

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 707 OF 2015

NAGOYA CO LTD}.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF

KAMPALA ARCHDIOCESE}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff, a limited liability company, filed this action against the defendant for breach of contract, general damages and an order for award of special damages of Uganda shillings 470,000,000/= as money outstanding on a contract. It is also for interest at the 30% per annum from the date of the breach till payment in full and costs of the suit.

The facts constituting the cause of action pleaded in the plaint is that on 16th September, 2015 the plaintiff was approached by the defendant for the supply of a fleet of 20 vehicles/units of Toyota Raum. Following deliberations between the parties, they executed a memorandum of understanding setting out terms of the supply and payment. Particularly the plaint discloses that under the memorandum of understanding it was agreed that the first party who is the plaintiff would deliver 4 - 5 cars by 17th of September 2015 and the second party who is the defendant will ensure that 100% is paid within two weeks after launch to be conducted on 18th September, 2015. The plaintiff without any prior payment by the defendant ordered for four cars and supplied and handed them over to the defendant. The plaintiff then asserted that the defendant was duty bound in line with clause 5 of the memorandum to effect 100% payment of Uganda shillings 470,000,000/= to the plaintiff being the total consideration for the 20 vehicles. The

defendant through its chancellor made a simultaneous commitment/confirmation to abide by the memorandum and giving a go ahead to the plaintiff to obtain the said vehicle. He contended that the payment of Uganda shillings 470,000,000/= was to be effected within two weeks from the launch conducted on 18th September, 2015 and in any case not later than 2nd October, 2015 but the defendant did not comply.

Furthermore, although the defendant was aware that the fleet of vehicles were ordered from abroad, it failed, neglected and refused to effect payment for the vehicles in question.

The defendant filed a written statement of defence denying liability to the plaintiff. The facts averred by the defendant in the WSD discloses that on the 16th September 2015, the defendant approached the plaintiff for the supply of a fleet of 20 vehicles of Toyota Raum to be used for the defendant's fundraising drive for rebuilding Namugongo ahead of the Papal visit to Uganda. The plaintiff was willing to supply the cars but stated that in order to make an order for the cars from his suppliers; he needed an agreement and a letter to the effect that he was already paid by the defendant. In respect of the aforementioned request, a memorandum of understanding was executed signed. It was signed on the understanding that it will only be used to facilitate the procurement of the cars by the plaintiff. Under the agreement the defendant was supposed to pay the plaintiff upon delivery of the cars and not under the terms of the memorandum of understanding otherwise under clause 2 thereof, the defendant would be deemed to have already paid the plaintiff.

The plaintiff failed to deliver the motor vehicles in time for the scheduled fundraising drive and thereby frustrating the subsequent launch. Due to the cancellation of the fundraising drive, there was no need for motor vehicles.

Because of failure of the plaintiff to deliver the motor vehicles in time, the defendant avoided the contract.

In the scheduling memorandum endorsed by counsel of the parties, it is an agreed fact that the parties entered into a memorandum of understanding for delivery of vehicles. It is also agreed that the plaintiffs applied for vehicles to the defendant.

The plaintiff is represented by Counsel David Kaggwa assisted by Counsel Ogwang Sam of Messieurs Kaggwa & Kaggwa, advocates while the defendant is represented by Buwule Francis of Messieurs Buwule & Mayiga advocates.

Two issues were agreed for trial namely:

1. Whether the defendant is liable for breach of contract?
2. Whether the plaintiff is entitled to the remedies on the plaint?

Whether the Defendant is liable for the breach of contract?

The plaintiff's Counsel submitted that the contract between the parties was breached by the defendant when it failed to pay the 100% value of the entire vehicles after two weeks from the date of launch as provided for in clause 5 of the Memorandum of Understanding exhibit P1 and as such they are in breach. In the case of **Uganda Building Services vs. Yafesi Muzira t/a Quickest Builders & Co. H.C.C.S. No. 154 of 2005** it was held that a breach of contract occurs when one or both parties fail to fulfil the obligations imposed by the terms of the contract. In this case the issue is whether the Defendant failed to fulfil its obligation imposed by the terms of the contract. Under clause 5 of the Memorandum of Understanding (MOU), the Plaintiff was required to deliver 4 – 5 cars by the 17th of September 2015 and whereupon the defendant would ensure that 100% is paid within 2 weeks after the launch agreed to be conducted on the 18th of September 2015.

