

**THE REPUBLIC OF UGANDA**  
THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL DIVISION

HCT - 00 - CC - CS - 96 - 2011

GAGAWALA NURSERY BED ..... PLAINTIFF

VERSUS

BUSINGYE PROPERTIES LTD ..... DEFENDANT

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

**J u d g m e n t**

The plaintiff a Community Based Organisation (CBO) filed this suit against the defendant company for breach of contract and the recovery of Ushs. 60,900,000/=.

The facts constituting the plaintiff's cause of action are that on 4<sup>th</sup> October 2010, it entered into a sale or purchase agreement with the defendant to supply them with seedling species worth Ushs. 77,460,000/=. The agreement provided that payment would be made as follows; 10% as down payment of the contract sum, thereafter 40% payment would be made after delivery and 50% payment would be made two months after completion of delivery. Delivery was to be done in October 2010.

The plaintiff avers that it fulfilled its part of the agreement by delivering the seedlings, but the defendant has only paid Ushs. 16,560,000/= under the contract. The plaintiff further avers that in November 2010, it demanded for the balance and the defendant drew up three cheques of Crane Bank; Cheque No. 000830 dated 29<sup>th</sup> November 2010 for Ushs. 20,000,000/=: Cheque no. 000844 dated 15<sup>th</sup> March 2011 for Ushs. 20,000,000/= and Cheques No. 000845 dated 15<sup>th</sup> March 2011 for Ushs. 17,000,000/=: all amounting to Ushs. 75,000,000/=. The plaintiff avers that upon presentation of the above cheques, were all dishonoured.

The plaintiff further avers that the defendant has despite several reminders refused to pay the outstanding amount. The plaintiff then sued the defendant seeking payment of the balance of the money plus contractual penalty of 50% on the unpaid invoices. The plaintiff avers that the defendant breached the contract thereby causing loss and damage to the plaintiff.

The defendant denied the allegations in the plaint and contended that the plaintiff has no cause of action against it. The defendant further contended that no agreement was entered into on the terms alleged by the plaintiff. Furthermore, that the parties had agreed to "the manner of presentation of the cheques, but this was not followed by the plaintiff".

At the hearing of the suit, the plaintiff was represented by Mr. Mulumba, while the defendant was represented by Mr. Kalemera.

### Pre-trial/Scheduling Conference

During the pre-trial it transpired that criminal proceedings in respect of this dispute had been preferred against one Mr. Arthur Busingye a Director of the defendant company. Following this the parties hereto entered into a Memorandum of Understanding dated 23<sup>rd</sup> June 2011(a copy is on Court record) whereby Mr. Busingye undertook to pay the outstanding balance of Shs. 60,900,000/= to the plaintiffs. Issues relating to additional sums for damages penalties and costs were to be the subject of further discussions or reference to trial.

The mediation report presented to the court dated 15<sup>th</sup> July 2011 showed that the principal sum had been paid; hence the remaining issues for trial were general damages, penalty, interest and costs. This position was also confirmed by counsels for the plaintiff.

What then remained for trial was the issue of damages, penalty and costs. It was then ordered that the parties file submissions on these remaining issues latest by 7<sup>th</sup> July 2012.

It is however only the plaintiff who adhered to the schedule for filing submissions. The defendant did not comply with the schedule for filing written submissions, and has not filed any to date.

*O.17 r 4 of the Civil Procedure Rules S. I 71-1 provides that,*

*“Court may proceed notwithstanding either party fails to produce evidence.*

*Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.”(Emphasis mine)*

The defendant did not file submissions and therefore, failed to take a necessary step for the further progress of the suit. The court shall therefore proceed under O. 17 r 4 of the CPR to make its judgment without the defendant’s submissions.

In its written submissions, the plaintiff raised the following issues for determination by the court.

1. Whether there was breach of contract by the defendant
2. Whether the plaintiff is entitled to the remedies sought.

### **Issue one: Whether there was breach of contract by the defendant.**

Counsel for the plaintiff submitted that according to the supply agreement dated 2<sup>nd</sup> October 2010, it was agreed that the defendant would pay to the plaintiff 40% of the purchase price upon delivery, and 50% two months after delivery of the seedlings. The defendant paid Ushs. 16,560,000/=, leaving a balance of Ushs. 60,900,000/=. Instead the defendant draw up a number

of cheques amounting to Ushs. 57,000,000/= but the said cheques were dishonoured on presentation to Crane Bank.

