THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HIGH COURT CIVIL SUIT NUMBER 073 OF 2009

REVOLUTIONARY ADS AND DESIGNES LTD} ..... PLAINTIFF

VERSUS

BOARD OF TRUSTEES OF NAKIVUBO STADIUM} ..... DEFENDANT

BEFORE HONOURABLE JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The Plaintiff is a limited liability company incorporated in Uganda and brings this action against the Defendant a body corporate for breach of contract, causing financial loss to the plaintiff, general damages, interests and costs of the suit. It is alleged in the plaint that the plaintiff on 7 December 2005 entered into an agreement with the defendant to run advertising services in Nakivubo War Memorial Stadium for a period of three years with an option for renewals for two years. The plaintiff alleges that the defendant allowed the companies such as WARID Telecom Ltd, Central broadcasting services, Peacock and Michelin companies to advertise on the premises without the plaintiffs consent. In total the defendant allowed 9 companies to advertise in the stadium without paying advertisements charges to the plaintiff contrary to the agreement.

The plaintiff claims that it has been occasioned a financial loss of Uganda shillings 140,500,000/= by the defendant refusing the plaintiff to collect advertisements charges from the 9 companies. The plaintiff alleges that the defendant terminated the contract with the plaintiff without due regard to the breach and without according a hearing to the plaintiff. The plaintiff contends that the actions of the defendant were in contravention of the agreement dated 7th of December 2005.

The plaintiff seeks an order that the defendant pays Uganda shillings 140,500,000/=, general damages for breach of contract and wrongful termination of the contract by the defendant, interest on (a) and (b) commercial rate of 30% from the time of the breach till full payment; costs of the suit and any other relief as this honourable court may deem fit to grant.

In reply the written statement of the defence avers that the defendant fully complied with the terms of the contract taking into account all money collected prior to the agreement and subsisting contracts and set off against the rental payments from the plaintiff in the first year. The defendant alleges that the plaintiff completely failed to implement the agreement by defaulting on payments. That the plaintiff was in arrears amounting to the sum of Uganda shillings 83,000,000/= by 31 December 2008 when the defendant formally terminated the contract. The defendant asserts that it was the duty of the plaintiff to seek out advertisers for the rented premises which by its own admission it completely failed. The defendant therefore contends that the plaintiff was the sole architect of any financial loss it allegedly suffered. That it had a contractual right of entry exercisable upon default by the tenant to pay rent. That the defendant effectively exercised this right upon the default of the tenant to pay rent.

The defendant counterclaimed against the plaintiff for a sum of Shs 83,000,000/=. The defendant alleges that the plaintiff failed to pay rent when it fell due in accordance with the contract resulting in rent arrears of Uganda shillings 83,000,000/= by the time of the formal termination of the contract in December 2008. It claims interest at 25% of the rent arrears from the date of filing the suit till payment in full, costs of the counterclaim and any other further relief as this honourable court may deem fit to grant.

Before the hearing the following facts were agreed upon in writing in the joint scheduling memorandum signed by both counsels namely:

1. That the Plaintiff on 7 to December 2005 entered into a formal agreement with the defendant to run advertising services in Nakivubo War Memorial

Stadium for a period of three years with an option of renewals for two years.

2. That the Defendant on 1 December 2008 terminated the contract with the plaintiff with each party alleging breach of contract.

At the hearing the plaintiff called one witness PW1 Agnes Kamya, the marketing manager of the plaintiff. The defendant on the other hand called one witness DW1 Afisa Nabukera a board member of the defendant and one-time chairperson of the management committee. Afisa Nabukera was the chairperson between 2005 – 2009 the relevant contract period.

At the close of the cases of both parties learned counsels opted to file written submissions.

Plaintiff's written Submissions

Issues

1. Whether there was a breach of contract and if so by whom and
2. What at the available remedies

Under the agreement the plaintiff who was a tenant had exclusive rights to the advertising space within the stadium during the term of the agreement. During the subsistence of the agreement the defendant without the consent of the plaintiff allowed new companies to advertise within the stadium contrary to the terms of the agreement. This action, the plaintiff for the contents and wanted to breach of contract since the defendant became its competitor as a result of causing a financial loss, wanting to 140,500,000/= under clause 5 of the agreement the landlord covenants with the advertiser under the fourth bullet as follows:

> "That the landlord shall keep secure the rented premises and shall not allow any other advertiser to erect advertising billboards on the landlord's property without the consent of the advertiser, save as agreed herein in this agreement"

The plaintiff's contention is that the agreement was contravened when the defendant stated sanctioning advertised events from various entities after 7 December 2005 in total breach of the agreement. Submitted that PW1 testified that the defendant were their competitors because they were also interested in the advertising space in the stadium thus frustrating their efforts to raise income from the business.

The plaintiff's obligation was to carry out advertising services from which they were to raise money to pay rent to the defendant. As they were trying to find clients, the plaintiff was frustrated when the defendant permitted advertisements in the stadium and collected rent from the clients. The advertisements from which the defendant was illegally collecting rentals included among others Michelin, Peacock Paints, WARID Telecom, Arrow Centre and that a competitor was also given a right to place billboards in the stadium. City Tires was allowed to construct their own billboard in the stadium and all payments were being made to the defendant.

PW1 adduced exhibit P2, a tax invoice dated 20th of May 2007 issued to Arrow Centre by the defendant as a demand for **Shs. 7,312,500/**=. This evidence was admitted by DW1 in cross-examination. Counsel contended that this proved that during the subsistence of the contract the defendant was collecting rent from advertising space a mandate of the plaintiff under the contract. Counsel referred to Exhibit P4 receipt dated 4th of January 2008 as proof of payment to the defendant for billboard space by ADNAN SOURCE CONTRACTORS LTD.

Counsel further testified that PW1 testified that that their client's advertisements where obscured and the defendant encouraged Illegal advertisements for which they were being paid. The illegal advertisements and obstruction of the plaintiffs advertisements as shown in exhibits P7, P8, P9 and P10 cost the plaintiff Uganda shillings 140,500,000/= and is illustrated by exhibit P5.

Learned counsel referred to Chitty on Contracts 27th Edition on guidelines on construction of terms of agreements. Paragraph 12.039 which gives the general rules of construction of written agreements as:

> "The object of the construction of the terms of a written agreement is to discover there from the intention of the parties to the agreement."

In Reardon vs. Smith Line and Hansen Tangen [1976] WLR 995, Lord Wilberforce stated:

> "No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to, is usually described as the surrounding circumstances but this phrase is imprecise. It can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the content, the market in which the parties are operating".

He went further on to state that in the same case at page 996 that:

> "when one speaks of the intention of the parties to the contract, one is speaking objectively the parties cannot themselves give direct evidence of what their intention was and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim or object or commercial purpose, one is speaking – objectively of what reasonable persons would have in mind in the situation of the parties...".

