

**THE REPUBLIC OF UGANDA**

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

**[COMMERCIAL DIVISION]**

**CIVIL SUIT No. 525 OF 2013**

**JUSTINE MUNYIGA ::: PLAINTIFF**

**VERSUS**

**ROBERT ASIIMWE ::: DEFENDANT**

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

**JUDGEMENT**

The plaintiff brought this case against the defendants seeking orders for; a) refund of the sum of GBP 21,530 and USD 12,650 with interest of 25% per annum from the date of disbursement until payment in full, b) general and punitive damages, c) costs of the suit, d) interest on the refund sum and damages at court rate from date of judgement till payment in full, e) any other relief that court may deem fit.

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

Sometime in March 2013, Maria Kabingabire and Annette Babigamba introduced the defendant to the plaintiff and recommended him as a competent and honest professional who the plaintiff could contract to construct her house. The plaintiff who is a Ugandan resident in the United Kingdom accepted to have the defendant construct her house in Entebbe which he did up to the level of a shell house.

The defendant sometime in September 2012 persuaded the plaintiff to send him to China to procure an assortment of goods to finish and furnish the plaintiff's house. The defendant assured the plaintiff that this would actually help her save up to 50% and the goods would be delivered within 5 weeks. The plaintiff disbursed to the defendant a total sum of GBP 21,530 which she sent in three instalments. The defendant also later asked the plaintiff for an additional sum of

USD 12,650 to cater for the balance on the purchase of the goods, their transportation to Kampala, clearance and fitting which she sent to the defendant on 25<sup>th</sup> March 2013. The defendant has since then never delivered the goods and the plaintiff is in doubt about their existence or possibility of their recovery.

By consent the defendant was allowed to file a defence.

The defendant in the written statement of defence responded that;

He purchased the materials and sent receipts and invoices to the plaintiff.

The materials were shipped from China to Mombasa and the defendant informed the plaintiff to clear transport costs, demurrage and balance on goods but she refused to do so up to date.

The plaintiff is actually indebted to the plaintiff in the sum of UGX 24,071,127 part of which is balance on expenditure while in China and 10% as professional fee for the work he has done so far on the construction.

In the counterclaim, the defendant averred that;

The respondent contracted the counterclaimant to construct her house at Entebbe at an agreed consideration of 10% commission of total expenditure.

By the time of commencement of the suit the counter claimant had so far used UGX 225,187,982 as expenditure on the construction which account for the sum of UGX 22,659,919 as 10% commission.

The defendant/counterclaimant had used more money on expenditure than he received amounting to UGX 1,411,208 which amount was communicated to the respondent as well.

In conclusion, the counterclaimant prayed that judgment be entered against the respondent/plaintiff for UGX 24,071,127, general damages, interests and costs of the suit.

The plaintiff in reply to the written statement of defence stated that;

The plaintiff maintains that the defendant breached the contract having received GBP 21,530 and USD 12,650 from the plaintiff for procurement of goods from China, and failing to deliver the said goods.

The plaintiff shall adduce evidence to show that the defendant took the said sums of money and failed to deliver the goods as agreed.

The plaintiff disbursed adequate funds to the defendant to cover the cost of purchase, transportation and clearance of goods and that the plaintiff disbursed to the defendant additional funds amounting to USD 12,650 but the defendant still did not honour his part of the bargain.

The defendant frustrated the plaintiff's attempts to remedy the situation, she contacted the defendant on several occasions to hand over documentation in relation to the goods to enable the plaintiff clear them through customs, but the defendant repeatedly refused to hand over the documents of title to the goods.

In reply to the counterclaim the plaintiff denied agreeing to a 10% commission on the total expenditure of the construction. The plaintiff stated that the defendant agreed to construct the house to completion at a total cost of UGX 90,000,000/= within six months but the plaintiff has paid the defendant over UGX 127,000,000/= and it is over 2 years but the house is incomplete.

In conclusion, the plaintiff denied that the defendant is entitled to any of the remedies sought in the counterclaim.

