THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-1017-2004

EDMUND AKATUKWASA :::::::::::::::::::::: PLAINTIFF

VERSUS

1. GERSHOM KANYARUJU]
2. DFCU LEASING CO. LIMITED] ::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

THE plaintiff's main claim against the first defendant is for the recovery of US $4000. That against the second defendant is for the recovery of Shs.7,000,000-. Additionally, he claims interest and costs of the suit. It is not disputed that the plaintiff and the first defendant were friends and also that the first defendant was a customer to the second defendant. From the evidence, the two erstwhile friends entered into a contract in which the first defendant was to sell a vehicle to the plaintiff. At the time of the contract the vehicle had not arrived in Uganda. The agreement was reduced in writing, P. Exh. XVIII. The contract price was Shs.30,000,000- out of which

Shs.10,000,000- was paid on execution of the agreement. The remaining payments were conveniently phased. The parties agreed that in case of failure to deliver the motor vehicle to the purchaser in Kampala for whatever reason attributable to the vendor, the vendor would refund to the purchaser the full advance payment of Shs.10,000,000- and any further payments that the purchaser might have effected as a deposit outside the provisions of the agreement plus 30% interest thereon per month. The seller defaulted. Following the default, the parties agreed, this time orally, that the seller refunds to the buyer all the money the buyer had deposited on the truck. It was by now Shs.15,000,000-.

The first defendant then requested the 2nd defendant, to whom the truck had been leased by the first defendant in breach of the contract between the plaintiff and the first defendant that it, the 2nd defendant, pays a sum of Shs.22,000,000- to the plaintiff. The second defendant agreed in writing to do so. However, the 2nd defendant only paid a sum of Shs.15,000,000- and refused to pay the balance of Shs.7,000,000- claiming that this was the only money on their customer's account and that in any case the parties had agreed that the 1st defendant pays the balance himself. Two cheques to the value of US $4000 issued by the 1st defendant to the plaintiff also bounced. The plaintiff's case is that following the 1st defendant's breach of the contract the parties agreed that the 1st defendant pays him a sum of Shs.28,000,000-. That of this, the 1st defendant agreed to make a direct payment of

Shs.6,000,000- to him and the balance of Shs.22,000,000- through the 2nd defendant. That since the 1st defendant did not have a shillings account, he issued to him two post dated cheques in dollars which unfortunately bounced. Hence the suit to recover the value of the two cheques from the 1st defendant and Shs.7,000,000- from the second defendant.

Three issues were framed for determination:

1. Whether the plaintiff is entitled to payment of US $4000.
2. Whether the 2nd defendant is liable to pay Shs.7m to the plaintiff.
3. Whether the plaintiff is entitled to other reliefs sought.

Mr. Nester Byamugisha for the plaintiff.

Mr. Edrin Mubiru for the 1st defendant.

Mr. Denis Owor for the 2nd defendant.

Mr. Mubiru participated in the scheduling conference. He was also present when the plaintiff testified. He thereafter disappeared. His client never appeared at the hearing at all.

The plaintiff's case is that upon the 1st defendant failing to honour his contractual obligation to deliver the truck to him, they sat down again and agreed that he refunds all that the plaintiff had so far lost. Court is satisfied that this was in accordance with the contract document, P. Exh. XVIII. He contends that on calculating what was due to him, the amount came to

Shs.37m and that after the 1st defendant had explained to him the problems he had encountered in the deal, they finally settled for a sum of Shs.28,000,000- to be refunded to him. That they agreed further that the 2nd defendant pays him a sum of Shs.22,000,000- on the 1st defendant's behalf while the 1st defendant would personally meet the balance.

I have duly studied the agreement between the parties, P. Exh. XVIII, particularly clause 10 (i) thereof. Under that clause, the plaintiff was entitled to a refund of his Shs.15m plus interest of 30% per month for 5 months. By simple arithmetic, the maximum amount payable as interest as at June 2004 was Shs.22,500,000- (that is, Shs.$\frac{15,000,000 \text{- x } 30 \text{ x } 5}{100}$).

Plus the Shs.15,000,000- which had so far been deposited, the amount recoverable by him under clause 10 (i) was Shs.37,500,000-.