Counsel further relied on the case of Bank Uganda Ltd vs. Translink Uganda Ltd Supreme Court CA No. 5/2004 where the Court said:

> "it is trite rule of interpretation that in construing the intention of the parties to a deed, the court must discern the intention from the words in the document. It ascertains the intention of the parties as expressed in the document."

Counsel submitted that the main object and intent of the agreement was for advertising at the defenders stadium. The parties intended the plaintiff to be the

only person to use the advertising space and not any other advertiser could be allowed on the property without the consent of the plaintiff. However the defendant in total disregard of the agreement and the plaintiff's rights and obligations allowed other advertisers in the stadium and went on collecting advertising fees which action amounted to a total breach of contract.

Remedies

On remedies counsel referred to John Nagenda vs. Sabena Belgian World Airlines CS No. 1148/1998 where the court held that "damages is compensation in money for the loss of that which he would have received had the contract been performed". In Hadley and another vs. Baxendale and another [1843 – 60] ALL ER 461 it is stated:

> "when two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally; i.e. according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as probable result of breach of it. If special circumstances under which the contract was made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract. Under the special circumstances were wholly unknown to the party breaking the contract he, at the most could only be supposed to have had in contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract".

Counsel prayed for judgment against the defendant in the following terms:

a) Uganda shillings 140,500,000 for loss of income due to illegal advertisements and obscuring of plaintiffs advertising space during the subsistence of the contract.
b) General damages for breach of contract and wrongful termination of the contract by the defendant/landlord.
c) Interest on items (a) and (b) at commercial rate of 30% from the time of the breach till full payment.
d) Costs of the suit.
e) And any other relief that this honourable court may deem fit to grant.

Defendants Written Submissions in Reply

In reply Counsel for the defendant submitted on the first issue of whether the plaintiff is liable to pay rent arrears during the subsistence of the contract and whether the landlord permitted other clients to advertise on the premises without the plaintiffs consent and if so, if this was in breach of the contract.

Counsel submitted that the plaintiff alleges that the defendant permitted other clients to advertise on the premises but this was permitted under clause 7 (a) of the contract. The defendant was permitted to place banners and billboards on a temporary basis for ad hoc functions so long as they were not placed or superimposed on the advertisers existing boards and they do not remain there for a period of more than 36 hours.

DW1's explanation is that the pictures of advertisements presented by the plaintiff in evidence were placed there for one-day functions as permitted by the agreement. Exhibit P6 demonstrates that the pictures were taken when there was an event going on. DW1 testified that the defendant did not bring in any illegal advertisers.

The plaintiff also did not bring any evidence to show which clients took over from the defendant, which ones it solicited from and had contracts with so as to show clearly that the advertisers in the pictures were brought in by the defendant after the signing of the agreement. The Plaintiff simply produced pictures of billboards

which in no way show that they were brought in by the defendant after the agreement had been signed. Some of the billboards shown in the pictures for example P 10 and the 12 were put up by Peacock and Arrow Centre which were advertisers that already had contracts with the defendant by the time of signing the agreement as shown by exhibits D6 and D4, the letters written by the defendant introducing the plaintiff to the existing advertisers.

The letters written by PW1 to the defendant explaining the plaintiffs delay in paying rent (exhibits D15, D16 and D18) are instructive. The reasons given by the plaintiff for the delay in payment were a lack of interest for corporate companies to advertise in the stadium and failure by the existing advertising companies to pay their rentals. Not once did she mention that the defendant was bringing in advertisers contrary to the agreement, a curious omission if this was true and a major frustration in the carrying out the plaintiffs business. DW 1 also testified that Agnes Kamya whom she spoke to regularly never brought to her attention any issue about the defendant bringing in illegal advertisers. The plaintiff only put forward this incredible allegation after the contract was terminated and the defendant demanded for its rent arrears.

The amount of Uganda shillings 140,500,000/= that the plaintiff is claiming is the amount that is reflected in exhibit P5 titled "companies that failed to pay." According to the agreement between the plaintiff and the defendant, it was the duty of the plaintiff to collect rentals from advertisers and then pay rent to the defendant. The letters written by the defendant to the existing advertisers introducing the plaintiff company (in exhibits D1- D14) stated that "all payments correspondences... Applicant, by Revolutionary Ads and Designs Ltd". If the plaintiff failed to collect these payments, that is not the defendant's fault as everything had been done to help the plaintiff to carry out its duties. As the defendants witness, one stated in her testimony, this money that the companies did not pay to the plaintiff was not received by the defendant either and the defendant is therefore not liable for the loss.

Exhibit P2 which the plaintiff argues shows that the defendant was collecting money is only an invoice. It does not show that the defendant received this

money. The receipt that is exhibit P4 does not show the period for which this payment was made and if it was for a period when the contract was running. Without prejudice to these arguments counsel submitted that should the court finds that the defendant received this money, the remedy would be set off against the much bigger sum and the plaintiff owes the defendant as discussed and issue two.

According to section 101 of the evidence act, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. The plaintiff failed to prove that the defendant permitted other clients to advertise on the premises without the plaintiff's consent. Counsel prayed that the court dismisses the plaintiffs claim with costs to the defendant.

Whether the plaintiff is liable to pay rent arrears during the subsistence of the contract

Defendant's Counsel submitted that DW1 testimony was that the plaintiff's duty was to get companies to advertise in the stadium and in turn pay rent to the defendant. The rent payable according to clause 2 of the agreement was Uganda shillings 45,000,000/= a year. It was also agreed that 50% of all money received by the defendant from the existing contracts at the commencement of the contract would be deducted and retained from the contract sum by the plaintiff. DW1 explained that this issue was resolved by giving the plaintiff a reduced invoice and as exhibit D19 showed, the plaintiff paid shillings 33,344,100/= in 2006.

The contract was terminated on 1 December 2008. By this time, out of a sum of shillings 90,000,000/= that the plaintiff should have paid for the years 2007 and 2008, the plaintiff had only paid shillings 7,000,000/=. The plaintiff owed the defendant a sum of Uganda shillings 83,000,000/=.

It was the duty of the plaintiff to collect payments from advertising companies that it solicited or those that already had running contracts with the defendant. It was then supposed to pay rent to the defendant. This rent was to be paid irrespective of whether the business for the plaintiff was good or bad. That is why

the defendant wrote letters which are exhibited as D1 – D14 introducing the plaintiff to the advertisers with whom they would deal for all negotiations and payments. As long as the contract was running, the plaintiff was obliged to pay rent.

According to clause 5 of the agreement, the defendant was not allowed to bring in other advertisers so that the only way it was to benefit from the arrangement with the plaintiff was from the plaintiff honouring its covenant under the same clause to pay the rent reserved. It was therefore up to the plaintiff to ensure that it solicited enough business to enable it to pay the rent.

