THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0070-2004

Wakiso Cargo Transporters Co Ltd Plaintiff

Versus

Wakiso District Local Government Council Defendant No.1

Attorney General Defendant No.2

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. The plaintiff entered into an agreement with the defendant no.1 on the 3 September 2003 to manage Kasenyi landing site. A written agreement between the parties was executed on that day. The agreement was to run until June 2004. During the currency of the agreement the plaintiff would pay the defendant no.1 Shs.5,000,000.00 per month. This agreement was terminated by defendant no.1 without notice or colour of right abruptly. The plaintiff brought this action for breach of contract against both defendants and seeks special damages of Shs.200,000,000.00, general damages and exemplary damages.
2. Defendant No.1 denied that it unlawfully terminated the contract in question. In the alternative it pleaded frustration of the contract by reason of a presidential directive. Defendant no.2 pleaded that there was no cause of action against it.
3. During the Scheduling conference attended by the plaintiff's counsel and defendant no.1's counsel two issues were agreed. Firstly whether the defendants jointly and severally unlawfully terminated the plaintiff's contract. Secondly whether the plaintiff is entitled to special and general punitive damages. 10 documents were admitted evidence for the plaintiff by agreement of the parties.
4. Before I review the evidence adduced in this case I think it is convenient to dispose of one matter which should have been dealt with as a preliminary matter but due to the

frequent absences of the defendant no.2 in the proceedings, it was not argued as a preliminary point. This point was argued during final submissions. Nevertheless, as it does not call for a review of the evidence in this case to be decided, I shall take the same now.

5. Mr. Mwaka, the learned Senior State Attorney who appeared for the Attorney General, submitted that there was no privity of contract between the plaintiff and defendant no.2. The contract in question was between the plaintiff and defendant no.1. Defendant no.1 had corporate personality with authority to sue and be sued. It was independent of the defendant no.2. Mr. Mubiru, learned counsel for the plaintiff did not submit on this matter or any other.
6. As to whether a cause of action is disclosed against the defendant it is only the plaint that we need to examine and not the evidence adduced in the matter. The plaintiff must establish on the pleadings that it had a right that was breached by the defendant in respect of which it is entitled to relief.
7. In the instant case the plaint contends that the plaintiff's claim against the defendant, and I shall assume, that though this is singular, the intent is to refer to both defendants, is special, general and exemplary damages for breach of contract. The plaint then sets out the particulars of the contract in question. The parties to the contract are defendant no.1 and the plaintiff only.
8. When it comes to allegations of breach of contract, it is then contended that defendant no.2 together with defendant no.1 unlawfully terminated the contract.
9. If a party is not a party to the contract I do not see how such party can terminate or breach the contract. Such party may be guilty of a tort, in case his/her actions lead to disruption of the performance of the contract, but he cannot be responsible, under the contract, for breach of the contract as it is not a party to the contract. Put differently, a person that is not a party to contract, save for certain exceptions of which this case is not one, cannot sue or be sued, for breach of contract. See *Kayanja v New India Assurance Company Ltd 1968 E.A. 295*.
10. In the result I agree with Mr. Mwaka for the defendant No.2 that there is no cause of action disclosed on the plaint against defendant no.2. The suit against defendant no.2 is dismissed accordingly.

