

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

**HCT - 00 - CC - CS - 215 - 2008**

**LIBERTY CONSTRUCTION CO. LTD. .... PLAINTIFF**

**VERSUS**

**LAMBA ENTERPRISES LTD. .... DEFENDANT**

**BEFORE: THE HON JUSTICE GEOFFREY KIRYABWIRE**

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

This suit arises out of a counter claim by M/s Lamba Enterprises Ltd. (hereinafter referred to as “Lamba”) against the Counter defendant M/s Liberty Construction Ltd (hereinafter called “Liberty”) for declarations that the memorandum of understanding dated 22<sup>nd</sup> August, 2008 (hereinafter referred to as “the MOU”) entered into between Lamba and Liberty is binding and enforceable in law.

Liberty also seeks a declaration that Lamba is entitled to specific performance of the MOU as it has been partially performed and a specific order for the payment of Ushs. 400,000,000/= as due and owing under the MOU.

The facts of this case are that by two agreements dated 26<sup>th</sup> and 27<sup>th</sup> of April 2008, Liberty sub-contracted Lamba to complete construction of four fish landing sites, including sites in Butiaba, Bulisa; Kiyindi, Mukono; Bukungu, Kamuli; and Lwampanga, Nakasongola, as well as the rehabilitation of Bushenyi Aquaculture Research and Development Center.

The contract sums for the two contracts were Ushs. 4,700,000,000/= and Ushs. 900,000,000/= respectively.

Due to an increase in operation costs because of a fuel shortage brought about by the Kenyan 2008 post election violence, Lamba requested a revision of the terms of the contracts on 14 July 2008 from Ushs. 4,700,000,000/= to Ushs. 7,581,162,021.98 for the fish landing sites, and from Ushs. 900,000,000/= to Ushs. 1,844,638,228/= for the rehabilitation of the Research and Development Center. Liberty rejected the proposition for contract modification.

Thereafter liberty terminated the contracts and demanded vacant possession of the sites. Lamba however asked to be paid for the work so far done and a dispute ensued as to the amount payable.

Liberty then filed the head suit and Lamba the present counter claim. The head suit was dismissed leaving the present counter claim to be resolved through trial.

The parties however went through a series of private mediations involving M/s MBW Consult where the parties agreed to carry out joint measurements to establish the actual amount of work carried out by Lamba.

Two memoranda was then signed between the parties both dated 22<sup>nd</sup> August 2008 whereby Liberty agreed to pay Lamba the sum of Ushs. 500,000,000/= for four fishing sites and Ug shs 276,640,728/= for Bushenyi.

Liberty paid Ushs. 100,000,000/= out of the Ushs. 500,000,000/= agreed in the first memorandum and Lamba released all the sites. Thereafter Liberty refused to pay any further sums on the grounds that the two memoranda had been signed under economic duress and therefore were invalid.

The parties agreed to the following issues for trial

- 1. Whether the memorandum of understanding was entered into under undue influence and or economic duress?**
- 2. If not, how much if any does Lamba claim from the counter defendant under the memorandum of understanding?**
- 3. If entered into under duress how much does Lamba claim from the counter defendants?**

The counterclaimants were represented by Mr. A Katongole and Mr. A Bemanyisa while the counter defendants were represented by Mr. B. Tusasirwe. The counterclaimant called two witnesses Mr. Christopher Obey (PW1) the Managing Director and Mr. Richard Odong (PW2) an Operations Manager; while the counter defendant called one witness Mr. E. Mabiwo (DW1) the Managing Director.

- 1. Whether the memorandum of understanding was entered into under undue influence and or economic duress?**

The case for Lamba is that while it was executing its obligations under the two agreements, the costs of operation significantly increased leading it to demand for cost reviews that the counter defendant subsequently rejected. Liberty however unilaterally terminated the contracts and demanded that Lamba vacate the construction sites. In response to its terminated contracts, Lamba requested payment previously agreed upon, for work completed plus value of materials. It is also the case for Lamba that the two parties to come to an amicable settlement so there was absolutely no alleged undue influence.

Counsel for Lamba submitted that the Memorandum of Understanding is a document expressing mutual assent between two parties and must be recognized as binding. He further submitted that undue influence may be rebutted by showing that a transaction was entered into in good faith, upon independent advice. In this regard I was referred to the case of **Allcard V Skinner (1887) 36 ch.D page 145**. Counsel for Lamba submitted that the events leading up to the signing of the MOU dispel any negative influence on it. He pointed out that Liberty began negotiations for the MOU in a letter dated 16 August 2008, stating;

***“We are ready to recognize mediation efforts . . . we shall pay you UGX 200,000,000 in 30 days time subject to immediate vacation of the sites . . . .”***

This letter was copied to their previous mediator in the dispute Mr. Eria Kalenge of MBW Consulting Engineers and Liberty’s lawyers. Furthermore as Liberty had previously worked with the mediator, Mr. Eria Kalenge, on previous cases, the mediator in no way was an intermeddler or stranger and was not forced upon Liberty as the mediator.

