

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL COURT DIVISION)  
CIVIL SUIT NO. 211 OF 2012**

**EDWARDMBENGEI:.....COUNTER  
CLAIMANT**

**VERSUS**

**KKRAFT (U) LIMITED:.....COUNTER  
DEFENDANT**

**BEFORE THE HON. LADY JUSTICE HELLEN OBURA  
JUDGMENT EX-PARTE**

On 18<sup>th</sup> June 2011 KKraft (U) Limited, the plaintiff company/counter defendant (hereinafter called the company) entered into a contract with Mr. Edward Mbengei, the defendant/counterclaimant under which Mr. Mbengi was engaged as the concept developer for the company. I will therefore hereinafter refer to him as the concept developer.

Under clause 1 of the agreement the concept developer was to leave his company called Renn Designs Limited based in Nairobi, Kenya and relocate to Kampala, Uganda where he would be full time manager and/or head of operations of the plaintiff company. By clause 3 of the agreement, the period of engagement was not specified but remained continuous and open till the parties agreed otherwise. His obligations were specified in clause 4.

The concept developer commenced work as agreed and as gleaned from the e-mail correspondences it appears all went on well until about late December 2011 or early January 2012 when the issue of payment of the commission caused a rift between the parties and subsequent termination of the contract by the concept developer via an e-mail dated January 31, 2012.

The company then brought a suit against the concept developer seeking for a principal sum of UGX 100,000,000/= being special damages for loss of business and UGX 5,900,000/= being special damages on account of the company laptop, costs of repair and spare parts for the company motor vehicle, and an outstanding loan advanced to the concept developer. The company also sought general damages for breach of contract, interest on the amounts at 25% from date of the cause of action until full payment, and costs of the suit.

In his written statement of defence (WSD), the concept developer denied the claim and instead brought a counterclaim by which he sought recovery of UGX 25,808,875/= as unpaid commissions/profits for work done for the company, damages for breach of contract, interests and costs. I note from the records that on 31<sup>st</sup> July 2012 the concept developer's counsel wrote to the Registrar of this court stating that an affidavit of service was filed indicating that the company was served with the WSD and the counterclaim but no reply to the counterclaim was filed despite the service being acknowledged by the secretary who stamped, signed and dated the original copy of the court documents which the deponent was said to have attached to the affidavit but this court did not find it on record.

Counsel for the concept developer prayed for judgment on the counterclaim based on the above affidavit and a default judgment was entered against the company on 2<sup>nd</sup> August 2012.

I also note that on 17<sup>th</sup> February 2014 the concept developer's counsel again wrote to the Registrar requesting that the suit be dismissed under Order 17 rule 5 of the Civil Procedure Rules (CPR). The Registrar then hand-scribbled that letter with the following words; *“Suit dismissed for want of prosecution under O17 r 6 CPR. Let the suit be set down for formal proof of counterclaim.”*

I must however point out that there appears to have been some irregularity in the process because if at all the Registrar wanted to dismiss the suit for want of prosecution then the appropriate law was O17 r 5 but my understanding of that rule is that the dismissal can only be done upon hearing the application brought by the defendant. That therefore would raise the question of jurisdiction of the Registrar to dismiss a suit under that rule without recourse to the trial Judge in whose docket the file falls as was done in this case. In any event, the procedure for applying for dismissal of the suit was also by letter yet O17 r 5 requires that the application is heard so as to determine whether it should be dismissed. My considered view is that for the application to be heard it should be brought formally so that it is served on the plaintiff who would then have a chance to show cause why the suit should not be dismissed.

Meanwhile a dismissal under O17 r 6 which the Registrar cited can only be done under sub-rule 1 thereof in a situation where no application is made or step taken for a period of two years by either party with a view to proceeding with the matter. Turning to this case, the plaint was filed on 1<sup>st</sup> June 2012 and the WSD together with the counterclaim were filed on 15<sup>th</sup> June 2012. It is indeed true no steps were taken by the company with a view to proceeding with the suit from that 15<sup>th</sup> June 2012 to 24<sup>th</sup> February 2014 which is a period of one year eight months but certainly less than two years so O17 r 6 (1) could not be invoked to dismiss the suit.

