THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO. 353 OF 2009

DR. ASABA GEORGE::PLAINTIFF

VERSUS

WESTERN UGANDA COTTON COMPANY LTD::::::::::::::DEFENDANT

BEFORE: THE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff sued the defendant by summary suit under order 36 of the Civil Procedure Rules (CPR) for recovery of a liquidated debt of US $ 200,000 plus interest thereon at an agreed rate of 6.5% per annum from 7th July 2005 up to date and costs of the suit. The background of this case is that on the 7th day of July 2005, the plaintiff together with Geocottco (U) Ltd where he was a shareholder, Cottco (U) Ltd and Cottco International Ltd (collectively referred to as vendors) entered into an agreement with the defendant (the purchaser) for the sale of assets comprising the cotton business units of Geocottco (U) Ltd and Cottco (U) Ltd to the defendant.

Various payments were to be made by the purchaser to each of the vendors but for purposes of this suit, under clause 3.1 (v) the defendant was obligated to pay the plaintiff US $ 600,000 as consideration for his investment in Geocottco (U) Ltd. Payments were to be made in three equal installments of US $ 200,000 each plus interest of 6.5% from date of execution of the agreement. The 1st installment was to be paid within 7 working days from the date of execution of the agreement. The 2nd installment was to be paid in May 2006 and the 3rd and last installment by May 2007.

It was alleged by the plaintiff that the defendant had refused and/or neglected to pay the last installment of US $ 200,000 plus interest of 6.5 % as stipulated under clause 3.1 (v) (c) of the agreement despite several reminders and undertakings hence this suit.

The defendant filed an application for leave to appear and defend the suit but when it was called on for hearing on the 10th of December, 2010 the plaintiff opted not to contest it so the defendant was by consent given leave to file a Written Statement of Defence (WSD) within seven days from that date.

The defendant filed a WSD plus a counterclaim against the plaintiff and three other counter-defendants on the 17th of December 2009. In the WSD, the defendant admitted that it entered into an agreement with the plaintiff and three others as alleged in the plaint. However, it was alleged that the sale of assets were subject to certain conditions which the vendors including the plaintiff defaulted upon.

It was specifically alleged that the vendors failed to procure consent from the Cotton Development Organisation (CDO) guaranteeing the defendant's takeover of 25% of the West Nile concession and procuring from Uganda Revenue Authority (URA) a tax ruling on the tax treatment of that transaction. It was alleged that consequent upon that default, the defendant was sued in the Chief Magistrates' Court of Mengo (***Civil Suit No. 114 of 2008, Speedline (U) Ltd v Western Uganda Cotton Co. Ltd*** upon a claim of UGX 50,000,000/=. Copies of the pleadings were attached as annexture "B" to the WSD.

It was further alleged that the defendant had suffered special and general damages whose value was well over US $ 330,000 for which a counterclaim was made against all the vendors. Further that the defendant had suffered serious consequential losses which in turn made it fail to pay the balance of the purchase price to the plaintiff. The defendant made a counterclaim for special damages of US $ 330,000, UGX 50,000,000/= and interest from the date of judgment till payment in full.

At the scheduling conference which was conducted on 10th June 2011, Mr. Paul Kuteesa appeared for the plaintiff and Mr. Joseph Mwenyi appeared for the defendant/counterclaimant. Four issues were agreed upon and the matter was fixed for hearing on 8th September 2011. After

the scheduling conference, counsel for the plaintiff raised a preliminary point of law that the counterclaim was not served on all the counter-defendants. He contended that the plaintiff was able to reply to the counterclaim because his counsel learnt about it during mediation and picked a copy of the same from the court registry. Counsel for the defendant requested and was allowed to file a written reply to the submission and the matter was fixed for ruling on 30th August 2011 which turned out to be a public holiday.

When this suit came up for hearing on 8th September 2011, Mr. Paul Kuteesa appeared for the plaintiff but there was no appearance for the defendant. Court however, proceeded to read the ruling where the counterclaim against the other three counter-defendants who were not parties to the original suit was dismissed. The counterclaim against the plaintiff was retained but since no appearance was made by and for the defendant, counsel for the plaintiff prayed to proceed with the hearing exparte under Order 9 rule 20 (1) (a) of the CPR. He also prayed that the counterclaim be dismissed as against the plaintiff under Order 9 rule 22 of the CPR for non-appearance of the counterclaimant or its counsel.

