

By way of counterclaim, the Defendant sought general damages for breach of contract when the Plaintiff recovered some of the gym equipment before he received full payment. The Defendant contends that the removal of the equipment was unlawful.

He listed the equipment as;

- (a) One Life Fitness Trade Mill 95T type,
- (b) One cross trainer 95X type,
- (c) Two Life Fitness bikes 95R life cycle type,
- (d) Six Lamonde yellow bicycles Revemaster.

Further that after full payment, the Plaintiff did not return the equipment.

The Defendant counterclaimed contending that this was illegal, sought the recovery of the equipment or the value, shs. 31,000,000/= paid to Semwanga, interest and costs.

In his reply to the counterclaim, the Plaintiff conceded that he took back some of the equipment worth 100,000,000 to mitigate loss. That this was witnessed by Leonard Asewe and Bobby Ongudi, both experts in such equipment working with Deacones Nairobi the suppliers and brokers of the transaction.

That they valued the equipment in the presence of the Defendant as worth 100 million. That in any case the 100 million was deduced from what the Defendant counterclaimant owed him.

That even the money paid to Semwanga was reduced from what was owed. He prayed for dismissal of the counterclaim.

The issues before Court for resolution as agreed upon by the parties at scheduling were;

1. Whether the Plaintiff breached the contract by removing the equipment.
2. Whether the equipment removed was worth 100 million.
3. Whether the Defendant participated in the removal.
4. How much money is owed and by whom if any?

There is no doubt that the parties entered into a contract wherein the Plaintiff supplied the Defendant with Gym Equipment at a price of 400 million.

It is also not in dispute that the Defendant on the 22nd July, 2014 paid Shs. 132,500,000/= leaving Shs. UGX 267,500,000/= which he undertook to pay within 8 months from date of the agreement.

It is also not in dispute that in the month of November 2014 before the expiration of the 8 months the Plaintiff seized some of the equipment. The Defendant alleged that the seizure of the equipment before the expiration of the 8 months constituted breach of the agreement.

The Plaintiff contended that he seized some of the equipment because the Defendant had failed to pay.

The answer to these questions lies in Exhibit P.1.

It provides in Clause 2(b) under Terms of Payment as follows:-

“The balance of UGX 267,500,000/= shall be paid by the Buyer within eight months from the 22nd July 2014 and the BUYER covenants to pay substantial monthly installments.

(c) The ownership of the said equipment will remain vested with the Seller until the full price thereof is paid to him and the title to the said equipment will pass to the buyer only after the full payment of the consideration.”

The parties then provided for what would happen in event of failure to pay in clause 3 as follows:

“3. In the event that the Buyer fails to make payment as agreed by the parties above, the Buyer agrees that he will lose all right, title and interest which Buyer might otherwise have acquired in and to the Equipment; and to reimburse the Seller for all costs, including equipment, legal fees, arising out of the Buyer’s failure to perform.”

A proper reading of clause 2(b) brings out two things. First that for the Defendant to avoid a breach he must pay the balance in 8 months: This means that the Defendant had upto 22nd March 2015 to effect payment.

Secondly the foregoing grace period could only be enjoyed if the Buyer in this case the Defendant made “substantial monthly” payments.

It follows that the Defendant could only invoke the 8 months relief if he made substantial monthly payments.

Evidence is abundant and undenied that from the 22nd July 2014 when the Defendant made the first payment he did not make any further payment until some of the equipments were seized in November. In fact the earliest payment was made on 27th December 2014 and another 06th March 2015.

Since the Defendant did not make any substantial payments in August, September and November, the protection given to him under clause 2(b) was lost, and at the same time the relief given to the Plaintiff under clause 3 was triggered off.

That being the case, the Plaintiff did not breach the contract when he seized the equipment having done it within the provisions of the agreement. On the contrary the Defendant's failure to pay substantial monthly installments constituted a breach of the contract on his part and I so hold.

On whether the Plaintiff is entitled to 65,000,000/=.

The Plaintiff stated that after he seized some of the equipment, the Defendant made further payments, some of which were those made to Henry Semwanga.

That those payments and others left 65,000,000/= unpaid.

The Defendant instead contended that the equipment taken by the Defendant was worth 150 million. That he also made payments which eventually covered the balance.

From the evidence, it is clear that one of the issues from which the dispute emanates is that the equipment which was taken amidst "protest" by the Defendant was not valued and that the plaintiff fixing it at 100,000,000/= is untenable.

Defendant also during cross examination stated that when the Plaintiff collected the equipment he was not present. I find it strange that this is not stated anywhere in his witness statement yet it was a very important aspect of his case.