11. I now turn to the evidence. The plaintiff called two witnesses. The first one was Mr. Haruna Semakula, the Managing Director of the plaintiff. He testified that the plaintiff responded to an advertisement for a tender of managing Kasenyi landing site from the defendant no.1. It submitted its bid. The bid was successful, and it was notified accordingly. An agreement was signed between the plaintiff and defendant no.1.
12. The plaintiff paid to the defendant no.1 Shs.10,000,000.00 being the fees for two months that would be due to the defendant no.1, at the rate of Shs.5,000,000.00 per month. Initially the company had some difficulty in taking over Kasenyi Landing Site as the former the managers resisted to hand over the same and it was not until about a week before the contract was terminated that the plaintiff effectively was in possession and management of the landing site.
13. On 24th October 2003 they received a letter from the defendant no.1 terminating the contract and they stopped managing Kasenyi Landing Site. The Chief Administrative Officer told the witness that they had instructions from higher offices. PW1 asked this court to order the defendant to pay the plaintiff the sum of money that they paid to the defendant at the commencement of the contract and profits.
14. PW2 was Sebidde Lukeman. He was the Assistant Manager, Operations in charge of the activities at Kasenyi Landing Site. After award of the tender, the company recruited 21 members of staff on a one year contract, and paid them a total of Shs.27, 960,000.00 being the total amount for their salaries for one year.
15. The plaintiff hired 4 guards from Superior Guards Ltd at shs.350,000.00 per guard per month. A total of Shs.10,800,000.00 was paid to Superior Guards Ltd, being the total charges for guards for one year. The company purchased furniture for the office totalling to Shs.9,600,000.00. The company purchased aprons and gum boots for Shs.880,000.00. The company purchased a telesaver phone for Shs.270,000.00. The company purchased drums, wheelbarrows, spades and rakes for a total of Shs.1,030,000.00. The company hired a pick up and paid for it Shs.43,200,000.00 being the charges for one year at the rate of Shs.120,000.00 per day.
16. The company purchased office tools and equipment including a computer, printer, and other accessories at Shs10,000,000.00. It bought a fax machine at Shs.4,000,000.00. 3 mobile phones cost Shs.900,000.00.

17. The company hired office premises at Kirumira Towers in Kampala and paid a total of Shs3,000,000.00 being rent for one year at the rate of Shs250,000.00 per month. The company further paid Shs.1,000,000.00 for feasibility and assessment studies from Global Management Services Ltd.
18. The total sum of money incurred by the company on purchases of goods and services was Shs.151,870,000.00. This money was borrowed from a sister company. It was hoped that this money would be recovered from the contract of managing Kasenyi Landing Site.
19. In cross examination asked why they made all payments for one year PW2 initially stated that because the contract was for one year. When counsel drew his attention to the specific period for duration of the contract he admitted that it was not for one year. The properties purchased and mentioned in the testimony of the witness were left where the property was when the contract was terminated. The company had no where to take it. The company just abandoned all the property for which it now seeks compensation.
20. That was the close of the case for the plaintiff. The defendants presented no evidence. Mr. Mubiru, learned counsel for the plaintiff, submitted that this case should be decided on the facts established in this case. Mr. Nelson Nerima, learned counsel for defendant no.1 submitted that this contract was frustrated by an irresistible force beyond the control of any of the parties. He relied on the 'directive' of the President as mentioned in various correspondences admitted into evidence. He referred this court to the case of *Sam Engola v Christine Nabitalo H.C.C.S.No. 1237 of 1987* in support thereof.
21. Mr. Nerima further submitted that in event a finding was made that this contract was not frustrated, this court should find that the plaintiff has failed to prove the claim to damages. Firstly he submitted that the plaintiff had not pleaded or proved any loss of income yet special damages must be specifically pleaded and proved. Secondly that the expenses that the plaintiff had shown in evidence were not losses, and thus not recoverable. He dismissed the evidence of the plaintiff on these expenses as being inherently unbelievable.
22. Mr. Nerima stated that damages for breach of contract are compensatory in nature, and in this case, the plaintiff would have to show what it lost as a result of the breach of the contract. The plaintiff has not proved loss of any income or profits. He prayed that the suit be dismissed with costs.

23. It is convenient to deal with the question of frustration first. In case it is successful, it would dispose of the case wholly, without the need to consider other matters. Frustration occurs when an intervening act or circumstance, without the fault of any party, makes it impossible to perform the contract. In the words of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council [1956 1 All ER 145* at page 160,

> 'So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do.'

24. In the instant case it is without doubt that the contract was terminated by the defendant by a letter from the defendant. The letter provides the reason for the termination. I shall set out the letter.