There is not dispute that 4 cars were delivered but not by the 17th of September 2015. The 4 vehicles were delivered and were given as gifts for the lottery. Counsel for the plaintiff relied on the testimony of DW1 for the submission that the launch took place after delivery of the four vehicles. The four vehicles were delivered and there was no complaint as to late delivery. He contended that even if there was a delay, the Defendant waived its right to challenge it at any stage. He relied on **Pioneer Construction Ltd vs. British American Tobacco (U) Ltd and Infrastructure Projects Ltd Civil Suit No. 209 of 2008**, where in a similar situation Hon. Lady Justice Hellen Obura held that the plaintiff waived its right to complain about delay in completing the work. The Plaintiff's counsel

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also relied on the definition in **Black's Law Dictionary 8th Edition page 1611** to define waiver as the voluntary relinquishment or abandonment express or implied of a legal right or advantage. An implied waiver may arise where a person has pursued a course of conduct as to evidence and intention to waive a right or where his conduct is inconsistent with any other intention than to waive it.

In the case of **Agri-Industrial Management Agency Ltd vs. Kayonza Growers Tea Factory Ltd & Anor HCCS NO 819 of 2004** Kiryabwire J in considering waiver held that in contract the term is commonly used to describe the process where one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived.

The effect of waiver is that a party cannot later seek a remedy for breach that was waived. Kiryabwire J in **Three Ways Shipping Services (Group) Ltd vs. China Chongqing International Construction Corporation HCCS 538 of 2005** held that what is waived is the right to reply on a term which has been waived. Secondly, the Plaintiff's counsel relied on the doctrine of estoppels by election defined in **Black's Law Dictionary, 8th Edition at page 590** as the intentional exercise of a choice between inconsistent alternatives that bars the person making the choice from the benefits of the one not selected to apply. The Defendant waived its right to complain about the delay in completing the work and is barred by the doctrine of estoppels from claiming that the delay caused the frustration of the contract. This is because the defendant never complained, but instead accepted the 4 cars, gave them away under the lottery drive and even paid for them. The conduct of the defendant is not a conduct from a party who claims the contract was frustrated. The Defendant waived its right to insist that the cars be delivered by the 17th September 2015 and is barred by the doctrine of estoppels from raising the issue at this stage. In the words of Lady Justice Hellen Obura in **Pioneer Construction Ltd vs. British American Tobacco (U) Ltd and Infrastructure Projects Ltd Civil Suit No. 209 of 2008** there was no breach of contract by the Plaintiff in so far as completion time is concerned. The plaintiff's counsel prayed that the court holds in the absence of the conjunctive "and" between the first part of the sentence

that “The 1st party shall deliver 4-5 cars by 17th September 2015” and the rest of the sentence after the comma, that the two parts are independent of the other. The first part relates to delivery of 4 - 5 cars. The 2nd part relates to consideration for all the cars. DW1 testified that payment would have been after delivery of all the vehicles however this not supported by any clause in the Contract. To further buttress the point that the 2nd part of Clause 5 related to consideration for all the 20 vehicles, one would have to read the entire Memorandum. This is further because in no other place is payment provided for except in clause 5. Clause 2 was erroneously included in the memorandum and this was acknowledged during trial by both witnesses namely PW1 and DW1. The Defendant breached the contract when it failed to pay for all vehicles after the launch.

In reply the defendant’s Counsel submitted that from the onset, from the evidence on record, given the time limitations of fundraising drive, aimed at raising funds to refurbish the shrines ahead of the Papal visit which was to take place in two months' time from the date of the MOU, the Plaintiff was not only incapable of performing the contract but its actions amounted to anticipatory breach of the contract thereby making it impossible for the Defendant to perform its part. The doctrine of anticipatory breach is also known as anticipatory repudiation. According to **Black's Law Dictionary, 10th Edition 2004: Thomson and West at page 4069** “anticipatory repudiation” is:

"Repudiation of a contractual duty before the time for performance, giving the injured party an immediate right to damages for total breach, as well as discharging the injured party's remaining duties of performance. Once the repudiation occurs, the non repudiating party has three options: (1) treat the repudiation as an immediate breach and sue for damages; (2) ignore the repudiation, urge the repudiator to perform, wait for the specified time of performance, and sue if the repudiating party does not perform; and (3) cancel the contract."

