

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION
CIVIL SUIT NO. 35 OF 2012
COUNTRY BAKERIES LTD:.....PLAINTIFF
VERSUS
INTERNATIONAL ORGANISATION FOR MIGRATION
(IOM):.....DEFENDANT
BEFORE: HON. LADY JUSTICE HELLEN OBURA**

JUDGMENT

Country Bakeries Ltd, the Plaintiff (referred to in the agreement as Service Provider) runs a commercial farm known as Teng Piny Farming Enterprises, located in the Gulu District. The International Organisation for Migration (IOM), the Defendant, is an international intergovernmental organization involved among other activities, in rehabilitation and resettlement of vulnerable ex-combatant youth of the Lord's Resistant Movement in Northern Uganda. The Plaintiff sued the Defendant for breach of the Service Agreement under which the Plaintiff was to house, feed and provide skills & empowerment through employment of the vulnerable ex-combatant youth on its farm and the Defendant was to provide to the plaintiff a maximum amount of US \$ 30,000 largely in kind and could also include cash as contributions for the services. It is the Plaintiff's case that whereas it housed, fed and employed the defendant's clients thereby incurring costs which it hoped to recover from the projected cash flows based on the farm input to be provided by the defendant, the defendant reneged on its obligations by providing deplorable and dilapidated machines not fit for the intended purpose. The plaintiff claimed for special damages, projected lost profits, general damages, interest and costs of the suit.

Summons to file a defence was issued on 25th January 2012 for service on the defendant but no defence was filed by 9th May 2012 and there was no affidavit of proof of service on court record. Consequently, on 9th May 2012, the suit was dismissed for failure to serve summons on the Defendant under Order 5 Rule 1(3) (c) of the CPR. The Plaintiff applied for

reinstatement of the suit on the ground that the service was effected but the clerk delayed to file the affidavit of service, and the advocate was out of the office due to surgery. The application was served on the defendant on 26th June, 2012 but no affidavit in reply was filed. Court then granted it since it was not opposed thereby reinstating the suit on 2nd July 2012. A default judgment was entered on 19th July 2012 because no defence was filed and the matter was set down for formal proof which was done, hence this judgment.

I must point out from the onset that upon looking at all the documents on the file this court is not satisfied that an effective service was done on the Defendant much as the affidavit of service has a copy of the summons that bear what appears to be the Defendant;' s stamp. I have come to the above conclusion upon looking at a letter at page 45 of the Trial Bundle by which the Defendant's lawyers M/S Lex Uganda Advocates & Solicitors advised the Plaintiff's lawyers that all correspondences in the matter should be directed to them. I then wondered why service of summons in the same matter could not be directed to the said lawyers. Be that as it may, since I have already heard this case despite the above anomaly which should have necessitated ordering for service on those lawyers or substituted service before entering a default judgment, I will proceed with the judgment but evaluate the evidence more critically since the suit was not defended.

At the scheduling conference two issues were canvassed for determination by this court. I now turn to address those two issues.

Issue 1: Did the Defendant breach the terms of the Services Agreement?

Before considering the issue of breach, I will first address the nature of the contract created between the Plaintiff and the Defendant which I hope will show the nature of the relationship created by the Services Agreement and the terms to which the parties agreed.

As stated above, the Defendant IOM is an international intergovernmental organization involved in rehabilitation of youth in Northern Uganda, many of whom were former child soldiers in the Lord's Resistance Army (LRA). The Defendant and the Plaintiff entered into a Services Agreement on 22nd September 2009, wherein the preamble stated thus:

“This agreement described the purpose, terms and conditions in respect of the Service Provider, a leading bakery and commercial farming enterprise based in the Acholi sub-region in Northern Uganda to take fifty (50) vulnerable youth on referral from the International Organisation for Migration initially for six (6) months and a further one hundred (100) vulnerable youth in the long term. This partnership will provide skills and jobs to vulnerable youth that may otherwise be inclined to violence, conflict, and criminality in part caused by a lack of other appealing socio-economic opportunities.”