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

- 1. Whether there was a valid contract between the plaintiff and defendant and if so, whether the defendant breached the contract*
- 2. Whether the plaintiff can sustain against the defendant an action for money had and received*
- 3. Whether the plaintiff is entitled to the remedies sought*

*4. Whether the plaintiff is liable to pay to the defendant a 10% commission on the total expenditure of construction of the plaintiff's house*

*5. Whether the defendant/ counter claimant is entitled to the other remedies sought*

At the trial, Mr. Kalule Fred represented the plaintiff while Ms Lydia Tamale represented the defendant.

The parties filed witness statements upon which the witnesses were cross examined.

***Issue one, whether there was a valid contract between the plaintiff and defendant and if so, whether the defendant breached the contract***

The plaintiff who testified as PW1 stated that she contracted the defendant to build her a house after a recommendation by Maria Kabigambire and Annette Babigamba. PW1 further stated that the defendant built her house to the level of a shell house and then requested for money to procure an assortment of goods to furnish the house. It was her further evidence that a sum of GBP 21,530 was first disbursed to the defendant and a further sum of USD 12,650 was added. PW1 stated that the defendant has never delivered the goods to the plaintiff to date despite her attempts and discussions with the defendant to have the goods cleared.

In cross examination, PW1 stated that she had contracted the defendant to build her a hose at a contract price of UGX 90,000,000/=. She however stated that there was no written contract to that effect since it was done by mutual understanding.

Mr. George Biribasa testified as PW2 and stated that he was requested by the plaintiff to ascertain whether the goods as alleged by the defendant were actually in Mombasa. It was his evidence that he ascertained that they were in Mombasa but found that they were in the names of someone else. He further gave evidence that the plaintiff had to first change the documentation into her names which the defendant did not agree to and instead started asking for money that he claimed the plaintiff owed him.

The defendant testified as DW1. It was his testimony that he was contracted by the plaintiff to construct her house in Entebbe but there was no contract agreement made. DW1 stated that he purchased the materials and sent receipts and invoices to the plaintiff for all the materials

purchased. He added that he informed the plaintiff to clear transport costs, demurrage and balance on transporting goods from the ware house to the port which the plaintiff has neglected.

Counsel for the plaintiff submitted that though the relationship between the plaintiff and the defendant was very informal it was one largely based on trust. Counsel cited **S.10 (2) of the Contracts Act** which provides that a contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties. Counsel further submitted that the defendant breached the contract by undertaking to procure the goods and deliver them within five weeks but has never delivered them to date under a claim that the money was insufficient.

Counsel for the defendant submitted that the issue of whether there was a contract between the parties does not arise in the circumstances as it was agreed in the joint scheduling memorandum that the plaintiff contracted the defendant to construct her house at Entebbe. Counsel argued that the issue is whether there was breach of contract. Counsel submitted that the goods were purchased and the plaintiff admitted receipt of the invoices. Counsel added that the plaintiff was requested to pay money to clear the goods and transport them which she declined to do. Counsel submitted that the defendant is not liable for any breach of contract since the goods were purchased and the report of PW3 is merely speculative since she did not open the container at all to count the goods and hence of no evidential value.

In rejoinder, Counsel for the plaintiff submitted that the defendant breached his undertaking to deliver the goods. Counsel added that the goods were never delivered therefore there was no way to enable physical verification or proof of their existence. Counsel argued that this also constituted the breach of contract.

***Issue two, whether the plaintiff can sustain against the defendant, an action for money had and received***

It was PW1's testimony that she disbursed to the defendant a sum of GBP 21,530 on three dates, i.e. GBP 2,030 on 2<sup>nd</sup> October 2012, GBP 4,000 on 11<sup>th</sup> October 2012 both through Western Union Money transfer and a cash delivery of GBP 15,500 through Ms. Mutonyi Monica on 23<sup>rd</sup> October 2012. She gave further evidence that the amounts sent were to cater for the cost of purchase of goods, their transportation from China to Kampala, clearance through customs, as well as the defendant's travel to and from China and his maintenance while in China. PW1

further stated that the defendant however procured more goods than agreed upon and demanded for more money from her. She stated that she later gave the defendant an additional sum of USD 12,650 on 25<sup>th</sup> March 2013 but the defendant even then did not deliver the goods.

