THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0880 OF 2020

SOLOMON SEMAKULA KAYINDA …….…… PLAINTIFF

VERSUS

AUGER REVIVAL MINISTRIES LIMITED …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

The Plaintiff sued the defendant for the recovery of professional fees in the sum of shs. 35,00,000/= special damages of shs. 150,500,000/= general damages for breach of contract, interest and costs. The plaintiff's claim is that at all material time he carried on the business of a technician, undertaking the installation and maintenance of all kinds of media and broadcasting equipment, internet and related services. During or around the year, 2017 he was contracted by the defendant's Managing Director, the late Pastor Augustine Yiga, to set up a television studio for the "ABS Television" service, owned, operated and managed by the defendant company. The said late Pastor Augustine Yiga had the ostensible authority of the defendant to enter into a contract of that nature in his capacity as Managing Director. It was agreed that the plaintiff was to be paid shs. 35,000,000/= on that contract. It was further agreed that the plaintiff was to purchase all the equipment required, but would be fully reimbursed by the defendant. As a commitment toward the undertaking, the defendant's Managing Director on 20th November, 2017 issued the plaintiff with a cheque in the sum of shs. 5,000,000/= and on 22nd May, 2019 a written acknowledgement of a sum of shs. 150,500,000/= as owed to the plaintiff. Out of the shs. 155,500,000/= spent by the plaintiff on purchase of equipment, the defendant has paid only shs. 5,000,000/= leaving a balance of shs. 150,000,000/= outstanding. The plaintiff performed his side of the bargain resulting in a fully operation television service but the defendant has not, hence the suit.

b) The defence to the claim;

In its written statement of defence, the defendant denies being liable to the plaintiff as claimed or at all. Although the defendant is the proprietor of "Abizaayo Broadcasting Television" it has never entered into any contractual relations with the plaintiff regarding setting it up or its studios and operations. In the event that there was such an agreement between the plaintiff and one of its directors, the late Pastor Augustine Yiga who unfortunately passed away on 26th October, 2020, then that agreement is not binding on the defendant. Instead the defendant purchased and installed the equipment from its own sources. The cheque of shs. 5,000,000/= issued to the defendant was intended for the purchase of new equipment, which never materialised. The suit was filed in bad faith as an afterthought following the admission of the late Pastor Augustine Yiga to the intensive unit of Nsambya Hospital and his eventual death. The suit should therefore be dismissed.

c) The issues to be decided;

The issues raised for trial are as follows:

1. Whether there was a valid contract between the plaintiff and the defendant to set up ABS Television studios for the defendant.
2. Whether the plaintiff performed his obligations under the contract; and if so
3. Whether the defendant breached its obligations under the contract.
4. What remedies are available to the parties?

d) The submissions of counsel for the plaintiff;

Although counsel for the plaintiff M/s Namutamba and Co. Advocates was on 26th August, 2021 notified that they should have filed the final submissions by 24th September and they undertook to do so, by the time of writing the judgment they had not so complied. The judgment has therefore ben written without the benefit of their final submissions.

e) The submissions of counsel for the defendant;

Counsel for the defendant M/s Crimson Associated Advocates submitted that there was no verbal or written agreement between the parties and the terms of the purported verbal agreement mentioned by the plaintiff are false. If any payment was made to the plaintiff by the defendant, it was an advance payment for purchase of items that were to be provided to the defendant. The defendant incurred all costs of purchase of the items used in setting up the studio and all items supplied by the different suppliers were on cash basis. In the alternative, if there was any agreement on the payment plan, the defendant was to bear the costs of purchase first and the machinery was only to be supplied upon completion of payment of the money agreed upon.

The alleged contract between the plaintiff and the defendant is not a valid contract considering that section 10 of *The Contracts Act, 2010* requires a contract whose subject matter exceeds twenty-five currency points to be in writing. There is need for certainty of terms for a contract to be existent and be valid. In the instant case the plaintiff has neither led any evidence to prove terms of the purported contract for the supply of items. It was the testimony of D.W.1 that that the defendant's director, the late Pastor Yiga Augustine, would give the plaintiff the full purchase price and a token of appreciation upon bringing the items required. The cheque issued to the plaintiff, is dated 20th November, 2017 two years earlier than the alleged contract of 2019. The Plaintiff did not adduce any evidence to explain and / or clear any doubt as to why the cheque he seeks to rely on as proof of existence of the purported contract(s) is dated two years prior to the date when the alleged contract was entered into. Furthermore, a payment schedule is not a contract, and does not have certain and clear terms of the contract. The commitment to pay shs. 5,000,000/= a month makes no reference to the defendant.

