

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**COMMERCIAL DIVISION**

**HIGH COURT CIVIL SUIT NO. 414 OF 2010**

**TUSKER MATTRESSES (U) LTD.....PLAINTIFF**

**VERSUS**

**DR. GILBERT OHEIRWE**

**GOOD PRICE SUPERMARKET LIMITED**

**HALF PRICE SUPERMARKET LIMITED**

**G.K.O MEDICINES LIMITED**

**ROYAL CARE PHARMACEUTICALS  
LIMITED.....DEFENDANTS**

**BEFORE THE HON. MR.JUSTICE HENRY PETER ADONYO:**

**JUDGMENT:**

**1. Background:**

The Plaintiff instituted this suit against the Defendants jointly and severally seeking for specific performance, permanent injunction and recovery of general damages arising out of breach of contract and nuisance or unlawful interference with the plaintiff's tenancies at property comprised in Kyandondo Block 216 plot 1900 at Ntinda, Kyadondo Block 216 plot 1615 Ntinda, Kyadondo Block 203 plot 3468 at Nakulabye, Plot 1336 Port Bell Road Kintintale and Plot 1/3 Nabugabo and costs of the suit.

The brief background to this suit is that the Plaintiff in 2009 entered into negotiations with the 1<sup>st</sup> Defendant who was acting on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants for the purchase and acquisition of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' business tenancies to enable it extend the reach

of its operations in the Ugandan market. It was also agreed during the negotiations that the plaintiff would pay for good will to the 2<sup>nd</sup> to 5<sup>th</sup> Defendants at United States Dollars One Million One Hundred Twenty Five Thousand Only (US \$ 1, 125,000) which according to the Plaintiff was fully paid and was fully discharged of its monetary obligations to the Defendants and therefore believed that it no further monetary obligations towards the Defendants but that later and in a twist of events, the First Defendant instead began interfering with its possession, use and enjoyment of the business tenancies thus resulting into this suit.

**2. Issues:**

- a) Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants breached any contract with the Plaintiff.
- b) Whether the Plaintiff breached any contract with the counter claimants
- c) What are the remedies to the aggrieved parties.

**3. Resolution:**

The issues are considered as below.

On the issue of whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants breached any contract with the Plaintiff, the Plaintiff called three witnesses to prove its case accordingly. Stephen Mukuha (Pw1) told court that in 2009, the Plaintiff entered into negotiations with the 1<sup>st</sup> Defendant who was acting on behalf of the 2<sup>nd</sup> to 5<sup>th</sup> Defendants to purchase and acquire the 2<sup>nd</sup> to 5<sup>th</sup> Defendant's business tenancies which would enable the Plaintiff to expand and extend its business operations in the Ugandan market. That the required negotiations and payments were made and the Plaintiff began to use the facilities in question but to the Plaintiff's dismay, the 1<sup>st</sup> Defendant interfered with the Plaintiff's use and enjoyment of the business tenancies to its detriment with this suit being filed to stop the First Defendant's incessant financial demands and changing of mutually agreed upon positions. The witness stated that this matter was first before Hon. Lady Justice Hellen Obura and a number of mediation sessions were conducted resulting in a comprehensive agreement of settlement by the parties on 15<sup>th</sup> day of July 2011 in which was the parties agreed that all the issues relating to goodwill, shelving and fittings to the Defendants had been fully settled and paid for with no mention during that mediation process before the lady judge of items such as cash in coins with that new development coming up as a mere afterthought by the First Defendant. This witness exhibited the settlement agreement as the Plaintiff's Exhibit P.17 to prove that point. This testimony was confirmed by Daniel Ndirangu

Githombe (Pw3) who similarly in his testimony intimated to discussions held between the Plaintiff and the First Defendant on behalf of all the Defendants which he said resulted into a memorandum of understanding between the parties (Exhibit D22) with a subsequent agreement, Exhibit D23 indicating the additional stocks taken over by the Plaintiff and the fact of sum of United States Dollars One Million One Hundred Twenty Five Thousand Only (US \$ 1, 125,000) to be paid as goodwill. This witness further stated that he was aware of another agreement of settlement (Exhibit P17) in which Ug. Shs 125,000,000/- was paid by the Plaintiff on 22<sup>nd</sup> July 2011 to include payment of final goodwill of Ug. Shs 5,000,000/-, lease of shelving of Ug. Shs 50,000,000/- and shs.70, 000,000/- in full and final payment to the First Defendant as director emoluments with that agreement concluding the purchase and acquisition of the Second to Fifth Defendants' business tenancies at various premises.

