

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 221 OF 2008

PAL AGENCIES (U) LTD:..... PLAINTIFF

VERSUS

1. **TESO COACHES LTD**
2. **MR. ETIU FAUSTINE:..... DEFENDANTS**

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff company first filed a suit on 22nd August 2008, against Teso Coaches Ltd and its managing director Mr. Etilu Faustine jointly and severally for breach of contract, loss of revenue in excess of Shs. 116,160,000/= and an injunction restraining the defendants by themselves, their agents, servants or otherwise from inducing, procuring breaches or unlawfully interfering in contracts between the plaintiff and their customers. The plaintiff claimed for damages for inducing breach of contract, general damages for inconveniences, interests and costs of the suit.

Soroti Municipal Council (hereinafter abbreviated as SMC) later applied and was joined to the suit as the 2nd plaintiff and an amended plaint was accordingly filed on 4th February 2009. The claim for both plaintiffs against the defendants jointly and severally was for breach of contract and loss of revenue in excess of Ug. Shs. 408,018,000/=. The plaintiffs also sought for an order of demolition of construction on Plot 15 Station Road SMC done without the permission of SMC as well as a permanent injunction restraining the defendants, their agents and servants from inducing, procuring breaches or unlawfully interfering with contracts between the 1st plaintiff and its customers. The plaintiffs further sought damages for inducing breach of contract and interference with the contract between the 1st plaintiff and the 2nd plaintiff, general damages for inconvenience, interest and costs of the suit.

The defendants in their written statement of defence (WSD) of both the first plaint and the amended one contested the entire claim and contended that they were granted permission to develop the bus park situate at Plot 15, Station Road, Northern Division of SMC, they also

contended that there was no contract between Pal Agencies (U) Ltd and SMC and as such they could not have interfered with a non-existent contract. The defendants also denied that they made the alleged agreement or contract with the plaintiff.

Subsequently, by a notice of withdrawal dated 24th March 2009 SMC withdrew from the suit. Meanwhile the plaintiff filed another suit (C.S. No. 351 of 2009) against SMC and Soroti Local Council III, Eastern Division on 21st September 2009 on the same subject matter for breaching the contract awarded to it by the defendants awarding a parallel tender to Teso Coaches. An application by the plaintiff to consolidate the two suits was heard by the then trial judge and disallowed on the ground that the consolidation would result into restructuring the plaintiff's case into an entirely new one as could be discerned from perusal of the "proposed amended plaint" annexed to the application.

When this suit first came up before me Mr. Richard Omongole appeared for the plaintiff while Mr. Edward Anguria appeared for the defendants and it was reported that SMC was still reflected as a party to the suit. Court then allowed the parties to amend the pleadings to remove SMC. An amended plaint was filed by the plaintiff on 2nd December 2010 and an amended joint WSD was filed on 24th January 2011.

However, when this matter came up for scheduling counsel for the defendants applied under Order 6 rule 18 of the Civil Procedure Rules to have some paragraphs in the amended plaint struck out arguing that they were pleaded when SMC was joined as a 2nd plaintiff and now that it had withdrawn from the suit the pleadings and prayers could not be maintained. I then considered the arguments of both counsel on the matter and ruled that apart from the pleadings and prayer on demolition of the structures at the Teso Coach Park the rest of the pleadings appeared in the original plaint. I accordingly struck out the pleadings and prayer on demolition from the amended plaint of 2nd December 2010.

The facts giving rise to this suit are that the plaintiff was awarded a contract by SMC to manage, levy, charge and collect parking fees from the main taxi/bus park situate in the Eastern Division of SMC in the Financial Year 2007/2008. When that contract was coming to an end the tendering process for the following financial year was commenced but due to complaints raised by some of the bidders at the contract award stage, an Administrative Review Committee was constituted to handle the matter. In the meantime an administrative extension was given to the plaintiff by the Town Clerk to continue collecting revenue from the bus/taxi park on behalf of SMC until a final decision was taken by the Administrative Review Committee.