In cross examination PW1 stated that she gave the defendant GBP 21,500 and USD 12,650 to purchase goods from China.

DW1 in his testimony admitted having received about UGX 127,586,582 for the construction of the house to the current state. He added that he also received GBP 15,500 and USD 12,650 for the purchase of goods from China.

In cross examination DW1 confirmed receipt of only GBP 15,500 and USD 12,650 for purchase of goods from China and the first two amounts sent were for the construction of the house.

Counsel for the plaintiff submitted that the plaintiff can sustain an action of money had and received against the defendant. Counsel added that the plaintiff's claim meets the essential elements for the action since the defendant was paid money by the plaintiff and the consideration completely failed. Counsel cited the case of ***Jamba Soita Ali Vs David Salaam HCT-OO-CC-CS-0400-2005*** where Court *inter alia* held that;

*“.....For the plaintiff to succeed there must be evidence of payment sought to be recovered.”*

Counsel submitted that the plaintiff had adduced evidence that she had disbursed GBP 21,530 and USD 12,650 to the defendant. Counsel added that the defendant admitted receipt of the sums from the plaintiff to procure goods from China.

Counsel for the defendant submitted that the plaintiff cannot sustain such an action as the money was to purchase goods for the furnishing and finishing of her house in Entebbe. Counsel contended that the plaintiff does not deny that they were purchased and was only requested to send more money and reconcile the books with the defendant to determine whether she had paid more money than was required. Counsel further submitted that the plaintiff can only sustain an action for specific performance if she pays money for transporting her goods to Uganda.

Counsel for the plaintiff in rejoinder submitted that the defendant's use of the sums disbursed to him for the purchase of various goods is not a defence to the action for money had and received. Counsel submitted further that the defendant failed to deliver the goods within 5 weeks as agreed which occasioned a total failure of consideration and it's the reason why the plaintiff seeks to recover the sums paid to the defendant. Regarding specific performance, Counsel quoted **Cheshire, Fifefoot and Furmston's Law of Contract, 10<sup>th</sup> Edition at pa 500-561** where it is stated that the fundamental rule is that specific performance will not be decreed if there is an equitable remedy at law. Counsel argued that all the plaintiff seeks is the recovery of her money from the defendant as well as damages for the loss occasioned to her.

***Issue three- whether the plaintiff is entitled to the remedies sought***

Counsel for the plaintiff submitted that the plaintiff is entitled to the following remedies;

- i) A refund of GBP 21,530 and USD 12,650 from the defendant who had those amounts disbursed to him for goods from China which he never delivered at all.
- ii) General and punitive damages for the failure to deliver the goods for two years and manipulation by the defendant. Counsel cited the case of **Obongo and another V Municipal Council of Kisumu [1972]1 EA 91** submitting that exemplary damages are penal, not consolatory as had sometimes been suggested.
- iii) Costs and interest

Counsel cited a number of decisions which included **Masembe vs Sugar Corporation and Another[2002]EA 434** where court held that the basis of award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had use of it himself and so he ought to compensate the plaintiff. Counsel also cited the case of **Ruth Aliu and 136 Others Vs AG Civil Suit No.1100 of 1998** where Court held that it is apparent that nowadays interest is payable for the deprivation suffered by the person to whom payment should have been made. Counsel concluded by praying that the Court awards interest to the plaintiff at commercial rate from the date of disbursement until refund in full since the defendant did not put the plaintiff's money to the intended use and the plaintiff has been denied its use for a long time.

Counsel for the defendant while addressing the remedies sought submitted thus;

Regarding the recovery, no money can be recovered especially based on the fact that it was used for the purchase of goods and can therefore only recover the goods and not money.

The issue of general damages is premature as no proof of breach of contract was adduced in Court.

In conclusion, Counsel submitted that the plaintiff is not entitled to any remedy as prayed.