The plaintiff was also aware of this obligation to pay rent as expressed in Agnes Kamya's letter (exhibit D18) which party states that: "... Revolutionary Ads and Designs Ltd is very much willing and committed to fulfil its financial obligations..." That is why the letter asked for the defendant to review the contract so that the plaintiff could afford the rent even when business was bad because the plaintiff knew that the rent had to be paid when it failed due as long as the contract was still running.

The plaintiff did not produce any evidence to show that it paid any more rent than is reflected in exhibit D19 and did not contest exhibit D 19 or its contents and is therefore liable to pay rent arrears amounting to Uganda shillings 83,000,000/=. The defendant prayed that judgment be entered in its favour for:

a) Uganda shillings 83,000,000/= in rent arrears.
b) Interest at 25% on the rent arrears from the date of filing the suit and till payment in full.
c) Costs of the counterclaim.
d) Any other relief that this honourable court may deem fit to grant.

Rejoinder to Defendants written submissions

In rejoinder to the defendants written submissions the plaintiff's Counsel reiterated its written submissions and in reply to the defendants written submissions wrote as follows:

That it wishes to raise preliminary objections to the effect that the counterclaim offends order seven rule is 2 (2), 7 and 8 of the Civil Procedure Rules. It is the argument that every pleading must be on its face entitled as to the parties. It is the plaintiff's contention that the counterclaim is substantially a cross action.

Under the rules of pleading and authorities cited the plaintiff applied to have the counterclaim struck off. (See **Karshe vs UTC Ltd [1967] EA 256 and Uganda Whokesalers Ltd vs Impex House Ltd [1971] HCB 245**)

Without prejudice to the submission the plaintiff's counsel wrote that the defendant submitted that under clause 7 (a) of the agreement between the plaintiff and the defendant, the defendant was permitted to place banners on a temporary basis for ad hoc functions so long as they are not based or super imposed on the advertiser's existing boards and they do no remain where they are placed for a period of more than 36 hours. The defendant however went ahead and allowed various advertisers to erect illegally and collected rentals from billboards for Michelin, Warid Telecom, Peacock Paints, Michelin Tyres, Arrow Centre and allowed City Tyres to construct a billboard in the stadium as shown in exhibits P7, P8, P9, P 10, P 11 and P 12.

Counsel submitted that furthermore the plaintiff's witnesses testified that the defendant obscured their clients advert which amounts to breach of the agreement.

The defendant submitted that according to clause 5 of the agreement, the defendant was not allowed to bring in other advertisers so the only way was to benefit from the arrangement with the plaintiff was for the plaintiff honouring its covenant under the same clause to pay the rent reserved. It was up to the plaintiff to ensure that it solicited enough business to enable it to pay the rent. However, the defendant frustrated the plaintiff in this by breaching the contract, allowing advertisers and invoicing them and receiving money from them, money which under the contract should have been going to the plaintiff.

The defendant also submitted that exhibit P2 which the plaintiff argues that the defendant was collecting money is only an invoice and that it does not show the

defendant the defendant received the money. Black's Law Dictionary 8th edition defines an invoice as an itemised list of goods or services furnished by a seller to a buyer usually specifying the price and terms of sale.

Exhibit P2 is an invoice number 0141 issued by the defendant to Arrow Centre (U) Ltd on 20 April 2007 during the subsistence of the agreement for 1 40 / 20 feet double sided billboard/space for the period of 1st May 2007 - April 2009 for 8,260,000 only.

The period 1st May 2007 – 7th December 2008 was within the contract period and while the defendant claims that an invoice does not prove receipt of the money, it is proof that the defendant provided services to the `invoice party invoiced and by the invoice is seeking payment for those services. It is proof that the defendant did in fact provide billboard space and so payment for the same which amounts to breach of contract.

Exhibit P3 is for double sided 4x20 feet advert space in the front parking yard along Namirembe Road for a period of two years from first of May 2005 to 30 April 2007 also within the contract period and it is clearly shown on the same that the amount for which the invoice was issued that is 7,312,500/= was paid by cheque number 831 Stanbic 5th May 2005.

The defendant also states that receipt that is exhibit P4 does not show the period for which this payment is made.

The receipt for payment for 3 million shillings received from Adnan Source and Contacts Ltd issued on 4 January 2008 clearly states that the sum of 3 million shillings was paid to Nakivubo War Memorial Stadium being payment for billboard space 7m times 10 meter for the period of 1st January to 31st December.

The agreement for advertising was signed between the plaintiff and the defendant on the seventh day of December 2005 and it was for a period of three years.

Counsel contended that paragraph 5 of D1 – the 14 letters of appointment of the Plaintiff dated 6th January 2006, all payments, correspondences, negotiations and

deals regarding billboard advertising are taken over by Revolutionary Ads and Designs Ltd. This appointment as per paragraph 2 took effect on 1 January 2006.

The invoices and receipts prove that at those times the defendant provided advertising services contrary to the contract and invoiced its private clients for money for those services and did in fact receive sums for services to those clients. According to D1 billboard negotiations and payments were to be taken over by the plaintiff. At this stage counsel begged the question "why was the defendant invoicing receipting companies listed in exhibit P5, as shown in exhibit P2, P3 and P4 if the plaintiff had been appointed to collect the advertising rent?. This is sufficient proof that the defendant did permit other clients to advertise in the premises without the plaintiffs consent. The plaintiff therefore prayed that the court awards damages as prayed for it in its pleadings and the plaintiffs written submissions.

Defendant's rejoinder to Plaintiffs reply to submissions on counterclaim

In rejoinder to the plaintiff's submissions on the counterclaim the written submissions, the defendant reiterated the averments made in its written submissions. In a reply to the plaintiffs objection that the counterclaim offends order 8 rules 2 (2), 7 and 8; the defendant contends that the counterclaim does not contravene those rules. Rule 8 states that the counterclaim must bear a title. In the part of the defence where the defendant states its counter claim, it is clearly titled "Counterclaim". Rule 8 does not prescribe a particular form which the title must take. It is enough that the counterclaim is titled.

Under rule 8, the defendant is also required to name the persons who, if the counterclaim were to be enforced by cross action, would be defendants to the cross action. The defendant's counterclaim clearly states that it is against the plaintiff.

Without prejudice to the above arguments, even if the court were to find that the defendant's counterclaim does not strictly or technically comply with the above-mentioned rules, the plaintiff has not shown that it was prejudiced by this counterclaim. The plaintiff was aware of the defendants claim against it and had

the opportunity to adduce evidence to counter that claim. The defendant avers that article 126 (2) (e) of the constitution which enjoins the court to administer substantive justice without undue regard to technicalities applies here. The defendant prayed that the court overrules the plaintiff's objection.

