

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

**HCCS NO.364 OF 2007**

**NEW ALOBO LIMITED ::: PLAINTIFF**

**VERSUS**

**MOYO HARDWARES LIMITED ::: DEFENDANT**

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE**

Civil law and procedure – contract – breach of contract

Contract – frustration -

**JUDGMENT:**

The plaintiff New Alobo Limited brought this suit against the defendant Moyo Hardwares Limited for the recovery of Ug.Shs.104,786,876/= (one hundred four million seven hundred eighty six thousand eight hundred and seventy six shillings) as special damages arising out of a claim for compensation for developments and renovations effected upon the defendant's land and premises, general damages for breach of contract, interest and costs for the suit.

The brief facts of this case are that the plaintiff with the defendant's permission granted through the Managing Director of the defendant Mr. Alexander Okello, effected developments on the defendant's property comprised in LRV 3150 Folio 18 Plot 30 and situated at Andrea Olal Road Gulu District measuring approximately 0.289 Hectares which included; effecting various repairs, erecting new structures, renovations and the construction of a parking yard on the said property. The plaintiff averred that it was implied from the conduct of the parties that the defendant would compensate the plaintiff of the said expenses. It is the plaintiffs' case that the defendant has without lawful excuse failed or refused to compensate the plaintiff for the said development and thereby breaching the understanding between the plaintiff and the defendant. The plaintiff therefore averred that the developments so effected added value to the premises and that they are entitled to a refund/

compensation in the form of special damages for the value so added as the defendant will benefit from the developments.

The defendant in its defence however denied any liability and averred that the renovation works carried out by the plaintiff after his occupancy of the premises were paid for by the defendant, who paid a bank loan that was obtained by the plaintiff from M/s Stanbic Bank. The defendant further contended that after the plaintiff received the loan money in the sum of Ug.Shs.100,000,000/= (one million Uganda shillings) from M/s Stanbic Bank which was guaranteed by the defendant's title, for the renovation of the night club, the plaintiff abandoned the premises on 9<sup>th</sup> March 2007. The defendant therefore prayed that the suit be dismissed with costs.

The defendant brought a counter claim against the plaintiff for Ug.Shs.166,200,000/= being unpaid rent and Ug.Shs.123,048,709/= being an amount paid by the defendant as guarantor of the plaintiff's loan, general damages for breach of contract, interests and costs of the counterclaim.

In reply to the counterclaim, the plaintiff/counter defendant averred that it had fully paid all the rent and it was never in arrears. The plaintiff/counter defendant further contends that the defendant/counterclaimant frustrated the tenancy agreement and the plaintiff/counter defendant's performance of the conditions imposed by the legal mortgage with M/S Stanbic Bank including paying back the loan by evicting the plaintiff from the premises and as such the plaintiff is not liable to pay any monies to the defendant/counterclaimant.

The following issues were raised;

1. Whether the plaintiff carried out renovation works worth Ug.Shs.104,786,876/= on the defendant's premises.
2. Whether the defendant's payment of the plaintiff's loan of Ug.Shs.50,000,000/= was applied to offset the works done in Issue No.1.
3. Whether the plaintiff owes the defendant unpaid rent worth Ug.Shs.166,200,000/=.
4. Whether the defendant is entitled to a refund of Ug.Shs.123,048,709/= from the plaintiff with regard to the second loan paid by the defendant.

Counsel T. Ocaya appeared for the plaintiff while Counsel J.P. Barenzi appeared for the defendant. The plaintiff called two witnesses namely; Mr. Johnson Olwa (PW1), the Managing Director of

New Alobo Ltd and Mr. Kilama David (PW2) a private contractor. For the defendant Mr. Okello Alex (DW1), a director in the defendant company, testified.

**Issue No.1: Whether the plaintiff carried out renovation works worth Ug.Shs.104,786,876/= on the defendant's premises.**