In rejoinder, Counsel for the plaintiff submitted that the fact that the defendant alleges to have purchased the goods is no defence because he received money and never delivered the goods. In conclusion, Counsel submitted that the plaintiff is entitled to the different remedies prayed for.

***Issue four    whether the plaintiff is liable to pay to the defendant a 10% commission on the total expenditure of construction of the plaintiff's house***

PW1 stated in her testimony that the defendant had undertaken to construct her house to completion at a total cost of UGX 127,586,581. She added that the defendant having received UGX 127,586,581/= agreed that he would reduce the commission fee to 6%. However the claim for commission was an afterthought by the defendant as the parties had not agreed to it.

In cross examination, PW1 stated that she paid UGX 90,000,000/= for the construction of the house through Western Union.

DW1 stated in his testimony that it was agreed that a profession fees of 10% out of total construction costs will be charged. He added that he has been paid    UGX 127,586,582/= for the construction of the house to its current state.

Counsel for the plaintiff submitted that the defendant is not entitled to a 10% commission on the total expenditure of the house because this was an afterthought. Counsel concluded that the defendant's claim is based on an alleged agreement which was not even reduced into writing as required by law.

Counsel for the defendant submitted that the defendant is entitled to a 10% commission on the total expenditure of construction of the plaintiff's house.



In rejoinder, Counsel reiterated that the plaintiff is not entitled to the 10% commission since it was not reduced into writing which made it unenforceable in law.

***Issue five- whether the defendant/ counter claimant is entitled to the other remedies sought***

Counsel for the plaintiff submitted that the defendant is not entitled to the remedies sought since he received colossal sums of money which he squandered. Counsel added that the defendant did not adduce evidence that he had suffered losses he claims. Counsel prayed that the defendant pays back the plaintiff GBP 21,530 and USD 12,650 being money had and received from the plaintiff as well as general and punitive damages, costs of the suit and interest be awarded.

Counsel for the defendant submitted that the defendant is entitled to the remedies which also include interests and costs to the counterclaim. Counsel prayed that the plaintiff's suit be dismissed with costs for being frivolous and vexatious or being filed prematurely. Counsel also prayed that judgement in the counterclaim be entered in favour of the defendant with costs.

In rejoinder, Counsel for the plaintiff submitted that the defendant be ordered to refund the plaintiff GBP 21,530 and USD 12,650 being money had and received from the plaintiff, general and punitive damages costs of the suit with interest.

**JUDGEMENT**

I have carefully considered the facts and arguments of both Counsel. The brief facts are that the plaintiff seeks recovery of a sum of GBP 21,530 and USD 12,650 which was disbursed to the defendant to procure an assortment of goods which have never been received by the plaintiff. The plaintiff also seeks general and punitive damages, interest and costs of the suit.

The issues are already highlighted above.

I will address issue one which is; *whether there was a valid contract between the plaintiff and defendant and if so, whether the defendant breached the contract*

From the evidence of PW1 and DW1 it is clear that by agreement of both parties the defendant was given a contract by the plaintiff to construct a house at Entebbe.

A contract in **S.10 (1) of the contracts Act** is defined as;

*“An agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.”*

The evidence on record shows that there was no written contract but the plaintiff and defendant agreed to have the house constructed and it was done up to the level of a shell house for which the defendant received an amount of UGX 127,586,582/=. Since the parties do not dispute the existence of the agreement and understandings, then as pointed out by Counsel for the defendant what needs to be determined at this stage is whether there was a breach of that undertaking. PW1 in her evidence stated that she was persuaded by the defendant that she would save up to 50% if she bought goods from China to furnish the house and she therefore disbursed GBP 21,530 and later USD 12,650 to the defendant who has not delivered the goods to date. DW1 testified that he actually bought the goods but they are at the Port and only require the plaintiff to disburse more money to clear the goods and transport them. PW1 however stated that she had disbursed what was more than enough to clear the goods and even transport them.

In the **Black’s Law Dictionary 5<sup>th</sup> Edition 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 stated to be:-

*“.....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 receipt of GBP 15,500 and USD 12,650 and other amounts stated to be towards the construction of the issue.

