

**THE REPUBLIC OF UGANDA**

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

**[COMMERCIAL DIVISION]**

**CIVIL SUIT No. 052 OF 2012**

**HIRAA TRADERS [U] LTD ::: PLAINTIFF**

**VERSUS**

**NDAULA RONALD ::: DEFENDANT**

**BEFORE HON. MR. JUSTICE B. KAINAMURA**

**JUDGEMENT**

The Plaintiff brought this suit against the defendants seeking orders for; recovery of a sum of UGX 223,000,000/= being special damages, general damages, Interest at a rate of 25% per annum from the date of filing the suit till payment in full, interest on general damages at a rate of 20% per annum from the date of judgement till payment in full and costs of the suit.

The plaint sets out the facts constituting the cause of action as:-

In the month of January 2011 the defendant entered into (05) agreements with the plaintiff and purchased (05) motor vehicles totalling to UGX 174,500,000/=. The defendant made part payment of UGX 21,500,000/= and agreed that the balance would be paid in instalments as indicated in each of the agreements. The defendant agreed to pay liquidated damages in case of breach or failure to pay any of the instalments amounting to 25% per month owing at the time, until payment in full. Additionally having failed to pay in time, the defendant agreed to pay the plaintiff UGX 30,000,000/= as compensation for the loss of the defendant's vehicle which was auctioned in Mombasa and agreed to pay UGX 40,000,000/= as compensation for the loss due to depreciation of the shilling.

The defendant issued 17 cheques drawn on Barclays Bank to the plaintiff which included the cover for compensation all amounting to UGX 223,000,000/= but they were dishonoured. The

plaintiff made several demands to the defendant to pay the balance but the defendant declined. The plaintiff filed criminal proceedings against the defendant and filed this suit to recover its balance from the defendant.

The defendant filed a written statement of defence in which he averred that he made part payment of UGX 31,500,000/= and not only UGX 21,500,000/= as claimed by the plaintiff. The defendant further stated that he shall aver and contend that the clause on liquidated damages in the transaction is illegal, harsh and unconscionable and legally unenforceable. The defendant denied the alleged agreement to pay UGX 70,000,000/= as compensation and stated it was rather a penalty for default to pay within the agreed time. The defendant stated that the cheques were issued under duress and threat of taking the matter to Police and exposing the matter in the press which would tarnish the name and image of the defendant as the LCV Chairman, Luwero District Local Government. The defendant added that two of the trucks the plaintiff sold to him were not in good condition. The defendant also averred that the plaintiff is not entitled to special damages as claimed save the actual balance. The defendant also added that he is not liable to the plaintiff in general damages and interest as the plaintiff contributed to the breach and the retention of the log books for the motor vehicle hampered the defendant from freely discharging his obligation under the contract.

In conclusion, the defendant prayed that the Court determines his actual and lawful indebtedness to the plaintiff in regard to the said transaction and the plaintiff be ordered to surrender the motor vehicle logbooks to him.

At the commencement of the trial the following issues were framed,

- 1. Whether the defendant is in breach of contract*
- 2. Whether the liquidated damages clause in the sales agreement is legally enforceable against the defendant.*
- 3. Whether the cheques were issued under duress and whether the defendant is liable for the dishonour.*
- 4. Whether the defendant is entitled to claim that two of the trucks purchased were in poor mechanical condition and therefore, not liable to pay for them.*

5. Whether there are remedies available to the parties.

At the hearing Mr. Lawrence Tumwesigye appeared for the plaintiff while Ms. Aine Ainomugasho appeared for the defendant.

**Issue one - Whether the defendant is in breach of contract**

The plaintiff called one witness; Mr. Mazhar Quayyum the Managing Director of the plaintiff. He testified as PW1 and stated that the plaintiff and defendant entered into five agreements under which five motor vehicles of the following description and at the prices indicated were purchased:-

- i. Isuzu Foward- UGX 65,000,000/=
- ii. Isuzu V330 – UGX 40,000,000/=
- iii. Nissan Pickup – UGX 18,000,000/=
- iv. Toyota Ipsum – UGX 13,500,000/=
- v. Isuzu Foward – UGX 38,000,000/=

That the defendant made part payment of UGX 21,500,000/= and it was agreed that the balance of UGX 153,000,000/= would be paid in instalments indicated in the agreements.

The defendant testified as DW1. He stated that he paid the plaintiff UGX 30,500,000/= out of the total purchase price for all the five vehicles of UGX 174,500,000/=.