If this court had noted this irregularity before the trial the matter would not have proceeded ex-parte. Even after proceeding with the hearing, this court could still exercise its inherent power and make an order for setting aside the dismissal and reinstatement of the suit. However, I have taken into account the length of time this matter has taken in court and the laxity of the plaintiff in pursuing its case to the extent that from February 2012 when the suit was dismissed to-date no application has been brought to set aside the dismissal and reinstate the case. It would therefore be a futile exercise to reinstate a suit that would eventually be dismissed for want of prosecution. For that reason, I will now proceed with the judgment despite the glaring irregularity.

This matter was scheduled and only two issues were canvassed for determination by this court namely; (1) Whether the counter defendant breached the contract with the counterclaimant. (2) Whether the counterclaimant is entitled to the remedies sought. Only the evidence of the concept developer was adduced to prove the counterclaim. Although a witness statement had been filed, court ordered the concept developer to give oral evidence so that some clarifications could be sought where necessary and most importantly for purposes of observing the demeanor of the witness since he was not going to be subjected to cross-examination. He testified about the provisions in the agreement and how the company breached it by refusing to pay him the agreed commission despite several demands and promises that the same would be paid after conducting an audit.

Counsel for the concept developer filed written submissions in which he argued the two issues. I now proceed to consider his submissions and evaluate the evidence adduced to prove those issues.

**Issue 1: Whether the counter defendant breached the contract with the counterclaimant.**

On this issue counsel cited the case of *Nakawa Trading Co. Ltd. v. Coffee Marketing Board Civil Suit No. 137 of 1991*, wherein the Court defined breach of contract as “when one or both parties fail to fulfill the obligations imposed by the terms.” He also relied on *Patel v. Madhvani International Ltd (1992-1993) HCB 189*, which stated that “where one party has absolutely refused to perform or has incapacitated himself from performing, he puts the power of the other party either to sue for breach of contract or to rescind and sue on the quantum meruit for the work done.”

Counsel then argued that since the company refused to pay the concept developer the percentage of profits due under clause 2 of the Agreement, the company breached the contract, prompting him to resign.

To my mind the answer to this issue lies squarely in the interpretation of the contract. Remuneration of the concept developer was provided under clause 2 of the contract. Clause 2 (a) thereof provided that the concept developer would be on a monthly retainer for the first six (6) months of engagement at the agreed sum of Kenya shillings eighty thousand only (Kshs. 80,000/-). PAYE, NHIF and NSSF to be paid in Uganda.

The parties also agreed inter-alia; that the profits from the company would be shared out at the ratio of 75% for the company and 25% for the concept developer to be paid once bills have been settled by the client, and the same would be payable on a month to month basis after the period of 6 months on retainer. Further, that profit on existing clients would be shared at the ration of 85% for the company and 15% for the concept developer.

It was further agreed that any expenses incurred by the concept developer for and on behalf of the company would be reimbursed by the company. Other benefits and allowances inclusive of housing, health insurance for self and family, use of company motor vehicle for official work & provision of fuel, payment of all bills relating to amenities also accrued to the concept developer.

Clause 15 of the agreement then provided thus;

*“This Agreement contains the whole agreement and understanding between the parties relating to the matter provided for in this Agreement and supercedes all previous agreements (if any) whether written or oral between the Parties in respect of such matters.”*

It is clear from the above clause 15 that the parties were to be bound by the terms in the agreement and nothing else. The concept developer has not raised any complaint about payment of the monthly retainer for the six months. His claim is for payment of commission within those six months. I have thoroughly perused the agreement and my interpretation of clause 2 thereof as paraphrased above is that the concept developer

agreed with the company that he would get a monthly pay of Kshs. 80,000/= for the six months and thereafter he would get the commission.

Since the agreement was signed on 17<sup>th</sup> June 2011 and the contract commenced shortly thereafter, the six months retainer salary would at minimum have ended on or about 17<sup>th</sup> December 2011. According to the agreement, then, commission would have been due on a month-to-month basis beginning in January 2012. The first payment would have been due by about 17 January 2012 for work completed from December 2011 to January 2012.

It is my finding based on the above provisions of the Agreement that it was the intention of the parties that the concept developer would only be entitled to commission after the six months. Therefore whatever works he did for the company within the six months were to be remunerated with the monthly retainer pay agreed upon in clause 2 (a) of the Agreement. Based on that understanding, I will now proceed to look at the particulars of the concept developer's claim as contained in the counterclaim and tabulated in his sworn witness statement. For ease of analysis I will reproduce the particulars of the claim in the table below.