The nature and scope of anticipatory breach was explained by Devlin, J in **Universal Cargo Carriers Corporation vs. Citati (1957) 2 ALL E.R 70 at pages 83-84** citing Anson's Law of Contract, (20th Edition) at page 319:

"I must therefore consider the nature of anticipatory breach and the findings thereon which the arbitrator has made. The three sets of circumstances giving rise to a discharge of contract ... (i) renunciation by a party of his liabilities under it; (ii) impossibility created by his own act; and (iii) total or partial failure of performance. In...the first two, the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the course of performance...The two forms of anticipatory breach have a common characteristic that is essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach. If a man renounces his right to perform and is held to his renunciation, the breach will be legally inevitable: if a man puts it out of his power to perform, the breach will be inevitable in fact-or practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities. So, anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited. "

According to PW1 clause 5 of the MOU meant that the Defendant had to pay Uganda shillings 470,000,000/= (Uganda Shillings Four Hundred Seventy Million Only) to the Plaintiff representing 100% of the total consideration within 2 weeks after the launch of the fundraising drive. The evidence on record shows that the Plaintiff failed to supply the first four cars in time thereby leading to cancellation of the launch. In re-examination, he explained that the Plaintiff did not deliver the first four cars within the time stipulated because the Plaintiff did not receive exhibit P1 until 16th day of September 2015 and that in his experience, a Local Purchase Order had to be obtained first. He testified that all of this made delivery within the stipulated timeframes impossible. However, in cross-examination, he admitted that by the 25th day of September 2016, the Plaintiff had delivered (4) four vehicles, all of which were paid for. Counsel submitted that if the court was to go by the plain interpretation of clause 5 of the MOU, time of delivery for the first batch of cars was of the essence. Failure by the Plaintiff to deliver the first batch of 4-5 cars in time amounted to breach of that clause in the first place. From the evidence

of the Plaintiff and the Defendant, both knew that the payment for the cars would come from the sale of the lottery tickets, hence the stipulation in clause 5 of the MOU that the Plaintiff shall deliver 4-5 cars by the 17th day of September, 2015 and the Defendant will ensure that 100% is paid within 2 weeks after launch.

The launch referred to is the launch of the fundraising drive. It was only logical to conclude that the parties hoped that within 2 weeks of the sale of the lottery tickets to have generated enough money to pay for the 4-5 cars delivered. The interpretation of clause 5 to mean that 100% payment meant for all the cars would be paid is not supported by the evidence on record or by the very nature of the transaction for which the vehicles were required. Exhibit PE 7 which is the primary supply document itself is silent on this important aspect but it provides that: “Please notify us immediately if you are unable to ship as specified.”

This is inconsistent with the anticipation of a party that would have paid the full purchase price in advance. Secondly, the cars were required as prizes in a lottery and the Plaintiff knew or ought to have known that the success of the lottery depended on the availability of the prizes and the regularity of the intervals at which the prizes are given out. This would not have been possible for the rest of the cars because according to Exhibit PE 9 the vehicles were only loaded on the vessel for shipment out of Japan on the 18th day of October, 2015. Therefore, since in the words of Devlin, J in the *Universal Cargo* case (supra) "Anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable."

It was clear that the cars could not be shipped in time for the fundraising drive and from that moment, the Plaintiffs actual breach was inevitable. He submitted that the Plaintiff, an experienced car dealer/importer, knew or ought to have known that by the 16th day of September, 2015 when it was approached by the Defendant, it was incapable of supplying the vehicles in time for the lottery ahead of the Papal visit in November, 2015 and its actions amounted to anticipatory breach. Secondly, the law on interpretation of contractual provisions has been summarised by Kiryabwire, J in **Agri-Industrial Management Agency Ltd vs. Kayonza Growers Tea Factory Ltd & Anor H.C.C.S No. 819 of 2004**, citing with approval the dictum of Lord Bingham of Cornhill in **Bank of Credit & Commercial International S.A. (in liquidation) vs. Ali (2001) 1 All ER 961** as follows:

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"In construing contractual provisions, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the party's relationship and all the relevant facts surrounding the transaction so far as known to the parties".

The evidence on record shows that clause 5 of Exhibit PE1 is capable of two meanings thereby creating an ambiguity as to whether it meant that the 100% payment was in respect to the first four- five cars which were paid for by the Defendant or that the same was in respect to 100% payment for the entire consignment of 20 cars. Based on the *contra proferentum* rule which is applicable in the circumstances, this ambiguity ought to be resolved in favour of the Defendant. This rule also known as the ambiguity doctrine is that:

“In interpreting documents, ambiguities are to be construed unfavourably to the drafter.” per Black's Law Dictionary, 10th Edition [2004], Thomson and West at page 995. The effect of this rule is that, where, as in this case, the contractual language is capable of two alternative interpretations, then it must be construed against the party which drafted the contract. PE1 was drafted by the Plaintiffs lawyers and it is attempting to use the said ambiguity in its favour to the detriment of the Defendant who despite not receiving any of the sixteen cars, is now required by the Plaintiff to pay the full purchase price”

He submitted that the Plaintiff, from the word go, knew or ought to have known that it was incapable of fulfilling its part of the contract within the time frame for which the vehicles were required and it is therefore, guilty of anticipatory breach and the Defendant avoided the contract. The Defendant paid for the 4 vehicles which the Plaintiff was able to supply in time and does not owe the Plaintiff anything. The loss which the Plaintiff claims to have incurred was self-inflicted and must lie where it has fallen.

