

5 **THE REPUBLIC OF UGANDA**

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT No. 334 OF 2016

AZK SERVICES LIMITED ::: PLAINTIFF

10 **VERSUS**

CRANE BANK LIMITED ::: DEFENDANT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

15 **JUDGEMENT**

The plaintiff, a limited liability company registered under the laws of Uganda brought this suit against the defendant, a financial institution for breach of contract, breach of fiduciary duty, breach of duty of care, breach of trust and confidence, fraud, misrepresentation, causing loss, injury to reputation and or defamation.

20 The brief facts of the case are that the plaintiff applied for a loan of UGX 1,500,000,000/= (Uganda Shillings One Billion Five Hundred Million only) for purposes of augmenting working capital for Import and sale of second hand clothes, shoes etc and for investment in real estate business.

The defendant disbursed the sum of UGX 1,250,000,000/= leaving the sum of UGX
25 250,000,000/= outstanding. The plaintiff on 20th November 2015 put in its protestations and requested the defendant to disburse the remaining sums so as to enable it clear the consignment but to no avail.

That the consignment arrived at Mombasa port in December 2015 and the plaintiff was unable to clear its goods because the defendant refused and neglected and or otherwise
30 omitted to remit the balance of the loan sums to the plaintiff as agreed under the loan agreement.

That the consignment attracted taxes and demurrage fees, port charges of over UGX 2,354,974,900/= as a result of the defendants conduct of refusing to remit the term loan funds agreed upon and failure to remit the balance.

In their written statement of defence, the defendants denied the claim stating that it was never a term of the facility letter that the loan would be disbursed in one tranche or that the plaintiff would be notified prior to any disbursement.

Issues for determination;

1. Whether the defendant is in breach of the contact
2. Whether the plaintiff is entitled to the reliefs sought.

10 **Issue One: *Whether the defendant is in breach of the contact***

Counsel for the plaintiff averred that it is mandatory for the parties to a contract to perform all respective promises thereunder unless such performance has been dispensed and or excused. That a contract per **Section 42(1)** and **Section 67 of the Contract Act 2010** is to be performed either within a reasonable time or at that time provided by the applicable trade usage/ practice to the contract in question. And that breach of a contract refers to a situation where one party to a contract fails to carry out a term of the said contract.

According to counsel for the plaintiff, it was a term of the agreement executed between the parties that the defendant would disburse UGX 1,500,000,000,/= to the plaintiff.

That the total sum was not disbursed, even after the perfection of securities according to the banking practice. Thus, the defendant breached the agreement in failing to disburse the total sum per the agreement.

On the other hand, counsel for the defendant averred that in as far as they concede that they did not disburse the full loan sum, they however had justifiable reasons. That the plaintiff did not use the loan amount for the purposes set out in the loan agreement that is, “*to argument working capital for import and sale of second hand clothes, shoes etc and for investment in real estate business*”. That while there was evidence of importation of second hand shoes, there was no evidence of the plaintiff’s investing in real estate.

Counsel further contended that the defendant breached another condition of the agreement, that is, to conduct all its banking transactions with the defendant bank and also pay monthly

instalments. That PW1 acknowledged in cross examination that he did not pay any monthly instalments yet no interest payments were ever made.

A breach occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. The plaintiff
5 contends that the defendant breached the contract when they failed to disburse the full amount. The defendants refuted that that though the facility provided that the defendant had to disburse the same amount; the defendant bank had to mitigate its risk.

Perusal of the loan facility, exhibit PEX 1, reveals that in clause 1 thereof, the parties agreed that the defendant would disburse the sum of UGX 1,500,000,000/= for the purposes of
10 augmenting working capital for the import and sale of the second hand clothes shoes etc and for investment in real estate business.

The credit facility does not state that it was a condition precedent that the plaintiff had to bank exclusively with the defendant bank or that the defendant had to invest both in the real estate and importation and sale of used shoes and clothes before it would disburse the loan
15 amount.