Both prayers were granted and hearing of the plaintiff's case commenced. Counsel for the plaintiff called the plaintiff as the only witness. Upon hearing his evidence the plaintiff's case was closed and his counsel requested to file a written submission within seven days and he was allowed to do so. In his written submission, counsel for the plaintiff was guided by the four issues that were agreed upon at the scheduling conference. The first issue was whether there was a breach of the sale agreement and if so by whom? This issue was framed to encompass the counterclaim but since the same was dismissed it was modified to read; whether the defendant breached the sale agreement.

On this issue, counsel submitted that the defendant breached the agreement which was exhibited as "P1". He submitted that PW1 had testified that the defendant was obliged to pay him as per clause 3.1 (v) (b) and (c) of the agreement in two equal installments of US$ 200,000 each in May 2006 and May 2007 but he was never paid the last installment plus interest. He further submitted that the defendant made various promises to pay in a manner that was not acceptable to the plaintiff as shown in the e-mails that were exhibited as "P2" and "P3".

As regards the allegation in the WSD that the plaintiff and the other vendors breached the agreement by not fulfilling the conditions under clause 4 of the agreement, counsel submitted that the plaintiff testified that the 25% concession over West Nile Cotton Zone was owned by Cottco (U) Ltd and not Geocottco (U) Ltd where the plaintiff had 49% shares. He argued that the plaintiff therefore had nothing to do with that condition since he was not a shareholder in Cottco (U) Ltd. He contended that the only asset of Geocottco (U) Ltd that was sold under that agreement was Kasese Ginnery which the defendant took over on the 30th November, 2005 and even used its title as security for a loan from Stanbic Bank. He referred to a statement of search at the Ministry of Lands, Housing and Urban Development dated 22nd January 2009 (Exhibit "P4") which indicated that the defendant was the registered proprietor having been registered on the 30th November 2005 under Instrument No. 361027. The statement also indicated that there was a mortgage to Stanbic Bank Uganda Ltd registered on the 30th November 2005 under Instrument No. 361028.

Counsel submitted that the defendant had never raised the issue of non-compliance with the conditions until this suit was filed and the same was stated in the application for leave to appear and defend the suit. He contended that this was raised as an afterthought after the defendant had paid a substantial amount of what it was obliged to pay the plaintiff to justify not paying the balance due. He pointed out that clause 12.1 of the agreement provided for termination of the agreement in the event that completion did not occur before the 31st August 2005.

He argued that if at all the plaintiff had not complied with the conditions of the agreement as alleged the defendant would have invoked this provision and terminated the agreement. He further argued that the defendant's failure to do so implied that there was due completion of the contract which under clause 5 of the agreement clearly meant that the vendors had complied with the conditions under clause 4 and delivered the required documentations.

He concluded his submission on this issue that the defendant breached the sale agreement by failing to pay the plaintiff the sum of US $ 200,000 plus interest as stipulated in the agreement and prayed that the issue be answered in the affirmative.

On the second issue as to whether the defendant is liable to pay the plaintiff the sum claimed or at all, counsel submitted that the defendant was liable to pay the plaintiff in accordance with the terms of the agreement. He referred to the case of ***Printing and Numerical Registering Company v Sampson (1875) LR 19 Eq 462,*** where ***Sir George Jessel*** stated that:-

> *"If there is one thing more than the other that public policy requires is that a man of full age and competent understanding should have the utmost liberty to contract and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice".*

He submitted that the agreement the plaintiff and the defendant entered into was very clear under clause 3.1 (v) that the defendant was to pay the plaintiff US $ 600,000 in three equal installments plus interest. He further submitted that it was clearly stated under the said clause that *the purchaser guarantees to pay Dr. Asaba the second and third installments on the due dates.*

Counsel submitted that the defendant did not dispute its liability in the WSD but only gave excuses for failure to pay that did not have merit. He prayed that court finds the defendant liable to pay the plaintiff thereby answering issue number two in the affirmative.