In reply to the plaintiffs other submissions on the counterclaim, the plaintiff does not deny that it had an obligation to pay rent under the agreement signed with the defendant. The plaintiff also did not show that it paid any more than the amounts shown in exhibit D19. The defendant is therefore entitled to the unpaid rent of Uganda shillings 83,000,000/=

The plaintiff further argues that the defendant frustrated the plaintiff in its efforts to pay rent by bringing in illegal advertisers. However, the defendant reiterates its averments in the written submissions that the plaintiff failed to discharge this burden of proving that the defendant brought in illegal advertisers. The pictures of advertisements presented by the plaintiff which it alleges were illegal advertisements were placed there for one day functions which was permitted by the agreement. The other pictures were of advertisements placed by advertisers who have running contracts with the defendant by the time the plaintiff's agreement with the defendant came into effect. The rest of the pictures do not in any way prove that they were illegal advertisers brought in by the defendant after the commencement of the agreement.

The defendant reiterated its earlier prayers that the plaintiffs claim be dismissed and the defendant be awarded Uganda shillings 83,000,000/= in the rent arrears, interest at 25% on the rent arrears from the date of filing the suit to payment in full, costs of the counterclaim and any other relief as this honourable court may deem fit to grant.

Judgment

I have carefully considered the exhibits on record, the pleadings of the parties and the testimonies of PW1 and DW1. I have also taken into account the written submissions of counsels for both parties set out above. In reply to the defendant's submissions counsel for the plaintiff objected to the counterclaim of the

defendant on the ground it was not properly entitled in that the parties to the counterclaim were not named. In the counterclaim the defendant repeats paragraphs 1 to 12 of the defence. These paragraphs inter alia describe the parties to the action in paragraphs 1 and 2 of the plaint which are admitted in the defence. The description of the parties in the plaint is incorporated in the pleadings in the counterclaim by reference to the defendant and plaintiff accordingly.

On the question of entitlement of the counterclaim the plaintiff argues that Order 8 rule 8 is mandatory and failure to name the defendants to the action in the title of the counterclaim is fatal to the counterclaim. Pleadings serve as notice and failure to name the defendants to the counterclaim in the title of the counterclaim is a procedural irregularity that does not substantially cause injustice or prejudice to the defence in the circumstances of this case. On 15 April 2009 the plaintiff specifically replied to the counterclaim of the defendant. It cannot be said that the defendant to the counterclaim or the plaintiff has suffered any prejudice in the entitlement of the counterclaim. The counterclaim is specifically entitled "Counterclaim". In the premises the objection goes to form and not substance, and under Order 6 rules 17 of the CPR *No technical objection shall be made to any pleading on the ground of an alleged want of form*. The objection is accordingly overruled with no order as to costs.

Exhibit P1 is the agreement dated 7th of December 2005 between the Trustees of Nakivubo War Memorial Stadium and Revolutionary Ads and Design Ltd. The contract provides for advertising sites and spaces which are not limited to those set out in the preamble. Under the contract clause 2 thereof the advertiser is obliged to pay the landlord an annual rent of Uganda shillings 45 million for each year within the initial three-year period. The advertiser is the plaintiff under the agreement. In the first year of the contract and upon execution of the agreement the advertiser was supposed to pay the landlord 50% of the annual rent income. In the subsequent years the advertiser’s mode of payment was 50% on the anniversary date of the execution of the contract by paying 25% within a period of 60 days of the anniversary date and another 25% within a period of 120 days from the anniversary date.

Under clause 3 the agreement notes that the parties understand that there were running advertising contracts in the stadium and it was agreed that 50% of all money received from the existing and running advertising contracts by the landlord at the commencement of the contract would be deducted and retained from the contract sum by the advertiser in the course of remitting payments for the initial period.

Under clause 7 (a) the landlord was entitled to retain 20 adverts spaces/sites in the pitch perimeter and may place banners and billboards on a temporary basis for ad hoc functions of concerts, Galas, boxing tournaments and football matches so long as they are not placed or superimposed on the advertisers existing boards, and provided they do not remain wherever they may be placed for more than 36 hours.

Exhibit D1, a letter dated 6th of January 2006 to the managing director of Casements (A) Ltd indicates that the contract was to take effect on 1 January 2006. This is not contested by the plaintiff. The letter introduces the plaintiff and particularly Mrs Agnes Kamya the managing director of the company as the person who would be handling the billboard business. It ends by concluding "all payments, correspondences, negotiations and deals regarding billboard advertising had taken over by..." (The plaintiff). 14 introduction letters with the same wording were written to 14 business entities which letters were admitted in evidence as exhibits D1 – D14. The letters provide evidence to the world from the defendant that the plaintiff was the sole advertising agent for billboards at the stadium of the defendant. Secondly it proves that all payments, correspondences, negotiations and deals regarding billboard advertising were taken over by the plaintiff. The case of the plaintiff was stated by PW1 Mrs Agnes Kamya whose testimony is summarised below.

The first issue that was agreed upon by both parties in the joint scheduling memorandum signed by both counsel is:

Whether there was a breach of contract and if so by whom? This was broken into two namely: (1) Whether the landlord permitted other clients to advertise on the premises without the plaintiffs consent and if so, if this was in breach of the

contract, (2) Whether the plaintiff is liable to pay rent arrears during the subsistence of the contract and (3) Any other remedies available to the parties. The initial agreed issue is broad enough to cover both the plaintiff's case and the counterclaim of the defendant. This issue shall be answered simultaneously with the question of what the available remedies of the parties are after resolution of the issues.

I have carefully reviewed the evidence on record namely the testimonies of the two witnesses and the exhibits admitted in evidence.

It is an established fact that the contract commenced on 1 January 2006 though it was executed on 7 December 2005. The contract document is entitled "**An Agreement for Advertising at Nakivubo War Memorial Stadium.**" Both witnesses for the plaintiff and for the defendant never clearly defined the nature of the contract between the parties. The plaintiff is named as an advertiser providing advertisements services. Under the agreement the defendant is the landlord while the plaintiff is the advertiser. The expression "Advertiser" is not very explanatory of the true nature of the plaintiffs work under the contract. From the testimony of DW1 the plaintiff was a sole agent of the defendant and its duties are specified by the contract. The landlord who is the defendant is the owner of the premises at Nakivubo and known as the War Memorial Stadium. The primary obligation of the plaintiff was to pay rent of Uganda shillings 45,000,000/= for each year within the initial three-year contract period to the defendant. The mode of payment of the rent is specified by clause 2.

Clause 2 (1) was never implemented in the manner specified. It provides as follows: "For the initial year of the contract, and on execution of this agreement, the advertiser shall pay the landlord 50% of the annual rental sum, and shall thereafter pay 25% within a period of 60 (sixty days) from the date of the first payment and shall finally pay 25% within a period of 120 (one hundred and twenty) days from the date of signing this agreement."

