

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 435 OF 2012

SALADIN MEDIA ADVERTISING:..... PLAINTIFF
T/A OMD UGANDA

VERSUS

PIONEER EASY BUS LIMITED:.....DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Saladin Media Advertising Ltd. herein referred to as the Plaintiff sues Pioneer Easy Bus Limited called the Defendant in these proceedings, for general damages for loss of income based on revenue projections, special damages being money expended in execution of the contract between the parties, exemplary damages, interest and costs.

The background to the suit lies in a Memorandum of Understanding entered between the Plaintiff, Portal Investments on the one part and the Defendant on the other.

Under the Memorandum of Understanding, the Plaintiff trading as OMD was to have exclusive rights to sell advertising solutions on behalf of the Defendant in Uganda and East Africa.

The Plaintiff had the responsibility for;

- a) Identification of advertisers.
- b) Maximize advertising income.
- c) Collecting additional information to be shared with other sponsors that would contribute to a successful venture.
- d) Negotiating with customers to secure contracts.

While the defendant had the responsibility to;

- a) Avail all possible avenues for advertising (Media) in the company.
- b) Securing consents, approvals, work permits, licences, concessions required for the Project from Government or any other regulatory authority.

The other party to the Memorandum of Understanding namely Portal's responsibility was to;

- a) Coordinate all activities between the sponsors.
- b) Approach other media agencies for business.
- c) Finance and implement the different media solutions.

In all this the Plaintiff was entitled to a commission of 18% of the generated revenue in East Africa. It would be entitled to a commission on every contract or all businesses executed or done with customers first introduced by it even after the termination of the Memorandum of Understanding.

The Plaintiff would however not be entitled to commission in respect of customers who dealt with the Defendant before the Memorandum of Understanding.

The Defendant and Portal were then to share the net income after implementation cost on a 50/50 basis. The foregoing were provided for in Clause 2 of the Memorandum of Understanding. The Memorandum of Understanding also provided for Termination of the Contract under Clause 3 in these words;

“Either Part may terminate this Memorandum of Understanding at will at anytime by giving seven (7) months written notice to the other party.”

Clause 3.2 however saved Clause 2 on Remuneration as follows;

“The provision in Clause 2 of this Memorandum of Understanding will continue to be binding on the parties notwithstanding any termination or cancellation of this Memorandum of Understanding.”

As for Notices, approvals, consent or any other communication, Clause 4 provided that they would *“be made in writing by way of a registered letter to the addresses set out”* in the Memorandum of Understanding.

On waivers and amendments the Memorandum of Understanding made it clear in Clause 6.1 that *“failure by a party to enforce at any time any of the provisions of the Memorandum of Understanding or to require at any time performance by another party of any such provision, would in no way be construed to be a waiver of such provision, nor affect the validity of the*

Memorandum of Understanding or any part thereof, or the right of either party thereafter to enforce each and every provision.”

Furthermore that any waiver would have to be in writing signed by the waiving or consenting party. There would be no amendments except in writing executed by the parties. The Memorandum of Understanding was followed by an agreement in September 2010.

After the execution of the agreement, the Plaintiff engaged Kayline Enterprises Limited and Energy Utilization (Uganda) Limited to design and construct bus shelters meeting the approved plans of KCC and begun constructions.

The Plaintiff alleges that between 6th – 10th October 2011, they were surprised to see in the Red Paper and Daily Monitor News Papers adverts inviting interested bodies to compete for jobs that were to be performed by the Plaintiff under the Memorandum of Understanding. These included services and works which had been exclusively contracted to the Plaintiff, **Exh P10.**

On the 16th November 2011, the Defendant wrote **Exh P11** stating that the contract between them could not continue.

The Defendant wrote in part;

“..... being in cognizant of the fact that most of the circumstances in respect of the intended business have since changed and in the result Pioneer Easy Bus Limited shall design and construct the bus shelters/stops.....

..... The purpose of this letter is to advise that the contract executed between ourselves and yourselves has been overtaken by events and we now invite you to our boardroom on Monday 21st day of November 2011 at 10.00am to discuss the matter and”

On the 21 November 2011, the Defendant again wrote to the Plaintiff stating that they had decided to construct the shelters at their own cost to ensure **compliance with the terms of their agreement with KCCA;**

“The result of the new arrangement is that the contract between Saladin Media Advertising will have to be terminated and a new one negotiated on the following terms.”

The terms included invitation of bids from other competitors. The Defendant then invited the Plaintiff to reapply which meant that the Memorandum of Understanding and the earlier agreement had been terminated. It is in protest of the termination that the Plaintiff lodged the suit seeking, special and general damages.

