THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA
COMMERCIAL DIVISON

HCT - 00 - CC - CS - 294 - 2009

KAWAMARA SAM ……. PLAINTIFF

VERSUS

RICHARD JJUKO …… DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The plaintiff brought this suit against the defendant for the recovery of Shs 75,000,000/= arising out of an alleged breach of contract.

The brief facts of the case are that the Defendant engaged the plaintiff as his agent to pursue his claim of Shs. 216,000,000 (hereinafter referred to as "the claim") against the Government of Uganda awarded to him as compensation in High Court Civil Suit No 26 of 2007 **Richard Juuko V Attorney General** (herein after referred to as "the case") at a fee of Shs.45,000,000. This was recorded in writing in a letter of Undertaking (hereinafter referred to as "LOU") dated 25th October 2006. The defendant subsequently was paid his claim of Shs. 216,000,000/= by the Government of Uganda. The plaintiff further avers that before the said payment was made by The Government of Uganda to the defendant the plaintiff at the defendant's request lent him Shs. 30,000,000/= for the defendant's personal use and upkeep. The defendant then issued the plaintiff a Tropical Bank post dated cheque dated 1st July 2009 worth a total sum of Shs. 75,000,000/= as security. The plaintiff further avers that he pursued the payment of the claim to its logical conclusion.

The plaintiff further avers that in breach of his undertaking the defendant never paid the said fee and even the cheque held as security when presented for payment was dishonored.

In his defence the defendant avers in his Written Statement of Defence stated that the plaintiff failed to pursue the said claim with Government as a result of which the defendant instructed his lawyers to do so and hence the plaintiff is not entitled to a fee for total failure of consideration. The defendant also denies a loan to him of Shs. 30,000,000/= and avers that the post dated cheque was a forgery.

The issues raised for trial were;

1. Whether there was a breach of the contract?
2. Who is liable for the breach?
3. What are the remedies available to the parties?

At trial, the plaintiff was represented by Mr. Niwagaba. The defendant and his lawyers did not attend the hearing which proceeded ex parte. The plaintiff called two witnesses himself (PW1) and Mr. Robert Asaba (a businessman and witness to the LOU)

The case for the plaintiff is that he offered to prosecute the case both financially and physically and a LOU was drawn up and signed by both parties together with two other witnesses Mr. Asaba Patrick and Mr. Obed Mwebesa an Advocate. The fee to be paid by the defendant for the services of the plaintiff in the LOU was Shs. 45,000,000/=. It is also the case for the plaintiff that other sums totaling up to Shs. 30,000,000/= were allegedly disbursed to the defendant for his welfare as he awaited for his claim to be settled which brought the figure to Shs 75,000,000/= hence the value of the post dated cheques.

The plaintiff testified that he engaged lawyers on behalf of the defendant who successfully pursued the defendant's case in Court and further went on to pursue the payment of claim when awarded by Court with the Ministry of Justice and Constitutional Affairs. It was therefore submitted that whereas the plaintiff fulfilled his end of the bargain the defendant did not which constituted a breach of contract.

The defendant did not testify at trial and thus Court only can rely on his pleadings in his written Statement of Defence and prayed for the plaintiff's suit against him to be dismissed.

I have considered the evidence before Court; the submissions of counsel for the plaintiff and the pleadings of the parties.

The testimony by the plaintiff is uncontroverted and therefore is the evidence that Court must rely on. This suit and the evidence before Court raises something more basic about the nature of this contract which is a hurdle that must first be overcome.

In his book **The Law of Contract in East Africa** Kenya Literature Bureau (at p.19) R. W. Hodgin writes

> *"…A contract is formed by an offer by one person that is then accepted by another. Both parties must have the legal capacity to make such a contract. Both parties must intend that their behavior shall result in a legal contract."*

The above text in other words states that for there to be formed a contract there should be in existence a meeting of the minds, made with free consent and with a lawful object.

The law may refuse to give full effect to a contract on the ground of the illegality that is because the contract involves the commission of a legal wrong or is in some other way contrary to public policy. Certain contracts are considered to be harmful to society and against the common good and public interest which makes them unenforceable. According to the legal text **Chitty on Contracts** (Vol. 1 p.836), illegality can arise either from statute or the common law and where the latter is involved the courts are faced squarely with the issue of whether public policy requires that a contract should not be enforced for illegality. Chitty (Supra) discusses the scope of public policy which are generally classified into 5 groups.
First, those that are illegal by common law or by legislation, secondly objects injurious to good government either in the field of domestic or foreign affairs, thirdly objects which interfere with the proper working of the machinery of justice, fourthly objects injurious to marriage and morality and fifthly objects economically against the public interest.

In the book **"Tritel on The Law of Contract"** (12th Ed Thomson Sweet & Maxwell) champerty agreements are discussed and classification as illegal contracts. Champerty according to the author is a contract by which one person agrees to finance another's litigation in return for a share in the proceeds, the former having no genuine or substantial interest in the outcome.