PW1 and DW 1 in the testimonies are in agreement that this clause was never implemented in its terms. What happened is that under clause 3 of the contract it is provided that they were existing and running advertisements contracts in the

stadium in which 50% of all money received by the landlord from the existing and running advertisements contracts at the commencement of the contract were to be deducted and retained from the contract sum by the advertiser in the course of remitting payments for the initial period. No evidence was led as to what amount of money was involved in the existing and running adverts at the commencement of the contract. The clause however presumed that the advertiser was going to collect money from the existing advertisements contracts. The nature of the advertisement contracts has not been indicated. What is material however is that it should be noted that the contract document clearly indicates that the plaintiff under clause 4 (a) contracted to use the premises owned by the landlord for purposes of constructing, erecting, installing and maintenance of advertising billboards, without prejudice to the use of the stadium for the landlords use for sports, games and other functions in its general business. Third parties who wanted to advertise in the stadium would contract with the plaintiff acting on behalf of the defendant to erect their advertisements on the sites managed by the plaintiff. The intention of the parties as clearly discerned from the contract and from the testimonies of both parties was to hand over management of the business of contracting advertising space at the stadium to the plaintiff. This explains clause 3 of the agreement which provides that the plaintiff was to retain 50% of all money received from existing contracts in the stadium in lieu of money received by the Landlord after commencement of the contract. Exhibits D1 to D14 are letters of introduction, introducing the plaintiff to existing clients for advertising space at the stadium.

As far as retaining 50% of all money received from existing contracts in the stadium is concerned, PW1 testified that clause 3 of the contract was never followed. She testified that the defendant had to pay 50% back to the plaintiff for all those adverts already running at the time of execution of the contract but the defendant did not pay but instead offset the money against rent due to it. Rent was 45 million per annum but the plaintiff paid less. Not all existing adverts were taken care of as the defendant shielded some adverts from the plaintiff such as Michelin and Peacock Paints. The director of Peacock was always in touch with the director of the defendant. He stated that he was not supposed to pay and the

issue had never been resolved. What is apparent from the testimony is that the plaintiff did not collect all rent from the existing clients with advertising space at the stadium. This proved to be a major bone of contention between the parties. PW1 testified that it was the defendant who was collecting this rent. Exhibit P2 was introduced by the plaintiff as evidence that the defendant was invoicing clients and receiving payments from them. In a tax invoice dated 20th of April 2007 the defendant addressed the invoice to the Arrow Centre Uganda Limited for a 40' x 20' double sided billboard space for the period first of May 2007 to 30 April 2009 an amount of Uganda shillings 7,000,000/= plus VAT amounting to 8,260,000/=. The plaintiff also introduced exhibit P3, another invoice dated 4th of May 2005 for a total of 7,312,500/= and addressed to Arrow Centre. It is not in dispute that the contract was executed on 7 December 2005 and therefore this invoice is from outside the period of the contract save for the client being included among the existing clients of the defendant. Exhibit P4 is a receipt dated 4th of January 2008 acknowledging receipt of Uganda shillings 3 million from ADNAN SOURCE AND CONTACTS Ltd for the period 1st January to 31st of December. Because the receipt is dated 4th of January 2008, it may be assumed that it is for the period prior to January 2008. It may be logical to assume that this was for the period 2007. Exhibit P4 also has the receipt for Outdoor Advertising Specialist dated 1 April 2009 for the period January 2009 to 31 of December 2009 (for a billboard) amounting to Uganda shillings 1,500,000/=.

Exhibit P5 is a table of existing clients, the type of billboard and the amount expected before the contract award and after the contract award. Against each client is the amount expected in each category before the execution of the contract and after the execution of the contract. The total sum estimated by the plaintiff as the amount lost is Uganda shillings 140,500,000/=.These exhibits were evidence adduced by the plaintiff as proof that the defendant was collecting rent and thus acting in breach of the contract between the parties. The estimates relate to 8 different companies. Six of these companies were companies with respect to which the plaintiff was introduced by the defendant in the letters exhibits D1 to D6. All of the letters were written on 6 January 2006 at the commencement of the contract. The only two companies in respect of which

introduction letters have not been given were Wall Painting and Warid Telecom. Wall Painting advertises CBS radio. For these companies the number of years from which rent was not collected amounted to between 2 to 3 years. The actual calendar years are not indicated in the table exhibit P5 i.e. whether it was between the year 2006 and 2008 or prior years.

DW1 on the other hand testified that out of rent from the existing advertisers the plaintiff was supposed to deduct 50% from it. Rent for the first year was 45 million but it was reduced to 33 million. This is a deduction of 12 million from the 45 million. DW1 testified that the plaintiff first deposited shillings 5 million. In the second year it paid 2 million in October 2007. Thereafter the plaintiff stopped paying and DW1 kept on reminding them. The plaintiff kept on saying that it be given time as it was trying to collect rent but the companies are not paying. The plaintiff finally wrote to say they had failed to collect rent in the letter of 14th June 2008 exhibit D18. That she encountered frustration and there was lack of total interest to advertise in the stadium. Secondly the existing clients refused to pay rent. That out of 14 companies only 6 fulfilled their obligations. The rest either pulled out or refused to fulfil their obligation.

The defendant's witness DW1 blames the plaintiffs marketing manager Mrs Agnes Kamya for failure to collect rent. There is no clear evidence as to whether all rent from existing clients were collected. The defendant blames the plaintiff for not soliciting more clients to advertise at the stadium space. The plaintiff on the other hand blames the defendant for frustrating them from collecting rent and alleges that the defendant had become their major competitor. Further analysis of the relevant exhibits is necessary.

Exhibit D15 is a letter to the Chairperson Nakivubo War Memorial Stadium dated 2 March 2006 by Mrs Agnes Kamya informing the defendant of the delay of the first quarter payment and is in following words:

> "This is to inform you that Revolutionary Ads and Design Ltd may not be able to pay the first quarter of the required contractual rental payment of Nakivubo Stadium due to the financial constraints which were not foreseen. However, the money will be remitted subsequently, within the

> total period given to the company to complete the annual payments. The delay is very much regrettable with all the inconveniences it may have caused."

Under clause 2 (1) the plaintiff was supposed pay 50% of the annual rent on the execution of the agreement. Thereafter the plaintiff was to pay 25% within a period of 60 days from the date of the first payment which is the date of execution of the contract on 7 December 2005. Finally the last instalment was to be paid within 120 days from the date of execution of the agreement. This was to be by April 2006. The defendant's witness testified that the plaintiff first paid 5 million Uganda shillings and then paid shillings 2 million in October 2007. Exhibits exhibit D16 is a letter to the defendant dated 19th of June 2006 signed by Mrs Agnes Kamya for the plaintiff and states inter alia:

> "..., regret is expressed for the delay met....
>
> This was due to a lot of short-term business constraints that were encountered and could not allow us to meet the obligations as in agreement.
>
> Nevertheless, part payment of 8 million Uganda shillings is here in sent...
>
> Again, I would further request to be given the benefit of doubt that by Sep. 2006 Revolution Ads would have completed all the obliged payment to Nakivubo Stadium management."