Counsel for the plaintiff submitted that breach of contract arises when a party to a contract fails to perform its obligation under the contract. Counsel urged that the defendant failed to pay for the goods he purchased which constituted breach of the contract of sale of goods. Counsel submitted that according to **Section 49 of the Sale of Goods Act** the seller is entitled to bring an action for recovery of the price of the goods against the buyer which in the instant case is UGX 143,000,000/=. Counsel concluded that this issue should be answered in the affirmative.

Counsel for the defendant submitted that, they do agree that there was a delay in payment of the purchase price which could have given rise to breach. Counsel however urged that if there was breach then the plaintiff's Company contributed towards the said breach as it made performance of the said contract difficult by inflicting penalties and interest upon the defendant.

In rejoinder, Counsel for the plaintiff submitted that Counsel for the defendant admitted to the breach but that he used the words delay in payment which amounts to the same thing as breach.

PW1 and DW1 testified that the plaintiff entered into 05 agreements with the defendant for the purchase of 05 Motor vehicles and paid UGX 21,500,000/= according to PW1 and 31,500,000/= according to DW1 out of the total purchase price of UGX 174,500,000/=. The defendant later issued cheques which bounced and therefore it is clear, the plaintiff was not paid any more money by the defendant hence this suit.

In ***Black's Law Dictionary 5<sup>th</sup> Edition*** at **pg 171** breach of contract is defined as where one party to a contract fails to carry out a term. In the case of ***Ronald Kasibante Vs Shell Uganda Ltd HCCS No. 542 of 2006 reported in [2008] ULR 690*** breach of contract was held to mean;-

*“.....the breaking of the obligation which a contract imposes which confers right of action for damages on the injured party.....”*

The facts as stated show that the defendant admits being indebted to the plaintiff and even issued cheques that bounced. This clearly proves that there was breach of contract and accordingly issue one is answered in the affirmative.

***Issue two - Whether the liquidated damages clause in the sales agreement is legally enforceable against the defendant***

PW1 testified that the defendant also agreed to pay liquidated damages in case of breach or failure to pay any of the instalments amounting to 20% per month owing at the time until payment in full.

DW1 stated that the said motor vehicles would not attract interest as they were bonded off motor vehicles which the plaintiff was selling from home and not on open market and there is no legal basis for claiming high and unconscionable interest of 20% per month on default of payment on the due date.

Counsel for the plaintiff submitted that in the purchase agreement entered into between the plaintiff and the defendant there was a clause which provided;

*“If the buyer fails to pay in a given time he or she will be charged 20% per month on the remaining balance”*

Counsel relying on ***Cheshire Fifoot & Furmston’s Law of Contract 11<sup>th</sup> Edition*** at **page 604** submitted that the clause is called a liquidated damages clause. Counsel added that there is a difference between a penalties and liquidated damages clause. Counsel submitted that Courts have over time developed rules for the guidance of the Judge when determining whether a clause of this nature is a liquidated damages clause or a penalty clause. He added that those rules were usefully summarized in the case of **Dunlop Pneumatic Tyre Co. Vs New Garage and Motor Co. Ltd [1915] AC 79** at pg 86 which include;

- The sum is a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow the breach.
- If the obligation of the promisor under the contract is to pay a certain sum of money, and it is agreed that if he fails to do so he will pay a larger sum, this larger sum is a penalty. The reason is that, since the damage arising from the breach is capable of exact definition, the fixing of a larger sum cannot be a pre-estimate of the probable damage.
- It is a canon of construction that, if there is only one event upon which the conventional sum is to be paid, the sum is liquidated damages.

Counsel argued that the 20% clause was compensatory in nature and if enforced would go a long way to put the plaintiff in a position he would have been if the defendant had not breached the agreement.

Counsel for the defendant maintained the position that paying 20% on a monthly basis is high and excessive and therefore invited the Court to treat the same as a penalty. Counsel urged that the rate of 20% brings the amount from UGX 143,000,000/= to UGX 367,200,000 since it is now three years. Counsel submitted that the figure claimed to be a liquidated sum is far above the actual purchase price and therefore only fits to be a penalty in line with the rules set in **Dunlop’s** case (supra). Counsel referred to the case of **Wayne Tank and Pump Co. Ltd Vs Employers Liability 1974, QB** at 57 where Court held that;

*“ Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either rising naturally .....*”

Counsel submitted that in the instant case, damages the plaintiff is claiming are not fair and reasonable and this answers the second issue in the negative.