As regards the third and forth issues as to whether the plaintiff is entitled to the interest as claimed or at all and the remedies available, counsel submitted that it is trite law that where a person is entitled to a sum of money or a liquidated amount of money and he has been deprived of it through the wrongful act of another person, he should be awarded interest on that amount. He referred to the case of ***Masembe v Sugar Corporation and Another [2002] EA 434*** where ***Oder JSC*** (RIP) quoting ***Lord Denning in Hambutt's Plasticine Limited v Wayne Tank and Pump Company Ltd [1970] 1 QB 447*** gave the rationale for the award of interest as follows:-

> *"It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money, and the defendant has had use of it himself. So he ought to compensate the plaintiff accordingly".*

He also referred to the case of ***Ruth Aliu and 136 Others v Attorney General , Civil Suit No.1100 of 1998*** where ***Tabaro J***, stated that it is apparent that nowadays interest is payable for the deprivation suffered by the person to whom payment should have been made. He submitted

that since the interest of 6.5% was contractual court should find the defendant liable to pay the same.

On general damages, counsel submitted that the plaintiff was entitled to the same for breach of contract. He referred to the case of ***Stroms v Hutchinson [1905] A.C 515***, where ***Lord MacNaghten*** held that general damages are such as the law will presume to be direct natural or probable consequence of the act complained of.

He also referred to the case of ***Flint v Lowell [1935] 1 KB 354*** where the position of the law was stated that for court to make a proper enquiry into the issue of general damages, the party seeking for the same must provide sufficient material to assist court assess the same.

He submitted that the defendant denied the plaintiff use of his money for over five years without any reasonable cause. He further submitted that the plaintiff testified that he had plans of reinvesting the money in other assets and getting some profits over time. He contended that the defendant through its officers had behaved arrogantly and tossed the plaintiff up and down treating him like a beggar. On the basis of the above, he prayed that the defendant be ordered to pay the plaintiff general damages of US$ 50,000. He also prayed for costs of the suit.

From the pleadings, the exhibits, the evidence adduced by the plaintiff and the submissions of counsel for the plaintiff, it is clear that it is not in dispute that the plaintiff together with three others collectively referred to as vendors and the defendant entered into the agreement that was exhibited as an agreed document "P1". The defendant in paragraph 4 of its WSD made a blanket denial of all the allegations contained in the plaint in summary suit including the fact that the parties entered into an agreement which was stated in paragraph 4 of the plaint. Interestingly, in paragraph 5 (a) of the WSD the defendant stated as follows:-

> *"In July 2005 the defendant agreed to purchase cotton business assets jointly/severally owned by M/s Geocottco (U) Ltd, Cottco (U) Ltd, Cottco International Ltd and the plaintiff herein collectively referred to in the aforementioned agreement as vendors. A copy of the sale agreement is annexture "A"".*

It is worth noting that this agreement is the same as the one attached to the plaint that was denied in the first place. The blanket denial in paragraph 4 of the WSD was therefore overtaken by the above averments. I found this quite contradictory and ridiculous!

In paragraphs 5 (c) to (e) of the WSD, the defendant alleged that the sale of the assets was subject to conditions precedent which the vendors failed to fulfill as a result of which the defendant suffered special and general damages to the tune of UGX 50,000,000/= and US $ 330,000 for which it counterclaimed. Apart from the pleadings in Civil Suit No. 114 of 2008 that was attached, no explanation was made or other documents were attached to show how the special damages accrued.

As stated in the background of this suit, the counterclaim was dismissed as against the other three counter-defendants because they were not served and as against the plaintiff for non-appearance of neither the defendant nor its counsel when the suit was called on for hearing.

I must also observe at this point that the manner in which the defence case was handled up to the stage an order for exparte proceeding was made left a lot to be desired. From the time the suit was fixed for scheduling and hearing, it came up four times but the defendant's official never showed up even once.

On 7th June 2011 when the matter came up for scheduling, the defendant was represented by Mr. Mathias Nalanya who informed court that he was holding brief for Mr. Charles Odere who had personal conduct of the case. He applied for adjournment on the ground that Mr. Odere was appearing as a witness in a criminal case in Nakawa court. Counsel for the plaintiff opposed the application for adjournment arguing that since the parties had already filed a joint scheduling memorandum with the agreed documents scheduling should proceed. This court then ruled that scheduling should proceed.

However, as scheduling commenced, Mr. Nalayanya appeared uncomfortable to proceed on the ground that he was not conversant with the facts of the case. In the circumstances, court was forced to allow a short adjournment to 10th June 2011 to accommodate the plaintiff's concern that he was due to travel back to South Africa where he resided and worked on 11th June 2011.

On 10th June 2011, Mr. Joseph Mwenyi appeared for the defendant but applied for an adjournment on the ground that the defendant's Managing Director was out of the country. This court declined to grant an adjournment because it was now clear that the defendant and his counsels intended to delay hearing and disposal of this suit. Court ordered counsels to proceed with the scheduling which was done and the matter was fixed for hearing of both the plaintiff's case and the defendant's case on the 8th September 2011.

