THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 275 - 2011

SIMON TENDO KABENGE TRADING AS
M/S SIMON TENDO KABENGE ADVOCATES :::::::::::::::::: PLAINTIFF

VERSUS

MINERAL ACCESS SYSTEMS UGANDA LIMITED :::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT:

The Plaintiff, Simon Tendo Kabenge trading as M/S Simon Tendo Kabenge Advocates who shall be referred to as the Plaintiff in these proceedings sued Mineral Access Systems (U) Ltd hereinafter referred to as the Defendant seeking a declaration that the Defendant is in breach of an Advocates/Client agreement, that the Plaintiff is entitled to enforce the terms of the agreement, special damages general damages, interest and costs.

This case proceeded without a Written Statement of Defence because it had been struck off the record following failure of the Defendant to pay the requisite fees as had been directed by Court on 27th August 2012.

The background of this case can be discerned from the pleadings. Briefly, they are that the Defendant, desirous of executing a sublease between themselves and M/S Krone Uganda Limited who were holders of Mining lease No. ML4478 known as the Bjordal Nyamuliro Wolfram Mine in Kabale, Uganda whose total consideration would be US$ 5,000,000-; contracted the Plaintiff to peruse, prepare, settle, execute and complete a sublease agreement and counterpart for the same.

On the 17th December 2010, the Plaintiff and the Defendant executed and completed an agreement which was headed as follows:

> *"In the matter of an agreement for remuneration in respect of employment of Advocates for the prosecution of non-contentious matter under Section 48, 51 and 54 of the Advocates Act Cap 267"*

The subject matter of the agreement also appeared on the top sheet as follows:

> *"Legal services in respect of the sublease of Bjordal Nyamuliro Wolfram Mine in Kabale Uganda for a total consideration and rack rent of US$ 5,000,000-.*

The agreement also indicates that it was between M/S Mineral Access (U) Ltd and Simon Tendo Kabenge Advocates. This agreement is not disputed. The terms of remuneration were clearly spelt out in clause 1 which I found necessary to reproduce here:

1. <u>REMUNERATION</u>

a) The client and the Advocates agree that taking into account the complexity and involving nature of the matters above mentioned, which matters shall be handled to their conclusion, the client shall pay the Advocates as their full and final remuneration, which shall not be subject to taxation, remuneration of US$ 194,000- (United States Dollars One Hundred Ninety Four Thousand Only) payable as follows:-

(i) US$ 20,000- (United States Dollars Twenty Thousand Only).

(ii) US$ 24,000- (United States Dollars Twenty Four Thousand Only) be applied towards monthly retention fees of US$ 2,000- (United States Dollars Two Thousand Only) over a period of twelve (12) months starting 21st April 2011. This part of the consideration shall be applied towards the retention of the Advocates as Company Secretaries of Mineral Access Systems Uganda Limited, a subsidiary of the client in Uganda which shall be involved in the management of the sublease.

(iii) US$ 150,000- (United States Dollars One Hundred Fifty Thousand Only) as the final payment for the legal services on or before the 12th January 2012.

On 7th February 2011, US$ 20,000- (United States Dollars Twenty Thousand Only) was paid to the Plaintiff as required by Clause 19a) 9i) of the agreement. The Plaintiff went into action which resulted into the

sublease agreement between the Defendant and M/S Krone Uganda Limited.

On 9th March 2011, the Defendant still acting through the Plaintiff paid M/S Krone (U) Limited a deposit of US$ 100,000- (United States Dollars One Hundred Thousand Only) which it accepted.

It is the Plaintiff's evidence that on or about the 19th or 20th April 2011, the Defendant gave US$ 300,000- (United States Dollars Three Hundred Thousand Only) to the Plaintiff which was in furtherance of the sublease agreement but M/S Krone (U) Limited refused it claiming the Defendants had breached the sublease agreement.