In rejoinder, Counsel for the plaintiff submitted that the defendant breached the contract and he therefore had to compensate the plaintiff with damages. Counsel further submitted that the parties compromised the 20% interest and substituted it by agreement with UGX 70,000,000/=. Counsel urged that the plaintiff may therefore opt to either pay the UGX 70,000,000/= or the 20% per month interest on the UGX 143,000,000/= from the date of default up to when the suit was filed.

Counsel for the plaintiff submitted that in the purchase agreement entered into between the plaintiff and the defendant there was a clause which read;

*“If the buyer fails to pay in a given time he or she will be charged 20% per month on the remaining balance”*

Counsel for the defendant submitted that the rate stipulated in the agreement was both high and excessive thus amounting to a penalty rather than liquidated damages which makes it unenforceable against the defendant.

According to *Cheshire, Fifoot and Furmston’s Law of Contract, Eleventh Edition, at pg 605*, the onus of showing that the specified sum is a penalty lies upon the person who is sued for its recovery.

I agree with the rules set in determining whether a clause is in nature of liquidated damages or a penalty in the case of *Dunlop Pneumatic Tyre Co. VS New Garage and Motor Co. Ltd* (supra) already set out above.

**Words and phrases legally defined vol. 2: D-J at pg 6** in answering the question of establishing whether a clause is a penalty or a liquidated damages clause states that;

*“The hinge on which the decision in every particular case turns is the intension of the parties to be collected from the language they have used. The mere use of the term “penalty “ or “ liquidated damages” , does not determine that intension, but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument.....”*

The charge of 20% per month on the remaining balance would amount to UGX 2,860,000/= per month, which accounts for the additional UGX 224, 200, 000/= the plaintiff is now demanding. In my view based on the test set out above, this would amount to a penalty rather than a liquidated demand as the amount is extravagant and un conscionable.

In the result, it is my considered opinion that the charge of 20% per month was rather excessive thereby resolving the issue in the negative.

***Issue three - Whether the cheques were issued under duress and whether the defendant is liable for the dishonour***

DW1 testified that the cheques were issued under duress and threat of taking the matter to Police and exposing the case of default and bounced cheques in the press which would tarnish his name.

In cross examination, DW1 stated that he issued the cheques so that he could be given more time and to stop the Managing Director of the plaintiff from publishing him in the press.

Counsel for the plaintiff submitted that duress means actual violence or threats of violence to the person that is calculated to produce fear of loss of life or bodily harm and referred to ***Cheshire & Fifoot Law of Contract at page 297***. Counsel further submitted that the plaintiff upon default approached the plaintiff to give him more time to pay. Counsel added that in the process they agreed that instead of enforcing the contract, the defendant pays an additional UGX 70,000,000/= to compensate the plaintiff for failure to pay the plaintiff together with the principal sum spread over a period of time and cheques were issued for different instalments. Counsel submitted that there was no duress and the threat to publish the defendant in newspapers

if at all, was not a threat to commit a crime. Counsel submitted that the cheques were not issued under duress and the defendant is liable for their dishonour.

Counsel for the defendant in rejoinder submitted that the defendant signed the cheques that were dishonoured as a way of protecting his good name. Counsel cited the decision in ***Esther Nakulima Vs Anne Nandawula Kabali Misc App. No. 235 of 2013*** where Court held that for a party relying on duress it was necessary to prove that unlawful pressure was applied on him or her so as to lose his or her free will. Counsel submitted that the defendant has adduced sufficient evidence of duress as demonstrated in New Vision Newspaper dated 9<sup>th</sup> December 2011 which was run about him. Counsel urged that the defendant signed the cheques under duress and is therefore not liable for their dishonour.

DW1 testified that the cheques were issued under duress and threat of taking the matter to Police and exposing the case of default and bounced cheques in the press which would tarnish his name. He further stated that he issued the cheques to buy time. While Counsel for the plaintiff submitted that the defendant is liable for the issuance of the cheques that later bounced, Counsel for the defendant submitted that the defendant signed the cheques as a way of protecting his good name.

***Black's Law Dictionary 17<sup>th</sup> Edition*** defines duress of person as;

*“Compulsion of a person by imprisonment, by threat, or by a show of force that cannot be resisted [Emphasis mine]”*

The defendant stated he was an LCV Chairperson of Luwero and that the alleged car scam was run in the New Vision of December 2011.