On 8th September, 2011, when counsel for the defendant knew quite well that the matter was coming up for hearing, he did not appear and no explanation was furnished to court, hence the order for exparte proceeding. In my opinion, the contradictions in the WSD and the conduct of the defendant's officials and counsels only confirm that the defendant did not have any serious defence to this suit. If the application for leave to appear and defend the suit had been contested the defendant would have most likely lost it and court's time would have been saved.

The above observations notwithstanding, as I now turn to handle the first and second issues together since they are intertwined, I will still consider the defence given by the defendant for failing to pay the plaintiff as stipulated under clause 3.1 (v) (c) of the agreement.

The allegation in the WSD that the agreement was subject to conditions precedent was addressed by the plaintiff in his evidence. He testified that he was made a party to the agreement because of the investment he had made in Geocottco (U) Ltd as a shareholder with 49% shares for which the defendant was obliged to pay him a total of US $ 600,000. He further testified that the only asset owned by Geocottco (U) Ltd which was sold to the defendant was Kasese Ginnery which was transferred to the defendant in November 2005. This testimony was borne out by what was stated in paragraph (c) of the recitals on page 2 of the agreement to the effect that; *"Dr. Asaba as a shareholder holding 49% of the shares in the first vendor has consented to the disposal of the assets of the first vendor"*. On the same page 2, Geocottco (U) Ltd was referred to as the first vendor.

The statement of search dated 22nd January 2009 which was exhibited as "P4" during scheduling confirmed that the registered proprietor of Leasehold Register Volume 3046 Folio 14 Plot No. 1-3 Buruli Drive, Kasese was at that date Western Uganda Cotton Company Ltd (the defendant). I

have no reason to doubt that position since the defendant's counsel who was present at the scheduling conference did not object to the statement of search and so it was admitted as an agreed document.

The plaintiff also testified that he was not bound by the conditions in the agreement that relate to obtaining consent from CDO confirming that the defendant would take over 25% of the West Nile concession because that was an obligation of Cottco (U) Ltd that owned it. This was clearly stated in clause 2.2 of the agreement so I do not have any reason to doubt the plaintiff's testimony. He however, did not testify on his role in delivering a ruling of the URA on the tax treatment of the transaction. Upon looking at the plaint in Mengo Civil Suit No. 114 of 2008, it is clear that the cotton wrapping materials in respect of which tax and accrued bond was being claimed in the suit were imported by Cottco (U) Ltd and not Geocottco (U) Ltd. It therefore follows that the plaintiff did not have anything to do with that claim. If at all the defendant suffered any damages arising from it, which in my opinion could not be proved just by attaching a copy of the plaint, then it should seek redress from Cottco (U) Ltd and not the plaintiff.

As regards the alleged special damages of US $ 330,000, I would not wish to delve into it since it was a mere allegation without any documentary proof attached and in any case the counterclaim was dismissed.

I also wish to point out that if at all the vendors had failed to deliver the tax ruling on the tax treatment of the transaction they would all be jointly and severally liable. However, the defendant opted to pay the rest of the vendors fully and unfairly withheld part of what was due to the plaintiff. In any case as submitted by counsel for the plaintiff, if the defendant felt that that was a fundamental breach of the contract he would have exercised his right under clause 12.1 to terminate the agreement. Since he failed to do so, he could not single out the plaintiff and refuse to pay what was due to him.

From the plaintiff's evidence, the defendant had never raised this matter with the vendors implying that it was being raised simply to defeat his claim. I am inclined to agree with the plaintiff because the e-mails from the defendant's director Mr. Bruce Robertson to the plaintiff's advocate (agreed documents exhibited as "P2" and "P3") did not allude to that position. Instead

the e-mail dated 22nd August 2008 (Exhibit P2) confirmed that US $ 200,000 was due and owing and there was a proposal that the same be paid in four yearly installments of US$ 50,000 per year. In that e-mail it was stated as follows:-

> *"We are willing to accept the interest which has been accrued to date, but cannot pay interest going forward. So in the interest of resolving this matter, we can accept that US $ 83,000 get paid by 30th June 2009, (being the first US $ 50,000 plus interest accrued to date), then US $ 50,000 per year in 2010, 2011 and 2012. The only security that will be on offer is that Dr. Asaba is the prime creditor after the banks and no dividend will be declared to shareholders prior to repayment of Dr. Asaba…".*

