THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0318-2012

JOHN KAGWA …….…….. PLAINTIFF

VERSUS

1. KOLIN INSAAT TURIZM
2. SANAYI VE TICARET A.S ::::::::::::::::::::::::::::::::::::DEFENDANTS
3. NASSUR BRUHAN

BEFORE HON. MR. JUSTICE MASALU W. MUSENE

RULING

The plaintiff John Kagwa sued the two Defendants, Kolin Insaat Turzim Sanayi Ve ticaret A.S. and Nassur Bruhan, jointly and severally for breach of an oral contract for payment of commission. The alleged commission was a sum of US$500,000.00 (five hundred thousand United States Dollars). The plaintiff under paragraph (4) of the plaint also seeks to recover interest at the rate of 12% per annum, General damages, Punitive damages and costs.

Furthermore and according to paragraphs (2) and (3) of the plaint, the 1st Defendant is a body corporate operating in Uganda and having its registered office at Malcom X Avenue, Kololo, Kampala, while the 2nd Defendant, Nassur Bruhan is the Country Director of the 1st Defendant.

The facts giving rise to the cause of action as alleged by the plaintiff are variously described under paragraph (5) of the plaint, but briefly that:-

(i) The plaintiff introduced the 2nd defendant to the personal assistant to the Minister or roads in Kenya, and a contract to the then Rtd. Hon. Prime Minister of Kenya where upon he was entitled to a fees to be paid by the Defendants.

(ii) That the plaintiff influenced the process and informed the Defendants of the opportunity to get a contract and construct Hoima Kaiso Tonya Road.

(iii) That the Plaintiff arranged a meeting of the Defendants with the president of Uganda.

(iv) The plaintiff engaged the then Mayor of Kampala, Hajji Sebaggala to sell out Plot 1 Sezibwa Road opposite Kampala Club to the defendants for construction of Commercial Centre, later consisted by Kampala Capital City Authority.

(v) The Plaintiff organized a meeting in Nairobi between the 2nd Defendant on behalf of 1st. Defendant with Mr. Fidel Castro Odinga and Mr. Maliko Gichana, whereby extensive business opportunities and proposals were availed to the Defendants.

Under paragraph (1) of the written statement of defence, the 1st and 2nd Defendant s stated that at the hearing, they would raise a preliminary objection

to the effect that the suit is not maintainable in law and that the same is frivolous, vexatious, misconceived and does not disclose a cause of action.

The plaintiff was represented by Mr. David Kagwa of M/s Kagwa & Kagwa Advocates, while the Defendant were represented by M/s Claire Amanya Advocates and Solicitors and Mr. Dancan Ondimu from Ondimu & Co. Advocates. So on 7.5.2013, M/s Claire Amanya for the defendants raised a preliminary objection and in the process, it was agreed that both sides file Written Submissions in respect of the preliminary objection.

Counsel for the Defendants raised the preliminary objection on a point of law under O. 6 rules 28, 29. And 30 of the Civil Procedure rules on grounds that the alleged oral contract upon which the plaintiff based his claim does not exist, and that notwithstanding, it contains elements that would render such contract unenforceable.

Learned Counsel for the Defendant cited the contract Act notably section 2 which defines **a contract as an agreement enforceable by law under S. 20 of the said Act**. Learned Counsel particularly stressed S. 10 (I) which provides that a contract is an agreement made with the **free consent** of the parties **with capacity to contract**, and for a **lawful consideration** and with the **lawful object**, to be legally **bound**. The same section 10 (2) also provides that a contract may be oral or written or partly written or may be implied from the conduct of the parties.

It was further submitted for the defendants that the plaintiff and the 2nd. Defendant had no contractual relationship, as there was no written evidence to support plaintiff's claim and there was not agreement for commission at any point. They asserted that it was a personal relationship, whereby they introduced each other to

their respective families, otherwise that the purported contract was voidable under sections 19(I), (2) and (3) of the contracts Act, 2010, and therefore void.

Counsel for Defendants Cited the case of **Makula International Ltd. Vs His Eminence Cardinal Nsubuga & Another (1982) HCB 11 and Broadways Construction Co. Vs Musa Kasule & Others (1971) E.A. 16**, where it was held that courts of law cannot sanction an illegality. And that once an illegality is brought to the attention of court, it overrides all questions of pleadings, including any admissions thereto.