It is the plaintiff's case that the amount was reduced to Shs.28,000,000- after the 1st defendant had explained to him the financial difficulty he was in. I have considered the fact that the remedy for the breach following the total failure of consideration lay in the contract document itself, clause 10 (i) thereof. I have also considered the fact that the two were friends; and that the amount was not enhanced but reduced favourably to the 1st defendant's advantage; and also the fact that the 1st defendant has opted not to be heard in his defence. I have found no reason for Court to doubt the plaintiff's

sincerity in the matter. The path taken by him is logical and supported by the contract document itself. Court is satisfied on the balance of probabilities that the parties orally agreed that a sum of Shs.28,000,000- be paid by the 1st defendant as a condition for his discharge from the breach.

In view of the above finding, I shall now proceed to consider the specific issues framed for Court's determination.

First, whether the plaintiff is entitled to payment of US $4000.

I have considered the plaintiff's evidence that the two cheques were issued to him by the 1st defendant in settlement of an additional Shs.6,000,000- to make a total of Shs.28,000,000-. This much was not reduced in writing. However, in law, where a contract is made orally, the terms of it can be proved by oral evidence, normally by the person claiming that there is a contract.

I have seen the two cheques, P. Exh. IV and P. Exh. V. It is the plaintiff's evidence that the 1st defendant told him that he did not have a shillings account and so issued him the two post dated cheques in dollars. The 1st defendant did not deny the fact of issuing those cheques in his Written Statement of Defence. There is evidence that both cheques bounced. The obligation of the drawer of the cheque which was to settle a debt owed by

him to the plaintiff was not honoured or fulfilled. When a bill is dishonoured by non-payment, an immediate right of recourse accrues to the holder. Therefore, the cause of action arose in favour of the plaintiff when the cheques were dishonoured. The plaintiff has proved that the 1st defendant owed him a debt. He opted to settle it by cheques and those cheques bounced. The plaintiff is entitled to the value of those 2 cheques. I so find.

Second, whether the second defendant is liable to pay Shs.7m to the plaintiff.

The story here is a long one. From the evidence, the 1st defendant wrote to the 2nd defendant's General Manager requesting that part of the funds accruing to him on the lease agreement for the truck be passed on to the plaintiff. The plaintiff agreed to this arrangement and so did the 2nd defendant. To be double sure, the plaintiff's lawyers sought confirmation from the 2nd defendant about its promise to settle the 1st defendant's obligations to the plaintiff. The second defendant confirmed so, in writing to them. From all this evidence, it is clear to me that the 2nd defendant without any pressure from any quarter guaranteed payment of Shs.22m to the plaintiff on the 1st defendant's behalf. They had reason to do so because they had taken over the vehicle that had been meant for the plaintiff. That was enough motivation. Why then have they decided to renege on their promise? According to DW1 Mukasa, the first defendant had also instructed them to pay a one Kaya. That upon paying the said Kaya, only Shs.15m

remained on the account. They have not produced any statement of account to substantiate that allegation. Since the purported instruction from the 1st defendant to pay Kaya preceded that of paying the plaintiff, no reason has been given as to why they made an un reserved commitment to the plaintiff to pay him fully. They were better placed to know whether the two instructions could be complied with.

DW1 Mukasa has also talked of 1st defendant's instructions to them to pay only Shs.15m. The letters are on record as attachments to P. Exh. XV and P. Exh. XVII but each has no any indication on it that it was ever received by the 2nd defendant and acted upon. In my view, that bit about the 1st defendant re-instructing them to pay less than had been originally agreed upon was an afterthought. It appears to me that after the 1st defendant had made a commitment to pay the plaintiff through the 2nd defendant and after the 2nd defendant had confirmed the commitment, he (1st defendant) secretly went to the 2nd defendant and stopped the full payment. Such stoppage was in my view fraudulent and inoperative. That the two cheques were issued at the time the parties agreed that the plaintiff be paid by the 2nd defendant is discernable on the dates thereon. One is dated 23/7/2004 and the other 23/8/2004, implying that since they were post dated, the time of issue was on or around 23/6/2004. This in my view is further circumstantial evidence that supports the plaintiff's story that at the time the 2nd defendant promised to pay Shs.22m on 1st defendant's behalf, the 1st defendant also undertook to

pay a sum of Shs.6,000,000- directly to him. This in my view destroys the 2nd defendants evidence that the two cheques were issued after the parties had realised that the whole amount could not be paid by the 2nd defendant.

