

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
CIVIL SUIT NO. 85 OF 2010**

KARAMA AHMED KARAMA:.....PLAINTIFF

VERSUS

ISA LULE:.....DEFENDANT

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff brought this action against the defendant for breach of agency contract dated 21st October 2009 claiming general damages, an order for specific performance of the contract, interest and costs of the suit.

It is the plaintiff's case that some time in October 2009; he entered into an agreement with the defendant under which the defendant was to act as the plaintiff's agent to import motor vehicles from Dubai and Japan as listed in the agency agreement (hereinafter called the suit vehicles). The plaintiff states that he fully paid money to the defendant to import the suit vehicles but the defendant failed to register them in his name. It is alleged that the defendant gave the clearing agent contrary instructions and claimed the suit vehicles for himself in an attempt to defraud the plaintiff. It is also the plaintiff's case that the defendant failed to account for the monies received and also failed to execute transfer forms for the suit vehicles as well as two other vehicles, a Toyota Prado and a Golf.

The defendant denies being appointed as the plaintiff's agent or employee. He also denies ever receiving any money from the plaintiff for the importation of the suit vehicles except for the Nisan Diesel Truck and Hino Dump. He claims that he purchased and imported in his own right and with his money motor vehicles namely; Hino Tadano Truck, Isuzu Dump Truck, 3 Mitsubishi Fuso Trucks and a Canter Dump Truck. The defendant further contends that the Prado and Golf

vehicles were his and only went into the possession of the plaintiff who purported to have a buyer for them. The defendant also challenges the validity of the agency agreement contending it was fraudulently obtained.

The plaintiff filed a reply to the defence in which he states that before a formal agency agreement was executed, the plaintiff had at all material times dealt with the defendant as his agent for the purpose of importing cars and doing business generally. The plaintiff avers that in August 2009 he traveled with the defendant to Dubai as his agent and he paid for all the transport and other expenses. The plaintiff contends that through the defendant he bought motor vehicles and other business goods from Dubai.

The plaintiff states that he suspected the defendant of dishonest behavior and requested him to have their agency relationship put in writing which was done in October 2009 before the plaintiff went for Hirja. The plaintiff also states that he and the defendant had an arrangement whereby the plaintiff sent money for purchase of some of the suit vehicles through a one Faisal Kiggundu to the defendant who was already in Japan.

At the scheduling conference the agreed facts were as follows:

1. That the plaintiff and the defendant traveled to Dubai in August 2009 and purchased various motor vehicles and other hardware items that were imported into Uganda by the parties and some of the vehicles are;
 - a. Mitsubishi Fuso Truck FH228G-512136
 - b. Mitsubishi Fuso Truck FK285-540869-1995
 - c. Mitsubishi Fuso Truck FK728J-540451
 - d. Mitsubishi Canter Dump FE518BD-401058-1995
 - e. Toyota Land Cruiser UAM 925P
2. That some of the motor vehicles were purchased and receipted in the name of the defendant while others in the name of the plaintiff.
3. That the said motor vehicles were imported into Ugandan with the Plaintiff's name on the Bill of Lading.

4. That the plaintiff transferred monies to the defendant to purchase trucks while the defendant was in Japan that were shipped and imported in the name of the plaintiff.
5. That the Hino Dump Truck is still in Mombasa with Badru Mulyazawo.

The following issues were framed for determination:

1. Whether or not the agency agreement executed on the 21st October 2009 is valid and enforceable against the defendant.
2. Whether there was breach of the agency agreement.
3. What are the remedies available to the parties?

This court heard evidence for both parties and both counsel filed written submissions. I will proceed to determine the issues in the order in which they were raised.

Issue One: Whether or not the agency agreement executed on the 21st October 2009 is valid and enforceable against the defendant.

Counsel for the plaintiff submitted that the agency agreement executed between the plaintiff and the defendant was valid and enforceable. He argued that the defendant admitted that he signed the agreement by saying the agreement has his signature which he identified. He referred to the evidence of PW1 and PW2 both of whom testified that the defendant signed the agency agreement. PW2 testified that he read the agency agreement back to the plaintiff and the defendant and explained in both Luganda and English before they signed. PW2 identified the agreement as well as his signature and stamp.