Furthermore, under cross examination the plaintiff admitted under-invoicing and further admitted to court that he usually does that when he is doing transaction so as to pay less taxes to Government. Any transaction designed to defraud government of its revenue is illegal and therefore would be void because of fraud. Such illegality goes to the root of any agreement and therefore make the contract void. In his notice of intention to sue, the plaintiff never included a claim for professional fees. Incorporating that claim in the plaint was an afterthought. There is no

evidence to prove that the plaintiff purchased the items himself. P.W.2 admitted that the late Pastor Yiga Augustine paid for the equipment. The plaintiff therefore is not entitled to any of the remedies sought.

f) The decision;

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed. Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (ii) resultant damages.

1st issue; whether there was a valid contract between the plaintiff and the defendant to set up ABS Television studios for the defendant;

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. This requirement is satisfied by any signed writing that; (i) reasonably identifies the subject matter of the contract; (ii) is sufficient to indicate that a contract exists; and (iii) states with reasonable certainty the material terms of the contract. Writing all material terms is not required; what is required at a minimum is a sales of goods contract is an acknowledgment of agreement by the parties and a specification of the quantity of goods that are to be exchanged.

Multiple writings relating to each other can be combined to show that a single contract exists to satisfy this requirement. While this provision is designed to avoid fraudulent enforcement of contracts that never took place, that the contract was carried out can also be powerful confirmation of the agreement. Therefore in a contract for the provision of material and services, delivery of the material and services and acceptance thereof by the other party is a sufficient substitute for writing. The agreement is enforceable to the extent of the material and services delivered and accepted. In

other words, performance renders an oral contract for material and services enforceable, but only to the extent of the delivery and performance by way of services rendered.

In considering whether these requirements are met, the court should focus on substance rather than form and consider how a reasonable person in the position of the parties would have understood the documents exchanged, given their terms and the context in which they were written. When interpreting the contract the court should be mindful of the fact that it is not the function of the court to improve the parties' bargain, as was held in *Wood v. Capita Insurance Services Ltd, [2017] 2 WLR 1095; [2017] AC 1173; [2017] 4 All ER 615*, that;

> The court must take the entire contract and, depending on its the nature and formality and the quality of its the drafting, give more or less weight to elements of the wider context in reaching its view as to that objective meaning; that the interpretation of a contract was a unitary exercise and, where there were rival meanings, the court could give weight to the implications of rival constructions by reaching a view as to which construction was more consistent with business common sense; but that, in striking a balance between the indications given by the language and the implications of the competing constructions, the court had to consider the quality of drafting of the clause and also to be alive to the possibility that one side might have agreed to something which, with hindsight, did not serve his interest; that similarly the court should not lose sight of the possibility that the provision might be a negotiated compromise or that the negotiators were unable to agree more precise terms; that that unitary exercise involved a iterative process whereby each suggested interpretation was checked against the provisions of the contract and its commercial consequences were investigated; that when interpreting any contract, textualism and contextualism could be used as tools to ascertain the objective meaning of the language which the parties had chosen to express their agreement, and the extent to which each tool would assist the court in its task would vary according to the circumstances of the particular agreements; that agreements which were sophisticated and complex because they had been negotiated and prepared with the assistance of skilled professionals might be successfully interpreted principally by textual analysis; that the correct interpretation of other contracts, for example those which lacked clarity because of their informality, brevity or the absence of skilled professional assistance, might be achieved by a greater emphasis on considering their factual matrix and the purpose of similar provisions in contracts of the same type; that that approach to contractual interpretation was confirmed by recent case law and the recent history of the common law of contractual interpretation which was one of continuity rather than change.

For a contract to come into existence, there must be an offer made by one party which is, in turn, is accepted by another party. An offer is a promise to provide something specific if the other party agrees to do something specific in return. The acceptance must be stated either by words spoken or written or by conduct. Either words or conduct constitute acceptance of an offer if it occurs in accordance with and in response to the specific terms of the offer. A contract may be partly in writing and partly oral.

As proof of the contract, the plaintiff relies on Barclays Bank cheque number 000251 dated 20th November, 2017 in the sum of shs. 5,000,000/= drawn on the defendant's account, signed by the late Pastor Augustine Yiga in favour of the plaintiff (exhibit P. Ex.1). The other document is a memorandum headed "Pending Payments for Solomon at ABS TV" dated 22nd May, 2019 (exhibit P. Ex.2). It has a typed list of seventeen items; three are related to live coverage at the Church with a total of shs. 75,000,000/= and fourteen items of equipment at the studio building with a total shs. 75,000,000/= The grand total is stated to be shs. 150,500,000/= Superimposed thereon is handwritten content that reads as follows;

> We agreed Solomon and Pastor Yiga
> 22nd/05/2019
> Payment plan; Pastor Yiga must pay 5,000,000/= every month to clear this balance below 150.5m and Solomon will finish the work when payment is being paid (sic).
> A/C: 01153003535039 Solomon Semakula.
> Signature - Solomon Semakula.
> (Signature)
> Signature – Pastor Yiga Augustine.
> (Signature)