Counsel for Lamba submitted that Liberty freely signed and sealed the Memorandum of Understanding without protest, as witnessed by Dr. Daniel Kaitaita and the appointed mediator Eria Kalenge. Furthermore Liberty took all benefit of the agreement, including regaining possession of the sites. He further submitted that Liberty had originally intended to pay UGX 200,000,000 in order for Lamba to vacate the sites in the letter dated 16 August 2008, but ultimately only paid Lamba UGX 100,000,000 as an initial deposit. This shows that Liberty was in control of the agreement.

Counsel for Lamba referred me to the Kenyan Court of Appeal decision in **Kenya Comm. Bank Ltd. & 2 others V Madhu Papers and others C.A. No. 181 of 2002, (page 25)** where it was held that

***“...It would be up to the party who made the threat to show that it had not influenced the victim in any way...”***

Counsel for Lamba submitted that the parties did negotiations and joint measurements to resolve the standing differences, as placed into writing by the memorandum of understanding. These negotiations show that Liberty was under no duress. He further submitted that Liberty did not ever protest to the negotiations.

Counsel for Lamba also referred me to the case of **DSND Sub sea V Petroleum Geo – semis [2000] QB 530**.

In that case which also involved a memorandum of understanding and an allegation of economic duress **Dyson J** held that

*“...The ingredients of actionable duress are that there must be pressure  
(a) Whose practical effect is that there is a compulsion on or a lack of practical choice for the victim  
(b) Which is illegitimate and  
(c) Which is a significant cause inducing the claimant to enter the contract. . . .”*

Counsel for Lamba submitted that Liberty had no ground to claim duress and had options to seek legal redress for breach of contract which it did not pursue. Instead Liberty having been paid by Government for work done by Lamba simply wanted Lamba to walk away unpaid by them which was not accepted. In any event Liberty ratified the MOU through part payment so the MOU should be enforced against them.

Counsel for Liberty as counter defendant submitted that Lamba illegally took over the work sites at a time when the projects were supposed to be completed. At the time Lamba was far behind schedule on the works and had attempted to unreasonably revise the contract sum which proposal Liberty flatly rejected. On 12<sup>th</sup> August 2008, Liberty lawfully terminated Lamba's sub-contract to construct the fish landing sites. However Lamba refused to vacate the sites even after agreeing to do so in the 1<sup>st</sup> August 2008 meeting. Counsel for Liberty submitted that Lamba had no right to be on the premises after the contracts were terminated. Counsel for Liberty further submitted that Lamba then deployed several guards on 12<sup>th</sup> August 2008 to enforce the notion that they would not leave the premises until the balance of Ushs. 678,952,860.70 was paid in full, a number Lamba claimed arose from the joint measurements and verifications.

Counsel for Liberty further submitted that the MOU was not based on free and deliberate will. The agreement between parties was made by economic duress and is therefore void.

He submitted that under economic duress, if a party compels the other to enter into a contractual agreement by threatening to harm the property or economic interests of that party, the promises made are not enforceable. In this regard he referred to the case of

**Universe Tankships Inc. of Monrovia V International Transport Workers Federation & Ors (The Universe Sentinel)** [1983] AC 383.

In that case it was held that serious financial consequences because of a threat constituted economic duress.

Furthermore I was also referred to the case of

**The North Ocean Shipping Co. Ltd. V Hyundai Construction Co. Ltd.** [1979] Q.B. 705.

In that case after plaintiff had paid one installment of a \$40 million contract to build a ship, the defendant threatened not to proceed unless the plaintiff paid an additional 10%. It was held by **Mocatta J** that the threat not to build the ship amounted to economic duress because the plaintiff

already had independent contracts to deliver fuel using that ship which would suffer and the plaintiff be forced to pay heavily in damages.

Counsel for Liberty submitted that economic duress makes a contract void or at least voidable. On the ingredients for economic duress counsel for Liberty referred me to the case of

**Pai On V Lau Yiu Long** [1980] AC 614 at P 635.

There the Privy Council held that

***“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent.”***

**Lord Scarman** at P 632 went on to find that

***“The commercial pressure alleged to constitute such duress must, must have entered the contract against his will, must have had no alternative course open to him . . . . “***

As to the burden of proof required in such cases counsel for Liberty referred me to the case of **Barton v. Armstong** [1979] AC 104.