The plaintiff's counsel also submitted that Exhibit D1, an agreement between the defendant and Cuberoot Limited shows that the defendant signs documents in English, the language he claims not to know. It was further submitted that the defendant deposed an affidavit (Exhibit P2) in support of an application arising from this matter in English without a Jurat to his alleged ignorance of the English language. It was further argued for the plaintiff that the defence put up by the defendant that he signed the agreement under a belief that he was witnessing a land sale agreement for the plaintiff on a car bonnet on Luwum Street at 7 pm is untenable.

On the other hand counsel for defendant submitted that the agency agreement was invalid and unenforceable for two reasons. Firstly, that for a contract to exist there must be a consensus ad idem between the parties, which was clearly lacking in the case at hand basing on the defendant's evidence that he was told to sign the agreement as a witness to the plaintiff's land sale agreement. It was submitted for the defendant that he denied being an agent of the plaintiff in the purchase of the said vehicles but the plaintiff chose not to cross examine him on these facts and this facts are deemed to have been admitted in law on the basis of **URA V Stephen Mabosi SCCA NO. 26 OF 1995**. According to counsel for the defendant, without a consensus ad idem between the alleged parties to a contract, the contract cannot be said to exist.

Secondly, the defendant's counsel submitted that Exhibit P5, the agency agreement should speak for itself because parole evidence is not admissible to vary the contents therein as provided for in section 91 of the Evidence Act. It was submitted for the defendant that the plaintiff and PW2 admitted in court that no money was paid at the execution of the agreement contrary to paragraph 1 of the agency agreement. He contended that the statement in the agreement that "*at the execution hereof the agent acknowledges receipt of the money from the principal*" is redundant as no money was received. It was the opinion of the defendant's counsel that there was no consideration and the failure of consideration invalidated the agency agreement under section 92(a) of the Evidence Act.

Thirdly, counsel for the defendant argued that the undisputed fact that the suit vehicles had already been bought and were already in the country also invalidates the agency agreement under section 92(a) of the Evidence Act as it does not say the truth about itself. He submitted that paragraph 4 of the agency agreement to the effect that "*the bills of lading for the said vehicles are in the possession of M/s Codia Clearing and Forwarders in Nakawa*" is inconsistent with clauses 1 and 2 of the agency agreement which states that the defendant was to import the said vehicles on behalf of the plaintiff.

Lastly, counsel for the defendant submitted that the plaintiff's purpose of preparing the agency agreement was because he was traveling for Hirja and did not know what would happen to him so he wanted his family to know that the defendant had

his vehicles. The view held by the defendant's counsel was that if it is true that the vehicles actually belong to the plaintiff, there are other ways the plaintiff should have brought his action other than relying on an agency agreement that does not speak the truth and is not supported by any consideration.

In rejoinder, counsel for the plaintiff argued that the agency agreement was admitted by the defendant in his testimony and since the parties and the witness to the agreement all admit to have signed it, the defendant cannot deny its existence or validity. He also submitted that the defendant validly executed the agreement since he usually signs such agreements and had also deposed an affidavit in English without showing that he was illiterate. As far as consideration is concerned, the plaintiff's counsel argued that his client transferred and gave the defendant monies as well as the defendant's agent and that at the date of execution of the agreement, the defendant acknowledged receipt of the monies. According to the plaintiff's counsel this was normal as receipts can be issued later.

In so far as the execution of the agreement at a later stage is concerned, reference was made to the case of **Kanting Printing Works v Tanga District Council Civil Appeal No. 18 of 1970** where it was held that it would seem that a note or memorandum need not be contemporaneous with the contract so long as it was in existence before the suit is filed. Court found that the fact that a document had not been issued until nine months after the oral contract had been made was of no importance.