In a nutshell, the Plaintiff agreed to provide accommodation, feeding, hand tools, a ten (10) ton truck for market produce distribution, and salaried employment for the fifty clients of the Defendant for the first six months, with possibility for long-term employment and additional recruitment of a hundred more vulnerable youth. Under Annex I being the scope of work, the Plaintiff also agreed to contribute to the partnership the following; 700 acres of agricultural land and farming equipment to employ 40 ex-combatants; a fully fledged operational and established bakery with state of the art equipment to employ 10 reporters; and USD \$3,400 or approximately UGX 7,004,000/= contribution to procurement of a delivery truck.

In exchange for the housing, feeding, job training, and employment of the youth, the Defendant agreed to provide up to but not exceeding \$30,000 USD in-kind contributions or cash contributions on a needs basis, subject to the service provider’s progress in implementation. The in-kind contribution is detailed in “Annex II: Budget” of the Service Agreement. The Defendant purchased four items totaling \$30,000, with the provision that the Plaintiff paid the remaining balance of \$3,400 on the Canter Two Tonne Truck. The total cost of the four items was therefore \$33,400. The three items listed as “Farm Equipment” were a 6 in 1 Peanut Butter Making Machine, a Vegetable Oil Extractor Machine, and a Peanut Sheller. The Bakery Equipment was a Canter Two Tonne Truck 1995 Model to be used for deliveries.

According to the Services Agreement, this equipment was subject to be returned to IOM at any time. It was provided under article 9.1; “IOM may request the return at any time, in whole or in part any funds, equipments, and/or tools that are provided directly by IOM or procured using IOM funds.” The agreement also stated in article 6.2: “On expiration of the agreement equipment and materials provided by IOM or procured with IOM funding may be transferred to the service provider on IOM’s written agreement, failing which all equipment and materials shall be returned to IOM by the Service Provider.” The agreement was signed and commenced on 22 September 2009.

There are two ambiguities raised by the language of the Services Agreement and the parties’ actions. The first is the nature of the relationship created between the Defendant and the Plaintiff. The second is the time period of the agreement consented to by the parties, both initially and as the project progressed.

Regarding the nature of the relationship, while the Services Agreement repeatedly refers to the relationship between the Plaintiff (Service Provider) and Defendant (IOM) as a “partnership”, in “*Article 12. Independent Contractor*” the Agreement states that, “The Service Provider shall perform all Services under this Agreement as an independent contractor and not as an employee, *partner*, or agent of IOM.” I find that despite several references to the relationship as a partnership, this “partnership” was not one typical to business relationships. As an intergovernmental organization, IOM was not investing equity in the Plaintiff Company with expectation of gaining financial profit. As made clear by article 3(b), “No official of IOM or any third party has received or will be offered by the Service Provider any direct or indirect benefit arising from the Agreement or award thereof.”

Article 20 of the Company Act describes some of the restrictions placed on charitable organizations, including that “by constitution the company is required to apply its profits, if any, or other income in promoting its objects and is prohibited from paying any dividends to its members.” The Defendant avoided the issue of profits altogether because no profits were required to be paid to it by the Plaintiff under the Agreement. Instead, the Defendant’s “return” on both their in-kind contribution investment and supply to workers to the Plaintiff

seems to have been limited to the employment, boarding and feeding of the fifty vulnerable youth, and the hope of increasing the number up to 100 youth in the long term. The Defendant's purpose was centered on the objects and purpose of the organization rather than a traditional profit motive that would be indicative of a traditional partnership or joint venture. Thus, the Plaintiff was contracted to help carry out the mission of the Defendant's organization through employment and training of vulnerable youth.

The Plaintiff's director (PW) indirectly acknowledged this when he said in his evidence that IOM approached the Plaintiff Company on discovering that in its business it was supporting victims of war by providing them training and employment. It is therefore clear that both parties were well aware of the objective of the partnership before they entered into it. In the circumstances, their relationship was intended for non-monetary gain by the Defendant, and was not an equity or venture capital partnership. I will proceed in light of this consideration.