The evidence given shows that the defendant had already received UGX 127,586,582/= for construction of the house to the level it remained. He later received the amounts of GBP 21,530 and later USD 12,650 which are proved by the receipts of the transactions done through Western Union. The defendant admits having failed to deliver the goods which he claims still exist.

It is my opinion that the defendant breached the contract notwithstanding the fact that there is no written contract setting out the agreed terms. PW1 stated that the defendant promised to have the goods delivered that very year which was 2012 but the goods have never been received by her. I

believe her testimony. This in my opinion is an express breach of contract. The evidence given by PW2 and PW3 show that the money disbursed to the defendant was sufficient to cover all expenses but the defendant continues to ask for more money. Additionally, PW1 gave evidence that the defendant procured more goods than agreed upon and this led to more expenses. It is therefore my view that there was breach of contract by the defendant. In the result issue one is answered in the affirmative.

I will move on to address issue two; whether the plaintiff can sustain against the defendant an action for money had and received.

In the case of ***Jamba Soita Ali Vs David Salaam HCT-00-CC-CS-0400-2005***, court while addressing an issue of money had and received stated that;

*“Money which is paid to one person which rightfully belongs to the other, as where money is paid by A to B on a consideration which has wholly failed or by mistake is said to be money had and received by B to the use of A. The paying of A to B, according to the learned author of A Concise Law Dictionary by P.G. Osborn, 5<sup>th</sup> Edn at p. 212, becomes a quasi-contract, an obligation not created by law, but similar to that created by contract, and is independent of the consent of the person bound. The cause of action is rooted on quasi – contract on the footing of an implied promise to re-pay”.*

The facts in this case are that the plaintiff alleges to have remitted to the defendant GBP 21,530 and later USD 12,650 for the purpose of procuring goods from China to furnish the plaintiff’s house in Entebbe. In my view there was a clear understanding between the parties as to how much money was disturbed and for what purpose. They only disagree as to performance. This is a clear indication that there was a contract which i have found to have been breached. I therefore agree with Counsel for the defendant that the action for money had and received in these circumstances cannot be sustained. In the result issue two is answered in the negative.

Regarding the remedies, issue one was resolved in the affirmative that there was breach of contract by the defendant. The principle is that he that alleges a fact must prove it. The evidence adduced by the plaintiff proves that the defendant received the sums that the plaintiff claims she sent. The defendant also admits receipt of the amount but claims to have purchased the goods which have to be cleared. However, the defendant did not prove existence of the goods to the

required standard of a balance of probabilities. In that case, I order a refund of GBP 21,530 and USD 12,650 to the plaintiff.

I also award general and punitive damages of UGX 10,000,000/= against the defendant for the failure to deliver the goods and wastage of the plaintiff's time.

I award interest of 5% on the sums due for refund from the date of filing the suit till payment in full.

I further award interest of 20% on the general and punitive damages from the date of judgment till payment in full.

Regarding the counter claim and liability of the plaintiff to pay 10% commission on the total expenditure of the plaintiff's house which the plaintiff denies relying on the decision in ***John Kagwa Vs Kolinsaat Turizm & 3 others HCT-00-CC-CS-0318-2012*** where court dismissed the claim for commission which had not reduced in writing basing on **Section 10(5) of the Contracts Act**. I hold a similar opinion that the defendant in this matter claims a commission which is not in writing and neither has it been proved otherwise.

Accordingly, I resolve the issue in the negative. The counter claim therefore fails and should be dismissed.

In the result, judgment is entered for the plaintiff in the following terms.

1. GBP 21,530 (British pounds twenty one thousand five hundred and thirty only)

and

USD 12650 (United stated dollars twelve thousand six hundred and fifty only) against the defendant.

2. General and punitive damages of UGX 10,000,000/=
3. Interest of 5% per annum on (1)
4. Interest of 20% per annum on (2)
5. Costs of the suit to the plaintiff

It is further ordered that the counter claim is dismissed in its entirety.

**B. Kainamura**

**Judge**

**09.12.2015**