Issue 2: Whether the parties are entitled to the remedies prayed for?

The Plaintiff's Counsel prayed for General Damages, an order for payment of Uganda shillings 470,000,000/= being money outstanding on the contract, interest on the order for payment at 17% from the date of breach till payment in full and costs of the suit.

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With regard to an order for payment of Uganda shillings 470, 000,000/= outstanding on the contract, Counsel submitted that the Defendant breached the contract when it failed to pay for all the 20 vehicles as per the term in Clause 5 of Exhibit P1. During Scheduling it was also established that payment for four (4) vehicles totalling to Uganda shillings 94,000,000/= was paid leaving a balance of Uganda shillings 376,000,000/=. It is this balance that the Defendant ought to pay. It is not in dispute that the Plaintiff shipped the remaining sixteen (16) vehicles up to Mombasa for delivery to the Defendant. This was stated by the Plaintiff and is evidenced by bills of lading exhibit P9. PW1 also testified that because the Defendant did not pay for the vehicles as agreed in the Memorandum of Understanding, when the vehicles reached Mombasa they were auctioned by Kenya Revenue Authority. This does not water down the fact that the Plaintiff brought the vehicles and the Defendant reneged on its obligation to pay for them 100%. The Defendant should pay for the outstanding balance of Uganda shillings 376,000,000/=.

With regards to interest of 17%, Counsel submitted that it has been over one and half years from the time when the payment for the vehicles ought to have been made. The Plaintiff has not been able to use its money. Under section 26 (1) of the Civil Procedure Act where interest was not agreed upon by the parties, Court should award interest that is just and reasonable (see *Mohanlal Kakubhai Radia vs. Warid Telecom Ltd*, HCCS No. 234/2011). In determining a just and reasonable rate, courts take into account: “the even rising inflation and drastic depreciation of the currency. A plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due.”

Counsel submitted that a rate of 17% per annum is fair and should be granted as such from the date of breach on 18th September, 2015 until payment in full.

General Damages: The plaintiff’s Counsel submitted that the Plaintiff suffered great loss as a result of the breach of contract by the Defendant. Furthermore, the measurement of the quantum of damages is a matter for the discretion of the individual Judge which discretion is to be exercised judicially having in mind the general conditions

prevailing in the country and prior decisions that are relevant to the case in question (See **Moses Ssali a.k.a. Bebe Cool & Others vs. Attorney General & Others HCCS 86/2010** also cited **Southern Engineering Company Mutia [1985] KLR 730**). In the assessment of the quantum of damages, courts are mainly guided 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 or injury suffered (See **Uganda Commercial bank vs. Kigozi [2002] 1 EA 305**). A plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the position he or she would have been as if she or he had not suffered the wrong (See **Charles Acire vs. Myaana Engola, HCCS 143/1993, Kibimba Rice Ltd vs. Umar Salim, SCCA No. 7/1988 and Hadley vs. Baxendale [1854]**)

One and half years passed from the time the Plaintiff was to be paid. The Plaintiff went through inconvenience and injury because of the actions of the Defendant since the vehicles have since been auctioned by Kenya Revenue Authority owing to the Defendant's failure to pay the Plaintiff. In the circumstances it is only just that the Plaintiff is awarded general damages of Uganda shillings 50,000,000/=. Counsel further submitted that costs follow the event unless the court for good cause orders otherwise under section 27 (2) of the Civil Procedure Act and decided cases. In the premises he prayed that judgment is entered for the plaintiff with costs.

In reply the defendant's Counsel prayed that court finds no merit in the Plaintiff's entire suit, decline to grant the reliefs therein and dismiss the same with costs.

In rejoinder, the plaintiff's Counsel submitted that the Defendant relied on the defence of anticipatory breach on the part of the Plaintiff but this defence was not pleaded and before a court can find whether there was anticipatory breach or not, it must hear the evidence. The ingredients of anticipatory breach are that there must be a renunciation by a party of his liabilities under it, an impossibility created by his own act and that the repudiation must happen before the time for performance.