Regarding time, there are conflicting observations regarding both the length of the initial agreement and the possibility that the agreement was extended. While article 6 and Annex I of the Service Agreement explicitly stated the finish date was after six months, or as 21 March 2010, the preamble (quoted above) states that the agreement was for employment of fifty ex-combatants "***initially*** for six (6) months ***and*** a further one hundred (100) youth in the ***long term.***" The question raised by the term of time is whether or not the parties agreed to six months or a longer period when they signed the agreement. At minimum, the parties at least hoped that the agreement would create a lasting relationship after the initial six months.

To my understanding right from the preamble and gathering from article 1.1 (c) as well as article 6.1 & 6.2 of the agreement, the agreed period of six months was for the employment of the fifty vulnerable youth with the support provided by IOM. Beyond that period more one hundred youth could still be employed by the plaintiff although the partnership of providing support would have ended within the six months with an option of transferring the equipment and materials provided by IOM to the plaintiff. In other words, the agreed period of six months was for the relationship between the parties as it relates to providing the necessary support to facilitate the on the job training, employment, feeding, and accommodation of the

initial fifty youth with a possibility of bringing on board additional one hundred youth and also maintaining the employer-employee relationship between the Plaintiff and the initial fifty youth beyond the period of six months.

Secondly, the Plaintiff testified that the agreement ended on 21 March 2010 as indicated in the initial agreement. However, two letters from IOM on pages 36 and 38 of the Trial Bundle, in addition to the email correspondence between the parties indicating an ongoing (albeit strained) relationship in July, suggest that the parties probably extended the agreement to 20th July 2010 by an amendment dated 15 April 2010 which this court did not have opportunity to look at because the Plaintiff chose not to adduce it in court for its own convenience. I must point out that since this matter proceeded ex-parte for formal proof all the documents on record were selectively adduced by the Plaintiff to support its case. The letter at page 36 of the Trial Bundle dated 28th October 2010 was written to Tom & Rose O’Lalobo of Teng Piny Farming Enterprises but they are also directors of the Plaintiff Company. In that letter, the Defendant’s Programme Coordinator stated that the Services Agreement dated 21st September 2009 ended on or about 20th July 2010 in accordance with the amendment dated on or about 15th April 2010. By that letter, the peanut butter-making machine, the peanut sheller and the Mitsubishi Canter Truck all purchased by the Defendant were disposed of to the Plaintiff. The Plaintiff did not tell this court that it protested the content of that letter for being containing untruth.

Similarly, the letter at page 38 of the Trial Bundle alludes to the date of finishing the Services Agreement as being 20th July 2010 and the Plaintiff has not complained about the content of that letter either. This court is therefore inclined to believe that the agreement was extended to 20th July 2010 and that is when it ended. It is therefore not true that the machines/equipment that arrived in June 2010 were delivered outside the agreed time in breach of the contract.

With the nature of the relationship and terms created by the Service Agreement in mind, I will now turn to the issue of breach. The Plaintiff initially indicated that it would call two witnesses (directors) to support its case but at the trial the evidence of the second director was dispensed with on the ground that it would be similar to that of the first director. The Plaintiff

contends that the equipment provided by the Defendant, namely; the peanut butter machine, peanut sheller, and 3-in-1 oil press were faulty, and therefore it suffered loss of profit and other damages because it was unable to use the equipment. The Plaintiff does not claim that the Canter Two Tonne delivery truck used for the bakery enterprise was faulty.