On 25th July 2011, the Defendant sent an email followed by a telephone call terminating the advocate/client agreement with the Plaintiff. The Plaintiff then demanded for US$ 166,000- (United States Dollars One Hundred Sixty Six Thousand Only) as agreed under the agreement. The Defendant declined and instead asked the Plaintiff to pay back to them the US$ 100,000- (United States Dollars One Hundred Thousand Only) that they had recovered from M/S Krone (U) Limited since there was no longer a contract, thus the Plaintiff filed this suit.

In his evidence, PW1 told Court that on the 14th December 2010 he was retained by the Defendant who instructed him to peruse, prepare, settle, execute and complete a sublease agreement between themselves and M/S Krone (U) Ltd in respect of mining lease on ML4478 known as the Bjordal Nyamuliro Wolfram Mine in Kabale, Uganda.

He said on the 17th December 2010, they executed an agreement in respect of the remuneration that the Plaintiff would receive for his legal services in respect of the sublease and work thereof.

The agreement provided for a fee of US$ 194,000- (United States Dollars One Hundred Ninety Four Thousand Only). This agreement was attached to the plaint as Annexture (A). The agreement clearly provided in Clause 1 the sum of 194,000- which would not be subject to taxation. In addition to that sum, the Defendant was to pay the Plaintiff US$ 2,000- as retention fees. This agreement was witnessed by Joel P. Olweny who told Court in his evidence that he was present and witnessed the execution of the agreement between the Plaintiff and the Defendant. He further said that the Defendants were represented by their Managing Director, one Glendon Archer.

Joel P. Olweny, an advocate is infact the one who drew the agreement at a fee of US$ 20,000. This agreement is not disputed. It is therefore not in doubt that the Plaintiff and the Defendant entered into this Advocate/Client agreement.

In my view therefore it is this agreement that was the operative document governing the relationship between the two parties.
By the terms of the agreement, the Plaintiff was obligated to investigate the ownership of the lease property, to negotiate on behalf of the Defendant, peruse various documentation which related to the transaction and give advise thereof, to ensure that all the procedural steps were taken care of and seek consent of the sublease. It was also the Plaintiff's duty to identify key experts and find out the government

departments that were relevant to the transaction; most of all, prepare and draft the agreement have it executed and witnessed.

The Plaintiff was to peruse, prepare and complete registration of the sublease agreement. Issues concerning insurance did not for part of this agreement.

The Plaintiff's evidence was that on the 7th February 2011 having been paid the initial installment of US$ 20,000-, he went into action, and engaged M/S Krone (U) Ltd and the sublease agreement was signed. This sublease agreement, attached to the plaint as B1 has a heading which reads as follows:-

> *"In the matter of a sublease under Mineral Agreement for Bjordal Nyamuliro Wolfram Mine deposit under Sections 3, 4, 5, 6, 8, 11, 13, 18, 43, 45, 49, 93, of the Mining Act 2003 and Regulation 48 of the Mining Regulations SI 71 of 2004."*

It was dated 7th February 2011. This agreement was between M/S Krone (U) Ltd and M/S Mineral Access Systems (U) Ltd, the Defendant. It also showed that the drawer was M/S Simon Tendo Kabenge Advocates. The signatories to this agreement were Danish Mir, Glendon F. Archer of Mineral Access System (U) Ltd and Simon Tendo Kabenge of M/S Simon Tendo Kabenge Advocates. An Addendum was made on 16th March 2011 and was signed by Isingoma Amooti, the Chief Executive Officer of M/S Krone (U) Ltd and witnessed by their Managing Director Rugazzora Rose.

For the Purchaser, Glendon Archer Chief Executive Officer of M/S Mineral Access Systems (U) Ltd signed on their behalf. The same was

signed in the presence of Joel P. Olweny, an advocate who is also the Plaintiff's witness in this case. There is no doubt that this sublease was entered into by the parties because soon thereafter, it was followed by payments emanating from the Defendant through the Plaintiffs to M/S Krone (U) Ltd.

These payments are clearly evidenced in emails headed proof of payment dated 22nd March 2011 attached to the Plaintiff's witness statement as 'C'. There is no doubt therefore that the Plaintiff did his work under the agreement.