Payment for the first year was therefore not made in accordance with the contract terms by the plaintiff. Secondly, a sum of shillings 33 million was the total that the plaintiff was supposed to pay for the year 2006 being the first year of the contract. This means that the defendant deducted Uganda shillings 12 million which is presumed to be money had by the defendant from existing tenants which money was not paid to the plaintiff but paid direct to the defendant. There is no evidence that the plaintiff paid 33 million to the defendant for the first year of the contract. Exhibit D16 shows that the plaintiff paid a part payment of Uganda shillings 8 million by cheque number 0270 8471 Centenary Rural Development Bank Ltd. The letter dated 19th of June 2006 is entitled "Payment of

the First Quarter". It is the defendant's document and is deemed admitted that the plaintiff paid 8 million for the first quarter around June 2006. The sum of 8 million Uganda shillings which is an addition of the 5 million and the 2 million testified to by the defendant witness number one must be in addition to this sum and for the period 2007. Further evidence shows that the plaintiff remained in arrears of rent which was to be ascertained. This is exhibit D17.

Exhibit D17, is a letter by the defendant to Revolution Ads and Designs dated May 15, 2007 and is entitled demand note. It is a demand for 17,500,000/=. They write that this money should have been paid by the plaintiff by the 24 May 2007 failure for which management would be left with no alternative but use enforcement measures. The letter also writes:

> "Be also informed that your arrears of 2006 are being compiled and shall be demanded from you as soon as the exercise is completed. (Please ignore this if you are up to date with your payments)".

The plaintiff's response to this letter in exhibit D18 addressed to the defendant on the subject of "Failure to Pay the Obliged Advertising Rentals". The letter gives the plaintiffs reasons for failure to pay rent:

> "Reference is made to your demand note you sent to us on May 2007.
>
> Whereas Revolution Ads and Designs Ltd is very much willing and committed to fulfil its financial obligations to Nakivubo Stadium Management, we have encountered such unforeseeable frustrations while operating in the stadium. Such frustrations have hindered our anticipated revenue earnings and have had adverse economic effects in the company's operations. Such frustrations have not enabled us to pay our obliged rentals to the stadium in the required time.
>
> Among the encountered frustrations, is the lack of total interest for the corporate companies to continue advertising in the stadium. This has been caused by failure of the local soccer to pick its rhythm. The stadium has always been virtually empty during soccer matches.

Secondly, the corporate companies which we found advertising in the stadium, refused or failed to pay their obliged rentals as was anticipated. For instance, out of the 14 companies that were supposed to pay only 6 have fulfilled their obligation. Much more money has been lost with the remaining companies which either pulled out or refused to pay completely.

Consequently, we have found ourselves without any source of income derived from the venture so that, we could effectively get money and pay the management.

On this note therefore, we are requesting the management committee to sit again and review the contract."

As far as breach of the terms of the contract by blocking the plaintiffs adverts by the defendant or permitting other persons to advertise in the sites of the plaintiff is concerned:

PW1 Agnes Kamya the marketing manager of the plaintiff testified that the plaintiff was to be paid for advertisement services and in return pay the defendant rent for the premises. The plaintiff was obliged under the admitted contract to source clients who would place advertisements in the stadium of the defendant.

As far as exhibit P2 dated 20th April 2007 an invoice issued by the defendant to Arrow Centre Uganda Ltd is concerned no payment was made to the plaintiff. Further invoice is exhibit P3 dated 4th May 2005. Exhibit P4 are receipts of money paid to defendant and money was not paid to the plaintiff. The companies which did not pay the plaintiff for adverts were Peacock, Warid Telecom, Arrow Centre, Kakira, Michelin and Uganda Telecom. The plaintiff made a demand on them but they did not pay and the total amount owing from them is Uganda shillings 140,500,000/= which the plaintiff claims against the defendant. PW1 further testified that the defendant's officials were asking them for money and they would now and then receive a phone call for their envelope. Different trustees were sending people for money. The plaintiff lost a lot of money in that they had constructed some structures but never used them.

On cross examination by defendants counsel PW1 agreed that she wrote exhibits D15, D16 and D18. D15 is a letter dated 2nd of March 2006 which writes that the defendants rent was going to be delayed. D18 is a letter dated 14th June 2007 which writes that delay in paying rent was because of lack of total interest of corporate companies to continue advertising. PW1 had not mentioned that the delay was due to the defendant advertising. The letters refers to other frustrations but did not refer to the adverts by the other people not being the plaintiff's clients. She admitted that she did not mention bribery in writing but did so verbally. Exhibit D6 introduces the witness to Managing Director Peacock Paints and also D13 Introduces the witness. In re-examination PW1 with reference to exhibit D18 testified that the companies refused to pay or failed to pay. Ugandan soccer had come down. Corporate companies had pulled out and no money was received from those companies. The plaintiff did not talk to Peacock and the MD of Peacock never paid and completely refused to pay.

For its part the Defendant called one witness Afisa Nabukeera one of the board members of the defendant and chairperson from 2005 – 2009, the period of the contract in issue. On the claim that the defendant brought its own advertisers and frustrated the plaintiff, DW1 testified that the landlord was entitled to retain 20 spaces and put banners for temporary adverts which they remove when the event in the stadium is over. With reference to alleged illegal adverts in the photos exhibit P6 DW1 testified that the adverts were on day events in the stadium by sponsors who were allowed to advertise for their companies. DW1 denied that the defendant was collecting rent from advertisers. As for exhibit P2, a voucher for payment DW1 stated that she doubted whether the money was ever paid. As far as Exhibit P4 is concerned dated 4th January 2008 DW1 testified that the plaintiff had failed to pay rent around 2007. That is why they paid the stadium. As far as exhibit P5 is concerned the defendant never received money from any of these companies and the companies used the plaintiffs inability/the chance provided to stop paying.

On cross – examination by Counsel for the plaintiff, DW 1 agreed that they terminated the contract by writing to the plaintiff. The letter of termination was written on the 1st of December 2008. The plaintiff was supposed to collect rent

from advertisers exclusively. Exhibit P2, a tax invoice/demand note issued by the defendant and dated 20th April 2007 to Arrow Centre, was a demand for rent of shs 8,260,000/=. DW1 insisted that there was no proof that the defendant was ever paid. In any case the defendants saw that there was a lapse in collections and the advertising company was not obliging to pay so the defendant wrote to them. The plaintiff was in breach of contract for not remitting money. 50% of money was supposed to be deducted from money received from running contracts but this was reduced to 33 million. In 2007 the plaintiff paid 7 million out of 45 million in instalments. Thereafter the defendant did not receive money from the plaintiff. The plaintiff wrote exhibit D18 explaining frustrations in collection rent. Even after sending a tax invoice for the plaintiff to pay, the plaintiff never paid. Exhibit P4 a receipt for 3 million was received during the subsistence of the contract by the defendant.