For the Defendants, Joseph Moses Ntende (Dw1) informed the court that that he was instructed by the First Defendant to inspect and make a valuation of the Defendants' supermarket furniture, fittings and equipment at Kitintale, Nakulabye and Shauri Yako which he did between 5<sup>th</sup> to 8<sup>th</sup> February 2010 and upon which he gave the value of Ug. Shs 379, 669,000/- as indicated in his report (Exhibit D24) being the value of the total assets of the Defendants. In cross examination this witness confirmed having received instructions from the First Defendant to carry out the valuation which he did based on a fair market value defined by the International Valuation Standards.

In his testimony Dr. Gilbert Ohairwe (DW2) confirms that he on behalf of the 2<sup>nd</sup> to 5<sup>th</sup> Defendants negotiated with the directors of the Plaintiff which culminated into the signing of several agreements and memoranda with what he considered as the most important terms agreed upon being the buying of the stock in the defendants' shop, the payment up of the his indebtedness at Diamond Trust Bank Ltd and the payments for shelves, fittings and furniture. He also indicated that the parties to those agreements allowed his wife to operate fast food takeaways and pharmacies at the Plaintiff's stores in Uganda and that he was to be appointed an Executive Director of the Plaintiff. Further this witness stated that the parties did agree that the Plaintiff would pay a good will of United States Dollars One Million One Hundred Twenty Five Thousand Only (US \$ 1, 125,000) for the whole transaction but indicated that the undertakings were never fulfilled to date especially in relations to fittings and furniture that were retained by

the Plaintiff whose values totalled to Ug. Shs 100,651,000/-, cash coins worth Ug. Shs 20,960,000/- and the good will of United States Dollars One Million One Hundred Twenty Five Thousand Only (US \$ 1, 125,000) in time with the parties ending up with a final settlement of 15<sup>th</sup> July 2011

after the breaches. This witness did acknowledge signing the final agreement (Exhibit P17) and confirmed that the same was witnessed by his counsel though he insisted that the same did not supersede any other previous agreement for the said agreement, according to him did provide for rent of shelving, fitting, equipment and furniture but rather talked of the handing over of those furniture and fittings on the assumption that the rentals due by the 30<sup>th</sup> day of July 2011 would have been paid by then. In further cross examination, this witness admits receiving Shs 50,000,000/- for fittings, shelves and equipment and states that no mention of cash coins was made in the final settlement (Exhibit P17) and he further admits that at the time of signing Exhibit P17 he had already received Uganda Shs 495, 000,000/- out of the agreed Uganda Shs 500, 000,000/- as good will with a balance Uganda Shs. 5.000,000/- remaining as in paragraph F (ii) of that agreement. This same witness later goes on to confirm that he also a further Ug. Shs 70, 000,000/- as full and final settlement as director as provided for in paragraph E of Exhibit P.17 but contends that the issue of goodwill however remained a sticking point and even after the signing of the Final Settlement the parties still resorted to court to have their dispute sorted out for he believed that indeed the Plaintiff had breached the contract it had signed with the Defendants.

#### **4. Resolution:**

This case is largely based on a breach of contract as alluded to by the parties with such a situation occurring when one or both parties fail to fulfill the obligations imposed by the terms as was pointed out in the cases of **Nakawa Trading Co. Ltd v Coffee Marketing Board HCCS No.137 of 1991** and that of **United Building Services Ltd v Yafesi Muzira T/A Quickest Builders and Co. HCCS No.154 of 2005**.

Relating the above legal requirements to the evidence on record, it is clear to this court that no dispute is to the fact of the parties herein having entered into negotiations in which the Plaintiff was to purchase and acquire the business tenancies of the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants who were all

represented by the 1<sup>st</sup> Defendant. Indeed several agreements and memoranda were signed in respect to the such undertakings but it appears that the parties still did not contend with the terms of such agreements and hence the resorting to court action as seen from several suits instituted between the parties such as High Court Civil Suit No 393 of 2010 Royal Pharmaceuticals Ltd v GKO Medicines Ltd & 2 Others and High Court Civil Suit 431 of 2010 Dr. Tatiana Ermoshikna alias Tanya Ermoshkins v Tusker Mattresses and Others.