I have carefully considered the submissions of both counsel and critically analysed the evidence on record and these are my findings. First of all, I do not agree with the defendant's contention that he signed the agency agreement believing he was merely witnessing a land sale agreement. His evidence that he signed it at 7.30 pm on the bonnet of a car on Luwuum Street is unconvincing. His allegation that he neither writes nor reads is equally unbelievable especially in view of the fact that the defendant has signed other agreements, letters and affidavits in English without them being verified by the person who wrote them for him in compliance with section 3 of the Illiterates Protection Act, Cap 78.

Secondly, clause 1 of the agreement (Exhibit P5) states;

“The principal shall pay money to the agent to import vehicles from Dubai and Japan and at the execution hereof the agent acknowledges receipt of the money from the Principal.” (Emphasis added).

It is not stated in the above clause and the entire agreement how much money was supposed to be paid by the principal and how much the supposed agent acknowledged receipt of. Although consideration need not be adequate, it must be real, that is, capable of estimation in terms of value, “of some value in the eye of the law.” See **Thomas v Thomas (1842) 2 QB 851, 859**. Exhibit P5 does not state the consideration that the agent is alleged to have acknowledged receipt of.

The plaintiff gave oral evidence to show how much money he had given the defendant to purchase the motor vehicles. I would be inclined to accept this evidence as an exception to the parole evidence rule in light of section 92 (b) of the Evidence Act if indeed the plaintiff adduces convincing evidence that at the time of signing the agreement he had already given the defendant the sum of money he alleges.

However, I do find a lot of difficulty in believing the plaintiff’s evidence that he gave out such a large sum of money according to him to the tune of US \$ 150,000 without any acknowledgment of receipt by the defendant apart from the US \$24,000 that was wired to the defendant directly. The plaintiff alleges that he gave money to the defendant partly cash that he directly handed to him and some that he remitted to him through a money transfer agent. Others were allegedly remitted through a one Faisal Kiggundu who was introduced to him by the defendant. Two of the remittances to Kiggundu were through Dahabshil, a money transfer agent.

The plaintiff’s wife also testified that she gave Mr. Kiggundu cash dollars on three different occasions in Kampala for onward transmission to the defendant. The first time on 12th May 2009 she allegedly gave him US\$ 18,000 for remittance to the defendant who was in Japan. The second time was on 20th May 2009 when she allegedly gave US\$ 7,100 still for remittance to the defendant in Japan and the last time was on 31st July 2009 when she allegedly gave him US\$ 14,700 for onward transmission to the defendant for registering the Toyota Prado.

Mr. Kiggundu who testified in court admitted that he received the moneys transferred through Dahabshil but his instruction from the plaintiff was to remit the same to Mr. Jaffari Makanga. He produced documents (Exhibits D9, D10, D11 and D12) to show that he remitted the moneys to Mr. Makanga on the very day he received them. Those documents appear to be genuine and they were not challenged by the plaintiff during cross examination. Mr. Kigundu totally denied receiving the money that he was allegedly given by the plaintiff's wife as there was even no acknowledgment of receipt by him.

It is therefore the word of the plaintiff's wife against that of Mr. Kiggundu with no documentary evidence or even an independent witness to prove the allegation. Similarly, there is no independent evidence to prove that money was given to the defendant apart from the plaintiff's allegation. The defendant on his part denied receipt of all the money except the US\$ 24,000 remitted to him through Dahabshil.

The denials are not surprising at all because there was no written acknowledgment of receipt of the large sums of money allegedly given to the defendant directly and through Mr. Kigundu. I find it quite strange that a business man can part with a huge sum of money on the basis of trust. According to the plaintiff he still continued to give the defendant more money even when he had noted some dishonesty on his part.

Curiously, the plaintiff again travels to Dubai and allegedly pays for the vehicles but does not get the receipt simply because he was rushing to buy other goods! He leaves the defendant to get the receipts which turn out to be in the defendant's name. My observation is that the plaintiff appears to be a very kind and humble person. Be that as it may, I am perturbed by the question as to whether the plaintiff is so naïve that he can just carelessly handle his business transactions by dishing out such a large sum of money without any acknowledgment and even paying money without getting receipts. Could there be some truth about this case that has not been told to this court?