It is noteworthy that SMC as a local government is responsible to provide some services as specified in Part 2 of the 2nd Schedule to the Local Government Act, Cap. 243. Section 13 (e) thereof stipulates provision and management of public vehicular parking. I must emphasize

that it is a service to the public. The defendants had buses and other motor vehicles that would load and offload at the SMC taxi/bus park. It is not in dispute that the 1st defendant later started to operate in its own bus park and henceforth stopped paying parking fees to the plaintiff. It instead started paying revenue to the Northern Division of SMC which according to the evidence given is currently assessed at Shs. 5,000,000/= per month. It is that refusal and or failure by Teso Coaches to park in the SMC taxi/bus park and pay parking fees as well as the establishment of its own park that aggrieved the plaintiff thereby giving rise to this suit.

At the scheduling conference counsel for both parties agreed on four issues namely;

1. Whether there was a contract between the plaintiff and the defendants.
2. If so, whether the defendants breached the said contract.
3. Whether the defendants induced Gateway Bus Company and other taxi operators to start parking in their park and to stop paying parking fees to the plaintiff.
4. What remedies are available to the parties?

The plaintiff called four witnesses namely; Patrick Ariong (PW1), Paul Omoko (PW2), Otim Paul (PW3) and Juma Opolot (PW4). The defendants also called four witnesses namely; Jovans Peter Odikhor (DW1), Osikei Okia Johnny (DW2), Faustine Etilu (DW3) and Edogu Joshua (DW4).

Issue 1: Whether there was a contract between the plaintiff and the defendants.

PW1 testified that the 1st defendant used to pay Ug. Shs. 30,000/= per bus for the two early buses and for the rest it would pay Ug. Shs 25,000/= while the returning buses used to pay Ug. Shs. 25,000/= per day seven days a week. He also testified that all buses were paying the same rates but those off loading were paying Ug. Shs 5,000/= It was also the testimony of PW1 that mini buses paid Ug. Shs. 9,000/= each. Lorries used to pay Ug. Shs. 20,000/=, small cars used to pay Ug. Shs. 3,000/= and pickups paid Ug. Shs. 12,000/=.

According to counsel for the plaintiff the above evidence was not disputed by the defendants showing that there was an offer, acceptance and consideration hence a valid contract within the meaning of sections 2, 10 and 19 of the Contracts Act, 2010.

He submitted that SMC legally under the Local Government Act Cap. 243 and the Public Procurement and Disposal of Public Assets Act, 2003 (hereinafter called the PPDA Act) awarded the plaintiff temporal permission to levy, charge and collect parking fees on behalf of SMC until the final decision of the Administrative Review Committee. The plaintiff's counsel contended that it was the duty of the plaintiff to enter contracts with motorists who

so wished to utilize the park which they did. It was also argued that the plaintiff made offer to the park users which they duly accepted and paid a consideration in return. Counsel for the plaintiff submitted that the consideration varied depending on the nature of transportation, number of buses and timing among others.

He referred to various excerpts from the book titled *Law of Contract in Uganda* by **Professor D.J Bakibinga** as to the nature of an offer and agreement as well as the case of *Jean Francois Piva vs Habitat [1995] 11 KALR 1* to explain the conditions for existence of a valid contract. For the definition of a contract this court was referred to *Black's Law Dictionary, Abridged Fifth Edition 1983, Minnesota USA, West Publishing Co. at page 169 – 171*. In that regard counsel for the plaintiff argued that there was an implied contract between the plaintiff and the 1st defendant since it parked and loaded its buses at the bus/taxi park managed by the plaintiff, paid the amount of money demanded by the plaintiff for usage of the park and they cannot turn around and claim not to have had a contract.

On the other hand, counsel for the defendants argued at length that in the first place the alleged contract between the plaintiff and SMC from which the plaintiff purported to derive authority to contract with the individual motorist who parked in the bus/taxi park never existed because the procedure laid down in the PPDA Act was never followed. As regards the alleged contract between the plaintiff and the defendants he submitted that the ingredients of a valid contract to wit offer, acceptance and consideration were not established by the plaintiff. It was argued for the defendants that none of the plaintiff's witnesses testified as to what the terms of the alleged contract were. The defendant's counsel referred to *Cheshire and Fifoot's Law of Contract M.P Furmston 10th Edition at page 107* where it was stated that, "...if the extent of the agreement is in dispute, the court must first decide what statements were in fact made by the parties either orally or in writing... it must be found as a fact exactly what it was the parties said..."