In that case it was held that the victim of duress must only show that improper/illegitimate pressure was exerted on him.

In this case counsel for Liberty submitted that Liberty could not overpower the armed guards Lamba put on the sites. In order to salvage the main contract, liberty was then forced, economically, to sign the MOU. Yet this was against the back drop that the main contract was with the Government which had become impatient with the pace of the work and wanted to terminate the main contract unless Liberty took over the sites. Counsel for Liberty submitted therefore that the court find the MOU dated 22<sup>nd</sup> August 2008 unenforceable. The fact that the memorandum of understanding states that the agreement was signed without undue influence does not mean duress was absent. Counsel for Liberty maintained that the MOU was not a result of successful mediation, as it was actually a last resort, as Lamba would not hand over the sites without compliance with the memorandum of understanding. He further submitted that taking possession of the sites after agreeing to pay a significant amount (Ushs. 200,000,000) was not taking the benefit from the agreement as this payment is a significant burden to Liberty.

I have addressed my mind to the evidence on record and the submissions of both Counsels for which I am grateful.

Duress is defined as “coercion of the will so as to vitiate consent...” *Pai On case (supra)*. I agree with counsel for Liberty that on the legal authorities the common law concept of duress (as the use of force or the threat of force to compel a person to make an undertaking) has been widened to include economic duress. An entity faced therefore with serious financial consequences due to the cancellation of a contract may constitute economic duress *The Universal Sentinel case (supra)*. It would appear to me on the authorities that the victim of duress is only required to show that there was improper pressure exerted by the opposing party to encourage entry into the contract the *Barton Case (supra)*. Furthermore this type of duress makes the contract in question at minimum voidable *The North Ocean Shipping Co. Ltd case (supra)*.

From the evidence it appears to me that at the time of the signing of the MOU the contract had already been terminated even though the parties did not fully address Court this point. In any event the termination was not denied by Lamba.

When both parties signed the MOU on 22<sup>nd</sup> August 2008, Lamba had already refused to peacefully hand over the construction sites, demanding a lump sum for the work completed. As Liberty had not agreed to this total, Liberty’s unwillingness to pay the demanded sum was founded. Therefore, when Lamba brought men onto the sites to ensure that the sites could not be taken over by Liberty, this action to my mind placed improper pressure on Liberty forcing the company to either pay the sum, or not recover the land.

Both parties clearly had a stake in the outcome of the settlement dispute over the termination of the contract. However, by refusing to hand over the sites, Lamba used this gesture to coerce Liberty into a rushed agreement in order to recover the sites. As Liberty had a significant financial interest in the construction sites, Liberty was left with no other choice but to enter into contract under the memorandum of understanding.

Liberty was also subjected to economic duress. In the *North Ocean shipping case (supra)*, after the plaintiff had paid one installment of \$40 million to build a ship, the defendant threatened not to proceed with the contract unless the plaintiff paid an additional 10%. The threat not to build the ship unless the contract was modified in the defendant’s favor constituted economic duress.

Similarly, Lamba refused to release possession of the land until they were paid a unilaterally created sum according to what Lamba had calculated as work completed. This constituted economic duress, because Liberty was faced with serious financial consequences if they were required to pay the sum requested, Ushs. 676,640,278/= or in the alternative the Ushs. 500,000,000/= required by the MOU. Without signing the memorandum of understanding, Lamba made no indication that they would relinquish the sites to Liberty, withholding a significant financial investment from Liberty. In this scenario it cannot be said that by the MOU indicating that it was made without undue influence is not sufficient to displace the undue influence because the evidence on record clearly shows otherwise. That being the case I find that

the MOU was indeed entered into as a result of economic duress and is thus voidable. This also disposes of the second issue as well.

**Issue No 3: If entered into under duress how much does Lamba claim from the counter defendants?**

As a preliminary argument counsel for Liberty submitted that Lamba did not plead an alternative prayer for quantum meruit and therefore a court cannot grant a remedy that has not been prayed for in this regard he referred to the case of

**Kananura Melvin Consultant Enginces V Connie Kabanda** SCCA NO. 11 of 1992 [1992] KALR 559.

He submitted that the counterclaimant must specifically claim special damages for them to be considered. He further submitted that since the MOU was void and must fail then this alternative remedy too must fail.