On re-examination DW 1 confirmed that in 2008 the plaintiff did not pay any rent. The last payment of rent was in October 2007.

Analysis of exhibits shows that the exhibit P6 dated 23rd of August 2008 are photos taken when there was an event taking place in the stadium. Secondly, the advertisements of City Tyres and Kobil are temporary flyers advertising the said companies. It is PW1's testimony that the sourcing of clients was disrupted by the Board of Trustees of the defendant rendering the plaintiff unable to work as expected. Time and again the defendants would put adverts during some events, WBS Agabudde, etc. For events carried out in the stadium. The plaintiff complained to the management of the defendant but this fell on deaf ears. On Col Gadafi's last visit to Uganda all billboards were pasted with his adverts. The adverts were put on plaintiffs billboards and people who brought business went direct to the board of the defendant when it was the plaintiff's duty to source for clients/customers. Exhibits were admitted of the adverts complained about. Clause III at page 3 of the contract, the defendant had to pay 50% back to the plaintiff for all those adverts already running at the time of execution of the contract. The defendant did not pay but instead offset the money against rent due to it. Rent was 45 million per annum but the plaintiff paid less. The defendant breached clause 7 paragraph (a) of the agreement by placing banners on bill

boards. Thirdly the Land Lord placed new adverts after the contract was signed. PW1 cited adverts by WARID who were given a right to construct a billboard to advertise, City Tyres constructed its own billboards and Casements Ltd. The plaintiff did not consent to these billboards or adverts and was not paid for them. Michelin was an existing advertiser but no money was ever remitted to the plaintiff. PW1 was told not to ever go to Michelin. Several photos were admitted which photos were taken on the 23rd August 2008. 4 photos in all appear in exhibit P6. The photo of the Warid Bill Board was admitted as exhibit P7. Photo of Oluwombo Lwa Beat and Kumho Tyres were tendered in as exhibit P9. Some adverts were illegal adverts. I.e. peacock paints. It was done in two places at the Pavilion and at the gate. There was also CBS Ekitobeero Agabudde. The photos of Peacock are exhibit P10 and that of Ekitobeero Agabudde exhibit P11. The Photos of Michelin are exhibit P12.

The conclusions that may be reached from a review of the testimonies and exhibits on record are as follows:

- The plaintiff did not comply with clause 2 (1) and (2) of the contract in terms of the period within which to make payments under the contract.
- The defendant compromised the terms of the above clause in that it did not treated it as a breach or repudiation of the contract and reduced the plaintiffs liability from 45,000,000 to 33,000,000/=. The proper inference is that the defendant collected part of the rent from existing tenants.
- The plaintiff experienced difficulties in fulfilling its obligations to pay "advertising rentals".
- The reasons for failure of the plaintiff to pay "advertising rentals" are contained in exhibit D 18 that only 6 out of 14 companies paid 'advertising rentals'. The 14 companies are existing clients of the defendant at the time of execution of the contract and letters of introduction introducing the plaintiff to these companies are exhibits D1 to D14.
- There is no evidence that the plaintiffs sourced additional clients to put adverts under the contract.
- Whether or not the defendant as the principal collected 'advertising rentals' is a matter of accountability between the two parties. The

defendant was the principal and the plaintiff was the agent as written in the introduction letters of the plaintiff. What is material is whether the money collected was applied according to the formula stipulated in the contract. No evidence has been adduced that the formula provided for under the contract had been or had not been complied with.

- Clause 3 of the contract seems to have introduced some confusion as to the proper intention of the parties. It requires the plaintiff to retain 50% of all money received by the landlord from the existing and running advertising contracts. The explicit intention of the parties was for the plaintiff to retain some money which is calculated from money received by the landlord after the commencement of the contract. As to how much money was received by the landlord after the commencement of the contract has not been explained or led in evidence. What is material however is that the plaintiff was not supposed to pay 50% of any amount of money received by the landlord from the contract sum stipulated in the contract? The only contract sum indicated in the contract is a sum of 45 million Uganda shillings per annum. To illustrate this point, if the landlord had received 7 million Uganda shillings from existing contracts after the commencement of the contract between the parties, the plaintiff would retain 3.5 million out of the money it was obliged to pay to the defendant. This was supposed to be done by the plaintiff in the course of remitting payments for the "initial period".
- Clauses 4 and 5 explicitly make it clear that the obligation of the plaintiff was to pay rent annually of Uganda shillings 45,000,000 to the landlord. This supposes that the plaintiff would retain any money received from any advertisers who use the services of constructing, erecting, installing and maintaining of advertising billboards provided by the plaintiff. This arrangement only affected the initial period. I tried to establish what was meant by the words 'initial period'.
- Clause 1 of the contract refers to a period of three years and uses the word "expiry of the initial period". The initial period referred to therein is the three-year period or duration of the contract. Secondly clause 3 (3) of the

agreement of the parties provides that the contract shall be subject to review after the "initial period of three years".

- From an overview of the entire contract executed by the parties on 7 December 2005, the defendant was not barred from collecting rent or receiving rent from existing contracts during the subsistence of the initial contract period of three years. Clause 3 assumed that the defendant may receive money from existing contracts. It only defines the period affected by the clause. It does not mean that the clause applies to money already received by the defendant at the commencement of the contract. Consequently it can safely be concluded that any money received by the defendant after the commencement of the contract was not expressly barred by the contract. What remains was for the parties to account between themselves to ensure that the contract was fulfilled according to the true intent of the parties. Both parties had a stake in ensuring that money is collected. The evidence led on the collections by the defendant if any show that it was negligible and offset was made reducing the plaintiffs liability to 33,000,000/= for the year 2006.
- There is no proof on record that the defendant collected a sum of 140,500,000/= from existing tenants or any new tenants or companies that wished to advertise on the premises of the defendant.
- I agree with the defendant's submission that the flyers Exhibit P6 were authorised by clause 7 (a) of exhibit P1, the agreement between the parties. The clause provides that the landlord shall retain 20 adverts spaces/sites in the pitch perimeter and may place banners and billboards on a temporary basis for ad hoc functions for concerts, Galas, boxing tournaments and football matches so long as they are not placed or superimposed on the advertisers existing boards, and provided they do not remain whenever they are placed for a period of more than 36 hours. There are two cases scenarios. The first case scenario is that the defendant retained 20 adverts spaces. These 20 adverts spaces were at the pitch perimeter. The retention of these 20 adverts spaces is to be read together with the sites and spaces that are defined in the preamble to the

agreement. There are 30 spaces at the Pitch Perimeter. The defendant retained 20 of them. The sizes were 3 1/2x24 feet.