Counsel for the defendants argued that the plaintiff failed to plead or lead any evidence to show the terms of the alleged oral contract and therefore this court should not attempt to guess them as they did not exist in the first place. He referred this court to the case of *Canaf Group Inc vs Attorney General & another Misc. Cause No. 27 of 2012* and invited it to hold that indeed no contract existed between the parties.

Additionally, the defendants' counsel submitted that the plaintiff did not plead the consideration and/or terms of the alleged oral contract yet under section 10(5) of the Contracts Act, 2010 a contract the subject matter of which exceeded twenty five currency points is required to be in writing. It was the defendants' contention that in the absence of the said vital facts this court cannot speculate on what could be the consideration of the alleged oral contract. The defendants cited the case of *John Kagwa vs Kolin Insaat Turizm & 2 others*

HCCS No. 318 of 2012 where the effect of section 10(5) of the Contracts Act, 2010 was considered by the Court.

I have carefully considered the evidence adduced by the parties and the written submissions of both counsel together with the authorities relied upon. I wish to first of all point out that as clearly seen from the above agreed issues, the question of the existence of the contract between the plaintiff and SMC is not for determination in this suit but it is one of the main issues in the plaintiff's suit against SMC. I will therefore not consider the arguments of counsel for the defendant on that matter.

Turning to the issue at hand, it is the plaintiff's case that there was a contract between the plaintiff and the 1st defendant since it parked and loaded its buses at the bus/taxi park managed by the plaintiff, and paid the amount of money demanded by the plaintiff for usage of the park. Conversely, it is the defendants' case that there was no contract between the plaintiff and the 1st defendant.

While the plaintiff's counsel has made a very elaborate submission on the definition and formation of contracts, I have found difficulty in appreciating the argument for the plaintiff that by the mere fact that it had a contract to collect revenue from the bus/taxi park there was a subsisting contract between it and the 1st defendant to load/offload and pay. To my mind that argument would only be sustainable where there is an agreement to pay a periodic fee be it daily, weekly, bi-weekly or monthly whether or not the 1st defendant has parked its buses at the SMC bus/taxi park. But this was not the case here as confirmed by the evidence of PW1 who had this to say in cross-examination when asked whether motorist who did not park were also charged fees:-

“Payment of parking fees was made daily and therefore we would not charge those that did not park on certain days.”

In the absence of an agreement for such a periodic payment of fees, it is the firm view of this court that a contract, if at all (because I prefer to call it a management arrangement), would only be formed where a motorist enters the park and it is allowed to park well knowing its obligation to pay. It is at the point of entering the SMC bus/taxi park or any other gazetted parking lot under the management of the plaintiff that an offer is made by the motorist and acceptance is by the plaintiff allowing entry for a consideration of a parking fee. Otherwise where a motorist chooses not to come to the park there is no way one can allege existence of a contract. To say that there is a contract would, in my view, create a liability where there is none.

The payments relied upon by counsel for the plaintiff to support the argument that there was a contract between the plaintiff and the defendants were made upon utilization of the Park.

For the above reasons, it is the finding and conclusion of this court that there was no subsisting contract between the plaintiff and the defendants which created an obligation on the parties. This answers the 1st issue in the negative and leads me to consider the 2nd issue.

Issue 2: If so, whether the defendants breached the said contract.

Having found that there was no subsisting contract between the parties and that a contract would only be formed as and when a motorist parked at the designated park, the above issue would only arise where the defendants parked their motor vehicles in the designated park and failed/ or refused to pay the parking fees. However, the plaintiff did not specify in its pleadings when the defendants parked and did not pay and how much is due and owing apart from the blanket allegation in paragraph 9 of the amended plaint filed on 2nd December 2010. There was also no satisfactory evidence to that effect. All that PW1 said in relation to that in cross examination is:

“There are days Teso Coach parked at the designated park at least on 1st and 2nd July 2008 when it did not pay. I do not know the exact amount outstanding for the two days.”