**TABLE 1: PARTICULARS OF CLAIM**

<b>JOBS DONE</b>	<b>COMM</b>	<b>LPO AMT</b>	<b>AMT</b>	<b>PROD.</b>	<b>CLAIMS</b>
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	. %	(UGX)	WITHOUT VAT	COSTS	COMMISSION
NILE BREWERIES	25%	112,808,000	96,600,000	40%	14,340,000
TUSKYS NTINDA	25%	3,790,520	3,214,000	1,247,000	491,750
TUSKYS MAKERERE	25%	11,264,280	9,510,000	3,430,000	1,520,000
<sup>1</sup> FRESH DAIRY	15%	18,290,000	15,500,000	50%	1,162,500
UNILEVER FSU	15%	34,976,144	29,640,000	9,833,000	2,971,170
UNILEVER CATEGORY	15%	42,904,800	36,360,000	9,234,000	4,068,900
<sup>2</sup> UNILEVER OFFICE BRANDING	10%	30,270,000	25,652,542	13,107,042	1,254,555
TOTAL COMMISSIONS					25,808,875

Some local purchase orders (LPOs) were attached to support the claim and for ease of reference I have summarised them here below to show the period when the order for works were made.

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<sup>1</sup> No supporting LPO attached

<sup>2</sup> No supporting LPO attached

**TABLE 2: SUMMARY OF LPOS**

<b>EXHIBIT NO.</b>	<b>NAME OF CLIENT</b>	<b>LPO NO.</b>	<b>ORDER DATE</b>	<b>AMOUNT IN UGX</b>
CC 2(i)	NILE BREWERIES	NOT CLEAR	17/10/2011	112,808,000/=
CC2 (ii)	SAMEER AGRICULTURE & LIVESTOCK	NOT CLEAR	30/09/2011	18,290,000/=
CC2 (iii)	TUSKYS	2166	17/10/2011	11,221,800/=
CC2 (iv)	TUSKYS	2165	23/09/2011	3,214,000/=
CC2 (v)	UNILEVER	GTU0003911	30/09/2011	29,640,000/=
CC2 (vi)	UNILEVER	GTU0004180	14/12/2011	38,380,000/=

As noted from the footnotes on Table 1, the claim for Fresh Dairy works and Unilever Office Branding were not supported by any LPOs. However, there were some other unexplained documents with tabulated items which were marked as Exhibits CC4 (i), CC4 (ii), CC4 (iii), CC4 (iv) & CC4 (v). It is not known for what purpose they were put in as exhibits because there are no corresponding claims that they support. The LPO for Sameer Agriculture & Livestock was also attached as exhibit CC2 (ii) but there is no claim for that work.

The concept developer also tendered in evidence the company bank statement as proof of payments for the works he did. The transactions he highlighted in that statement as being the payments relevant to his claim are as summarized in the following table.

**TABLE 3: PROOF OF PAYMENTS**

<b>DATE</b>	<b>DEPOSITOR</b>	<b>AMOUNT IN UGX</b>
13/05/2011	UNILEVER	4,956,000
26/07/2011	UNILEVER	14,466,800



03/10/2011	UNILEVER	4,960,000
23/11/2011	UNILIVER	34,302,600
28/11/2011	NILE BREWERIES	107,072,000
06/12/2011	TUSKER MATTRESSES	5,000,000
13/01/2012	UNILEVER	36,527,372

I have carefully compared, contrasted and scrutinised the particulars of the concept developer's claim, the local purchase orders (LPOs) which show the period when the order for works were made and the bank statements showing payments to the company and these are my findings:-

First of all, the concept developer highlighted some payment in the bank statements which were made on 13/05/2011 before he had even signed the agreement with the company. The payment of 26/07/2011 was also made before Unilever had issued any LPO under his management. It is therefore obvious that those claims are outside the contract period and at best I can call it a fishing expedition to try and justify the claim. They are accordingly rejected.