This is corroborated by oral testimony of performance by the plaintiff. P.W.2 Mr. Lukwago Frederick Igombe, the personal assistant of the late Pastor Augustine Yiga testified that he used to see the plaintiff undertake installation of equipment at the church and in the studio and being paid by the deceased. That much was admitted by D.W.1 Mr. Jengo Andrew who testified that the late Pastor Augustine Yiga used to pay the plaintiff shs. 100,000/= on each visit after installation. He used to give him money to import the equipment and he would also be paid for the installation. Lastly, P.W.3 Mr. Ntale Reagan, working in the Control Room as a Technician at the time, testified that the defendant bought some of the equipment installed while the plaintiff bought most of the equipment.

Therefore, the overall effect of the plaintiff's evidence is that the contract was not complete as a written contract; it was partly in writing and partly oral, which is a category of contract recognised by the law (see section 10 (2) of *The Contracts Act, 2010*). Such is treated as an oral contract evidenced by writing. The writing does not integrate, but merely evidences, the oral agreement. A plaintiff might recover on such a contract although all the terms of it are not in writing, provide the terms are ascertainable. Therefore I find that there is sufficient evidence that proves, on a balance of probabilities, the existence of an oral contract between the plaintiff and the late Pastor Augustine Yiga relating to the purchase and installation of equipment for television broadcasting at ABS Television. The only two sub-issues left are whether that contract is binding on the defendant and as to whether it is enforceable.

a. <u>The defendant's liability on the contract</u>.

Generally speaking, the principal officers of a company, who include its owners, officers, directors and/or managers, have authority to bind a company. However any other person in the company acting as its representative, regardless of their role in the company, who acts within the scope of his or her "actual" or "apparent" authority, may create a legally binding obligation on behalf of the company. Such authority can be established through direct evidence or can be implied through the actions of others at the company. This arises from conduct of the company, whose effect is to hold out that a person (agent) as having authority to deal with the company's affairs on its behalf.

Apparent or ostensible authority is proved by evidence showing that; (i) a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (ii) that the representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of the particular matter to which the contract relates; (iii) the third party was induced by the representation to enter into the contract; and (iv) under its memorandum or articles of association the company was not deprived of the capacity to enter into a contract of the kind sought to be enforced or to delegate authority to the agent to enter into a contract of that kind. The representation, if acted upon by the third party by entering into the contract, operates as an estoppel. That prevents the company from denying that it is not bound by the contract.

Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular (see Royal *British Bank v. Turquand (1856) 6 E&B 327*and *Kanssen [1946] AC 459*). The rule is designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he or she claims. The third party can assume that the affairs of company have been complied with, unless something has happened that would cause it to question that state of affairs. If the third party has actual or constructive notice that such steps had not been taken, he or she will not be able to rely on any ostensible authority of the directors and their acts, being in excess of their actual authority, will not be the acts of the company (see *Criterion Properties plc v. Stratford UK Properties LLC and others [2004] 1 WLR 1846*).

In the instant case I find that s way back as 20th November, 2017 the late Pastor Augustine Yiga was in possession of the defendant's cheque book. By his conduct and as confirmed by the testimony of D.W.1 Mr. Jengo Andrew, he was a person who had actual authority to manage the business of the defendant either generally or in respect of this particular payment. The plaintiff was induced by the representation to enter into a contract with him. There is no evidence to show that under the defendant's memorandum or articles of association it was deprived of the capacity to enter into a contract of this nature. The other document is the memorandum headed "Pending Payments for Solomon at ABS TV" dated 22nd May, 2019 (exhibit P. Ex.2). The content indicates this was not a personal transaction. The representation that the deceased was acting on behalf of the corporate entity managing ABS TV was acted upon by the plaintiff by entering into the contract. This operates as an estoppel that prevents the company from denying that it is not bound by the contract. I therefore find that the contract is binding on the defendant.

b. Enforceability of the contract.

A valid contract may, however, be unenforceable. A contract can be rendered unenforceable for numerous reasons related to circumstances of the signing, terms of the agreement itself, or events that occur after the contract has been signed. The most common issues that can render a contract

unenforceable at the time it came into existence are; illegality of its object or being against public policy, lack of capacity of any of the parties, mistake, unconscionability, duress or undue influence, misrepresentation, and ambiguity of the terms, where they are too vague to be understood. Events that occur after it is signed that render a contract unenforceable include; illegality of performance and force majeure. Of these two have been advanced by counsel for the defendant, i.e. ambiguity or uncertainty of the terms and illegality of performance.