Firstly, the Plaintiff performed its obligations by delivering 4 cars to the Defendant who paid for only the 4 cars but not the whole consignment of 20 cars. The Plaintiff shipped the 16 cars from

Japan and they reached Mombasa but the Defendant failed and or refused to pay as per the terms of the MOU. Most importantly, the Defendant did not lead evidence that it wrote or communicated to the Plaintiff that it had renounced its right to perform and that the breach was as a matter of fact inevitable. The evidence instead shows that the Defendant waived its right to stick to the time for delivery and instead received the 4 cars out of time and paid for them. The defence of anticipatory breach was neither pleaded nor proved in evidence and should be disregarded. This substantive rule of procedure was emphasized in **Sietco vs. Noble Builders (U) Ltd SCCA No. 31 of 1995**, per Wambuzi CJ (as he then was). Pleadings govern the scope of the case and delineate areas upon which evidence may be adduced. A departure from the pleadings in adducing evidence leads to the party departing being precluded from adducing such evidence (See **Byrd vs. Naun (1877) 7 CHD 287**).

Counsel further submitted that all the submissions by the Defendant regarding anticipatory breach should be disregarded since they amount to a departure from pleadings. The Defendant also submitted that the parties understood that the payment would come from the proceeds of the lottery tickets. This provision is not provided for in the MOU and it contravenes the parole evidence rule.

Sections 91 and 92 of the Evidence Act provides as follows;

91. When the terms of a contract or of any other disposition of property, have been reduced to the form of a document ... no evidence ... shall be given in proof of the terms of that contract..... except the document itself....

92. When the terms of any such contract.... have been proved according to Section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representations in interest for purposes of contradicting, varying, adding to or __ from its terms but

(a) Any fact may be proved which would invalidate any document..... Such as fraud, intimidation, illegality, want of due execution, want of capacity...want or failure of considerate or mistake in fact or law. Our humble submission is that the parties reduced their terms into the MOU; there was no clause that the payment by the Defendant to the

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Plaintiff would arise from the proceeds of the sale of the lottery tickets. This evidence is extrinsic and inadmissible since it has the effect of contradicting the terms of the written agreement. The exceptions contained in S. 92 (a) such as fraud were neither pleaded nor proved. He prayed that the Defendant's submissions be disregarded and the judgment is entered in favour of the Plaintiff as prayed for.

Judgment

I have carefully considered the plaintiffs case and the defence as disclosed in the pleadings as well as the evidence and the written submissions of counsel.

The first issue for consideration is: **Whether the defendant is liable for breach of contract?**

Submissions were made with reference to a contract dated 18th of September 2015 between the plaintiff and the defendant. The memorandum of understanding provided that the plaintiff was desirous of supplying 20 units of motor vehicles at the cost of Uganda shillings 23,500,000/= each and the defendant was willing to purchase the same. In the agreement itself it is provided that the consideration for the total consignment was Uganda shillings 470,000,000/= to be paid in accordance with the agreement. The wording of the agreement is pertinent and will be reproduced for ease of reference in considering the controversy arising. The memorandum of understanding comprises of six paragraphs which are reproduced herein below as follows: "...

1. In consideration of the total sum of Uganda shillings 470,000,000/=, to be paid in accordance with these presents, the first party has sold the 20 units of Toyota Raum to the second party.
2. The second party has at execution of this memorandum of understanding paid to the first party Uganda shillings 470,000,000/= receipt of which is acknowledged by the first party's representative appending his signature hereunto.
3. The first party will provide space where the branding will be done from.
4. The second party shall finance the branding of the 20 units.

5. The first party shall deliver 4 – 5 cars by 17th September 2015, the second party will ensure that 100% is paid within two weeks after launch which will be conducted on 18th September 2015.

6. The parties have further agreed that this memorandum of understanding is made in good faith and either party undertakes to ensure that the terms herein are fulfilled...."

The first problem with the memorandum of understanding is that the plaintiff had not received any money as acknowledged in paragraph 2 of the memorandum of understanding. In fact paragraph 3 (c) avers of the Plaintiff that the suit is for the payment of Uganda shillings 470,000,000/= which is the money outstanding on the contract. This is claimed together with interest from the date of breach of contract, general damages for breach and costs of the suit. The suit was filed on 29th October, 2015. In paragraph 4 (e) of the plaintiff, the plaintiff avers that the defendant was duty bound in line with clause 5 of the memorandum of understanding to effect 100% payment of Uganda shillings 470,000,000/= to the plaintiff which is the total consideration for the vehicles/units. In paragraph 4 (b) it is averred that the plaintiff without any prior payment by the defendant ordered for the said 4 – 5 cars, supplied and handed them to the defendant. In paragraph 4 (3) it is averred that the plaintiff was required to deliver 4 – 5 cars by 17th of September 2015 and the defendant was to ensure that 100% is paid within two weeks after launch to be conducted on 18th September 2015. Furthermore, the plaintiff averred that the payment of Uganda shillings 470,000,000/= was to be made within two weeks after the launch conducted on 18th September, 2015 and it was not supposed to be later than 2nd October, 2015 but the defendant never paid.