Indeed the evidence on record, both documentary and oral, confirms that the farm equipment arrived in June 2010. The 3-in-1 oil press was in a very poor state upon arrival at the Plaintiff's farm, and the technician who came from South Africa and inspected the machine determined that it needed to be returned to South Africa for repair. An email exchange between the Defendant, the Plaintiff, and the Manufacturer in South Africa describe the aftermath, as the parties struggled to figure out how to resolve the issue. Therefore there is no doubt that the 3-in-1 oil press was faulty and was unfit for use. Whether or not that amounted to breach of contract will be discussed herein later but in addition to the oil press, the Plaintiff contends that the peanut sheller and peanut butter machine also were found to be faulty and unfit for use. However, the email correspondences and letters submitted by the Plaintiff only show clear indication that the 3-in-1 oil press was unfit for use. The only proof that the peanut butter machine and peanut shelter were also faulty is the testimony of the witness. This is not backed by any other evidence. An email from Mr. James Bean to the manufacturer indicated that the peanut butter machine and the peanut sheller had not been thoroughly inspected and they had not ascertained their condition. Mr. James Bean's said e-mail was marked as Exhibit P4. It has the manufacturer's comments against all the issues raised by Mr. Bean and in particular it said Mr. Wright who inspected the machines confirmed that the peanut butter machine and the peanut sheller are in order. I do not therefore see the basis for the Plaintiff's claim that those machines were also unfit for use.

It is also curious to note that by a letter to the Plaintiff dated 23rd August 2010 (at page 38 of the Trial Bundle) Mr. Jeremy R.A. Haslam, the Defendant's Chief of Mission wrote to the Plaintiff and proposed two options of resolving their impasse, namely;

- (1) Allowing the agreement to finish as had been agreed and assigning to the Plaintiff the peanut butter machine, the peanut sheller and the canter two-tonne truck

already provided on condition that the 34 clients then employed by the Plaintiff would remain in gainful employment within the Plaintiff's means to do so and the 3-in-1 oil press machine would not be available to the Plaintiff.

- (2) Extending the then Services Agreement until 31st December 2010 and once the 3-in-1 oil press machine is delivered to IOM it would make it available to the Plaintiff and all the other obligations that bind it in relation to referral of the Plaintiff's clients, their employment conditions and other terms of the conditions of the Agreement would remain in force.

The Plaintiff has not shown to this court that it protested the proposal to assign to it the peanut butter machine and the peanut sheller because they were faulty. I would have expected that protest if indeed those machines were defective. On the contrary, there is a letter on record at page 36 of the Trial Bundle which I have already alluded to herein above, which shows that those machines were actually disposed of to the Plaintiff which received them without any protest.

This court is therefore not convinced that those machines were so faulty and unfit for use because the Plaintiff would not have received them if it were so. It is possible that some parts had minor defects which must have been fixed as at the time they were assigned to the Plaintiff. I therefore find that the peanut butter machine and the peanut sheller were provided to the Plaintiff as agreed. With that resolved, I now turn to discuss whether the Defendant breached the contract by providing a defective 3-in-1 oil press machine.

As I deal with this issue, I must again emphasize that the agreement between the parties was to support the Plaintiff Company so that it could initially employ, train, feed, and accommodate fifty vulnerable youth who were victims of the insurgency in Northern Uganda and possibly employ one hundred more after the six months. In exchange for that service, the Defendant was to provide in-kind and perhaps some cash contributions not exceeding US \$ 30,000. To that end, the Defendant provided Canter two-tonne truck, peanut butter machine, peanut sheller and the 3-in-1 oil press machine now in issue. It however turned out that the 3-in-1 oil press was unfit for use. This fact was acknowledged by the Defendant whose Mr.

James Bean witnessed the opening and testing of the machine and by an e-mail dated 9th July 2010, deeply expressed his disappointment to the manufacturer and requested them to either replace the machine or refund their money. The Plaintiff's director was copied in the mail and therefore was aware that the defect in the machine was no fault of the Defendant who was equally disappointed. In the circumstances of this case, I would be uncomfortable to find that the defendant breached the contract for the reasons I will state herebelow.