In my view, the Plaintiff had executed his obligations under the contract and earned the remunerations specified in Clause 1 of the Remuneration In respect of Employment of Advocate's agreement that they had executed on the 17th December 2010.

What then are the remedies the Plaintiff is entitled to?

In the plaint, the Plaintiff prayed for a declaration that the Defendant was in breach of the Advocate/Client agreement.
Clause 4 of the Remuneration Agreement under termination provided for in (a) the remedy where the Defendant terminated the agreement.

It reads;

> *"(a) Paying the Advocates if the client terminates this agreement.*
> *The client can terminate the agreement at any time but must pay the Advocates agreed fees as per this agreement. If the client terminates this agreement before the client completes payment*

of the fees, the Advocates shall be entitled to immediate and prompt payment of any and all outstanding payments."

This was a term of the agreement freely entered into by the parties who in my view knew what they were doing at the time of signing. The mood of the parties at the time of signing was well described by Joel P. Olweny in Paragraph 4 of his witness statement. He spoke thus:

"The agreement was entered into freely while the Plaintiff and the Defendant's Managing Director Mr. Glendon Archer who signed on his behalf, were in a joyous and buoyant mood that they had achieved a major milestone."

The Defendant might argue that when the sublease between them and M/S Krone (U) Ltd collapsed, it also affected the remuneration agreement between them and the Plaintiff but this cannot be relied on because they are the ones who caused the collapse of the agreement with M/S Krone. Isingoma Amooti, a director in M/S Krone (U) Ltd stated in his witness statement that they rescinded the sublease because the Defendant had breached the terms of the agreement.
He said in Paragraph 11:

"*On 18th May 2011, the Plaintiff formally wrote to M/S Krone (U) Ltd terminating the sublease agreement and demanding a refund of the US$ 100,000- paid to us by the Defendant as instructed."*

It would be an injustice to visit the failures of the Defendant on the Plaintiff's relationship with them, much so when the source of the problem had nothing to do with the Plaintiff.

Furthermore, this agreement having been entered into by willing parties, it is only within this agreement that the dispute should be resolved. This Court cannot begin reading into the agreement, provisions that were not intended to be included. This position was well illustrated by **Lord Jessel MR** as early as 1875 in the case of **Printing & Numerical Registering Co. Sampson (1875) Lr Eq 462 at 467** where he stated:

> *"If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and their contracts, when entered freely and voluntarily, shall be held enforceable by the Courts of justice."*

This was further enunciated in the later case of **Stockloser V Johnson (1954) 1 All ER 640** where in it was held:

> *"People who freely negotiate and conclude a contract should be held to their 'bargain', rather that the judges should not intervene by substituting each according to his individual sense of fairness, terms which are contrary to those which the parties have agreed upon for themselves."*

From the foregoing authorities, to read different clauses into the agreement would be judicial interference resulting into what the parties had never intended. Clause 4 of the agreement clearly provided that if the Defendant terminated the agreement before completing payment of the fees, the Plaintiff would be entitled to immediate and prompt payment of any and all outstanding payments.

Nowhere in this case has the Plaintiff been shown to have breached any part of this bargain. Going by those provisions, it is this Court's finding that the Plaintiff is entitled to his full pay as provided for under Clause 1 of the agreement.
Failure therefore to pay the Plaintiff is a breach of the Advocate/Client agreement and it is so declared.

The Plaintiff prayed that the agreement be enforced and he be paid or services less US$ 28,000- that the Defendant has so far paid. In view of the findings herein above, this Court declares that the Plaintiff is entitled to enforce the terms of the agreement.

The Plaintiff also prayed for a declaration that it holds onto and pay itself the US$ 114,400- which is in its Stanbic Bank Account as professional fees due to it.

The contract sum was US$ 194,000-. This sum less by US$ 28,000- leaves a balance of US$ 166,000- due and owing to the Plaintiff. US$ 114,400- is much less than the sum due.
It is therefore declared that the Plaintiff is entitled to hold onto the US$ 114,400- and it is hereby ordered that it be used to offset part of the entire debt owed by the Defendant to the Plaintiff.