Mr. Olwa testified that his tenancy at the defendant's premises commenced on 4<sup>th</sup> December 2001 and that at that time the premises were in a very poor state. The building had taken long without being painted and the overall view structure, the lighting and plumbing system had been destroyed. Counsel for the plaintiff submitted that the plaintiff with the permission of the defendant embarked on renovating the premises. Mr. Olwa testified that the pool bar was renovated at a cost of Ug.Shs.8,181,600/=, the water system was restored by putting up plastic tanks at a cost of Ug.Shs.12,646,000/=, the ceramic tiling in the premises at a cost of Ug.Shs.6,265,266/=, the electrical work was at a cost Ug.Shs.7,909,600/= and the construction of a VIP hall and a VIP wing at the cost of Ug.Shs.49,185,810/=. Mr. Olwa further testified that he contracted qualified personal to do the plumbing, tiling, electrical work and the construction of the VIP hall. Mr. Kilama David testified that he supervised the plumbing and electrical work. Mr. Kilama further testified that the building plan for the VIP hall was approved by the commissioner at a cost of Ug.Shs.600,000/= and the labour fees was 40% of the cost of the material. Counsel for the plaintiff submitted that the cost of renovation works, construction and labour costs were embodied in the bills of quantities issued by the respective constructors/ technicians. It was counsel for the plaintiff's submission that these bills of quantities were discussed with Mr. Okello the defendant's director who allowed the plaintiff to go ahead and carry out the renovations. Counsel for the plaintiff therefore submitted that a total of ug.Shs.104,786,876/= was spent on construction and renovation and therefore prayed that the plaintiff be compensated in this sum.

Counsel for the defendant however submitted that the amount claimed by the plaintiff for works done has not been proved to the required standard of proof and should therefore fail. It was counsel for the defendant's submission that Mr. Alexander Okello in his testimony admitted that there was some work carried out by the plaintiff however the said works were not fully authorised by him. Counsel for the defendant submitted that Mr. Olwa adduced in evidence a host of receipts dating back to 2001(marked exhibit P.5) and bills of quantities(marked exhibit P.1, P.3, P.4 and P.5) relating to a specific period, which he claimed were for the items that he purchased for the renovation works. Counsel for the defendant submitted that Mr. Kilama David (PW2) testified that

the renovation works were carried out in 2005. It was counsel for the defendant's submission that this left questions as to when the plaintiff actually carried out the renovation works. Counsel for the defendant further submitted that no receipt was produced by the plaintiff as having been issued by the contractor for the labour charged save for the bill of costs which had been reconstituted. Counsel for the defendant submitted that it is trite law that special damages should be specifically pleaded and strictly proved. He submitted that the plaintiff has however not strictly proved the special damages in the amount of Ug.Shs.104,786,876/= and that court should therefore not award it to them. Counsel for the defendant submitted that the receipts which have been presented in the matter amount to only a sum of Ug.Shs.31,089,000/= (thirty one million eighty nine thousand shillings only) and that the plaintiff has therefore left the claim for special damages unproved in the amount claimed.

I have addressed myself to the evidence before court and the submissions of both counsels on this issue. It would appear that there is no dispute that some renovations to the defendant's property were done by the plaintiff. However, this issue hinges on whether or not the plaintiff carried out renovation works worth Ug.Shs.104,786,876/= on the defendant's premises. How now has the plaintiff chosen to prove the renovations worth Ug.Shs.104,786,876/= ? He has done this first through adducing in evidence exhibits P.1, P.3, P.4, P.5 and P.7. These are receipts and bills of quantities which according to the testimony of the Mr. Olwa and Mr. Kilama shows the various costs on the materials and labour spent on renovation of the defendant's premises and the construction of the VIP hall. Secondly, the plaintiff relies on the testimonies of Mr. Olwa and Mr. Kilama who give detailed evidence on the renovations that were carried out on the defendant's premises. The defendant agreed that some renovations were done but however claimed that the receipts were never given to him nor did Mr. Olwa inform him of the expenditure on the renovations. Save for the claim that the plaintiff did not give the defendant any receipts nor inform the defendant of the expenditures incurred out of the renovations, the defendant did not adduce any evidence in court to show that the renovations worth Ug.Shs.104,786,876/= had not been carried out by the plaintiff. That being the case, I am persuaded by the arguments of counsel for the plaintiff that the plaintiff carried out renovation works worth Ug.Shs.104,786,876/= on the defendant's premises.

In answer therefore to issue No.1 I find that the plaintiff did carry out renovation works worth Ug.Shs.104,786,876/= on the defendant's premises

**Issue No.2: Whether the defendant's payment of the plaintiff's loan of Ug.Shs.50,000,000/= was applied to offset the works done in Issue No.1.**

