

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

**HCT - 00 - CC - CS - 779 - 2007**

**DAVID BUSUULWA ::: PLAINTIFF**

**VERSUS**

**HUSSEIN BUHAITI ::: DEFENDANT**

**BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE**

**J U D G M E N T**

The Plaintiff filed this claim against the Defendant for breach of contract of Shs.3,700,000/=, loss of earnings of Shs.41,600,000/=, loss of property and damages. It is the case of the Plaintiff that before December, 2004 he was running a night club known as Club ONE at Najjanakumbi on Entebbe Road in Kampala. It is the case of the Plaintiff that on the 14<sup>th</sup> December, 2004 he entered into a “goodwill agreement” for the consideration of Shs.5,000,000/= where he would allow the Defendant to take over the Plaintiff’s right to occupy the premises of Club ONE together with its stock of drinks, fridges, pool table and other items for a period of one year. It was further agreed between the parties that the Defendant would also provide the Plaintiff a music system for use at the Plaintiff’s Miami Beach facility at Luzira, Kampala on Wednesday, Saturday and Sunday and the gate collections therefore would be shared. The Wednesday and Saturday gate collections would be shared between the parties while the Sunday collections would be retained by the Plaintiff.

It is the case for the Plaintiff that he was only partially paid on the agreement leaving a balance of Shs.3,800,000/=. It is also the case of the Plaintiff that the Defendant refused to provide him with the music equipment nor yield up the Club ONE premises after one year as agreed for which he has suffered loss.

The Defendant denies any breach of the goodwill agreement. The Defendant in his defence pleaded all due monies were paid and music equipment provided. The Defendant however avers that; the Plaintiff did not provide accountability for the use of the Defendant's musical equipment and instead used all the proceeds for his personal gain. The Defendant further pleaded that if there was any breach, then, it was occasioned by the re-entry of the land lord at the Club ONE premises which amounted to frustration.

The Defendant also filed a counter-claim for Shs.10,000,000/= against the Plaintiff for fraudulent misappropriation of money and his music system.

At the pretrial conference the parties agreed to the following issues;

- 1) Whether the Defendant breached the agreement by not paying the full amount of Shs.5,500,000/= as good will?
- 2) Whether the Defendant breached the agreement by not returning the properties to the Plaintiff where the agreement terminated after one year.
- 3) Whether the Defendant breached the agreement by not providing to the Plaintiff music equipment on the days agreed upon in the agreement?
- 4) Whether the Plaintiff breached the agreement by misappropriating Shs.10,000,000/= belonging to the Defendant?
- 5) Remedies.

Mr. Nuwagaba appeared for the Plaintiff while Mr. Kaggwa and Sserwanga appeared for the Defendant. Before I address myself to the issues I need to point out that this trial was plagued by party and counsel absenteeism and finally proceed exparte at the end with the defence evidence. However, despite a generous amount of time given the defence did not file written submissions. This greatly delayed this case and consequently this judgment is given based on what is available on court record.

As to the first issue as to whether the Defendant breached the agreement by not paying the full Shs.5,500,000/= provided by the agreement the Plaintiff testified that only Shs.1,800,000/= was paid leaving a balance of Shs.3,700,000/=. The Plaintiff testified that; based on the agreement, the Defendant was to pay an initial down payment of Shs.1,000,000/= then the rest in instalments of Shs.800,000/= per month until payment in full. The Plaintiff stated that the first instalment of Shs.1,000,000/= was made on the execution of the agreement on the 14<sup>th</sup> December, 2004 and further instalment of Shs.800,000/= on the 25<sup>th</sup> January, 2005.

The Defendant however submitted that; he actually paid Shs.3,800,000/= and not Shs.800,000/= on the 25<sup>th</sup> January, 2005 based on exhibit D.2. The Plaintiff stated that; the figure of “3” was inserted in front of Shs.800.000/= by the Defendant who at all times was in possession of the handwritten acknowledgment exhibit D.2. There was also testimony that the Defendant paid a balance of Shs.700,000/= to the Plaintiff’s landlord one Grace Tendo.

I have addressed my mind to the evidence on record. The memorandum of agreement between the parties in Paragraph 1 provided for the mode of payment. Paragraph 1.1 provides that; Shs.1,000,000/= would be paid on the 14<sup>th</sup> December, 2004 and the balance paid in monthly instalments starting on the 10<sup>th</sup> January, 2005 until the 10<sup>th</sup> June, 2005. I agree with counsel for the Plaintiff that; it was strange that the Defendant decided to pay Shs.3,800,000/= instead of Shs.800,000/= as the second instalment.