In other words from the pleadings taken together with the memorandum of understanding and clause 2 thereof, the money acknowledged by the plaintiff had in fact not been paid.

On the other hand the defendant averred in paragraph 5 (d) that the defendant was supposed to pay the plaintiff upon delivery of the cars and not according to the terms of the memorandum of understanding, otherwise under clause 2 of the memorandum of understanding, the defendant would be deemed to have already paid the plaintiff. Secondly, it is averred that the plaintiff failed

to deliver the motor vehicles in time for the scheduled fundraising drive hence frustrating the same subsequent to which the defendant cancelled the drive. Due to cancellation of the fundraising drive, there was no need for motor vehicles which had not yet been delivered by the time the written statement of defence was filed.

In the joint scheduling memorandum it is an agreed fact that the plaintiff supplied some 4 vehicles to the defendant. Secondly, the parties executed a memorandum of understanding for delivery of vehicles.

The basis of the plaintiff's case is the memorandum of understanding. The defendant conceded that clause 2 of the memorandum of understanding in which the plaintiff acknowledged receiving Uganda shillings 470,000,000/= is not correct because that amount of money was not paid. It is therefore an admitted fact in the written statement of defence of the defendant and particularly paragraph 5 (b) (c) (d) that the defendant would pay the plaintiff upon delivery of the vehicles. Implicit in the admission is that the plaintiff had not been paid rendering clause 2 of the memorandum of understanding redundant. It would be absurd to enforce clause 2 of the memorandum of understanding in the face of the admission of both parties that the amount of Uganda shillings 470,000,000/= acknowledged by the plaintiff had actually not been paid. The acknowledgement was to help the plaintiff procure the vehicles in question.

Going to the rest of the memorandum paragraph 5 of the memorandum of understanding is that the first party shall deliver 4 – 5 vehicles by 17th September, 2015, the second party will ensure that 100% is paid within two weeks after launch which will be conducted on 18th of September 2015.

The question for consideration in the first issue revolves upon the interpretation of clause 5 of the memorandum of understanding. The controversy that arises is whether the 100% payment is to be made upon the delivery of the 4 – 5 vehicles mentioned in clause 5 or pursuant to the delivery of 20 vehicles agreed upon. For that reason I have considered the preamble to the agreement where it is provided that the plaintiff deals in selling cars. Secondly the second party is holding a fundraising drive for rebuilding Namugongo situated at the same address. It is therefore part of the intention of the parties that there was going to be a fundraising drive for rebuilding

Namugongo. The second preamble is that the plaintiff was desirous of supplying 20 units of the vehicles with the specifications in the contract at the cost of Uganda shillings 23,500,000/= each to the defendant who was also willing to purchase it.

The purpose for which the vehicle was to be applied can also be established from clauses 3, 4 and 5 of the memorandum of understanding. Under clause 3 of the memorandum of understanding the plaintiff was to provide space where the branding of the vehicles will be done from. The defendant was to finance the branding of the 20 units of vehicles. It is further apparent that the plaintiff was to deliver between 4 - 5 vehicles by 17th of September 2015 whereupon the defendant would insure that 100% is paid within two weeks after launch which will be conducted on 18th of September 2015. It emerged from the evidence of the parties to supplement the memorandum of understanding that the launch was of a lottery drive which was for fundraising to rebuild Namugongo Shrine in time for the visit of the Pope. The fact that there was going to be a lottery drive can be discerned from the agreement itself. Secondly there was going to be a launch on 18th September, 2015 which is also apparent from the agreement. Clause 1 and 2 of the memorandum of understanding have to be read together because in clause 1 it is provided that the plaintiff sold 20 units of Toyota Raum to the second party. In clause 2 it is written that the plaintiff acknowledged Uganda shillings 470,000,000/= paid by the defendant and the acknowledgement is by the plaintiff's director appending his signature to the memorandum of understanding.

From the evidence adduced by PW1 and DW1 clauses 1 and 2 of the memorandum of understanding never came into operation. The plaintiff's director Mr Henry Nkeera testified that the defendant agreed in line with clause 5 of the memorandum to make a 100% payment amounting to Uganda shillings 470,000,000/= being the total consideration for 20 vehicle units by 18th September 2015. In many ways it brings out the contradiction with clause 2 where the plaintiff acknowledged having received Uganda shillings 470,000,000/=. In clause 6 of the testimony the director testified that despite the representation in the agreement that payment had been made, in actual fact no payment was made at the time of signing the contract.