First of all, it is the understanding of this court based on articles 2.2 and what is stated at page 8 of Annex I to the Agreement that the obligation to provide the in-kind or cash contribution to the tune of US\$ 30,000 was only indicative and on a needs basis, as determined by IOM and in line with the tasks and activities described in the Agreement. Secondly, and most importantly, clause 6 of the agreement also provided that the equipment would be returned to IOM after the expiration of the agreement, unless there was written consent for the Service Provider to keep the contributions. It was not being purchased as property of the Plaintiff. Thirdly, the Agreement was for the initial employment of fifty youth but from the evidence not all the fifty youth were employed. These factors and the nature of the agreement the parties entered into, in my firm view, watered down the obligation of the Defendant to fully contribute the US\$ 30,000 and therefore its failure to provide the total amount of contribution would not amount to a breach of contract as defined in ***Ronald Kasibante v. Shell (U) Ltd. No. 546/2006 HCB 162 ar 163 Bamwine J***, that *“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...”* and in ***Black's Law Dictionary 8th Edition at page 200***, as a *“violation of contractual obligation by failing to perform one's own promise, by repudiating it or by interfering with another party's performance.”*

On the contrary, I find that the Defendant endeavored to fully perform its obligations but it was let down by the manufacturer that supplied a faulty 3-in-1 oil press machine. It must also be noted that according to the Budget (Annex II to the Agreement) the value of the other items provided, that is, Canter two-tonne truck, peanut butter machine and peanut sheller was US\$ 29,400 out of which the Plaintiff only contributed US\$ 3,400 towards purchase of the truck as the parties had agreed. This means that the Defendant spent US \$ 26,000 on what was

delivered to the Plaintiff in good working condition and only failed to deliver equipment fit for use worth US \$ 4,000 out of the agreed US\$ 30,000 representing only 13%. That contribution was in exchange for employment of 34 vulnerable youth in the Plaintiff's farm. If indeed the Defendant had intentions to breach the Agreement as the Plaintiff would want this court to believe it would not have provided those equipment worth 87% of the agreed maximum limit. In fact all the agreed equipment/machines were provided except that one of them turned out to be unfit for use due to the manufacturer's fault. The Defendant also lost money because it paid for the machine.

I must also point out that the Plaintiff based its claim on its expected profit as contained in the cash-flow projection on page 29 of the Trial Bundle. I have thoroughly perused the Services Agreement and its annexures and I have not found any basis for suggesting that the agreement was intended to make the Plaintiff generate the projected income. First of all the cash-flow projection itself is foreign to the Agreement although the Plaintiff contends that it was the one that induced it to enter the Agreement. All the annexures to the Agreement that are referred to therein are marked as Annex I, Annex II & Annex III but the cash-flow projection does not bear such marking. In any case, why would another organization which is non-profit making in the first place guarantee cash-flow and hence profit in another company in which it has no management control merely because of its in-kind or cash contribution to facilitate employment of the client of that organization. I do not find much logic in it. I find more logical the explanation made by the Defendant's Chief of Missions in his letter of 23rd August 2010 already alluded to herein above that:

".....We embarked on this partnership with your organization in order to provide jobs to vulnerable youth, not as a form of investment by IOM in your business. The equipment and in-kind support made available by IOM to your businesses was meant to make the employment of these young people more affordable and attractive to your company. Accordingly, we repudiate any assertion that IOM is responsible for any loss experienced by your organization. Moreover, given that IOM took no equity position in

any of your businesses, and the fact that your businesses solvency is not our responsibility, we cannot accept any liability in this respect....”

It is also pertinent to note that the two options given to the Plaintiff in that letter clearly indicated that if the plaintiff was assigned the peanut butter machine, the peanut sheller and the Canter Two-Tonne Truck the 34 clients then employed by the Plaintiff would remain in gainful employment within the Plaintiff's means to do so and the 3-in-1 oil press machine would not be available to the Plaintiff. The Plaintiff did accept the assignment of the Truck and machines so it cannot now turn around and sue for breach of contract especially when it has not shown this court that it did not accept that proposal. I believe if this suit was defended the Defendant would have raised this issue.

All in all, for the above reasons based on the facts and circumstances of this case and the evidence on record, I find no breach of the Agreement. This answers the first issue in the negative and leads me to consider the second and last issue.

Issue 2: What remedies are available to the Plaintiff?

In the plaint filed in this suit, the Plaintiff prayed for:

- (1) A declaration that the Defendant breached the service agreement.
- (2) Recovery of special damages as pleaded.
- (3) Recovery of business profits lost.
- (4) General damages.
- (5) Interest on (b) & (d) above at a court rate from the date of judgment, till payment in full.
- (6) Costs of the suit.