In response to the Plaintiff's claim the Defendant, while conceding that a Memorandum of Understanding and an agreement had been entered between the parties and that it had subsequently terminated both of them, the Defendant contested the engagement by the Plaintiff of Kayline Enterprises Limited and Energy Utilization (Uganda) Ltd. to design and construct the shelters. She also contested the claim of damages and that the Plaintiff was not at all suffering any damage. That in any case by November 2011 the Plaintiff had not constructed any bus shelter and yet the buses were expected in January 2011.

She justified the termination of the contract stating that there was realization that the Plaintiff could not set up the required shelters in the remaining one month. Further, that the Plaintiff's failure to construct the shelters amounted to breach of the agreement and that the Defendant was within her rights to repudiate the agreement.

The parties agreed to the following issues for trial;

1. Whether the Defendant's actions were in breach of the terms of the contract?
2. Whether the Defendant is liable to indemnify the Plaintiff and if so to what extent?
3. Whether the parties are entitled to any remedies?

Starting with the first issue of whether the Defendant's actions were in breach of the contract, the answer lies in the agreement between the parties. This agreement, **Exh P5** incorporated the terms of the MOU. Clause 7 of the agreement provided for termination and procedure thereof. Clause 7.3.2 provided as follows;

“In the event of breach, neglect or failure by any of the parties hereto, which breach, neglect or failure shall, after the aggrieved party giving not less than 15(fifteen) business days’ notice requiring rectification or remedy of breach, failure or neglect, remain unrectified or unremedied, in which case the aggrieved party shall be entitled to terminate this Agreement without further notice.....”

From the foregoing it is clear that notice was mandatory and had to be given by the Defendant to the Plaintiff. This notice also had a 15 day span to give the other party a chance to correct

whatever the aggrieved party was unhappy with. The Defendant in her paragraph 5 (V11) of the written statement of defence stated that it terminated the contract because ***“the Plaintiff would not have erected the required shelters as specified in the remaining time frame.”*** The Defendant did not call any evidence to prove this assertion. There is nothing to show the Plaintiff would not have fulfilled the contract judging by photos, **Exh P20**.

The Defendant also asserted that the Plaintiff's shelters did not meet the KCCA standard. **Exh P4** shows that the erection of shelters was approved by KCCA but there is nothing on record to show that the shelters put up by the Plaintiff were rejected. The Defendant did not call any evidence in that regard.

The foregoing notwithstanding Clause 7.3.2 which required notice before termination was not followed. Its purpose was to enable the Plaintiff rectify any improperly done works. In this case even if KCCA had found the work improperly done and rejected it, the Defendant was obliged to give notice to the Plaintiff giving him a chance to make good what had been done badly. Instead of the notice, the Defendant simply re-advertised the contracted works and terminated the contract work between the parties. In disregarding Clause 7.3.2 the Defendant violated the contract and he is hereof found in breach of the same.

Turning to the question of indemnity to the Plaintiff the answer lies in Clause 12 of the agreement entered into by both parties. Clause 12 reads;

“ Each party agrees to indemnify and keep the other party indemnified from and against any loss, damages, costs, expenses or liability whether criminal or civil suffered by the other Party resulting from breach of, act or omission in connection with this Agreement, any law, regulation or agreement entered into with any third party in connection with the Services.”

Since this court has found that the Defendant acted in breach of the terms of the contract the Plaintiff is entitled to be indemnified from and against any loss, damage, expenses and costs occasioned by the breach.

Turning to the remedies the Plaintiff prayed for general damages, special damages in the sum of UGX 94,959,745/=, exemplary damages, interest on general damages and special damages as well as costs.

The Plaintiff contended that in fulfillment of its contractual obligations it incurred costs and expenses under several heads. It claimed a commitment fee in the sum of UGX 15,000,000/= being a refundable commitment fee in fulfillment of clause 5.6 of the agreement. The Defendant acknowledged receipt, **Exh P14**. The Plaintiff also paid a commitment fee to Investpro Holding Limited in the sum of UGX 10,000,000/=**Exh P15**. A further payment was made to Energy Utilization Uganda Limited for UGX 7,260,000, **Exh P17** and UGX 3,000,000, **Exh P16** towards fabrication, erection and supply of bus shelters. To Kaylines Limited the Plaintiff paid UGX 7,611,750/= by cheque number 1043, **Exh P18**. Other payments were to Riley packaging Uganda Limited in the sum of UGX 405,745/= and yet another to Transit media of UGX 13,766,000/=**Exh P19**.