In the dictionary **'Words and Phrases Legally Defined'** (at p.239) champerty is defined as a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.

In England since 1967 both criminal and tortuous liability for maintenance and champerty have been abolished by the Criminal Law Act 1967 but the abolition of these forms of liability does not affect any rule of law as to the cases in which a contract involving maintenance or champerty is to be treated as contrary to public policy or otherwise illegal.

That being the case the general rule at common law remains that such contracts are illegal.

In the instant case, I find that the nature of the contract entered into by the parties is well within the meaning of a champerty contract whose object at common law is contrary to public policy and hence is illegal.

The plaintiff does not deny that the LOU was designed by parties such that the defendant would obtain benefit from pursuing the claim of the plaintiff in Court. That is what the LOU actually provides for. It reads in part

> *"…I Richard Juuko…engaged Mr. Sam Busiinge Kawamara …to act on my behalf in all matters related to my case Vide Richard Juuko Vs The Attorney General where I am seeking compensation from the Ministry of Agriculture Animal Industry and Fisheries… of Shs 216,000,000/=…Mr. Kawamara will be paid a total of …Shs 45,000,000 on completion of this engagement…"*

In recent times the English Court of Appeal in the case of **Jennifer Simpson V Norfolk & Norwich University Hospital NHS Trust** [2011] EWCA Civ 1149 has also dealt with these types of contracts.

In that case the court followed the House of Lords decision in ***Trendtex Trading Corp V Credit Suisse (1982) AC 679 HL*** which established that the assignment of a cause of action will be void as against public policy where the assignee does not have a "sufficient interest" to justify pursuit of the proceedings for his own benefit. The Court further held that principle applies whether the assignee is aiming to profit from the litigation or wishes to pursue the litigation as part of a personal campaign, however honourably motivated.

In a more recent decision of this Court Lady Justice Irene Mulyagonja in the case of **Shell (U) Ltd 9 Others V Rock Petroleum & 2 Ors** Misc. App No. 645 of 2010 held that champertous agreements and maintenance is known among lay persons as buying into another's lawsuit and also means sharing in the spoils of litigation. She further held that champerty is an aggravated form of maintenance. Lady Justice Mulyagonja in the Shell Uganda Ltd case (supra) made reference to a decision of Lord Denning in *Re Trepca Mines Ltd* and held that the reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. He

added that such fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and where it is prohibited, we cannot do otherwise than enforce the law. She therefore held this practice to be unlawful.

In relation to the facts before this court, it can not be said that the plaintiff had a bonafide interest in the litigation involving the plaintiff. To my also such an agreement as in the LOU offends public policy as totally lacking in transparency. If such contracts were not prohibited, poor litigants and the cause of justice stand to lose. In this case the burden of Shs. 75,000,000/= placed on the defendant is too onerous.

In the case of **Makula International** V **Cardinal Nsubuga** [1982] HCB 11 it was held that Court cannot sanction that which is illegal and illegality once brought to the attention of court cannot and this overrides all questions of pleadings including any admission made there on.

I accordingly find that the claim by the plaintiff to a fee consideration of Shs 45,000,000/= must fail as illegal under the law.

As to the claim for Shs. 30,000,000/= as welfare up keep given to the defendant by the plaintiff, the only evidence on this is the difference between the figure of Shs. 45,000,000/= in the LOU and Shs. 75,000,000/= in the post dated cheque. To my mind I do not see why the plaintiff would make the defendant sign for one amount and not the other. I find that this claim is a special damage which under the law has to be strictly proved. I find that the post dated cheque without more is not sufficient proof for this court to make an award of special damages of Shs. 30,000,000/=.

Furthermore Bakibinga in his **book Law of Contract in Uganda** writes that illegality generally renders a contract void. This is a principle upon which a contract may be impeached. The principle was set down by Lord Mansfield in the case *of* ***Holman*** *V* ***Johnson*** (1775) 1 Cowp.341, 343 as being ***'ex dolo malo non oritur actio' i****.e no court will lend its aid to a man who finds his cause of action upon an immoral or illegal act.*

Similarly in the case of ***Euro-Diam Ltd V Bathurst*** [1990] Q.B 1 Lord Kerr L.J held that the "**ex turpi causa"** defence rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal conduct which the courts should take notice of.

These further authorities fortify me holding that the claim for Shs. 30,000,000/= is equally not payable

Those being my findings this suit is hereby dismissed. As the defendant and his Counsel did not appear in Court I make no order as to costs against the plaintiff.

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Justice Geoffrey Kiryabwire
JUDGE

Date: **13/07/12**

13/07/12
10:50

Judgment read and signed in open court in the presence of;

- R. Nsubuga h/b Nuwagaba G. for the Plaintiff

In court

- No parties in court
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 13/07/12