From my finding that there is no breach of contract, it follows that no remedies are available to the Plaintiff. However, I will still go ahead and analyse each of the remedies sought by the plaintiff.

(1) A declaration that the Defendant breached the service agreement.

This prayer is automatically denied as no breach was proved.

(2) Recovery of special damages as pleaded

Under this remedy the plaintiff claimed for:

- (a) Loss of US\$ 33,400 being the costs of the equipment agreed to be supplied.
- (b) Loss of money spent on daily wage and food allowance on 34 clients at Shs. 7000/= daily for 210 days that they were in the farm.
- (c) Loss of payment of freight costs on the delivery of the project machines US\$ 2115
- (d) Loss on expenses incurred on accommodation and feeding of the Engineer who came to fix and install the farm equipment.
- (e) Loss of seeds bought for demonstration approximately 2000kgs at a cost of Shs. 4,000,000/=
- (f) Loss of business earnings as projected in the Teng Piny Cash Flow over six months:
 - 1st month Shs. 12, 797,500/=
 - 2nd month Shs. 48,375,000/=
 - 3rd month Shs. 83,952,500/=
 - 4th month Shs. 119,930,000/=
 - 5th month Shs. 155,107,500/=
 - 6th month Shs. 190,685,000/=

(a) Loss of US\$ 33,400 being the costs of the equipment agreed to be supplied.

This claim is brought in bad faith and it is untenable in view of this court's finding that the Defendant made in-kind contribution by providing a Canter Two-Tonne Truck and two equipment/machines worth US\$ 26,000. If indeed the Plaintiff was being honest it would not claim for the full amount as if the Defendant never contributed anything to its business. The Plaintiff is therefore not coming to court with clean hands. This claim is denied as it has no basis and has not been proved.

(b) Loss of money spent on daily wage and food allowance on 34 clients at Shs. 7000/= daily for 210 days that they were in the farm.

I must also point out that the Plaintiff cannot be seen to bring this claim when it enjoyed the equipment provided by the Defendant and even owned them after they were disposed to it. This claim would only succeed if the Defendant did not contribute at all but the evidence showed that it contributed about 87% of what was agreed. Besides, it was the evidence of the

Plaintiff's director that these youth cleared 200 acres of the Plaintiff's farmland and planted some groundnuts. It cannot therefore claim for the full salary and feeding of the youth whose services it benefitted from. In the premises, this claim is unreasonable and it is also denied.

(c) Loss of payment of freight costs on the delivery of the project machines US\$ 2115

This claim is equally untenable for reason that two of the three machines were found to be fit for use and the Plaintiff benefitted from their use so the claim for refund of the freight is unjustified.

(d) Loss on expenses incurred on accommodation and feeding of the Engineer who came to fix and install the farm equipment.

This claim is also unreasonable because two of the machines were fit for use and the Plaintiff benefitted from the service of the engineer.

(e) Loss of seeds bought for demonstration approximately 2000kgs at a cost of Shs. 4,000,000/=

Since no proof was shown that the seeds got spoilt and were thrown away and not used for other purposes this claim is denied. In any event, even if there was any loss of those seeds it was the duty of the Plaintiff to mitigate its loss by disposing of the same or utilizing them for other purposes.

(f) Loss of business earnings as projected in the Teng Piny Cash Flow over six months

Finally, as I already stated herein above this claim is foreign to the Agreement and beyond its scope and so it is untenable. It is accordingly denied.

(2) General damages.

This claim is also denied because there was no breach of the agreement and in any event, the Plaintiff gained more from the Agreement than the Defendant whose objective of having fifty vulnerable youth employed initially and a further one hundred employed later was not fully achieved.

In the result, the Plaintiff's suit is dismissed and it shall bear its own costs.

I so order.

Dated this 17th day of September 2015.

Hellen **Obura**

JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of Mr. Tom O'Lalobo the Plaintiff's director who informed court that his counsel was in another court upcountry and had requested him to receive the judgment.

JUDGE

17/09/15