In a subsequent e-mail dated 17th September 2008 (Exhibit P3) it was stated as follows:-

> *"We need to formally resolve the situation in Western Uganda Company Ltd. The company's bankers have written to the company stating that should the company not be able to reach a settlement with its creditors and repay outstanding bank debt to the value of US $ 169,000 and* ***US $ 200,000*** *(total bank debt is US $ 1,169,000) by 31 September it will foreclose on its loan and send in court brokers.*
>
> *For us, the only realistic option is for Dr. Asaba to convert the outstanding debt into equity. We are therefore hereby offering Dr. Asaba to purchase 12.50% of the shares of WUCC in return for cancellation of the outstanding debt……"* (Emphasis added).

Clearly, from the above e-mails there was an acknowledgment of indebtedness to Dr. Asaba (the plaintiff) by the defendant and proposals were made on how to settle the same. At least no mention was made of any conditions precedent that were breached by the vendors generally and the plaintiff in particular.

I do not therefore find any valid justification for the defendant's failure to pay the plaintiff his due balance of US $ 200,000 which was not disputed. The alleged breach of conditions by the vendors was raised as an afterthought to defeat the plaintiff's claim and even then, I do not find it applicable to the plaintiff and Geocottco (U) Ltd where he was a shareholder.

In the circumstances, I find that the defendant breached the sale agreement by refusing to pay the plaintiff US $ 200,000 in May 2007 plus interest of 6.5 % from the 7th July 2005 when the agreement was executed as was stipulated under clause 3.1 (v) (c).

As regards the third issue as to whether the plaintiff is entitled to the interest claimed, it is not in dispute that the interest of 6.5% was contractual. In my view this issue is a matter of interpretation of the contract. According to the agreement, it was the intention of the parties that interest would continue to accrue till payments were completed. Each installment attracted the same interest rate. Since the defendant denied the plaintiff use of his money and interest continued to accrue as was agreed I do not see why the plaintiff would not be entitled to recover the same.

In arriving at this conclusion, I was guided by the long established principle on interpretation of contracts that courts must give effect to the intention of parties. To this end, ***Kim Lewison*** in his book entitled ***"The Interpretation of Contracts, 2nd Edition"*** at page 4 states as follows:-

> ***"For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning".***

I wish to point out that it was not indicated in the agreement whether the 6.5% interest was per annum. However, looking at the e-mail of 22nd August 2008 from the defendant's director to the plaintiff's counsel (Exhibit P2), it is clear that the parties intended that it was per annum. The figure of US $ 83,000 that was stated to comprise of the first installment of US$ 50,000 plus interest that had accrued as at that date meant that the interest was calculated per annum.

Finally on remedies available, the plaintiff has prayed for special damages of US $ 200,000 plus interest of 6.5% from the date of execution of the agreement till payment in full. He has also prayed for general damages of US $ 50,000 and costs of the suit. I am satisfied that the plaintiff has proved its case against the defendant on a balance of probability and he is entitled to the special damages as prayed.

As regards the prayer for general damages, I agree with the principles that govern its award as stated by counsel for the plaintiff and I will be guided by them while handling this issue. I have already made a finding on the first and second issues that the defendant breached the sale

agreement by refusing to pay the plaintiff what was agreed. According to ***Black's Law Dictionary 7th Edition*** at ***page 182***;

> *"Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages"*.

It follows that the plaintiff would be entitled to general damages for that breach. However, I am alive to the fact that the contract provided for interest from the date of execution of the contract until the last installment is paid. I believe this was intended to take care of such eventualities and since interest is already awarded I would be inclined to award nominal damages.

Consequently, taking into consideration the inconveniences the defendant has suffered in trying to recover this money until he was forced to bring this suit I would award nominal damages of UGX 20,000,000 (Uganda Shillings Twenty Million Only).

In the result, I enter judgment for the plaintiff for:-

a) US $ 200,000;

b) Interest at the contractual rate of 6.5% pa from 7th July 2005 till payment in full;

c) Nominal damages of UGX 20,000,000/=;

d) Costs of the suit.

I so order.

Dated this 24th day of November, 2011.

Hellen Obura

JUDGE

Judgment delivered in chambers at 2.30 pm in the presence of Mr. Jet Tumwebase who was holding brief for Mr. Paul Kuteesa counsel for the plaintiff.

JUDGE

24/11/2011