As we will note in due course, a contract operates as estoppels under the Evidence Act cap 6 laws of Uganda. Either the parties are bound by the terms of the contract which they signed or

the contract should be avoided. The doctrine of exclusion of evidence to contradict the terms of a written contract is provided for under sections 91 – 93 of the Evidence Act which I will quote for ease of reference. I will start with section 91 of the Evidence Act quoted below:

“91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he or she is appointed need not be proved.

Exception 2.—Wills admitted to probate in Uganda may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact.”

The provision may be called the best evidence rule in that it provides that where the terms of the contract have been reduced into a written document, no evidence shall be adduced about the

terms except the document itself. Section 91 provides for some exceptions and exception 1 deals with a public officer required by law to be appointed in writing. It does not apply to the circumstances of this case. Secondly, exception number 2 deals with Wills and does not apply. Explanation number 1, explanation number 2 and 3 do not apply to the facts and circumstances of this case. The second provision of the Evidence Act is section 92 which expressly excludes an oral agreement or agreements that purport to vary the terms of a written agreement which has been proved. It further provides for exceptions to the general rule on the exclusion of the oral agreements to vary the terms of a written agreement and it provides as follows:

“92. Exclusion of evidence of oral agreement.

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—

(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which that

contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of the incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.”

In this case the plaintiff seeks to rely on clause 5 of the memorandum of understanding. At the same time he seeks to exclude the terms of clause 2 of the memorandum of understanding. It does not argue that there was a waiver of any particular clause. A waiver operates as estoppels against the operation of any particular term in the contract. That notwithstanding section 92 is very explicit that the evidence of oral agreements as varied the terms of a written agreement is excluded. In other words the plaintiff is barred by proving the terms of an oral agreement to vary the terms of the written agreement. The written agreement should be varied expressly by another written agreement. It cannot rely on one clause and exclude another through oral testimony. The document speaks for itself and this is the law of evidence. The exception is that any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of execution, want of capacity in any contracting party, one of failure of consideration or mistake in law or fact. The plaintiff is not pleading failure of consideration per se so as to invalidate the document but is trying to enforce the document. Secondly, the plaintiff does not plead any fraud, intimidation, illegality, want of due execution, want of capacity in a contracting party etc. The exception in section 92 (a) does not apply. Secondly, the plaintiff is not pleading the existence of any separate oral agreement on a matter in which the document is silent and which is not inconsistent with its terms and therefore section 92 (b) does not apply. The plaintiff is not trying to prove an agreement to rescind the contract but trying to rely on the memorandum of understanding. In general I have perused the exceptions to section 92 and have come to the conclusion that they do

not apply to the facts and circumstances of the plaintiff's suit in which the plaintiff seeks to enforce a written agreement and particularly to selectively enforce the terms of clause 5 of the agreement. Without any estoppels or waiver, the entire memorandum of understanding is applicable and the terms of the agreement however absurd do not entitle the plaintiff to any remedy. The terms are double edged. The document purports to provide that the plaintiff supplied 20 motor vehicles and the defendant paid for the same. If we go by the oral testimony, clause 5 provides for 4 - 5 motor vehicles which were supplied and which were paid for. The evidence that they were supplied and paid for 100% is not contradicted. The interpretation of the plaintiff that the 100% relates to payment for 20 vehicles is not supported by the document he seeks to rely on. If he relies on a clause of the agreement, he is estopped from denying other parts of the agreement which negative the notion that 20 vehicles were not paid for. On the other hand the payment for the 4 – 5 vehicles and read in context is provided for in clause 5. The only acceptable interpretation consistent with section 91 and 92 of the Evidence Act is that 100% payment in clause 5 relates to the 4 - 5 vehicles provided under that clause. In paragraph 7 of the written testimony of PW1 who is the director of the plaintiff, the said vehicles were delivered by 17th of September 2015 and are being used by the defendant. The problem is that in paragraph 8 of the witness statement, he testified that on 25th of September 2015, the defendant issued a purchase order for the remaining 20 units of vehicles.

On the other hand DW1 Rev. Fr. Joseph Mary Ssebunya who testified on behalf of the defendant in his written statement agreed that the parties executed a memorandum of understanding. In paragraph 5 of the statement he testified that the church devised various means to fund raise including holding a lottery which was planned to offer prizes ranging from motorcars to other attractive prizes. He further testified that the planned lottery tickets would be sufficient to cover the cost of the vehicles namely the 20 vehicles the subject matter of the memorandum of understanding. They executed a memorandum of understanding. However he went on to testify that it was understood that the payment for the cars would be got piecemeal from the proceeds of the sale of the lottery tickets as and when a sufficient number of tickets sales were realised. He further testified that that is why the plaintiff supplied the first four cars and payment was effected after the delivery of the four cars. His defence is that the plaintiff failed to deliver the additional

cars in time for the scheduled fundraising drive thereby frustrating it and subsequently the defendant cancelled the drive.