While this evidence was supported with receipts and other documents there were other payments that received oral evidence from PW1 George Wanjohi and PW2 Sylvia Nabukenya which evidence was not countered by any evidence from the Defendant. This included payments of UGX 16,186,250/= for sample shelters, the fabrication of the revised bus shelter sample in the sum of UGX 14,520,000/=**UGX 3,450,000/=** cost for site visits, UGX 3,000,000/= to KCC, UGX 1,000,000/= for the architectural blue prints and UGX 750,000/= towards enumeration sample site visits. This evidence remained undisturbed either by way of cross examination or by adducing evidence by the Defendant.

Exh P20 which are photos clearly shows that erection of shelters took place, and there is evidence abundant which shows that the Plaintiff indeed entered into contracts with manufacturers of shelters to whom it paid commitment fees and also purchased materials. This money which totaled to UGX 94,959,745/= is found to have been spent by the Plaintiff in fulfillment of its obligations in the contract and the Defendant having breached the contract by illegally terminating it, is held liable to make good the loss.

The Plaintiff also prayed for general damages. The settled position is that the award of general damages is in the discretion of court and as the law will presume to be the natural and probable consequence of the Defendant's act or omission; **James Fredrick Nsubuga vs Attorney General, H.C.C.S No. 13 of 1993, ErukanaKuwe vs Isaac Patrick Matovu & Anor H.C.C.S No. 177 of 2003**. A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she should have been in had she or he not suffered the wrong;**Kibimba Rice Ltd v Umar Salim, S.C.C.A of No. 17 of 1992**.

The Plaintiff based their claim on the breach committed by the Defendant, loss of commissions and advertising revenue upon repudiation of the agreement by the Defendant. Counsel for the Plaintiff submitted that the service to be provided was a wide service, dealing with the buses, bus shelters, bus stops, tickets, and apparels. That when the Defendant run adverts in the Red pepper and Daily Monitor News papers advertising and calling new tenders for a new advertising agent it amounted to breach.

In my view the actions of the Defendant not only violated the contract but also sought to strike a new bargain with another party disregarding the agreement between the Plaintiff and themselves.

Considering the time spent, investment both financial and human resource, the loss of income suffered and the likely loss of reputation by the Plaintiff as a result of the Defendants action, I find an award of UGX 30,000,000/= as general damages appropriate. It is so awarded.

The Plaintiff also prayed for exemplary damages. These form of damages may be awarded where there has been oppressive, arbitrary, or unconstitutional behavior. Where the Defendant's conduct was calculated by him to make a profit which may well exceed the compensation payable to the Plaintiff, or where some law for the time being in force authorizes the award of exemplary damages; **Rookes vs Barnard [1964] ALL ER 367.**

In the instant case there is breach of contract and failure of a party to carry out her obligations as stated in the agreement. There is nothing to show acts of impunity or oppression. I instead see a Defendant who is struggling against odds in a bid to survive in difficult times wherein he makes mistakes amounting to breach of contract. Considering the circumstances of this case, an award of exemplary damages would be excessive in a matter that could be addressed by indemnity and general damages. Exemplary damages are accordingly denied.

The Plaintiff prayed for interest on special and general damages from September 2010 when the agreement, **Exh P5** between the parties was executed. It is trite that interest is awarded at the discretion of court, but it must be exercised judiciously taking into account all circumstances of the case; **Uganda Revenue Authority vs Stephen Mabosi SCCA No.1 of 1996.**

The basis of such an award is that the Defendant has kept the Plaintiff out of his money so the Plaintiff ought to be compensated accordingly; **Harbutt's Plasticine Ltd vs Wyne Tank & Pump Co. Ltd [1970] 1 Ch 447.**

It is without doubt that the Defendant kept the Plaintiff out of use of its money. Taking into account that this was a matter of commercial nature and that the Plaintiff a business entity, I would consider a commercial rate of interest of 18% pa on the special damages from 1st October 2012 till payment in full which is hereby awarded.

In regard to general damages interest is awarded at Court rate from date of judgment till payment in full.

The Plaintiff is also awarded costs of the suit. The sum total is that judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

- a) Special damages of UGX 94,959,745/=
- b) General damages of UGX 30,000,000/=
- c) Interest on (a) at 18 % per annum from 1st October 2012 till payment in full.
- d) Interest on b) at 6 % per annum from date of judgment till payment in full.
- e) Costs.

Dated at Kampala this 7th day of September 2017.

HON. JUSTICE DAVID WANGUTUSI
JUDGE