Of note however, and which is central in the resolution of the dispute between the parties is a document termed Final Settlement which was exhibited in court as Exhibit P17. This is an agreement of settlement between the Plaintiff, the 1<sup>st</sup>, the 2<sup>nd</sup>, the 3<sup>rd</sup>, the 4<sup>th</sup> and the 5<sup>th</sup> Defendants. Of specific importance is clause 6 of the said agreement which provides as follows;

**“whereas the aforesaid proposals for settlement formed the basis of a successful interparties negotiation meeting held on 17<sup>th</sup> June 2011 at Humura Restruant..”**

**NOW THEREFORE, THE PARTIES HERETO agree as follows:**

**Clause B. SHELVING, FITTING & EQUIPMENT.**

**i. The first party shall pay to the second party a total sum of Ug.shs.50,000,000/- as the cost of leasing the latter’s shelving, fittings and other equipment currently in its possession for the period between 13<sup>th</sup> July 2010 to 30<sup>th</sup> July 2011.**

**Clause E. DIRECTORSHIP**

**I. The first party shall within 7 days from the signing of this agreement pay Dr. Gilbert Ohairwe a total sum of Ug.shs.70,000,000/- as full and final settlement of his emoluments as director of the first party, and**

**Clause F. GOOD WILL & SHARES IN TUSKER MATRESSES (U) LTD**

**I. Consideration for good will having been fully paid, the second party hereby acknowledges receipt of the sum of ug.shs.495,000,000/- of the agreed sum of ug.shs.500,000,000/- payment made pursuant to the M.O.U signed on the 13<sup>th</sup> of July 2010.**

**II. The first party shall within 7 days from the execution of this agreement pay to the second party a sum of ug.shs.5.000,000/- as the balance on the agreed sum of ug.shs.500,000,000/- per the M.O.U dated 13<sup>th</sup> July 2010.”**

The above clauses in the settlement agreement are clearly central in determining as to which party fulfilled its part of the bargain and which party breached the same which according to Mr. Ohairwe (Dw2) the facts contained therein that he received the sums in respect to shelving, fitting and equipment, directorship and good will which Exhibit P17 confirms but Dw2 alludes in cross examination that the amounts paid as indicated in Exhibit P17 were only part of the consideration for he was expecting further payments which the Plaintiff never fulfilled as the Ug. Shs. 500,000,000/- was paid merely for the purchase of shares of the Defendants.

My view of this testimony is that it is very contradictory to what is contained in the final settlement between the parties herein and is considered a lie for it is apparent that the terms in settlement agreement is succinct and clear and was signed by this very witness himself in the presence of his counsel and whose contents he confirms by his testimony thus by virtue of **Section 114 of the Evidence Act** he is estopped from denying these very clear provisions which he signed and which contains no interpolations whatsoever contents. Therefore the conclusion to be had from the evidence received in court is that the parties having chosen to put in writing a document which signified a final conclusion of their intent are simply bound by it and any failure of the parties to abide by the provision of that freely undertaken action would be regarded as a breach of contract and arising from the evidence received in court here none other than the Defendants breached the contract entered into with the Plaintiff and would thus be liable for such breach.

The Defendants also brought a counter claim against the Plaintiff in which they sought to recover Ug. Shs.100, 651,000/- being the value of the assets retained by the Plaintiff, cash in coins Ug. Shs 20,960,000/-, good will of United States Dollars 1,125,000, VAT Tax liability Ug. Shs 522,516,798/-.

From the consideration as analysed above, the claims brought by the defendants /counterclaimants was clearly shown to have been misplaced for DW2 does admit to having received in his own right and as a representative of the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants all that is claimed

save for the VAT Tax which in my view the Defendants have not justified by any evidence as to why and on how they should recover the same from the Plaintiff for the Final Settlement which is Exhibit P 17 is conclusive in this respect thus the Defendants' counterclaim would be considered as unfounded and as such ought to fail accordingly.