Counsel for the plaintiff submitted that the defendant has not adduced any evidence to prove that the defendant's payment of the plaintiff's loan of Ug.Shs.50,000,000/= (fifty million shillings) was applied to offset the works done. Counsel for the plaintiff submitted that the defendant produced evidence under exhibit P.6 which is to the effect that Ug.Shs.50,000,000/= was advanced to Mr. Olwa under Powers of Attorney issued by the Mr. Okello Alex for the defendant. Counsel for the plaintiff further submitted that Mr. Okello testified that he wrote a document (marked exhibit P.6) which shows that he received Ug.Shs.50,000,000/= less Ug.Shs.6,234,600/= legal expenses and Ug.Shs.24,700,000/= (twenty four million seven hundred thousand shillings) debt paid. It was counsel for the plaintiff's submission that the document marked exhibit P.6 does not show that Ug.Shs.24,700,000/= was paid to the plaintiff as a debt for renovation done on the premises or that Ug.Shs.6,234,600/= was for legal expenses rendered as claimed by Mr. Okello. Counsel for the plaintiff submitted that to accept that evidence of Mr. Okello amounts to addition to contents of a written document by oral evidence which is contrary to **section 91 of the Evidence Act cap 6**. Counsel for the plaintiff referred court to the defendant's testimony in Criminal proceedings No.297 of 2007 (exhibit P.8) where the Mr. Okello testified that the loan of Ug.Shs.50,000,000/= was secured by the plaintiff for the defendant. Counsel however submitted that Mr. Okello during cross examination denied his criminal testimony and so his testimony should not be relied upon because he lied on oath. Counsel for the plaintiff further submitted that Mr. Olwa testified that receipts were a precondition for paying the plaintiff's renovations. In this case however, the plaintiff issued no receipts to the defendant for the deductions of Ug.Shs.6,234,600/= and Ug.Shs.24,700,000/= as such; counsel submitted that the defendant could not pay basing on his testimony. Counsel therefore submitted that the deductions were made on account of the defendant that is why it paid the entire loan even though it had received less cash and that no payment was ever made by the defendant for the renovations carried out by the plaintiff.

Counsel for the defendant however submitted that the amount applied in respect of the setoff as led by the evidence of Mr. Okello was Ug.Shs.24,700,000/=. Counsel for the defendant submitted that the hand written payment schedule (marked exhibit P.6) shows among other things that Mr. Johnson Olwa must give receipts in respect of loan expenses and debt fully paid to him. Counsel for the defendant further submitted that these words in the document marked exhibit P.6 must be construed

as they stand as was provided in the case of **British Movie Tone News .V. London and District Cinemas [1952] AC 166**. Counsel for the defendant therefore submitted that an amount of Ug.Shs.24,700,000/= was applied by the parties to offset the works carried out by the plaintiff on the defendant's premises.

I have considered the evidence of both parties in its totality. I also had the opportunity to note the demeanour of their witnesses as they testified. Mr. Olwa during cross examination testified that the Ug.Shs.24,700,000/= that is mentioned in the document marked Exhibit P.6 was payment for a loan that Mr. Okello had borrowed from him. Mr. Olwa further testified that the defendant gave him a cheque worth Ug.Shs.42,000,000/= (forty two million shillings) which was to be used to repay back the loan of Ug.Shs.50,000,000/= and he acknowledged receipt of this amount in a document dated 4<sup>th</sup> October 2004 (marked Exhibit D.1). Mr. Okello however submitted that he Ug.Shs.24,700,000/= was used by the plaintiff to renovate the premises that is why he was requested the plaintiff in the document marked Exhibit P.6 to produce receipts to justify this expenditure. Mr. Okello testified that the plaintiff however failed to produce the receipts. In my view, as between the plaintiff and the defendant, the defendant's version is much more credible than that of the plaintiff. I therefore accept defendant's evidence that Ug.Shs.24,700,000/= was used by the plaintiff to renovate the premises and duly paid back by the defendant when it paid off the plaintiff's loan of Ug.Shs.50,000,000/=.

Therefore in answer to issue No.2, I find that the defendant's payment of the plaintiff's loan of Ug.Shs.50,000,000/= was applied to offset the works done in Issue No.1.

**Issue No.3:                    Whether the plaintiff owes the defendant unpaid rent worth Ug.Shs.166,200,000/=.**

Counsel for the plaintiff submitted that no evidence was lead to prove that the plaintiff had failed to pay the remaining balance for rent worth Ug.Shs.166,200,000/=. It was counsel for the plaintiff's submission that Mr. Okello Alex's evidence that he authorised the plaintiff to use rental balance of Ug.Shs.2,700,000/= to renovate the premises in question and that he kept on demanding for receipts for renovations done, is a departure from pleadings and is inadmissible since it contravenes Order 6 Rule 7 of the Civil Procedure Rules. Counsel for the plaintiff referred court to the case of **Interfreight Forwarders (U) Ltd .V. East African Development Bank SCCA No.33 of 1993** where Justice Oder JSC at page 10-11 held that;

*“A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged...”*

Counsel for the plaintiff further submitted that Mr. Johnson Olwa adduced uncontroverted evidence that it duly paid rent and demanded for receipts but none was issued by the defendant. Further, counsel for the plaintiff submitted that the plaintiff paid Ug.Shs.3,000,000/= (three million shillings) as rent for the period of 4<sup>th</sup> December to 31<sup>st</sup> January 2007 and that Mr. Okello never demanded for any rent when he asked the plaintiff to vacate the premises. Counsel for the plaintiff therefore submitted that the defendant's conduct of failure to take similar action of arresting Mr. Olwa for failure to pay rent worth Ug.Shs.166,200,000/= shows that the rent was paid and renovations were done and that the plaintiff is therefore stopped from claiming otherwise.