The credit facility does not as well state that the defendant bank would disburse the entire amount in instalments on condition that the plaintiff pays interest. All the credit facility states is that the defendant had to disburse the total sum of UGX 1,500,000,000/= to the plaintiff.

The defence that the plaintiff had failed to pay interest does not hold water because that was
20 not a condition for the defendant to fulfil its part of the bargain. The plaintiff had perfected the securities and in case of any default, the bank had securities and it would rightfully enforce the mortgage in case of default from on part of the defendant.

Under the circumstances therefore, I find that the defendant breached the contract in part when they failed to disburse the balance of the contract sum as agreed upon. Accordingly
25 issue one is answered in the affirmative.

Issue Two; Whether the plaintiff is entitled to the remedies sought.

The plaintiff sought for an award of damages for negligence and misrepresentation.

According to counsel for the plaintiff, where a man who has or profess to have special knowledge or skill makes representation by virtue thereof to another with intention of
30 inducing him to enter a contract with him, he is under duty to use reasonable care to see that

the representation is correct and that the advice information or opinion is reliable, that if gives unsound advice or misleading information or expresses an erroneous opinion and thereby induces the other side into a contract with him, he is liable in damages. He relied on the case of *Esso Petroleum Company Limited Vs Mardon [1976] 2 All ER 5*.

5 Counsel therefore contended that the defendant, a financial institution possessed with special knowledge and skill represented to the plaintiff that it would give a loan of UGX 1,500,000,000/= if the plaintiff provided security. That the plaintiff provided the necessary security and paid the necessary fees but the defendant did not disburse the promised amount of money. Therefore, the defendant misrepresented and is liable in damages for inducing the
10 plaintiff to enter such a terrible loan transaction.

On the other hand, counsel for the defendant averred that there was no such representation made to the plaintiff by the defendant.

The Law dictionary (*@ the Law.com*) defines Misrepresentation as an intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by
15 nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally; *also* :an act or instance of making such a representation

My understanding of a misrepresentation is a false statement of fact or law which induces the representee to enter a contract. There must be a false statement of fact or law as oppose to opinion or estimate of future events (See [Bisset Vs Wilkinson](#) [1927] AC 177). Once it has
20 been established that a false statement has been made it is then necessary for the representee to demonstrate that the false statement induced them to enter the contract (See *Horsfall Vs Thomas [1862] 1 H&C 90*). If the representee does an act to adopt the contract, or demonstrate a willingness to continue with the contract after becoming aware of the misrepresentation they will lose the right to rescind (See *Long Vs Lloyd [1958] 1 WLR*
25 *753*).

It is banking practice that the customer is the one who applies to the bank for a loan. The bank then asses the loan application to see its viability, asks the customer to perfect their securities and the loan is processed.

The defendant has not adduced any evidence to prove that the defendant induced them or
30 made any representation that made them to apply for this particular loan. The fact that the

defendant promised to disburse UGX 1,500,000,000/= but disbursed less than the agreed amount cannot be construed as misrepresentation. I therefore disallow this claim.

The plaintiff further sought for damages for fraud. The particulars of fraud pleaded are;

- 5 1. Signing a term loan agreement for UGX 1,500,000,000/= and deciding not to avail the sum in full.
2. Disbursing the term loan sum in instalments
3. Representing that it would credit the term loan amount in full and failing to do so
4. Failure and or omission to give the plaintiff prior notice that the defendant bank would not credit and or remit the entire loan sum;
- 10 5. Failure to assist the plaintiff clear the consignment leading to accumulation of port charges, demurrage fees and storage fees and subsequent loss of the consignment and projected future profits.