I have accordingly considered exhibit P7 which is a local purchase order dated 25th of September 2015. The local purchase order cannot be read together with the memorandum of understanding because it is contradictory to the specific terms of the memorandum of understanding. This document is also inconsistent with the testimony of DW1 that he had cancelled the lottery. The memo of understanding purports to say that the vehicles had been delivered and paid for. For this reason the plaintiff cannot rely on the memorandum of understanding and the local purchase order can be considered on its own merits. Before concluding on the issue, I have also considered section 93 of the Evidence Act which excludes evidence to explain or amend an ambiguous document and it provides as follows:

“93. Exclusion of evidence to explain or amend ambiguous document.

When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.”

Section 93 of the Evidence Act is discretionary. It provides that where the language used in the document is on the face of it ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. However the question is whether the language used in the memorandum of understanding is on the face of it ambiguous or defective. I do not think so. The language is not ambiguous or defective but merely contradictory. When the language is harmonised, it means that clause 5 applies to 4 – 5 vehicles which through oral testimony shows that they were paid for by the defendant.

In the premises, the plaintiff's submission that the defendant waived its rights to receive the vehicles earlier only relates to the 4 - 5 vehicles. The rest of the contract or memorandum of understanding cannot be enforced. Because the vehicles which had been delivered had been paid for, there is nothing more to gain from the memorandum of understanding. I do not agree with the interpretation that the 100% in clause 5 relates to 20 vehicles which the contract specifically provides were paid for (or bought by the defendant).

Lastly, the local purchase order does not have any terms as to when supplies would be made or the terms of payment. The local purchase order terms is for the plaintiff to send two copies of invoice, to enter the local purchase order in accordance with the process, terms, delivery method and specifications listed in the local purchase order. And to notify the defendant immediately if the plaintiff is unable to ship as specified. All correspondences are to be sent to DW1 who testified in court.

The plaintiff is asking the court to order the defendant to pay Uganda shillings 470,000,000/= for 20 units of vehicles with each vehicle costing Uganda shillings 23,500,000/= without any evidence that it has the vehicles. The truth of the matter is that the plaintiff wants to be paid in order to be able to supply the vehicles. Or to be paid damages for ordering vehicles which vehicles were sold by Kenya Revenue Authority after the plaintiff failed to clear the consignment (of the remaining 16 vehicles). The plaintiff has not supplied the 20 vehicles mentioned in the local purchase order. As far as the local purchase order is concerned, I agree with the plaintiff's submissions that time is not of essence. However no evidence was adduced as to what happened to the supply other than the fact that the plaintiff needed the money to be able to clear the goods and the goods were sold in Kenya. In other words the vehicles are not available for supply of the defendant. For the plaintiff to make this submission, it has to rely on the memorandum of understanding which as I have indicated above has no room for such an interpretation. I cannot even hold that the contract has been frustrated. It may be true that the lottery could not have been held in the circumstances. That assertion cannot hold true after considering the local purchase order.

For the plaintiff to be able to rely on the local purchase order, it must produce evidence about the terms of delivery and the terms of payment. In the very least the plaintiff should prove that it has supplied 20 units and the defendant has refused to pay. There is no term to suggest that payment has to be made in advance. The evidence adduced by the plaintiff that the vehicles were in Mombasa pending shipment or were auctioned for failure to pay dues by Kenya Revenue Authority is not relevant.

The plaintiff's suit will fail simply because it seeks to rely on the terms of the memorandum of understanding as clearly averred in paragraph 4 of the plaint. In total the plaintiff's suit is for the

payment of Uganda shillings 470,000,000/= being money outstanding on a contract when it has not supplied the goods, the subject matter of the agreement. Quite the contrary, the memorandum of understanding specifies clearly that goods were provided for and paid for. Any other evidence is a separate contract which cannot be based on the written agreement of the parties. For that reason the plaintiff's evidence does not prove supply of vehicles to the tune of Uganda shillings 470,000,000/= and which the defendant has breached the terms of supply by failure to pay the consideration for the vehicles supplied.

In the premises, there is no need to consider issue number two as to the remedies other than to hold that the plaintiff has not proved any breach of contract by the defendant and therefore the plaintiff's suit has no merit and is dismissed with costs.

Judgment delivered in open court on 29th August 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Lukongwa Aubrey holding brief for David Kaggwa for the Plaintiff's

Francis Buwule for the Defendant

Plaintiffs MD Henry Nkeera is in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

29th August, 2017

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+ maximum735securityx 2017 style*