It was further submitted that all acts that the plaintiff is claiming to have done are marred with inferences of corruption and influence peddling which are illegal **under sections 2, 3, 4, and 8 of the Ant corruption act No 6 of 2009**. They added that even the principles of procurement under the Public Procurement and Disposal of Assets (PPDA) Act and the regulations there under would be violated. Counsel for the Defendants submitted that the alleged facts by the plaintiff also contravened **Article 4 (f) of the African Union Convention on Prevention and combating corruption to which Uganda is a signatory**. Otherwise the defendants denied the plaintiffs alleged contribution to the award of the contract and that the Defendants distanced themselves from any such dealings and commitments marred with corrupt tendencies and influence peddling.

They cited a case of **Crown Prosecution Services Vs Ananias' Tumukunde & Another**, whereby they were charged of receiving corrupt payment in the preparation of the Common Wealth Heads of Government meeting held in Kampala in 2007, sentenced to 12 months imprisonment and ordered to refund the money. Counsel for the defendant reiterated that since the alleged contract did not comply with the law and is not enforceable, then the claim based on the same be

dismissed as frivolous, vexatious and misconceived and should be struck out under O. 6 r 30 of the Civil Procedure rules.

Counsel for the plaintiff on the other hand, maintained that the plaint discloses a cause of action. He submitted that the courts should look at the plaint ordinarily and assume that the facts are correct in determining whether a cause of action is disclosed or not. He cited the case **Attorney General Vs Olwoch (1972) E.A. 392** to support his argument. It was also submitted that O. 6 r. 28 of the Civil Procedure rules gives court a wide discretion as to whether to dispose of the preliminary point at or after hearing. Counsel for the plaintiff further submitted that the suit required evidence to be led first, before the issue of cause of action is determined.

On whether the said contract is enforceable or not counsel for the plaintiff referred to the case of **J. K. Patel Vs Spear Motors Ltd**. **SCCA No. 4 of 1991**, where it was led that if there has been an offer to enter into a legal relations on definite terms, and that after is accepted, the law considers that a contract has been made.

He added that since the above law is applicable, on oral contract is enforceable. Counsel for the plaintiff referred to the E. Mails exhibits P4 and P5, which he submitted was a form of Data message for purposes of s. 10 (3) of the Contract Act. Otherwise, they added that the plaint shows that the plaintiff enjoyed a contractual right to be paid for his services by the defendants and that the defendants breached the contract and are liable.

It was further submitted that as far as section 10 (4) of the contract Act which provides for a contract exceeding twenty five currency points to be in writing, that the word “shall” in the above provisions is not **mandatory** but merely **directory**.

Counsel for the plaintiff concluded that his role commenced after the award of a contract and he denied any allegations of corruption, bribery or influence peddling.

The court has considered the summarised submissions on both sides as far as the preliminary objection is concerned. The gist of the objection is that the contract alleged to have been breached by the Defendants should have been in writing. Section 10 (4) of the contracts Act provides:-

> "Section 10: agreement that amounts to a contract
>
> "**10(4) a contract the subject matter of which exceeds twenty five currency points shall be in writing**"

According to the schedule to the contracts Act, a currency point is equivalent to twenty thousand shillings, so twenty five currency points meant five hundred thousand (500,000) Uganda shillings.

It follows therefore that any contract exceeding Shs,500,000 like the present one, allegedly a commission of U.S. $500,000.00 should have been in writing.

Counsel for the plaintiffs reply was that the suit contract was partly oral and written in the Emails attached as exhibits P3, P4 an P5 respectively. I have looked at the said emails. P3 was an email from John Kagwa to Bruhan (the Plaintiff to 2nd Defendant). In summary it was a message of congratulations from the plaintiff to the 2nd Defendant upon the signing of the contract. And it goes on to lament that the plaintiff had forgotten him to cut off communications but that he was ready for one to one at the convenience of the defendant. Then the Email, P4 was from B. N. (presumably 2nd Defendant), to John Kagwa, the plaintiff. It states that he was glad they were back to one on one relationship and that no one else could do better

than the two of them. The 2nd Defendant then assures the plaintiff that he had no intentions to cheat him.

Lastly we emailed P5 which was from the plaintiff to the 2nd Defendant. It is to the effect that the plaintiff was apologising to the Defendant for whatever went wrong. He adds that "**we all learn through experience and that was an eye opener**." And that if there is another opportunity, then they all know their latitudes. P

A close analysis of those emails by this court shows that there is nowhere in the said emails P3, P4 and P5 where the alleged commission of US$500,000.00 is mentioned. And as correctly submitted by counsel for the defendant in my view, the plaintiffs submissions with regard to the emails is an attempt to deviate from his original claim of enforcing an oral contract of US$500,000.00, as set out in the pleadings. The emails exchanged and alleged data messages between plaintiff and 2nd Defendant confirm a social and private relationship between the plaintiff and the 2nd Defendant only.