Fraud has been adequately defined by superior of Courts in Uganda. In **Fredrick J. K. Zaabwe Vs Orient Bank Ltd. Civil Appeal No. 4 of 2006 (Supreme Court)** which has been
15 widely followed stated that fraud is;

“intentional perversion of the truth for purposes of inducing another in reliance upon to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact whether by word or by conduct, by false or misleading allegations, or by concealments of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.” “... Anything calculated to deceive, whether by a single act or culmination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or the innuendo by speech or silence, word of mouth, or look or gesture ... a generic term, embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated...”

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In my considered view, for the plaintiff to succeed at the claim of fraud, it has to show that the acts of the defendant were dishonest, a willful perversion of the truth, a total false
30 misrepresentation of the truth and they deprived the plaintiff of its legal right.

The particulars of fraud pleaded do not show any dishonesty on the part of the defendant. The fact that they disbursed money in installments, or disbursed less money than agreed on might be a breach of contract but by all means is not fraud. The fact that the defendant did not help in clearing the goods at the boarder was not even a contractual term and cannot be construed as fraud.

The plaintiff has not proved any dishonest acts of the defendant that deprived it of its legal right. Under the circumstances therefore, I disallow this claim.

The plaintiff sought for damages for breach of contract.

The principle of law is that;

10 “special damages must be specifically pleaded and proved, but that strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example by evidence of a person who received or paid or testimonies of experts conversant with the matters”. See **Gapco (U) Ltd Vs A.S. Transporters (U) Ltd CACA No. 18/2004 and Haji Asuman Mutekanga Vs Equator Growers (U) Ltd, SCCA No.7/1995.**

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The plaintiff prayed for USD. 3,116,880,000/= being the total cost of the 36 containers. The plaintiff relied on PEX 5 which indicated the purported cost of each container, the shipping cost and all the expected profit margins per container.

According to counsel for the defendant, the plaintiff did not prove any special damages that it sought to be awarded. Counsel averred that the plaintiff ought to have adduced evidence to show any bank telegraphic transfer or Letters Of Credit to prove payment but no such evidence was adduced. I am inclined to agree with counsel for the defendant; there is no iota of evidence that shows that the defendant indeed purchased the 36 containers so as to ascertain the price of each container. There are no receipts from the supplier, no shipping documents, nothing attaches the containers to the plaintiff. Special damages ought to be proved strictly. But there is no any evidence adduced by the plaintiff to strictly prove these.

The plaintiff also prayed for UGX 75,000,000/= being special damages for payment of utilisation fees, arrangement fess, valuation fees and stamp duty. According to counsel for the defendant, the above claim presupposes that there was no loan disbursed to the defendant yet the defendant disbursed UGX 1,250,000,000/=. That having drawn this amount, the

plaintiff cannot seek an award of special damages for valuation, arrangement and utilisation fees.

The plaintiff further prayed for UGX 1,720,000,000/= being loss of expected profits had the containers been cleared and sold.

- 5 Since the plaintiff did not prove the claim for the value of the 36 containers, the claim for expected earnings accordingly stands unproved so does the claim for interest.

The plaintiff also sought for a declaration that the conduct of the defendant bank of not crediting the UGX 256,000,000/= terminated and or repudiated the loan agreement. Respectfully i do not agree. Notwithstanding my finding under issue 1, the plaintiff in my
10 view still remains indebted to the defendant for the sums disbursed.

Under issue one it was my finding that the defendant breached the contract in part. It is my view and holding that the plaintiff is entitled to general damages. In ***Haji Asumani Mutakanga Vs Equator Growers (U) Ltd SCCA No. 7 of 1995***, the Supreme Court held;-

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

In the premis i believe an award of UGX 25,000,000/= as general damages would be commensurate in the circumstances.

Since the plaintiff has succeeded in part, i will award half of the taxed costs.

- 20 In the result judgment is entered for the plaintiff against the defendant in the following terms;
- a. Award of UGX 25,000,000/= being general damages
 - b. One half of the taxed costs
 - c. Interest of 20% p.a on (a) from date of judgment till payment in full.

I so order.

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B. Kainamura

Judge

7.08.2018