I have directed my mind to the issue of NOVATION raised by counsel for the plaintiff. As a general rule liabilities under a contract cannot be assigned. However, they can be assigned with the consent of the other party to the contract. This is what is known in law as Novation. Thus novation is the only method by which the original obligor can be effectively replaced by another. What then is novation? In Cheshire, Fifoot & Furmston's Law of contract, 14th Edition at p. 577, the learned editors define it thus:

> *"Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made. The new contract may be between the original parties, e.g. where a written agreement is later incorporated in a deed; or between different parties, e.g. where a new person is substituted for the original debtor or creditor."*

From the evidence, it is this last form, the substitution of one debtor for another, that concerns us in this case.

George Kanyaruju, the 1st defendant, owed Shs.22,000,000- to Edmund Akatukwasa, the plaintiff. Under the lease transaction between the 2nd

defendant and the said Kanyaruju, the 2nd defendant owed money to Kanyaruju. The three parties agreed between themselves that the amount owed by Kanyaruju to Akatukwasa be paid by the 2nd defendant to Akatukwasa. To show the seriousness of that commitment, the 2nd defendant not only made a confirmation of the fact to the plaintiff's lawyers but also made a part payment in the sum of Shs.15,000,000-. The plaintiff now seeks to enforce the payment of the balance. The law as contained in S. 3 (1) of the Contract Act, Cap 73, is that no suit is maintainable on certain guarantees or representations unless they are in writing and signed by the party chargeable. It provides:

> *"3 (1). No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which the suit is brought, or some memorandum or note of the agreement, is in writing and signed by the party to be charged with it or some other person lawfully authorized by him or her to sign it."*

It has not been argued that Nsubuga who made the commitment on behalf of the 2nd defendant lacked the capacity to do so. I do understand the law to be that a transaction of this nature is not effective as NOVATION unless an intention is clearly shown that the debt from A to B is to be extinguished. In my view the decision to reduce the commitment in writing was in the spirit of

S. 3 (1) of the Contract Act. It was sufficient demonstration of the second defendant's serious commitment to settle the debt on the 1st defendant's behalf. The first defendant was after all their client. That commitment could in my opinion only be revoked upon the same three parties sitting down together and agreeing to do so. The unilateral withdrawal by 2nd defendant was ineffective. The principle contained in S. 3 (1) of the Contract Act has been interpreted to apply whether the liability guaranteed is contractual or tortious. It applies where a third party, as herein, promises to the creditor to pay the debt. It does not apply where the third party's promise is to the debtor. See LAW OF CONTRACT IN UGANDA by David J. Bakibinga at page 61. In all these circumstances, it appears to me that whether the issue is approached from the point of view of the doctrine of NOVATION or of contracts of Guarantee, the plaintiff's claim against the 2nd defendant in respect of the Shs.7,000,000- is unassailable. I hold so.

Third, whether the plaintiff is entitled to the other reliefs sought.

He has prayed for interest of 30% per annum on the US $2000 from the date of dishonour of each cheque till payment in full. This is as regards the 1st defendant. As regards the 2nd defendant, he has prayed for interest at the same rate per annum from the date of payment of Shs.15m till payment in full. This was a business transaction. The plaintiff expected to earn a living out of the original contract. After the breach, he expected to be

compensated for it and forget all about it. The basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself; so he ought to compensate him accordingly.

In the instant case, the plaintiff has been wrongfully denied the use of money that was rightfully his. It is necessary that he be compensated for that loss. No damages for breach of contract have been asked for and/or awarded to the plaintiff. I would award him interest on the two awards. For the award against the 1st defendant in the sum of Shs.6,000,000-, the equivalent of US $4000 at the then exchange rate of Shs.1500- per dollar, interest at the rate of 25% per annum shall be paid from the date of the dishonour of the last cheque (i.e. 28/09/2004) till payment in full. As for the award against the 2nd defendant, interest at the same rate of 25% per annum shall be computed from the date when the 2nd defendant defaulted on the payment of Shs.7,000,000- (i.e. 06/07/2004) till payment in full.

As regards costs, the usual result is that the loser pays the winner's costs. A successful party should only be denied costs if it is proved that but for his conduct, the action would not have been brought. I have found no fault on the part of the plaintiff to warrant denial of the costs to him. He will be paid the taxed costs of the suit, one half by the 1st defendant, the other half by the 2nd defendant.

It shall be so.

Yorokamu Bamwine

J U D G E

30/5/2006

30/5/2006

Nester Byamugisha for plaintiff.

Denis Owor for defendants.

Court: Judgment delivered.

Yorokamu Bamwine

J U D G E

30/5/2006