Matters were not helped by the submissions of counsel for the plaintiff. He referred to the evidence of PW1 to the effect that, *“Teso Coaches started parking on the streets and refused to pay revenue to Pal Agencies...”* and that of PW3 who stated:-

“From 2008 the problem which occurred was that more buses came on board and competition became very stiff as they struggle for passengers. We came in to organize them and harmonise the loading process. We told the buses to load from inside the park and we made a gate. They were to load one by one. They did not respect that, particularly Teso Coach and Gateway. They continued loading from outside the park and refused to pay the fees as Teso Coach got its own terminal.”

Counsel for the plaintiff relied on the above evidence together with that of PW4 which is to the same effect to argue that the 1st defendant well knowing that it had a contract with the plaintiff and had to pay daily parking and loading fees breached the contract when it refused to pay revenue to the plaintiff. That argument was based on the assumption that there was a subsisting contract between the plaintiff and the defendants which created an obligation for the defendants to pay whether or not the 1st defendant parked in the designated park. But as I stated under the 1st issue there is no such subsisting contract and as such the argument of counsel is seriously misdirected.

Since the plaintiff has also failed to prove non-payment of fees for the two days the 1st defendant allegedly parked in the designated park when it had the burden to show the number and types of motor vehicles parked and the amount due and owing, I am unable to believe its story. Instead I find and conclude that the plaintiff has not proved on a balance of probabilities that the 1st defendant parked at the designated park and failed to pay the fees thereby breaching the contract it entered into with the plaintiff by so parking. This answers the 2nd issue in the negative and leads me to the 3rd issue.

Issue 3: Whether the defendants induced Gateway Bus Company and other taxi operators to start parking in their park and to stop paying parking fees to the plaintiff.

During examination in chief PW1 testified that they lost authority to collect revenue because no motorist could respect them after the 1st defendant's buses left although he could not remember the total number of vehicles that left the designated bus/taxi park. In cross examination PW1 testified that Teso Coaches induced taxis to park in their park by charging lower rates than what was approved by SMC. He however, conceded that the tender they were awarded did not restrict the opening of another taxi/bus park.

Counsel for the plaintiff submitted that the conduct and actions of the defendants induced the breach of contract between the plaintiff and SMC as well as between the plaintiff and other taxi/ bus operators who refused to pay. It was contended that the defendants' act of parking their buses outside the gazetted park and refusing to pay loading fees to the park management when it knew of the contract between the plaintiff and SMC can only be interpreted that the defendants intended to interfere with the contract between the plaintiff and SMC as well as the contract between the plaintiff and other park users.

It was further argued for the plaintiff that the defendants established an illegal park without the authority of the SMC in which they charged a very low rate which caused buses and taxis to move to their park. The plaintiff argued that provisions of the Local Government Act and the PPDA Act were not followed in establishing the defendants' bus park which amounted to unlawful interference with the plaintiff's contract. The plaintiff referred to ***R.F.V Heuston and R.A Buckley, "Salmond and Heuston on the Law of Tort", 21st Edition at page 350 – 352*** as to the ingredients of actionable interference with contractual rights. The case of ***Mercur Island Shipping Corp vs Laughton [1983] 2 ALL ER 189*** was cited in regard to interference in the execution of a contract where **Denning MR** stated that the interference is not confined to the procurement of breach of contract but extends to a case where a third person prevents or hinders one party from performing his contract.

On the other hand, counsel for the defendants referred to the evidence of DW1 and DW3 who separately testified that when the 1st defendant moved into its own bus park it did so

with only its buses and that Gateway Bus Company remained in the main bus park. According to the defendants' counsel, this position was confirmed by PW4 who testified during cross examination that some buses remained in the main bus park including those of Gateway Bus Company. Counsel for the defendants contended that no evidence was adduced by the plaintiff to prove the alleged inducement. It was the defendants' submission that on the basis of the evidence on record the directive to other motorists to use the Teso Coaches Park came from the Assistant Town Clerk of SMC rather than the defendants.

In his submissions in rejoinder, counsel for the plaintiff argued that the plaintiff did not at any point say that Gateway buses were parked in Teso Coaches Park but the Gateway Bus Company refused to pay parking fees because of the precedent set by Teso Coaches and other buses that went to the Teso Coaches Park.