In the case of ***Sobetra (U) Ltd & another Vs Leads Insurance Limited Misc. App. No.0454 of 2011***, the 2<sup>nd</sup> applicant was given the option of signing a consent judgment or go to Luzira and Court set it aside on the ground of it being procured under duress. In that application, Court emphasised the fact that;

*“...the general rule is that any wrongful act or threat which overcomes the free will of a party constitutes duress.”*



Court highlighted the decision of *Maureen Tumusiime Vs Macario Detoro and Another [2006] HCB Vol. 1 at 127* where it was held that;

*“Duress of a person may consist in violence to the person or threats of violence or imprisonment, whether actual or threatened. Proof of duress, like fraud requires a standard that is more than a mere balance of probabilities, though not beyond reasonable doubt....”*

From evidence on record, and upon review of the cases cited above, I find no compelling evidence to lead me to a conclusion that the cheques were issued under duress. During cross examination, the defendant admitted that he issued the postdated cheques because he wanted the plaintiff to give him more time to come up with the payments because he (the defendant) had problems which the plaintiff knew about. In my view the defendant has failed to show to the satisfaction of court that he issued the cheques under duress. In the result it is the finding of court that the cheques in question were not issued under duress and the defendant is liable for the dishonor.

***Issue four - Whether the defendant is entitled to claim that the two of the trucks purchased were in poor mechanical condition and therefore, not liable to pay for them.***

DW1 testified that two of the trucks sold to him were in bad mechanical condition, whereas the plaintiff at the time of sale represented them to be in good mechanical condition.

In cross examination, DW1 stated that the money owed by him was UGX 143,000,000 minus UGX 40,000,000/= for the two vehicles which were not in good condition. He further stated that the vehicles he bought were old but he did not inspect them because the parking yard was small and there was no way they could test them.

In re-examination, DW1 stated that he complained about the vehicles but was told that once goods are sold they are not returnable.

Counsel for the plaintiff submitted that according to the purchase agreements which are exhibits P1-P5, it is provided in clause D that;

***D. “Representation, warranties & disclosures.***

*“Buyer has inspected the vehicle even he was free to bring his mechanic and satisfied himself, after taking delivery of the vehicle and signing the agreement the seller will not take any responsibility for any mechanically/ damage of missing parts. The vehicle is sold “AS IT IS” and the seller does not in any way, expressly or impliedly, give any warranties to the buyer”*

Counsel for the plaintiff submitted further that before the defendant signed these agreements he read this clause. Counsel urged that the defendant cannot turn around now to say that some of the vehicles were in poor mechanical condition when he had opportunity to inspect them. Counsel added that the defendant did not adduce evidence to prove the nature of defect on the said two vehicles in order to satisfy Court that the vehicles were not fit for purpose or of merchantable quality as provided under **S.15 and 16 of the Sale of Goods Act**.

In conclusion, Counsel submitted that the answer to this issue is in the negative.

Counsel for the defendant did not submit on this issue.

DW1 testified that two vehicles were in poor mechanical condition and he was only willing to pay the money owed minus UGX 40,000,000/= for the damaged vehicles. DW1 stated that the parking was small and he therefore could not test the vehicles.

Counsel for the plaintiff submitted that the purchase agreements provided in clause D that;

***D. Representation, warranties & disclosures.***

*“Buyer has inspected the vehicle even he was free to bring his mechanic and satisfy himself after taking delivery of the vehicle and signing the agreement the seller will not take any responsibility for any mechanically/ damage of missing parts. The vehicle is sold “AS IT IS” and the seller does not in any way, expressly or impliedly, give any warranties to the buyer”*

Counsel for the plaintiff urged that the defendant had the opportunity to inspect them.

**Section 15(1)(b) of the Sale of Goods Act** provides that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except; where goods are bought by description from a seller who deals in goods of that

description, whether the seller is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality; except that if the buyer has examined the goods, there shall be no implied condition as regards defects which the examination ought to have revealed.

The decision of Lord Denning in the case of **Bartlett Vs Sydney Marcus Ltd [1965] 2 All ER 753** was to the effect that where a buyer buys a second-hand car, he should realize that the defects may appear sooner or later. In that particular case the defect appeared in the clutch which was more expensive to repair than had been anticipated. It was held by the Court that the fact that the defect was more expensive than had been anticipated did not mean that there had been any breach of the implied condition as to fitness for the purpose. Lord Denning MR held that on the sale of a second-hand car, it is merchantable if it is in the usable state, even though not perfect. This is very similar to the position under section 14 (1) [**our section 15**]. A second car is "reasonably fit for the purpose" if it is in a roadworthy condition, fit to be driven along the road in safety, even though not as perfect as a new car. A buyer should realise that when he buys a second-hand car, defects may appear sooner or later. In the absence of an express warranty, he has no redress. Even when he buys from a dealer the most that he can require is that it should be reasonably fit for the purpose of being driven along the road.