There are not terms of any binding contract between the plaintiff and 2nd Defendant in those data messages, let along the 1st Defendant which is a company. Nowhere in those data messages it is stated that the 2nd Defendant was acting on behalf of the 1st Defendant. And even then those emails fall short of containing elements of a valid contract as set out under S. 10 (I) of the contract s Act.

It was an apparent attempt by the plaintiff to trap the 2nd Defendant and nothing completely to do with 1st Defendant which is a company. Needless to emphasise, parties are bound by their pleadings. That is the law practice. And as was held in the case of **Libyan Arab Uganda Bank Vs Messers Interpo Limited (1988) HCB 73**, in considering applications under O. 6 r 29, the court has to look at the pleadings alone and any annextures thereto, and not any subsequent affidavit.

This court therefore finds and holds that there was nothing at all in those emails to do with the alleged commissions of US$500,000.00 (over 1 billion Uganda shillings). And the Courts of Law cannot act on guesswork, particularly where it is in black and white that such contracts must be in writing. Counsel for the Plaintiff quoted the case of **Sitenda Sebalu Vs Sam Njuba, Supreme Court Civil Appeal No 26. Of 2001** to support his submission that the word "shall" in S 10 (4) of the Contract Act is not mandatory but merely directory. I do not agree with those submissions because their Lordships in the Supreme Court were dealing with an issue of extension of time for service to Notice together with the petition on the Respondent within 7 days after presentation of the petition. And that was under the Parliamentary Elections Act of 2005 and Rules there under. It had nothing to do with the exercise of the courts discretion regarding contracts, the subject matter of which exceeds 25 currency points to be in writing. The Supreme court case was quoted completely out of context, In the case of **Steel Vs Sirs (1980) All ER 529 Lord Diplock** held:-

> "**Where the meaning of the words in plain and unambiguous, it is not then for the Judges to invent fancied ambiguities as an effect to its plain meaning because they consider the consequences for doing so would be in expedient or even unjust or immoral**"

And in conformity with the above highly persuasive decision, I hold that the word "shall" under S. 10 (4) of the Contracts Act is mandatory. The provisions that such a contract shall be in writing is in plain English which can be understood by anyone who has gone to school. There is therefore no need for this court to bring in any other interpretations to suit the circumstances of the plaintiff's case. And the relationale behind that legislation under S. 10 (40 of the contracts Act was to prevent persons or groups of persons from conspiring to claim huge sums of

money from others under dubious deals. So in cases like the present one where hundreds of millions of Uganda shillings (after converting US$ 500,000.00) is being claimed this court cannot admit nothing less than a written contract.

And as was held in the case of **David May Vs Busitema Mining CIE Ltd. HCT-00-CV-CS-0086-2008** quoted by counsel for the Defendants **non compliance with the law rendered the contract invalid and unenforceable**.

That is the position as far as the plaintiff's case is concerned. I am further fortified in my findings by another highly persuasive case of **Olympic Holding Co L.L.C. Vs ACE Ltd Slip Opinion No 209 – Ohio – 2057**, cited by counsels for Defendant. In **2009, the Supreme Court of Ohio** ruled that a party's breach of an alleged promise to sign an agreement does not eliminate the requirement under Ohio Statute of frauds that such a contract is enforceable only if it is in writing and has been signed by the parties on which enforcement is sought. Justice Stratton noted:-

> **"Courts have long recognized that signed contract constitutes a party's final expression of his agreement. Thus the Statute of Frauds is necessary because a signed writing provides a greater assurance that the parties and the public can reliably known when such transaction occurs**."I have no doubt whatsoever, that that was the similar intention under S.10 (4) of the contracts Act 2010 in this republic of Uganda.

Furthermore, paragraph (5) of the plaint portrays dealings carried out in a friendly manner and there was not written contract as this court has already held. And in any case, there would be no lawful consideration for such transactions as introduction fees to the personal Assistant of the Minister of Works of Kenya or

plaintiff assisting the defendants to meet Mr. Fidel Castro Odinga, the son of the Honourable Prime Minister of the Republic of Kenya, Raila Amollo Odinga. Under what law would the courts in Uganda enforce a contract where someone was an assisted to meet important people in the Republic of Kenya and was not paid? There is no direct law to that effect because the Jurisdiction of this court does not extend to events in the Republic of Kenya, **unless it is expressly stated by the parties in writing which with respect is not the case here**.