I must observe at this point that either the plaintiff is a very forgetful person or he is telling deliberate lies. For example, there are too many inconsistencies in the plaintiff's evidence on the amount of money given to the defendant on different occasions. In his evidence in chief, he testified that around February 2009 he gave

the defendant US \$ 25,000 at his place of business in Busabala. About the same time he gave another US \$ 11,000 in the same place. Still in February 2009 he remitted US\$ 24,000 to the defendant. He produced a photocopy of an uncertified statement allegedly from the money transfer agent showing that US\$12,000 was also transferred by him to the defendant on 11th October 2008. He further testified that he gave the defendant KShs. 300,000/= when they went to Mombasa.

On cross-examination, the plaintiff testified that he gave the defendant cash of US\$ 13,000 and cash of US\$ 24,300 in February 2009 at Busabala. He also gave the defendant another cash of US\$ 17,000 in the same month then an additional cash of US\$ 7000 in June 2009 and KShs. 60,000/= when they were in Mombasa. It is noteworthy that it is the evidence of the plaintiff that he travelled with the defendant to Mombasa in July 2009. This is confirmed by the entries in their respective passports which show that they travelled on 7th July 2009. I do not therefore know how he gave the defendant that money in June 2009 in Mombasa.

The plaintiff's evidence on the purchase price he allegedly paid for the four motor vehicles in Dubai are also not consistent with the figures in the receipts for the same tendered in evidence by the defendant as Exhibits D3 (i), D3 (ii) and D3 (iii). Similarly, the sum of money he travelled with to Dubai is less than what he allegedly spent in total.

I have also carefully evaluated the plaintiff's evidence that when they arrived in Dubai on 13/08/2009 and the next day (which I believe was now 14/08/2009) the defendant went alone to look for the vehicles and to meet some of his friends. He further testified that the following day (I believe 15/08/2009) they went to Shirja and the defendant showed him the trucks. They negotiated and agreed on the prices then went back to Dubai. They came back in the evening and he paid for the trucks in the company of the defendant and two other people (a friend called Umar and a taxi driver called Nuna Habyarimana). None of those people who witnessed him pay for the trucks was called to testify to corroborate the plaintiff's evidence.

According to the plaintiff's evidence, he paid for the motor vehicles on 15/08/2009 and the receipts were not issued to him but to the defendant. However, the receipts for four of the suit vehicles adduced by the defendant as Exhibits D3 (i), D3 (ii) and D3 (iii) are all dated 13/08/2009. This evidence does not support the plaintiff's

case but instead lends credence to the defendant's contention that he went and purchased the motor vehicles the same day he arrived in Dubai.

I have also closely scrutinized the so called agency agreement and I find that a lot of things have not been explained to my satisfaction. For instance, if indeed money had already been given to the defendant to purchase the suit vehicles why was this not stated so in the agency agreement which according to the plaintiff was merely formalizing what had already been done. For all intents and purposes the agreement talked of shall which is a future event. It equally refers to importation of the motor vehicles listed therein as a future event and yet they were already in the country as conceded by the plaintiff during cross-examination.

It was argued for the plaintiff that the formal agency agreement was preceded by a parole agreement and dealings there under and therefore the receipt of money in the agency agreement was not time-bound to the signing date but rather extended backwards to the beginning of the transactions. The case of **Kanting Printing Works v Tanga District Council (supra)** was relied upon. It is the view of this court that that case is distinguishable from the instant case because the parties before this court have not even proved the existence of an oral agreement between themselves.

This court would still be convinced by the plaintiff's explanation and would be inclined to read the agreement to give it the meaning the plaintiff attaches to it if only there is proof of prior payment for purchase of the motor vehicles. Unfortunately, as I have made a finding above there is no such proof.

The defendant denies ever being the plaintiff's agent or employee. I have had to request both parties to produce their passports (after submissions were already filed) to prove the parties alleged business trips to China, Mombasa and Dubai. While it is true that the parties have made business trips together to those places, the nature of their dealings remain obscured as they are mainly relying on oral as opposed to clearly written agreements. The only document that should have clarified the relationship is also not helpful as observed above. What now remains is the allegation by one party and denial by the other. It is only the parties and the Almighty God to whom no secrets are hidden who know the truth which they have not availed to this court.