#### **5. Remedies:**

The resolution of the issues above indicate that it was the Defendants who were in breach of the contract entered into with the Plaintiff for evidence has been shown that after having received all that the Final Settlement provided for they sought to vary illegally the settlement to the detriment of the Plaintiff by interfering illegally with the Plaintiff's business resulting in the said business being inconvenienced unnecessarily and thus would be liable for the consequences. .

As regards to the defence evidence as submitted that from the testimony of Mathias Nyombi (Dw3) he states that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not corporate entities with capacity to sue or be sued but merely trademarks registered with the registry for intellectual property and owned by the 4<sup>th</sup> defendant thus should have been struck off the record for no case could be made against them, my finding in this regard is that having had the opportunity to go through the testimony of DW3 I find nowhere in that testimony any statement to the effect that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are trademarks. In fact Dw3 confirms in cross examination that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were all separate legal entities duly registered. I would am therefore find the defence submission in this respect convincing and regard that as a submission from the bar which is of no consequence and as such would confirm that the 2<sup>nd</sup> and 3<sup>rd</sup> are liable in their own right as they are indeed legal entities.

The Plaintiff sought for an order of specific performance and a permanent injunction against the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants. The record show that this aspect of the pleadings were amended with the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants no longer parties to the suit thus no such order against non existing parties can issue as that would be an action in futility and thus in vain.

The Plaintiff further sought a permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants restraining them from their continued nuisance and interference with the plaintiff's use and enjoyment of its tenancies. From the evidence adduced on record indeed it has been shown that the First Defendant acting on behalf of the 2<sup>nd</sup> to 5<sup>th</sup> Defendants have continued to interfere in

the running of the business of the Plaintiff being a nuisance to it and thus would call for restraint of the Defendants' actions. In the circumstances, I would issue a permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants from further interfering with the business and tenancies of the Plaintiff.

The Plaintiff also prayed for general damages in its claim whose position is well settled in law in that the award of general damages is at the discretion of a court for always the presumption to be drawn by the court would be that the defendant knew of the natural consequence of its action or omission as was held in the case of **James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993**.

Secondly in the assessment of the quantum of damages courts are mainly guided, *inter alia*, by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach as was also held in the case of **Uganda Commercial Bank v Kigozi [2002] 1 EA. 305** and therefore a plaintiff who suffers damage due to the wrongful act of a defendant must be put in the position he or she would have been in had she or he not suffered the wrong with this principal was restated by the Supreme Court in the case of **Kibimba Rice Ltd. v Umar Salim by the Supreme Court Civil Appeal No 17 of 1992**.

In the instant matter, there is no doubt that the Plaintiff being a commercial entity has indeed suffered largely owing to the Defendant's incessant breach of freely entered into undertakings and thus incurred unnecessary loss which in the circumstances must be restituted accordingly thus the Plaintiff would be awarded general damages of Uganda Shillings One Hundred Million only (Shs 100,000,000/=) as against the Defendants jointly and severally to act as a deterrence to such greedy entities who after freely entering into agreements would wish to twist the same now and then as they like without taking into account the cost of their doing so to the other party.

As to the costs of the suit, it is trite law that costs of a suit would follow the event as provided for by **Section 27(2) of the Civil Procedure Act** and restated in the case of **Jennifer Behangye, Rwanyindo Aurelia, Paulo Bagenze v. School Outfitters (U) Ltd., Court of Appeal Civil Appeal No. 53 of 1999** thus accordingly the Plaintiff would be awarded costs of the suit.

6. Orders:

- a. A permanent injunction is issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants restraining them from interfering further with the business of the Plaintiff.



- b. The Plaintiff is awarded a general damages for interference and loss of business to a tune of Uganda Shillings One Hundred Million Only (Ug. Shs. 100,000,000/=) against the Defendants jointly and severally at an interest rate of 6 per centum per annum till payment in full from the date of this judgment.
- c. The Plaintiff is awarded the costs of this suit being the successful party.

I do so order accordingly.

**HENRY PETER ADONYO**

**JUDGE**

**27<sup>TH</sup> NOVEMBER, 2015**