It is hereby ordered that any order freezing transactions on the said escrow account 0240086755201 be and is hereby lifted.

Since that will leave a balance of US$ 51,600- unpaid, the Defendant is ordered to pay the Plaintiff this sum.

The Plaintiff sought orders restraining and Defendants and its officials representatives, agents and assignees from threatening, intimidating, defaming and abusing the Plaintiff.

In Paragraph 40 of his witness statement, the Plaintiff stated that when he demanded for his fees, the Defendant, using high authorities in Uganda and East Africa in an attempt to forcefully withdraw the money kept in the escrow account, abused threatened and intimidated him. This had the effect of denying him his fees, lowered his reputation and that of his firm in the minds of right thinking members of the public. He was referred to as a fraudster, which was inhumane and degrading. That this caused him psychological and physical stress, anxiety and apprehension for fear that the Defendant's action (d) lead to incarceration and detention. This allegation by the Plaintiff received support from Joel. P. Olweny who had also received information of the Plaintiff being branded a fraudster. In Paragraph 15 of his witness statement, he stated thus:

> *"I was surprised to learn that Mr. Simon Tendo Kabenge had been branded a fraudster. I then heard many lawyers in town laughing at him that he had defrauded a Foreign Company and that he was in trouble for it. This made me to think that maybe there was something outside the agreement which I did not know and my high opinion and regard for him changed dramatically."*

He further states the "effect of referring to the Plaintiff as a fraudster in Paragraph 16 in these words:

"I started avoiding him, shunning him so that fellow lawyers do not associate me with a person that had been branded a fraudster which is a serious criminal matter."

This evidence is not disputed and I have no reason to disbelieve it. Being referred to as a fraudster has serious repercussions to a practicing advocate. Legal practice calls for discipline, uprighteousness decency, integrity, truthfulness and honesty.
Being referred to as a fraudster perforates and mutilates all of them and yet they are the basis of a successful practice. It is therefore only befitting that those who refer to practicing lawyers as fraudsters without foundation should be restrained from doing so.

There being no foundation for referring to the Plaintiff as a fraudster, a permanent injunction is issued against the Defendant and its officials, representatives, agents and assignees from threatening, intimidating, defaming and abusing the Plaintiff.

The Plaintiff also asked for general damages. General damages are awarded so as to put the Plaintiff in the same or as near as possible a position he would otherwise be in if the wrong complained of had not been done. **Hall Brothers SC Co. Ltd V Young [1939] IKB 748**.

The Plaintiff seems to have claimed general damages under two heads namely; tort and contract. Under the head of tort, the Plaintiff was expected to show how his reputation was lowered, how he was shunned and how it had affected him in the eyes of the public. He could have done this through documentary evidence, press extracts or by calling witnesses. There was no documentary evidence or press extracts attached to his plaint to assist Court in assessing damages

under tort. The only witness he called, Olweny Joel said he started avoiding him because he feared that other lawyers would refer to him as an associate of a fraudster. But under Paragraph 17 this same witness went back to the Plaintiff and finds no problem associating with him. This is not a sign of lost reputation. I therefore find nothing under tort to award the Plaintiff.

As for breach of contract, it is well known that the remedy is damaged and in the instant case, the Plaintiff would be entitled to have such a sum as would put him in the same financial position had the Defendant carried out his side of the bargain. **JK Patel V Spear Motors Ltd SCCA 4/1991**.

In the instant case, both parties were bound by the terms of the remuneration in respect of employment of advocate's agreement in which the Defendant was to pay the Plaintiff US$ 194,000- under Clause 1 even in the event of termination under Clause 4(a) it has been found earlier in this judgment that the Defendant breached Clause 4(a) of this agreement and is accordingly indebted to the Plaintiff to the tune of US$ 166,000-.

It is not in dispute that the Plaintiff's services were terminated on 25th July 2011 and have since been deprived of the use of the money due to them.