It is possible that money was given as alleged but for purposes of proving his claim before this court the plaintiff needed to adduce more convincing evidence. The cardinal principal of law as stated in section 101 of the Evidence Act is that he who alleges must prove. The burden of proving that the plaintiff gave money to the defendant to purchase the suit vehicles and the agency agreement was merely formalizing that transaction squarely laid on him but he dismally failed to discharge it. I am aware that the burden of proof in civil cases is on a balance of probability. However, the evidence adduced to prove the plaintiff's case including the photograph of the defendant holding foreign money in the presence of some oriental man and the photograph of a Prado were never corroborated. In my view they were no nexus between them and the plaintiff's alleged giving of money to the defendant. This court cannot therefore rely on them to conclude that the plaintiff gave money to the defendant for the purchase of the suit vehicles.

Without proof of prior remittance of money to the defendant for purchase of the suit vehicles the agency agreement remains devoid of any consideration and as such is unenforceable. According to **Chitty on Contracts, 28th Edition, Vol. 1, General Principles, Paragraph 3-013**, under the doctrine of consideration, a promise has no contractual force unless some value has been given for it. The general rule as stated in **Halsbury's Laws of England 4th Edition Vo. 9(1) Paragraph 727** is that a promise which is made without consideration may not be sued upon in law of contract for it is merely a bare promise on which no action will lie.

The above legal principles have been incorporated into the Contracts Act, 2010. Section 20 of that Act provides that an agreement made without consideration is void except where;

- (a) is expressed in writing and registered under the Registration of Documents Act and is made on account of natural love and affection between parties standing in near relation to each other;
- (b) is a promise to compensate, wholly or in part, a person who has voluntarily done something for the promisor or something which the promisor was legally compellable to do; or
- (c) is a promise, made in writing and signed by the person responsible for it or by the agent of that person, to pay wholly or in part a debt for which a

creditor may have enforced payments but is restricted by the Limitation Act.

The agency agreement does not fall under any of the above exceptions. In the circumstances, this court finds it void for lack of consideration. This answers the first issue in the negative.

Issue 2: Whether there was breach of the agency agreement.

I have duly considered the arguments of both counsel on this issue. However, for there to be breach there should be an obligation imposed by a contract which the offending party breaks. What constitutes breach of contract was elaborately stated by Bamwine J. (as he then was) in the case of **Ronald Kasibante v Shell Uganda Ltd H.C.C.S No. 542 of 2006** as follows:

“Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other Party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract discharged or seeking a discretionary remedy.”

For the reason that the plaintiff has neither proved the validity of the agency agreement nor the existence of an oral agreement with the defendant, no obligations have been breached as there is no contractual duty on either party. The plaintiff claimed from the defendant a receipt for the vehicles he paid for in Dubai yet according to his evidence he had paid the monies for the vehicles to the seller. There is no proof that he actually bought those vehicles apart from the bill of lading being in his name. He stated in his evidence that the bill of lading was drawn in his name because he had hired the container. The defendant has a more solid proof that he purchased those vehicles. He produced receipts to that effect.

All in all, the relationship between the two parties is not clearly laid out as a contractual one to be able to give rise to rights and duties. In such a scenario, I

have failed to find the duty the defendant breached. The second issue is therefore also answered in the negative.

Issue 3: What are the remedies available to the parties?

The plaintiff sought for an order that he is entitled to the vehicles in the agency agreement in addition to the Toyota Prado and Golf. He also sought for parking costs, general damages as well as costs of the suit. However, having failed in the two issues above, I do not find the plaintiff entitled to any remedies. In the result, this suit is dismissed with costs.

I so order.

Dated this 15th day of March 2013.

Hellen obura

JUDGE

Delivered in chambers at 2.00 pm in the presence of Mr. Frederick Sentomero for the plaintiff and Mr. Brian Othieno for the defendant. Both parties present.

JUDGE

15/03/13