The Defendant’s testimony in this area was cagey just relying on the written acknowledgment D.2. A careful look at this document shows the figure “3” is in heavier bold compared to the rest of the Shs.800,000/=.

I find the evidence credible that the figure “3” was inserted. In any event, the Defendant’s pleadings did not refer to this significant payment. How could such an omission have been made. In this regard, I find the evidence of the Plaintiff credible and answer the first issue that only Shs.1,800,000/= was paid to the Plaintiff leaving a balance of Shs.3,700,000/=.

As to the second issue whether the Defendant returned the Plaintiff's property or not, the Plaintiff provided a list of items worth Shs.8,193,000/= that were not returned. However, counsel for the Plaintiff conceded that; the pool table on the list was not the Plaintiff's was eventually taken by its owner. This would reduce the pleaded claim by Shs.2,400,000/= leaving a balance of Shs.5,793,000/=. This claim was not specifically rebutted by the Defendant in his pleadings. The Defendant did not even address it in his evidence. I accordingly find that on the evidence on record, the Plaintiff's properties were not returned to him. I also find the Plaintiff's computation of Shs.5,793,000/= as the value of the equipment to be fair and therefore accept it.

As to the third issue; as to whether the Defendant supplied the Plaintiff with musical equipment, the Plaintiff in his testimony testified that; this was not done. He testified that the Defendant told him that the equipment had been hired to do promotions with a breweries company so he had to hire alternative equipment at a higher price until he eventually abandoned the whole idea. The Defendant testified that the equipment was provided to the Plaintiff but that the Plaintiff did not provide accountability for the gate collections.

This is actually evidence based on one person's word against the other.

Of the two, I find the evidence of the Plaintiff to be more credible. The Defendant stated that; one time he sent his driver to check on the equipment which was found abandoned on the beach. However, this driver was not called to give evidence about this abuse of use which would even have clarified as to whether the equipment was actually provided. This could have settled the matter but it did not.

I accordingly find that the Defendant did not supply the music equipment as provided for in the agreement.

The fourth issue is whether the Plaintiff breached the agreement by this appropriating Shs.10,000,000/= belonging to the Defendant. This would cover the Defendant's share of the gate collections at "Miami beach" and equipment that was damaged. However, in light of my finding that no such equipment was supplied according to the agreement, then, the Defendant's counterclaim must fail and it is hereby dismissed with costs.

As to remedies, I find as I have above that; the Plaintiff is entitled to Shs.3,700,000/= under the agreement. I award it from the 10<sup>th</sup> January, 2005 with interest at 20% p.a. from then until payment in full. I also award the Plaintiff the value of his items at Club ONE of Shs.5,793,000/= from the 14<sup>th</sup> December, 2005 with interest at 20% p.a. from that date until payment in full.

The Plaintiff has also claimed the sum of Shs.41,600,000/= as his loss on gate collections for 24 months. I must say that I was not impressed with the way the Plaintiff handled this claim. This is a special damage that not only has to be specifically pleaded but also strictly proved (see **Kyagulanyi Coffee Ltd V Tomusange** C.A. 9 of 2001 C.A). The claim is for gate collections but no evidence of gate collection receipts was adduced in court. Just stating income as the Plaintiff did in my view is not good enough. Consequently, the claim for Shs.41,600,000/= is denied.

Counsel for the Plaintiff prayed for general damages of Shs.11,000,000/= for breach of contract. He did not show court how he came to this assessment save for stating that it is a reasonable figure. I accordingly award in my discretion the sum of Shs.10,000,000/= as general damages against the Defendant with interest at 8% p.a. from the date of this judgment until payment in full.

I award the Plaintiff's costs in the main suit.

Justice Geoffrey Kiryabwire

**JUDGE**

**Date: 10/01/2011**

10/01/2011

11:20 a.m.

**Judgment read and signed in Court in the presence of;**

- D. Kaggwa for Defendant
- The Defendant
- The Plaintiff
- Ruth Naisamula – Court Clerk

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**Geoffrey Kiryabwire**

**JUDGE**

**Date: 10/01/2011**