In an earlier case of

**Agri-Industrial Management Agency Ltd V Kayonza Growers Tea Factory & Anor**  
HCCS 0819 of 2004

I held that the relief of quantum meruit results from what in English law is called a quasi-contract or restitution. In that case I made reference to the decision of **Fibrosa Spolka Akcyjna V Fairbairn Lawson Combe Barbour Ltd.** [1943] A.C. 32 at 61 where **Lord Wright** held that quasi-contract is generically different from the remedies in tort and contract and forms a “third” category of remedy altogether under English law that provides against unjust enrichment or benefit. This is an equitable remedy that lies in the discretion of the Court. In this case even though I found that the MOU was voidable, that is no reason for Liberty not to pay based actual work done. In this case the parties had even agreed to joint measurements which in reality should have made the calculations easier. However unfortunately even with joint measurements the parties still did not necessarily use the same rates from the Bill of Quantities’ (BOQs) and so came up with different results.

According to the submissions of counsel for Liberty if the Court was inclined to use the principle of quantum meruit then Lamba was over paid Ushs. 40,986,807/=. This is because according to their calculations the claims for work done at the four fishing sites (Bukungu, Lwampanga, Kiyindi and Butiaba) was Ushs. 621,269,241/= as the amount due. Against this a flat discounted figure of 17.22% (or Ushs. 106,982,563.30) was to be applied to bring Lamba’s quotation within the overall contract price as Lamba’s sub contract price would have been higher than the main contract price. This would further be reduced by Ushs. 500,000,677.7/= paid before termination; a further Ushs. 100,000,000/= paid after signing the MOU which give an initial over payment of Ushs. 85,713,322.30/=. Against this figure counsel for Liberty adds a claim for Bushenyi of

Ushs. 44,726,515/= which would reduce the over payment to Ug shs 40,986,807.30/= meaning that Liberty owed Lamba nothing.

Lamba on the other hand states that correct sub total for all the five fishing sites is Ushs. 1,112,215,286/= of which Ug Shs 500,000,000/= was paid giving an outstanding total of Ushs. 612,215,286/=.

My own calculations based on the agreed measurements and the areas where even the rates were agreed differ from both sides. Initially, Lamba claimed that Liberty owed Ushs. 400,000,000/= from the memorandum of understanding, and Ushs. 276,640,278/= for work completed at Bushenyi, totaling Ushs. 681,240,728/=. This is a simple math mis-calculation, as the total is actually Ushs. 676,640,278/=. Sifting through other totals in Lamba's bills of quantities, other simple math totals are also calculated incorrectly. With this in mind, it is difficult to believe that Lamba's stated calculations are accurate.

I have failed to find the discounted figure of 17.22% for the sub contract documented anywhere and this is probably why it is disputed by Lamba. It would be difficult for Court to apply it as a result without further proof of its existence.

My own findings give the following calculations

Bushenyi	158,118,000
Lwampanga	164,467,589
Bukungu	119,104,050
Kiyindi	312,530,124
Butiaba	24,088,460
<b>SUB-TOTAL</b>	<b>778,308,223</b>
Payment deposited	- 25,000,000
Payment before termination	- 500,000,000
<b>TOTAL</b>	<b>253,308,223</b>

I find that as quantum meruit Lamba would be entitled to a figure of Ushs. 253,308,223/=.

### **Remedies**

I have already found that Lamba is entitled to Ushs. 253,308,223/= as payment in quantum meruit.



Counsel for the Lamba also prayed for Ushs. 500,000,000/= as general damages. Counsel for Liberty submitted that this claim for general damages was not pleaded nor prayed for by the witnesses for Lamba so should not be awarded. It is trite law that general damages are such as those that the law will presume to be the natural consequence of a default. As a result such damages unlike special damages may be averred generally.

In the assessment of damages it is for the claimant to prove to Court their loss so that Court can accurately assess the amount of damages. In this case not much was done by the counter claimant to assist in the assessment of damages. In any event I see a claim could have been made either way. This was a badly executed and managed sub contract. In this regard Lamba greatly contributed to the break down of this contractual relationship as well. Since the award granted in any event is in quantum meruit and not necessarily breach of contract I do not award general damages.

I award interest of 21%p.a. on the figure of Ushs. 253,308,223/= from the date of filing the suit until payment in full.

Given the nature of the MOU, which was entered into as a result of economic duress I order each party to bear its own costs.

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Justice Geoffrey Kiryabwire  
JUDGE

Date: 16/08/2012

16/08/12

9:36 a.m.

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

- B. Tusasiirwe for Plaintiff
- Mr. Bemanyisa for Defendant

In Court

- None of the parties in court
- Rose Emeru – Court Clerk

.....  
**Geoffrey Kiryabwire**  
**JUDGE**

**Date: 16/08/2012**