> 'The Director/Chairman,
> Wakiso Cargo Transporters,
> PO Box 73 Kyambogo RE:
> MANAGEMENT OF KASENYI LANDING SITE: Reference is made to the communication by the Honourable Minister of State for Fisheries No. MOS/F dated 23rd October 2003 and that of the Deputy RDC dated 24th October 2003 addressed to my office concerning the above mentioned issue. Arising from the above, and in fulfilment of the directive by His Excellency the President of the Republic of Uganda, you are hereby directed to hand over the management of Kasenyi Landing Site to Mukoni Framers Ltd with immediate effect. By copy of this letter, the Sub-county chief for Katabi Sub-county is requested to ensure that this directive is effected without any further delays.
> G. Ntulume
> CHIEF ADMINISTRATIVE OFFICER'

25. The letter of 23rd October 2003 of the Minister of State Fisheries, referred to in this letter, copied to the RDC, Wakiso District, states,

> 'The District Executive Secretary
> Wakiso District MANAGEMENT
> OF KASENYI LANDING SITE I have been directed by the H.E. the President (see attached letter) to cause you to hand over back the management of Kasenyi landing site to the owners M/s Mukoni Farmers Ltd. This should be carried out immediately and any further interference should be avoided.

Fabius Byaruhanga MINISTER
OF STATE – FISHERIES'

26. Both these two letters were admitted into evidence by agreement of both parties. What they convey is that apparently M/s Mukoni Farmers Ltd, had a claim on the ownership of the Kasenyi Landing Site, and with the 'assistance' of the President, if I may call it that, Mukoni Farmers Ltd, regained control and possession of Kasenyi Landing Site, from Wakiso District Administration.
27. Clearly if any one is at fault here, it must be Wakiso District Local Government Council, who gave out property to the plaintiff to manage when the title to do so, was in doubt, and as it turned out contested by another person. If it had title or other right to hand over the said property to the plaintiff, it chose not to defend its position, but meekly handed over the same to the other claimant. These events are not the kind that could be referred to as sufficient to amount to frustration of a contract. These events are the direct fault of the Wakiso District Local Government Council.
28. I must therefore reject the claim that this contract was frustrated. On the evidence before me I can only find that the defendant no.1 breached the contract in question by terminating it pre maturely before its expiry date of June 2004. Issue no.1, whether the contract was unlawfully terminated or breached by the defendants, is answered in the affirmative with regard to the defendant no.1. (The action against defendant no.2 is already dismissed.)
29. I now turn to the issue of damages. Lord Nicholls restated the general position in the case of *Attorney General v Blake, [1998] 1All E R 376* at page 309 thus,

> 'As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that, in the oft-quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong (see Livingstone v Rawyards Coal Co. (1880) 5 App Cas 25 at 39). Damages are measured by the plaintiff's loss, …'

30. I accept the foregoing to be a proper restatement of the law in this area, as a general rule. There may be exceptions to this general, which do not apply in this case. In the instant case but for the defendant's breach of contract the plaintiff would have been able to earn income from performance of this contract for the period from 24 October 2003 to June

2004, during the currency of the contract. The plaintiff would have been able to earn income for another 8 months. The defendant's breach of the contract has denied the plaintiff this income and applying the general principle with regard to assessment of damages for breach of contract, the plaintiff would be entitled to compensation for this loss. The plaintiff would thus be entitled to the income lost less any expenses incurred, which in effect would be the net profits lost.

31. It is the duty of the plaintiff or the party that seeks damages to prove the loss it has suffered for which it would be entitled to recompense by way of an award for either special or general damages. And where it is a claim for special damages, the special damages must be specifically pleaded and proved.
32. The plaintiff claimed special damages of Shs200,000,000.00 in the plaint. I shall set out this portion of the claim.

> '5 (d) That from the performance of this contract, the plaintiff incurred a lot of expenses and costs so as to fully perform this contract totalling to Shs.200,000,000/= (Two hundred million shillings only). Refer to Annexture "C".'

33. First of all the annexture "c" referred to in the paragraph was never attached to the plaint, and up to the time of trial, and to-date, it had not been filed. It is therefore questionable whether this amounted to sufficient pleading of this claim for special damages' as it remained just a claim for a lump sum, without particulars thereof be setting out in the plaint. I accept the submissions of Mr. Nelson Nerima that the claim for special damages was not sufficiently pleaded to found a claim for special damages.
34. To sustain a claim for special damages, it is now settled law that the plaintiff must specifically plead the claim for special damages, setting out particularised items of what is claimed as special damages in the plaint. Secondly, the plaintiff must strictly prove the claim for special damages. See *Christopher Kiggundu and Anor v Uganda Transport Co. (1975) Ltd Supreme Court Civil Appeal No.7 of 1993, (unreported) and John Nagenda v Sabena Belgian World Airline, High Court Civil Suit No.1148 of 1988 (unreported).*
35. That is not the only problem. The plaintiff was entitled to compensation for the loss that it had suffered for the breach of the contract in question. That loss is not the expenses that the plaintiff incurred on the performance of that contract. The plaintiff had to incur these expenses to perform the contract. The loss the plaintiff incurred was the lost income it