And even for the events that took place in Uganda, such as the alleged introduction of the Defendants to the then Mayor of Kampala Al Hajji Nasar Ntege Sebagala by the plaintiff, or the introduction and meeting of the Defendants with His Excellency the President of Uganda in Mbale State Lodge. This court is not aware of any law in this country which provides for payment of commission to a person who has enabled another to meet the Mayor or the President. So in the absence of any written agreement that creates legal obligations, the plaintiff cannot just come to court to enforce or claim payments for social interactions with highly placed people in society.

The law as stated in **Balfour Vs Balfour (1919) 2 KBS 571 by Lord Atkin** is that agreements of social or domestic nature do not contemplate legal relations and as such they do not give rise to a contract. The plaintiff has not stated in the plaint in what capacity he works either in the office or the president or the Mayor of Kampala and so cannot be allowed to file, frivolous and vexatious claims not provided for under the law of this country to be paid commission for alleged facilitation of Defendants to meet his Excellency the President of Uganda or big personalities in neighbouring the Republic of Kenya.

Counsel for the Plaintiff submitted that the Defendants should wait for the hearing and bring witnesses to prove that no consideration was agreed upon. And that the preliminary objection was premature until the parties adduce evidence. I do not agree with learned counsel for the plaintiff because the law provides that a preliminary objection on a point of law can be raised at any stage of the proceedings

Furthermore, in deciding whether or not a suit discloses a cause of action, one looks ordinarily, only at the plaint and assumes that the facts alleged in it are true. The relevant authorities are **Jaraj Sherif & Co Vs Chatai Fancy Stores (1960) E.A. 374, and Attorney Geenral Vs Olwoch (1972) E. A. 392**

In the case of **Attorney General Vs Olwoch**, the respondent had sued the Attorney General as a result of Execution of a warrant issued by a magistrate's court to a police officer. It was held that the Attorney General could not be sued under vicarious liability for the actions of the magistrate and police officers under the Government Proceedings Act. Magistrates, like any other judicial officers, enjoy Judicial immunity. In that case Mr Othieno, Counsel for the Respondent (Olwoch) submitted that the evidence at the trial might disclose lack of good faith and that the Plaint was sufficient to allow the introduction of such evidence.

However, those submissions that details will come out in evidence were rejected by **the Court of Appeal for East Africa**, In the same vein, I do hereby reject the submissions by Counsel for the plaintiff that this court waits for parties to adduce evidence. In any case, O.6 r. 28 of the Civil Procedure rules give **this court the discretion to dispose of the preliminary point of law either after the hearing (when it is treated as an issue) or before the hearing** . This court has chosen to

dispose off the preliminary objection before the hearing. O. 6 r. 29 specifically states that:-

> "**if in the opinion of the court, the decisions on a point of law substantially disposes of the whole suit, or any distinct cause of action, ground of defence or set off, counter claim, or reply therein, the court my there upon dismiss the suit or make such order in the suit as may be just**."

In the case of **Inter Freight (U) Ltd Vs Hajji Ahmed Nsubuga HCT-00-CC-0156-2005**, the importance of dealing with the preliminary point of law at the beginning was emphasised. Justice Egonda Ntende as the then was, held:-

> "**In light of the findings made herein above, it is not necessary to review the evidence of the parties adduced in this case or the issues that had initially been agreed upon. A finding that this suit is barred by S. 3 (I) of the contract Act is sufficient to dispose of this suit. I regret that this issue did not arise earlier or at least during the scheduling conference as it was definitely pivotal in disposing of this matter. In addition, the time of this court and the parties as well as the costs of all would have been saved accordingly. I have no alternative other than to dismiss this suit with costs accordingly."**

In the circumstances a suit to enforce a contract of US$500,000.00 (over 1 billing Uganda Shillings) which is not in writing cannot be sustained and that is sufficient to dispose of the whole case.

I shall therefore not go into other detailed submissions by counsel for the Defendant s about the illegality of the purported or alleged transaction between the

plaintiff and 2nd Defendant in relation to the Public Procurement and disposal of Assets Act (PPDA) and Regulations there under, or matters of influence peddling and inferred corruption. Non compliance with the provisions of S. 10 (4) of the Contracts Act which is mandatory is sufficient to do away with the present suit.

I accordingly do hereby uphold the preliminary objection by the Defendants and dismiss the plaintiff's suit with costs under O. 6 rules 28, 29, and 30 of the Civil Procedure Rules.

19.6. 2013

Mr. David Kagwa for the Plaintiff present
M/s Claire Amanya for Defendants present
2nd Defendant in court
Mr. Ojambo Court Clerk present

Court: Ruling read out in open court

Justice W. M. Musene
High Court Judge
19.6.2013