The Plaintiff stated that to remove the equipment, they had to enlarge the entrance by removing the aluminum framework. This evidence was not dislodged. In my view dismantling the door frame work without the consent of the owner, would have amounted to a break in.

The Defendant did not report any break in to the authorities. This lack of reaction can only mean that he was in full agreement with the act of removal.

Furthermore the failure to prevent the break in can only be construed that the value of the equipment removed was agreed upon.

The Defendant tendered proforma invoices attached to his witness statement stating the value of the equipment taken. This proforma invoice was not very useful because it was in respect of new equipment. On the other hand, the equipment that was removed from the Defendant's gym was used.

That being the case and the fact that the Defendant participated in its removal, I find that the sum of 100,000,000/= for the equipment removed was agreed upon.

The Defendant stated that since some of the payments were not acknowledged, the Plaintiff had failed to prove the debt of 65,000,000/= as it was his word against that of the Plaintiff's. With respect I am not of that view. I hold that position because once the Defendant admitted that he owed the Plaintiff Shs. 267,500,000/= as at 22nd July 2011, Exhibit P.1, the onus was on him to show that he paid the balance.

Learned Justice Yorokamu Bamwine summarized it well in ***Global Forwarders & Clearing Ltd v. Henry Mugenyi t/a Kifaru High Court Bailiffs and Auctioneers*** in these words;

“The law is that where a party alleges that it paid the other and the other denies receipt of the payment, the burden is on the party who alleges payment to prove it.”

In the instant case the only proof of payment presented by the Defendant was that of 31 million made to Henry Semwanga. There is no proof of any other payment.

Infact if the Plaintiff was a cheat as the Defendant alleges, he would have claimed all except the 31 million paid to Semwanga.

As it stands, there is nothing to show that the Defendant paid all the money. There is no reason to doubt the debt of 65,000,000/= and it is therefore upheld as due and owing.

The Plaintiff also prayed for General damages for breach of contract.

General damages are the direct and probable consequence of the act complained of. This can be inconvenience, mental distress, loss of use of money retained or loss of profit, ***Kampala District Land Board & Another v. Venansio Babweyana, Civil Appeal No.2 of 2007.***

In the instant case the Plaintiff was forced to dismantle the heavy equipment and carry it back to his place, an inconvenience which would never have arisen if the Defendant had not breached the contract. Furthermore he was deprived of use of his money which as a businessman must have occasioned loss. The dismantling and re-transporting the equipment must have been at a cost. The Plaintiff has therefore suffered damages. Taking all the circumstances into consideration, I find general damages of 20,000,000/= appropriate and I so award.

The Plaintiff also prayed for interest at commercial rate.

In awarding interests, court takes into account the rising inflation and depreciation of the currency. It is therefore necessary to award such interest as would not neglect the prevailing economic value of money but also take into account and insulate the plaintiff against future vicissitude of fortune in the event that the amount awarded is not paid promptly, ***Kinfera vs The Management Committee of Laroo Boarding Primary School HCCS 099/2013.***

In the instant contract under consideration, the parties did not provide for commercial interest. It was not anticipated and would in my view be harsh to award 25% on all the awards as submitted by counsel.

Taking into account all the circumstances of this case, I find an award of interest of 18% pa on the special damages and 6% pa on General damages appropriate.

The interest on special damages runs from date of filing suit and that on General damages from date of judgment.

The Plaintiff is also entitled to costs.

Turning to the counter claim, the Defendant/Counterclaimant alleged that the equipment seized by the Plaintiff was in breach of the contract and that the equipment should be returned. He also prayed that the 31,000,000/= he paid to Henry Semwanga be refunded.

This Court has however found that the Plaintiff did not breach the contract when he retook some of the equipment. It has also found that the value of 100,000,000/= as well as the 31,000,000/= to Semwanga was set off the debt. That being the position, the counterclaim is ill founded with no basis at all and it is dismissed with costs.

In conclusion, judgment is entered in favour of the Plaintiff against the Defendant in these terms;

- a) The Defendant pays the Plaintiff 65,000,000/=.
- b) The Defendant pays the Plaintiff General Damages of Shs. 20,000,000/=.
- c) Interest on (a) at 18%p.a from date of filing this suit till payment in full.
- d) Interest on (b) at 6% from date of judgment till payment in full.
- e) Costs of the suit.

Dated at Kampala this 17th day of August 2018.

**HON. JUSTICE DAVID WANGUTUSI
JUDGE**