In conclusion, the overall picture is that the plaintiff failed to fulfil its obligation of collecting rent from existing clients and prospective clients which obligation was placed on it under contract. The plaintiff was armed with letters of introduction from the defendant at the commencement of the contract. It has not been established from the evidence which methodologies the plaintiff adopted to fulfil its obligations to collect monies it was obliged to collect from companies wishing to advertise at the defendant's premises. Despite not having a strict adherence to the contract terms both parties continued having a relationship in the year 2006 and the best part of 2007. During this period, either the plaintiff or the defendant could have repudiated the contract. The defendant could have repudiated the contract for failure of the plaintiff to pay rent but did not do so. The plaintiff on the other hand could have complained to the defendant about any of its officers blocking it from receiving rent. I need to emphasise that the defendant is a Corporation capable of suing and being sued. This is pleaded in paragraph 2 of the plaint. It was incumbent upon the plaintiff to prove that some of the officers of the defendant acting in the course of their employment with the defendant blocked, frustrated, or sought bribes from the plaintiff. In the absence of showing that they were acting in the course of their employment, and establishing exactly what they did, the plaintiffs witness was timid and failed to establish any fact by which it can be said that the defendant which is a Corporation Sole was vicariously liable or bound in contractual terms by acts of its servants. The last letter of the plaintiff exhibited D18 which is addressed to the Corporation Sole namely the defendant, clearly absolves the defendant of wrongdoing or frustrating the contract.

There is no evidence that the plaintiff tried to use legal process to secure rent which was due and owing under existing contracts from companies which had refused to pay. There is no evidence whatsoever about how much the defendant may have collected from existing contracts of companies which advertised on the defendant's premises for purposes of applying clause 3 of the contract between the parties, exhibit P1. The letter of the plaintiff dated 14th of June 2007 exhibit D

18 clearly and unequivocally shows that the plaintiff had failed to meet its obligations under the contract and was seeking a review of the terms of the contract. Most importantly, the plaintiff failed to pay rent, a fundamental term of the contract. The payment of rent was not predicated on the collection of money from companies advertising at the stadium. The tone of the plaintiff's testimony and letters suggested that this was the case.

In the premises I am satisfied that the defendant handed over the management of its advertising space to the plaintiff. The defendant went ahead and wrote letters introducing the plaintiff to existing companies and the contract permitted the plaintiff to source for new clients. The plaintiff was unable to fulfil its obligations and instead pleaded frustration of the contract due to the slow pace of business and companies not wanting to advertise. The plaintiff did not accuse the defendant of any breach but attributed the failure to some other factors causing it failure to meet its obligations to pay rent. The plaintiff claimed some "unforeseeable frustrations", "lack of total interests from corporate companies to continue advertising in the stadium", "refusal or failure to pay the obliged rentals as was anticipated" of existing companies at the time of the commencement of the contract. The principle stated in the case of **Clough vs. London & Northern Western Railway Ltd 1871 LR 7 Exch 26, (1861 - 73) ALL ER Rep 646 at 652** and quoted in **Peyman vs. Lanjani and Others [1984] 3 ALL ER 703 at 727** is that where a man has a right of recession he has to choose either to rescind or accept the contract and having full knowledge of facts, he either by express words or by unequivocal acts affirms the contract, his election has been determined forever. There was some acquiescence by the parties on the failure to follow the strict terms of the contract. The term acquiescence is defined by Halsbury's Laws of England, 3rd Edition, and Volume 14 page 638:

> "It is acquiescence in such circumstances that assent may reasonably be inferred, and it is an instance of Estoppels by words or conduct. Consequently, if the whole circumstances are proper for raising these Estoppels, the party acquiescing cannot afterwards complain of the violation of his rights. For this purpose the lapse of time is of no

importance, he is immediately estopped by his conduct and the effect of acquiescence is expressly preserved by the Limitation Act.".

Under the Evidence Act Cap 6 section 113 it is stated that when a person by his declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and act upon such believe, neither him or his representative shall be allowed in any suit or proceedings between him and such person or his representative to deny the truth of that fact/thing.

In the case of Dr. Margaret Basaza versus the Attorney General Civil Suit No. 185 of 1997. The plaintiff brought an action against the defendant to recover arrears of rent arising from occupation of her house by the defendant's agent. During the subsistence of the tenancy the plaintiff was made to believe that payment of rent was made on behalf of the defendants. It was held by Justice Tabaro that the defendant is estopped from denying the existence of the valid contract and liability since for more than one year the plaintiff had been made to believe through the payment of rent and occupation of her premises that there was a valid contract and liability by the defendants to pay for the occupied premises.

I am satisfied that the defendant condoned the delay by the plaintiff to pay rent after expiry of the periods stipulated in the contract. Similarly the plaintiff did not complain about any individuals who could have frustrated its efforts by seeking to benefit personally. After exhibit D18 the situation changed and instead of reviewing the contract between the parties, the defendant terminated the contract on 1 December 2008. Something must be said about this date. From the 1st of January 2006 to the 1st of December 2008 is approximately a period of 3 years. The plaintiff was only left with one month to the expiry of the contract for the initial period of three years. Clause 1 clearly provided that the contract between the parties shall be for a period of three years with an option to the advertiser to renew for a further two years period which option shall be exercised in writing by the advertiser three months prior to the expiry of the initial period. No evidence was produced to establish that the plaintiff wrote this letter for renewal of the contract.

In the premises the plaintiff has not established its case against the defendant and the plaintiff's suit is dismissed with costs.

As far as the counterclaim is concerned, the defendant has established that the plaintiff had failed to pay rent. The defendant claims 83,000,000/= Uganda shillings. DW1 did not establish clearly how this money arose. Rent for a period of three years amounts to Uganda shillings 135,000,000/=. After reviewing all the evidence on record it cannot be said that the plaintiff did not pay rent for the initial period of one year. As far as the year 2007 is concerned, the defendant admits that they plaintiff had paid the sum of shillings 7,000,000/= hence the claim of Uganda shillings 83,000,000/=.

I have taken into account the fact that the plaintiff admitted that it failed to make money from the defendant's premises. The defendant however had absolved its self of that management role and placed the burden on the plaintiff in return for the receipt of rent per annum. It was upon the plaintiff to do everything possible including filing actions for recovery of advertisements money from the companies which had advertised on the premises. It was also incumbent upon the plaintiff to source for new clients to advertise on the premises in the face of clients who had refused to pay. The defendant had not relieved the plaintiff of its obligations to do this. In the premises, the defendant is entitled to the sum of Uganda shillings 83,000,000/= in rent arrears.

The defendant is awarded interest at 14% on the rent arrears from the date of filing the suit until the time of the judgment. Additionally the defendant is awarded interest on the decreed sums at 8% per annum from the date of the judgment till payment in full. Each party shall bear its own costs of the counterclaim.

Judgment delivered in open court this 2nd of March 2012.

Hon. Mr. Justice Christopher Madrama

Judgment delivered in the presence of:

Habomugisha Innocent for the plaintiff

Pearl Nyakabwa for defendant,

Parties not represented.

Ojambo Makoha Court Clerk

Hon. Mr. Justice Christopher Madrama

2nd of March 2012