was to have made in performing this contract that it did not make by reason of the breach of the contract by the defendant. The claim for the plaintiff ought therefore to be the net income, that is, gross income less the expenses, it lost as a result of the breach of contract.

36. Claiming the expenses does not establish the loss or injury suffered by the plaintiff with regard to this breach of contract. I am satisfied that the plaintiff has in this regard failed to establish the loss it suffered. Firstly by failing to properly articulate the same on its pleadings, and consequently not calling any evidence that would establish the same.
37. Under the contract in question, the plaintiff bid to manage revenue collection on behalf of the defendant. The plaintiff committed himself, regardless of whatever expenses he may incur, to pay a fixed sum to the defendant every month. In this case it was Shs.5,000,000.00 per month. The plaintiff would probably recover much more than Shs5,000,000.00 per month, and it would retain the balance to cover its expenses and make a profit for itself.
38. In the world of business it was also possible that the plaintiff may fail to recover Shs.5,000,000.00 per month or there may be cycles in the income flow, depending on the nature of business operations at the Landing Site, such that there would be peaks and lows over the period of the contract. The plaintiff committed itself to regularly remit to the defendant shs5, 000,000.00 regardless of the ebb and flow of business at the landing site.
39. In order for the plaintiff to show its loss, it had to produce evidence related to the operation of this contract, evidence that would show how it was performing with regard, not only to expenses, but also with regard to receipts of income. It would have to establish its actual income and projected income lost by some recognised accounting method. It was not enough to just throw its expenses at the court, and say, ‘This is what I have lost. Give it to me.’ That is not the loss that the law compensates for a breach of contract of the nature in this case.
40. In fact PW1, the managing director of the plaintiff, in his testimony stated that he wished to awarded profits, and I presume he was referring to the profits lost as a result of the defendant’s breach of contract. Unfortunately, this had not been claimed in the plaint at all. And neither was any evidence adduced to support this claim.

41. Worse still, the evidence of the plaintiff with regard to its financial management was simply incredible. A whopping Shs43,000,000.00 was paid out upfront to hire a pick for one year at a daily rate of Shs120,000.00. But this contract was not for one year. It was for ten months only! The claim is simply absurd. The same goes for payment of staff salaries. The claim is for salaries for one year totalling to Shs27,000,000.00 for all staff hired for this contract. Why the staff had to be paid for one year when the contract is for 10 months was not explained at all. In any case there was no proof to show that this sum had been incurred at all.
42. PW2 testified that whatever properties they purchased to run this contract, including furniture, computers, fax machine, phones, including mobile phones, assorted equipment and tools were abandoned in a building that the plaintiff hired near Kasenyi Landing site simply because they had no place to relocate the same. Where would one need to relocate mobile phones for instance? Or why should a defendant pay for this disingenuous behaviour? If this account of PW2 is truthful, (which it is not, in my view), this would amount to self inflicted injury.
43. The Plaintiff claimed exemplary damages for breach of contract. It is settled law in Uganda that, generally, no award for exemplary damages can be made for breach of contract. See *Esso Standard (U) Ltd v Semu Amanu Opio, Supreme Court Appeal No. 3 of 1993, (unreported) and John Nagenda v Sabena Belgian World Airline, High Court Civil Suit No.1148 of 1988 (unreported)*. This claim fails.
44. The plaintiff has failed to prove any relief that it would have been entitled to for the breach of contract by the defendant. As the plaintiff has succeeded on only one issue, I will award the plaintiff one quarter of its costs for these proceedings.

Signed, dated and delivered in Kampala this 26th day of October 2006

FMS Egonda-Ntende
Judge