Mr. Alexander Okello testified it was orally agreed that the plaintiff would become a tenant on the defendant's premises and that he would pay monthly rent of Ug.Shs.3,000,000/= (three million shillings) not in cash. It was Mr. Okello's testimony that Ug.Shs.300,000/= (three hundred shillings) of the Ug.Shs.3,000,000/= was to be paid by the plaintiff to Mr. Okello's dependants and the balance of Ug.Shs.2,700,000/= (two million seven hundred shillings) per month would be used to renovate the premises on condition that the plaintiff would produce receipts. Mr. Okello testified that the plaintiff never paid any rent for the period of occupancy of the premises save for the Ug.Shs.300,000/= per month which was paid to the relatives of the defendant's directors. Counsel for the defendant submitted that the plaintiff has adduced no evidence of payment of rent for the period that it occupied the defendant's premises. It is counsel for the defendant's submission therefore that the defendant seeks to recover the unpaid rent for the period less what was admittedly paid and clearly deducted.

I have addressed myself to the evidence before court and the submissions of both counsels on this issue. It would appear that there is no dispute that an oral tenancy agreement was entered into by the parties wherein, it was agreed that the plaintiff would pay Ug.Shs.3,000,000/= (three million shillings) as monthly rent. However, what is contentious is that it is alleged by the plaintiff, that in reality, all the rent was paid. Mr. Olwa testified that he would pay the Ug.Shs.3,000,000/= per month, two months in advance and that he was never issued a receipt for the rent paid. The defendant disputes this fact and claims that save for the Ug.Shs.300,000/= per month which was

paid to the relatives of the defendant's directors, the plaintiff has not paid any rent for the period of tenancy which run from 4<sup>th</sup> December 2001 up to 31<sup>st</sup> January 2007. There is however no independent evidence that court can rely on to show that the plaintiff did pay the rent owed to the defendant. In the instant case it is one person's word as against another. In a matter such as this the burden of proof will lie on he who asserts the rent was paid. It is difficult to understand why for a period of 5 (five) years the plaintiff continuously paid rent of Ug.Shs.300,000/= per month to the defendant and that he never received not even one receipt indicating the amount that he had paid to the defendant for rent. Court is unable therefore on a balance of probability to state that the plaintiff paid all the money due for rent to the defendant.

I accordingly find that the plaintiff owes the defendant unpaid rent worth Ug.Shs.166,200,000/=.

**Issue No.4:                    Whether the defendant is entitled to a refund of Ug.Shs.123,048,709/= from the plaintiff with regard to the second loan paid by the defendant**

Counsel for the plaintiff submitted that the defendant knowingly frustrated the plaintiff's abilities to repay the loan by terminating the tenancy agreement. It was counsel for the plaintiff's submission that the defendant's action of paying off the loan was the natural consequence of its frustration of the contract for the plaintiff to repay the loan. Counsel for the plaintiff submitted that the rules governing the legal principles of frustration discharge the plaintiff of any liability to pay since the frustration event occurred immediately after the loan was advance before the plaintiff was liable to repay the loan. Counsel for the plaintiff referred court to a book entitled **The Law of Contract 8<sup>th</sup> edition at page 803** where the author **Professor G.H Treitel** observed that an innocent party can rely on an act of frustration committed by the other party to defeat that party's claim. Counsel therefore submitted that since the defendant caused the frustrating event which made it liable to repay the loan, it cannot claim the monies it paid from the plaintiff.

Counsel for the defendant however submitted that the amount paid by the defendant in settling the loan is not disputed nor is the fact that the defendant settled the loan. Counsel for the defendant submitted that the defendant did not terminate the tenancy of the plaintiff but rather, the plaintiff vacated the premises after it had received the loan of Ug.Shs.100,000,000/= (one hundred million shillings) from M/S Stanbic Bank. Counsel for the defendant referred court to a book entitled **Law of Contract 12<sup>th</sup> edition at page 967** where the learned author **Professor G.H Treitel** observed that a party cannot rely on self induced frustration, that is frustration due to his own conduct or the



conduct of those for whom he is responsible. Counsel for the defendant therefore submitted that the defendant did not frustrate the plaintiff's ability to settle the loan but rather that the plaintiff refused to settle the loan knowing that the defendant would have to settle it as guarantors if only to save there property.