I have found it imperative to define the key words "induce" and "inducement" before analyzing the evidence adduced to support this issue. According to ***Black's Law Dictionary, Abridged Fifth Edition*** the verb "induce" means, "*to bring on or about, to affect, cause, to influence to act or course of conduct, lead by persuasion or reasoning, incite by motives, prevails on*". The noun "inducement" is defined as, "*The act or process of enticing or persuading another person to take a certain course of action.*"

The plaintiff contends that the defendants influenced other bus and taxi operators to stop paying revenue to the plaintiff by refusing to park in the SMC bus/taxi park and pay parking fees, constructing an illegal park and charging a very low rate which caused the buses and taxis to move to their park. The defendants dispute that contention.

As regards the alleged refusal to park in the SMC bus/taxi park, it is not disputed that the 1st defendant stopped parking at that park because of the wrangles between it and Gateway Bus Companies. The only question would then be whether or not that action induced other motorists to move out of the park and refuse to pay. Looking at the above definition of the verb "induce" I am of the firm view that the plaintiff needed to prove some more active role played by the defendants in convincing and or influencing the other motorists to move out of the Park than the mere act of the 1st plaintiff refusing to park and pay the fees.

PW 4 testified that the 2nd defendant mobilised people from the market and one of the board members of the 1st defendant called Mr. Oyara Farouq together with a one Abilu who collects parking/loading fees from Teso Coaches Park told the motorists not to pay to the plaintiff. I found this evidence unconvincing because there is no proof that the motorists who were being told not to pay to the defendant had parked at the SMC Bus/Taxi Park. Besides, none of the motorists who were allegedly told not to pay was called to testify to that effect.

It should also be noted that from the evidence on record both the plaintiff and the defendants agree that the main park that was being managed by the plaintiff had become chaotic arising from wrangles between two major bus companies which used to park and load passengers therein. It is also not in dispute that some motorists were parking along the roadsides in the municipality. In fact Exhibit P5 indicates that as far back as 25th April 2007 when that letter was written by the Senior Enforcement Officer SMC to the Town Clerk SMC there was already a problem of parking along the road sides hence the directive that all motorists should park their vehicles in the gazetted park. This was in the Financial Year 2006/07 before the administrative extension was given to the plaintiff as its contract with SMC was still subsisting.

This position is strengthened by the evidence of PW2 Mr. Paul Omoko who was then the Ag. Town Clerk SMC. He had this to say in cross-examination:

“There were illegal stages outside the gazette park which made it very difficult to coordinate collection of revenue”.

It is therefore not true that the defendant is responsible for inducing the operators of motor vehicles not to park at the designated park. To my mind the underlying problem of wrangles and violence in the designated park must have discouraged the motorists from parking inside the designated park as opposed to the alleged inducement by the defendants. As a matter of fact PW3 testified to this when he said:-

“The various disputes in the park were mainly to do with competition, wrangles which led to defaulting of payment of fees....The Park had blockers and Pal had revenue collectors. The dispute involved all the parties including our staff. One time the blockers fought and hit one boy who was taken to the hospital and treated. He was one of the blockers. Because of these disputes, Teso Coached decided to build their own terminal-Teso Coach Park located in SMC.”

I have also had the opportunity to look at Exhibit P 16 being a letter of complaint to the Minister of Presidency on the conduct of the Resident District Commissioner (RDC) Soroti. That letter is dated 16th December 2008 and it was written by M/S Kasozi Omongole & Co. Advocates the plaintiff's lawyers. The letter accused the RDC and not the defendants of stopping vehicles from loading and parking at Soroti main Bus/Taxi Park, stopping the bus and taxi owners from paying money to the plaintiff and directing vehicles to park at the illegal park of Teso Coaches.

The second limb of inducement alleged by the plaintiff is the illegal construction of the 1st defendant's park. I must observe at this juncture that just as this court declined to consider the question of whether or not there was a contract between the plaintiff and SMC because it

is not one of the agreed issues for determination in this suit but in another one which is yet to be determined, for the same reason I will not delve into the question of whether or not construction of the Teso Coach Park is illegal.