Furthermore, that the defendant never paid any monies until this suit was filed on 23<sup>rd</sup> March 2011. Counsel for the plaintiff submitted that breach of contract occurs when one or both parties fail to fulfil their obligations under the contract. He referred to the authorities of **NAKANA TRADING Co. LTD V COFFEE MARKETING BOARD** (1994) 2 KALR 15, **JB UNITED CIVIL ENGINEERING AND BUILDING CONTRACTORS V LIRA MUNICIPAL COUNCIL** (HCCS No. 35 of 2007) and BLACK'S LAW DICTIONARY 7<sup>th</sup> Edition at 182 for this submission. Counsel for the plaintiff further submitted that when the defendant failed or refused to pay the sum of Ushs. 60,900,000/=

after delivery of the seedlings in accordance with the contract, the defendant was in breach of contract.

I have carefully considered the pleadings of both parties and the submissions of Counsel for the plaintiff, and I find as follows;

I have perused the contract between the parties, marked Annexure A to the plaint. The contract provided as follows;

*“Initial instalments 10%, 40% after delivery & 50% after two months from completion of delivery.”*

The terms of payment under the agreement were clear. Although the defendant denied the plaintiff's claim in its written statement of defence, the memorandum of understanding executed by the parties, dated 23<sup>rd</sup> June 2011, which is on court record and is signed by the defendant's Managing Director Mr. Arthur Busingye shows that when criminal proceedings were instituted by the plaintiff against the defendant for the claim in this suit and the defendant agreed to pay the sum. Indeed the sum was subsequently paid.

According to BLACK'S LAW DICTIONARY 7<sup>th</sup> Ed. By Bryan A Garner at pg 182, the term breach of contract is defined as,

*“Violation of a contractual obligation, either by failing to perform one's own promise or by interfering with another party's performance.”*

Quoting RESTATEMENT (SECOND) OF CONTRACTS Par. 236 cmt.a (1981) the author of Black's law Dictionary further notes that,

*“A breach may be one by non performance, or by repudiation, or by both. Every breach gives rise to a claim for damages, and may give rise to the other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages. If a court chooses to ignore a trifling departure, there is no breach and no claim arises.”*

It therefore clearly evident and I so find that the defendant, having failed to make payment as provided under the contract, breached the contract by non performance of its part of the contract.

**Issue two: Whether the plaintiff is entitled to the remedies.**

Having found for the plaintiff in issue one above, the plaintiff is entitled to the sum of Ushs. 60,900,000/=: This sum, being the principal was paid after the plaintiff commenced criminal proceedings against the defendant as stated in the mediator's report. That being the case the claim for special damages is overtaken by events and I make no further order in that respect.

The contract provided for penalty as follows,

***“Failure to deliver: A penalty of 50% will be imposed on the unpaid invoices.”***

I have already found that the defendant breached the contract. It was clearly a term of the contract that a penalty of 50% would accrue on unpaid invoices.

What is not clear however is how the 50% would be determined i.e. of the invoice amount; per annum or per month? Such penalty would in business normally be referred to as penalty interest. Counsel for the plaintiff has calculated this to amount to Ushs. 30,450,000/=. This would amount to 50% on the invoice amount. This provision was unclear. Even then a penalty of 50% on the invoice amount, if this was the intention of the parties, to my mind would be harsh and unconscionable and ought not to be enforced in a legal process (see Section 26 Civil Procedure Act). I would instead grant penalty interest of 5% on the unpaid invoice which would amount to Ushs. 3,045,000/=.

The plaintiff also prayed for general damages but counsel for the plaintiff did not address Court as to the quantum to be awarded. Since breach of contract has been established I will award the plaintiff general damages of Shs 3,000,000/=.

I also award the plaintiff interest at 21%p.a. on the penalty from the date of filing the suit until payment in full and 8%p.a. on general damages from the date of Judgment until payment in full.

I also award the plaintiff the costs of this suit.

.....

Geoffrey Kiryabwire

**JUDGE**

Date: 20/12/2012

20/12/12

9:56

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

- Kyenjo h/b P. Karemera for Defendant

**In Court**

- None of the parties

- Rose Emeru – Court Clerk

.....

**Geoffrey Kiryabwire**

**JUDGE**

**Date: 20/12/2012**