refund - this time did so by way of a written commitment Exh.P4 to start installment payments, commencing on 12/09/2002 and ending 12/10/2002. To date, Defendant has not made any refund - despite the demands made in that brief by the Plaintiffs (see Exh. P6).

The above facts were duly testified to in this Court by two witnesses: Tom Mulegi (PW1), and John Mweluka (PW2) - the two Plaintiffs. As the Defendant did not come to Court on the day of the hearing of this case - despite having been duly served (per affidavit of serve of Mr. Sebamanya deponed on 07/07/2003 - the matter was allowed to proceed *ex parte*. Accordingly, the evidence by PW1 and PW2 was unchallenged and uncontroverted. The two witnesses were strictly, consistent and firm in the delivery of their evidence. I found them to be truthful. I accept their evidence.

In the result, I agree with the submissions of the learned counsel for the Plaintiffs to the effect that:

- (a) there was a valid contract between the Plaintiffs and the Defendant; and the Defendant breached that contract. He got a consideration of Ushs.5m/= as a

share contribution for the joint project; but failed or refused to honour his part of the contractual obligation - namely construction of the school and pit latrines, let alone making the promised school desks;

- (b) Defendant by his statement conduct, clearly committed a direct and dishonest deceit and fraudulent misrepresentation on the Plaintiffs, with a view to extorting money from them. In this regard I am satisfied that all the ingredients of deceit have been proved in this case, namely:
- (a) that the Defendant by his words and conduct made a representation of fact (i.e. to the effect that he had won a tender at the District Administration of Mpigi);
- (b) that he made that representation, knowing it to be false
- (c) that he made that representation with the intention that it should be acted upon by the Plaintiffs, in the manner in which damage resulted to the Plaintiffs;
- (d) that the Plaintiffs did indeed act upon the Defendants' false representation;
- (e) that the Plaintiffs have sustained damage/loss.

As to the loss and damage suffered by the Plaintiffs, one element is eminently clear. The Plaintiff lost UShs.5, 000,000/= by way of the share contributions withdrawals advanced to the Defendant during the period 24/09/2001 to 30/09/2001. In addition, Plaintiffs also claimed UShs.30, 000,000/= as the profits expected from the Defendants' representation that their Ushs.5m/= investment would produce a profit of 30m/=. In support of this contention, Plaintiffs relied on the case of **Bank of Uganda v Fred Masaba CA. No. 3/98** (unreported). However, the Bank of Uganda case is clearly distinguishable from the instant case. The latter case (unlike the present case) involved the promise of a retirement package to employees who

opted to retire early. Such a promise is a definitive promise and commitment to deliver the promised amount. In the instant case, the promise was dependent on the vagaries of any investment. Implicit in any such promise is the indefiniteness and speculation associated with investment. The profits may or may not materialise; and if they do, they may materialise below, at or even above the promised amount.

In light of these, I am not satisfied that Plaintiffs proved their claim for UShs.30m/=. But quite apart from proof, to expect a profit of 30m/= from an investment of UShs.5m/= is not only unrealistic, it is outright extortionate. That would have been a profit margin of 600%. Worse still that level of profit was expected to be made not in the long or even medium term — but in a very short while; may be within a period of perhaps one to two months (i.e. the period it would take to dig and construct a pit latrine or make school desks). It is not worthy in this regard that the Plaintiffs did not indicate the period of the investment. Therefore Court has no option but to conclude that the claim for a profit of UShs.30m/= was both speculative and fanciful.

In the premises, Court hereby grants the Plaintiffs:

- (a) their claim for a refund of the Ushs.5m/=.
- (b) Interest on that amount at the rate of 18% p.a. from 01/10/2001 until payment in full.
- (c) Their claim for travel expenses to and from Kabibi, Mpigi and the sites of the works - in an amount of UShs.500, 000/= and
- (d) The costs of this suit

Ordered accordingly.

James Ogoola

JUDGE

24/03/2004

DELIVERD IN OPEN COURT, BEFORE:

Charles Mbogo, Esq - Counsel for the Plaintiffs

J.M. Egetu — Court Clerk

James Ogoola

JUDGE

24/03/2004