Secondly, the concept developer relied upon the above documents to bring his claim but as seen from the tables all the orders for those works were made within the six months period when he was not entitled to commission. It was only one payment for the order made by Unilever on 14/12/2011 that was effected in January 2012 when the six months retainer period had lapsed. That order was made three days to the expiry of the six months period and so it is possible that the works could have been executed outside the six months period thereby entitling the concept developer to commission of 15% which in his claim he calculated at Shs. 4,068,900/=. To my mind that would be his only entitlement since all the rest were within the six months period of retainer but I must hasten to add that that entitlement would even be subject to the company's claim which the concept developer does not dispute as per the e-mail correspondences tendered in evidence as exhibits.

By an e-mail dated Wed, Feb 1, 2012 at 9:17 AM Joan Wachira of Kkraft wrote to the concept developer requesting him to prepare to handover some office equipment inclusive of a laptop and other items but also to let them know how he planned to pay the loan balance of Kshs. 40,000 plus cash advance of Kshs. 40,000 given to him in January 2012 all totaling Kshs. 80,000. The concept developer in his reply acknowledged the company's claim as relates to the laptop and loan as follows:-

*“Thanks for your mail. I have noted the content but kindly note the following:*

- 1. The laptop was bought on 50/50 basis so its either the Company refunds the 50% or I refund.*
- 2. ....*
- 3. ....*
- 4. The company owes me over Kshs. 500,000 commissions, so you can deduct loan amount once you are doing my payment.”*

In effect, the particulars of the company's claim in the suit that was dismissed included value of the laptop at UGX 2,100,000/= and recovery of the outstanding loan sum of UGX 2,800,000/=. That means the claim was still outstanding as at the time of filing the dismissed suit. The concept developer in his WSD maintained that the laptop was purchased by the company and him each contributing 50% (UGX 1,050,000). However, as regards the claim for loan recovery he did not specifically deny it. As such it remains outstanding and therefore his claim for Shs. 4,068,900/= would be subject to that claim.

Thirdly, I have noted the timing of the concept developer's demand for commission, the response of the company that an audit needed to be done first before he could be paid and his reaction by terminating the agreement. It is my well considered view that the concept developer misinterpreted clause 2 of the contract as a result of which he mistakenly believed that he was entitled to commission from the commencement of the contract. His claim for commission was therefore based on that mistaken belief when in the actual sense no commission was due at the time he demanded for it. The Shs. 4,068,900/= only became due after Unilever paid the company on 13/01/2012. Therefore, his resignation

after giving only seven days notice contrary to clause 9 of the Agreement was emotional, unjustified and in breach of the contract since that clause required the party who opted to terminate the contract to either give not less than six months notice or settlement of such dues in lieu of notice for that period.

For the above reasons, it is the finding and conclusion of this court that the company (plaintiff/counter defendant) did not breach the contract. On the contrary it was the concept developer who breached the contract by failing to give six months notice of termination to the company. This resolves the 1<sup>st</sup> issue in the negative.

Before I take leave of this matter, I wish to observe that commission based on profit is a very ambiguous term because there are various ways to calculate the profit made from a given project. This dispute largely arises from different interpretations of an ambiguous term in the original agreement. It is in the interest of both parties to clearly define their terms at the beginning of these types of arrangements to avoid disputes like this one. It would not be unreasonable for a company to hire an auditor to calculate profit prior to paying an employee a percentage share of profits. A company could not reasonably rely on an employee to calculate his own profits for fear that the employee would not take into consideration all the costs incurred by the company to complete a given project.

At the same time, an employee might have reason to be hesitant allowing a company to determine what profits had been earned through his or her efforts. Therefore, it is the firm view of this court that if a remuneration term specifies a percentage of profit commission scheme it is to the advantage of both parties to clearly and specifically identify how and when the percentage of profits will be calculated, at the time the contract is made. This was not done in this case hence the dispute giving rise to this suit.

**(1) Whether the counterclaimant is entitled to the remedies sought.**

The concept developer in his counterclaim sought recovery of UGX 25,808,875/= as unpaid commissions/profits for work done for the company, damages for breach of

contract, interests and costs. Following my findings and conclusion on the first issue I do not find him entitled to any of the remedies sought and they are accordingly denied.

In the result, the counterclaim is dismissed with no order as to costs since it proceeded ex parte.

I so order.

Dated this 21<sup>st</sup> day of October 2015.

Hellen Obura

**JUDGE**

Judgment delivered in chambers at 2.00 pm in the presence of Mr. Nionzima Vianne for the plaintiff who was absent.

**JUDGE**

21/10/15