The Plaintiff prayed for US$ 100,000-. He however did not give much guidance to Court in validating this amount. Court in this case can only be guided by the "no power to give more, and ought not to give less" principle. **Argentino (1889) 14 App Case 519, HL**

Restitution to restore the Plaintiff to his situation before the breach of contract would be the basis. **Bank of Uganda V Masaba & Ors [1999] I EA 2**.

It therefore becomes important to consider whether the act of the Defendant was proximate in this case, because his liability for breach of the contract was limited only to losses that were proximate.
In other words, could the loss suffered be viewed as the likely consequence of the breach or one that could have been contemplated by the parties at the time they entered into the contract. **Hadley V Baxendale [1843 – 60 All ER 46**

In the instant case, the Plaintiff perused, prepared, settled, executed and completed the sublease agreement and counter part of the same for which it was instructed. They investigated the ownership of the lease property, negotiated on behalf of the Defendant and perused various documentation related to the transaction of obtaining a sublease for the Defendant with M/S Krone (U) Ltd for the Bjordal Nyamuliro Wolfram Mine. It was the Defendant's conduct in failing to make the requisite installment payment to M/S Krone that let to the dissolution of the sublease agreement and the Defendant subsequently terminated the Plaintiff's services.

It was foreseeable to the Defendants who had willingly signed the Advocate/Client agreement with the Plaintiffs that if they terminated their services, the Plaintiffs would be entitled to immediate and prompt payment of any and all outstanding payments. The Defendants in refusing to adhere to this term of the agreement deprived the

Plaintiff's of the use of their money and can only be justly held liable in general damages.

Considering all the factors surrounding this case, I find an award of Ugx. 20,000,000/= (Uganda Shillings Twenty Million only) appropriate in the circumstances.

The Plaintiff prayed for interest of 24% per annum on the special damages of US$ 166,000- from the date of filing the suit till payment in full. Lord Denning has said that an award of interest is discretionary. He wrote thus in **Harbutt's Plasticine Ltd V Wayne Tank & Pump Co. Ltd [1970] AQB 447**.

> *"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money, and the Defendant has had the use of it himself. So he ought to compensate the Plaintiff accordingly."*

Interest is awarded so as to bring a person to a position he would have been if the wrong complained of had not taken place. In this exercise consideration must be given to the type of business the Plaintiff does and to the length or period he has been deprived of the use of his money.

In the instant case, the Plaintiff has been put out of his money for over 3 years. It is just fair to conclude that if he had invested this money he would have reaped some profit. The Plaintiff has prayed for interest of 24% per annum. He did not however justify this interest. The record

does not show him as a business man who invests in trade goods or buildings nor a borrower at interest so as to justify 24% per annum. I therefore find the interest rate of 24% manifestly high in the circumstances.

Taking into account the factors surrounding this case and much so that the bulk of the money was on his escrow account and the Defendant therefore not having had use of it, it is Court's finding that an award of interest of 8% on the US$ 166,000- appropriate.

The Plaintiff is therefore awarded interest of 8% per annum from the date of filing the suit till payment in full and costs of the suit.
In conclusion, judgment is entered in favour of the Plaintiff in the following terms:

a) A declaration that the Defendant is in breach of the Advocate/Client Agreement.

b) A declaration that the Plaintiff is entitled to enforce the terms of the Agreement.

c) A declaration that the Plaintiff is entitled to hold on to and pay himself the US$ 114,400- in its custody in Stanbic Bank A/c No. 0240086755201

d) An order unfreezing transactions on the said escrow account No. 0240086755201.

e) The Defendant pays to the Plaintiff US$ 51,600-.

f) An injunction restraining the Defendant, its officials, representatives, agents and assignees from threatening, intimidating and defaming the Plaintiff.

g) General damages of Ugx. 20,000,000/=.

h) Interest of 8% per annum on (c) and (e) herein above from the date of filing the suit till payment in full.

i) Costs of the suit.

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David K. Wangutusi

JUDGE

Date: 11/12/2014