Be that as it may, I have not come across any convincing evidence by the defendant showing that the plaintiff induced the owners of other public motor vehicles to park in its park either by word of mouth, letter, conduct or any other means. On the alleged charging of lower parking fees as a means of inducing the motorist to park, the plaintiff has not provided an approved rate for parking to this court apart from the oral evidence which was not backed by documentary proof. On 18/08/2011 during the hearing of the evidence in chief of PW3, counsel for the plaintiff sought to have guidelines showing tentative rate for parking fees admitted in evidence but upon objection from counsel for the defendants regarding the competence of the witness to tender in the guidelines and his desire to cross-examine the author, Mr. Omongole abandoned the prayer to have that document admitted in evidence. He stated thus:

“Since this document does not have any much evidential value we will dispense with its admission in evidence.”

That being the case, there is no evidence before this court as to the rates that were approved by SMC and therefore it would be speculative to find that the defendants charged a lower rate than that which was approved by SMC which influenced other bus and taxi operators to abandon paying fees in the designated park that was managed by the plaintiff.

Lastly on this point, there is evidence to show that the taxis that were operating in Northern Division were directed to either use the 1st defendant’s bus park or the SMC bus/taxi park. Exhibit P6 is a letter dated 17th July 2008 written by Johnny Osikei-Okia, the Senior Assistant Town Clerk of SMC to all the Motorists (Taxi drivers) at Katakwi Stage, Station Road, Northern Division. The letter states in part as follows:

“RE: VACATING KATAKWI STAGE

Northern Division has directed that parking along Station Road stops with immediate effect.

You are given up to Sunday 20th July, 2008 to make a decision as to whether to park in Teso Coach Park or the Public Taxi Park. This is because of the congestion now being experienced on Katakwi stage.”

The purpose of Exhibit P6 was to give the motorists a choice to either park in the park managed by the plaintiff or the 1st defendant’s park as a means of ensuring public order and cleanliness in the environment in the municipality. All in all, I find that the plaintiff has failed to prove on a balance of probabilities that the defendant induced Gateway Bus

Company and other taxi operators to start parking in the defendants' park and to stop paying fees to the plaintiff. The third issue is therefore answered in the negative.

Issue 4: What are the remedies available to the parties?

The plaintiff sought for a sum of Ug. Shs. 408,018,000/=, a permanent injunction, damages for inducing breach of contract and interference with the contract between the plaintiff and SMC, general damages for inconvenience, interest and costs of the suit.

The plaintiff having failed in all the above three issues, I find that it is not entitled to any remedies. It is important to note that even if the plaintiff had proved its case on those issues it would have been very difficult for this court to assess the special damages which were particularized in paragraph 15 of the amended plaint and not strictly proved in evidence. In that paragraph the plaintiff listed the different categories of motor vehicles, applied some rates which as I said earlier was never proved in evidence and multiplied it by 240 days. The total amount came to Shs. 468,240,000/= and yet what is claimed and prayed for is Shs. 408,018,000/=. No explanation was given as to why it was multiplied by 240 days. The disparity in the two sets of figures was also never explained.

The plaintiff's witnesses merely testified about the rates applicable, the amount that was being collected per month and that there were fees defaulters. They did not produce any accounting document to prove the monthly collections just as they did not indicate whether or not the alleged defaulters had indeed parked at the SMC Bus/Taxi Park and refused to pay. The record of the alleged defaulters tendered in evidence as Exhibit P21 would equally not be helpful to this court because it does not indicate whether or not those motor vehicles had actually utilized the park on the dates they are said to have defaulted. I believe no evidence was led to that effect because as I have already observed herein above the plaintiff's case was based on the assumption that there was a subsisting contract between the plaintiff and the operators of all public motor vehicles which required them to pay parking fees to the plaintiff whether or not they had utilized the park. It was therefore assumed that all that the plaintiff needed to do was to list all the vehicles and apply some rates then the total sum would be the plaintiff's entitlement in terms of specific damages. That is a serious misconception because the law is now settled that special damages must not only be specifically pleaded but it must be strictly proved.

For the above reasons, even if the plaintiff had proved its case it would not have been awarded any special damages for lack of strict proof of the same. I would have only awarded general damages of Shs. 10,000,000/= for breach of contract and inconveniences if indeed there had been a contract which was breached.

But since none of these has been proved, the result is that this suit is dismissed with costs.

I so order.

Dated this 6th day June 2014.

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.00pm in the presence of Mr. Richard Omongole for the plaintiff and Mr. Edward Anguria for the defendants.

JUDGE

06/06/14