I also note that the defendant had time to inspect the vehicles and the excuse of the size of parking is rather an afterthought. The clause made provision for the buyer to come with his own mechanic which I think was fair enough. Additionally, under **Section 102 of the Evidence Act** the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

In **Sebuliba Vs Co-operative Bank (1982) HCB 129** Court held that the burden of proof in civil matters lies upon the person who asserts or alleges.

In my view the defendant has not been able to demonstrate that the two vehicles were in poor mechanical conditions so as to entitle him to any remedy. In the result issue four is answered in the negative.

***Issue five- Whether there are remedies available to the parties***

*PW1 stated that he was asking Court to order the defendant to pay the plaintiff the following;*

- a) UGX 143,000,000/= being the sum that remained unpaid purchase price
- b) Either UGX 70,000,000/= as compensation for the loss occasioned to the plaintiff as a result of the defendant's failure to pay or interest of 20% per month on UGX 143,000,000/= from the date of default till filing of the suit.
- c) General damages for breach of contract
- d) Interest at rate of 25% per annum on both general and special damages
- e) Costs of the suit.

Counsel for the plaintiff submitted that the plaintiff is entitled to receive UGX 143,000,000/= being the unpaid balance on the purchase price. Counsel added that this is the uncontested sum by the defendant in both the pleadings and evidence.

Counsel for the plaintiff further submitted that the plaintiff is entitled to receive from the defendant UGX 70, 000,000/= which both parties agreed to as liquidated damages for the loss occasioned by the default of payment.

Counsel further submitted that the plaintiff is entitled to interest at a commercial rate of 30% per annum on both UGX 143,000,000/= and UGX 70,000,000/= from the date of filing till payment in full.

Additionally, Counsel prayed for general damages for breach of contract, interest on general damages from the date of judgment till payment in full and costs of the suit.

Counsel for the defendant submitted that the plaintiff is not entitled to any remedies sought save for the UGX143, 000,000/= which the defendant admitted.

In rejoinder, Counsel for the plaintiff submitted that the plaintiff is entitled to the remedies already stated in the main submissions.

The remedies sought by the plaintiff are as first set out above.

The defendant admitted that he was indebted to the plaintiff a contract balance of UGX 143,000,000/= minus UGX 40,000,000/= for the two vehicles that were in poor mechanical condition. However as already resolved in issue four, the defendant is still liable to pay for the two vehicles he did not want to pay for.

Accordingly the plaintiff is awarded UGX 143,000,000/= being the remaining unpaid purchase price.

Regarding the compensation of UGX 70, 000,000/= for the loss, I am alive of the decision in ***Lutale Vs Ssegawa HCT-CC-CS-0292-2006*** where Court held that;

“ The test as to how much money an injured party may recover was laid down in the 19<sup>th</sup> Century leading case of ***Hadley Vs Baxendale (1854) 9 EX. 341*** as follows:

*“Now we think that the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of the parties, at the time they made the contract as the probable result of the breach of it.”*

The contract was breached by the defendant in the year 2011, and this is 2015. The plaintiff being a business entity it suffered loss. Additionally, they agreed as parties that UGX 70,000,000/= would be paid for late payment of the contract balance. That being the case, I accordingly award the plaintiff UGX 70,000,000/= as compensation for the breached contract.

In the case of ***Lutale v Ssegawa (supra)*** Court relied on the case of **Haji Asumani Mutekanga Vs Equator Growers (U) Ltd SCCA No. 7/95** reproduced in **[1996] 111 KALR 70 at 83** and held that;

*“With regard to proof, general damages in a breach of contract case are what the Court may award when it cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable tribunal.”*

Consequently I believe an award of UGX 30,000,000/= as general damages would be commensurate in the circumstances.

I also award interest at the rate of 18% per annum on the sum remaining unpaid on the purchase price from date of filing suit till payment in full and interest at rate of 25% per annum on the general damages from date of judgment till payment in full.

Costs of the suit are awarded to the plaintiff.

In the result judgment is entered for the plaintiff in the following terms:-

1. UGX 143,000,000/= being sum that remained unpaid on the purchase price.
2. UGX 70,000,000/= being compensation agreed upon.
3. UGX 30,000,000/= being general damages
4. Interest of 18% p.a on (1) and 25% on (3) above
5. Costs of the suit

**B. Kainamura**

**J u d g e**

**05.11.2015**