I have perused the submissions of both counsels and the evidence adduced in court in this matter. It is not a disputed fact that that the defendant settled the loan of on behalf of the plaintiff. The plaintiff however under this issue pleads frustration. 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.'*

It is the plaintiff's claim that its ability to repay the loan of Ug.Shs.100,000,000/= was frustrated when the defendant evicted the plaintiff from the premises. The defendant however denied evicting the plaintiff and claimed that the plaintiff abandoned the premises on 9<sup>th</sup> March 2007 after receiving the loan of Ug.Shs.100,000,000/=. The defendant further contended that the plaintiff set up its night club business on other premises and this was not denied by the plaintiff. Clearly if any one is at fault here, in regard to the failure by the plaintiff to repay the loan, it must be the plaintiff himself. Nonetheless, 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 plaintiff. I must therefore reject the claim that the plaintiff's ability to repay the loan was frustrated by the defendant. On the evidence before me, I find that the defendant is entitled to a refund of Ug.Shs.123,048,709/= from the plaintiff with regard to the second loan paid by the defendant.

In regard to remedies, the plaintiff in its pleadings prayed for the recovery of Ug.Shs.104,786,876/= (one hundred four million seven hundred eighty six thousand eight

hundred and seventy six shillings) as special damages arising out of a claim for compensation for developments and renovations effected upon the defendant's land and premises, general damages for breach of contract, interest and costs for the suit.

In light of my findings in issue No.1 above, I accordingly award the plaintiff the sum of Ug.Shs.104,786,876/= (one hundred four million seven hundred eighty six thousand eight hundred and seventy six shillings) as special damages arising out of a claim for compensation for developments and renovations effected upon the defendant's land and premises. However, this amount is offset by the loan repayment of Ug.Shs.123,048,709/= (one hundred twenty three million forty eight thousand seven hundred and nine shillings) made by the defendant on behalf of the plaintiff and Ug.Shs.24,700,000/= (twenty four million seven hundred thousand shillings) which was duly paid back by the defendant when it paid off the plaintiff's loan of Ug.Shs.50,000,000/=.

Since there is no outstanding sum due to the plaintiff from the defendant, I accordingly decline to award general damages, interest and costs to the plaintiff.

As to the counterclaim, counterclaimant/defendant prayed for Ug.Shs.166,200,000/= (one hundred sixty six million two hundred thousand shillings) being unpaid rent and Ug.Shs.123,048,709/= (one hundred twenty three million forty eight thousand seven hundred and nine shillings) being an amount paid by the defendant as guarantor of the plaintiff's loan, general damages for breach of contract, interest at a rate of 23% from the date of judgment till payment in full and costs of the counterclaim.

In light of my findings in issue Nos.3 and 4 above, I accordingly award the counterclaimant/defendant the sum of Ug.Shs.166,200,000/= being unpaid rent owed by the counter defendant/ plaintiff to the counterclaimant /defendant. I also award the counterclaimant/defendant the sum of Ug.Shs.42,961,833/= (forty two million nine hundred sixty one thousand eight hundred and thirty three shillings) being the remaining balance on Ug.Shs.123,048,709/= which offset part of the amount that was claimed by the plaintiff.

I now turn to the issue of general damages. It is trite law that general damages are a pecuniary compensation given on proof of a wrong or breach. The general intention of the law in giving damages for breach of contract is to restore the wronged party into the position he would have been

in if there had been no breach of contract. The counter defendant/plaintiff's breach of the contract by failing to pay the rent owed to the counterclaimant/defendant has denied the defendant of its income. The counterclaimant/defendant did not guide court as to quantum of damages however, the court using its discretion and applying the general principles with regard to assessment of damages for breach of contract, accordingly awards Ug.Shs.3,000,000/= (three million Uganda shillings) as general damages to the defendant/counterclaimant.

In regard to interest, it is a firmly established principle that an award of interest is made at the discretion of the court. It is clear that counterclaimant /defendant ought to be compensated by an award of interest for the loss thereby occasioned to it by the counter defendant /plaintiff. I therefore award the counterclaimant/ defendant interest on the principle amounts at a rate of 21% per annum from the date of judgment it payment in full. I also award the counterclaimant/defendant interest of 8% per annum on the general damages from the date of judgment until payment in full.

I also award the counterclaimant/defendant the costs of the counterclaim.

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**Geoffrey Kiryabwire**  
**JUDGE**

**Date: 11-01-11**