As regards uncertainty of the terms, the rights and obligations of parties to a contract are determined by the terms of that contract. It is then trite that unless the essential terms of the contract are agreed upon, there is no binding and enforceable obligation. However, if "the parties have agreed upon the essentials, the law will supply, by appropriate implications, the necessary "machinery," the "subsidiary means of carrying out the contract" (see *May and Butcher v. R [I934] 2 K.B. 17 at 22*). What is subsidiary must depend upon the circumstances of each case. For example in *Perry v. Suffields Ltd, [1916] 2 Ch 187*, an agreement to sell a house was upheld, notwithstanding that it did not address important features like payment of deposit, and completion. Similarly, where the core terms in respect of product, price, and quantity were agreed upon in a sale of goods, incompleteness as regards port of shipment was held to be immaterial (see *Pagnan SpA v. Feed Products, [1987] 2 Lloyd's Rep 601*). The question then always is whether the "essentials of the contract" were defined and agreed by the parties.

In resolving uncertainties, it may be necessary for the court to resort to extrinsic evidence. Where there are substantiating means of proof that show some form of agreement between the parties, these can be furnished. However to the parol evidence rule prevents parties to a written contract from presenting "extrinsic" evidence of terms in a contract that contradict, modify, or vary the terms of a written agreement, when that written agreement is considered complete and finalised. The rule applies to evidence that relates to a contract, but is not contained in the body of the contract. The parol evidence rule applies only when a contract is completely finalised, or "integrated." This means an unambiguous execution of the written agreement that leaves no doubt that the parties intended it to be the final contract. A complete integration captures the parties' full and exclusive agreement on a contract matter. There are exceptions to the parol evidence rule.

(i) The first one is where the evidence is needed to clarify terms in a contract when a term's meaning is missing or ambiguous (see *Kerl v. Smith, 96 Miss. 827, 51 So. 3 (1910*).

(ii) The second is where there has been a transcription mistake in recoding in writing a previous oral agreement and there is need for rectification of the error, when through fraud, mistake, or accident, a written contract fails to express the real intention of the parties. This is only allowed, however, if (a) both parties must come out with a complete agreement that was in writing; (b) the written document must contain an error or more; and (c) no third party must have acquired an interest in the subject matter of the contract and lastly, the amendment me be capable of expression in clear terms (see *Webster v Cecil (1861) 30 Beav 62*).

(iii) The third is where it is to demonstrate evidence of collateral agreements; to prove that an independent collateral agreement exists side-by-side with a completely integrated and finalised written agreement. This is only allowed, however, if the collateral agreement: (a) does not contradict the written and finalised contract; and (b) does not contain terms that would normally be included in the present agreement (see *Green v. Booth, 91 Miss. 618, 44 So. 784 (1907*).

(iv) The fourth exception is that parol evidence may be used to demonstrate that a party was fraudulently induced to enter into an agreement (see *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n - 55 Cal. 4th 1169, 151 Cal. Rptr. 3d 93, 291 P.3d 316 (2013*).

(v) The fifth exception applies to the introduction of terms implied through trade usage or custom, whereby the rule cannot be used to exclude extrinsic evidence of trade usage or custom (see Hutton v. Warren (1836) 1 M & W 466, P. 475).

(vi) The sixth exception relates to evidence intended to show suspension of operation of the contract, where the operation of the contract proved in writing is verbally made subject to the occurrence of some named event or to the continuation of some specific state of affairs. Extrinsic evidence may be adduced to show that the contract hasn't come into operation or that it has been placed on hold (see *Pym v. Campbell (1856) 119 ER 903*).

(vii) Finally, the rule does not apply to partly written and partly oral contracts. This means that the contract is not entirely a written contract and therefore the rule absolutely does not apply. Extrinsic evidence is permitted to show, if it can be proved by both parties, that the contract consists of oral and written terms (see *Van den Esschert v. Chappel [1960] WAR 114*)

In the instant case the court applies the last exception to construe the written parts of the agreement (exhibit P. Ex.2), alongside the oral testimony to discern the terms of the contract. Generally, the Court should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so (see *G Scammell & Nephew Ltd v. HC ad JG Ouston [1941] AC* 251 and *Nea Agrex SA v. Baltic Shipping Co Ltd [1976] 1 QB 933*). Courts do indeed try very hard to give meaning to contracts which, at first sight, appear to be vague or contradictory. The likelihood that a court will ignore completely certain parts, or all, of a contract as being void for uncertainty is usually fairly remote. It was observed in *Hillas & Co v. Arcos Ltd (1932) 147 LT 503*, that;

> Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the Court should seek to apply the old maxim of English law, "*verba ita sunt intelligenda ut res magis valeat quam pereat*" [words are to be understood such that the subject matter may be more effective than wasted]. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.
>
> The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite

meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found. But I think that it is found in this case. My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right to hold the appellants to any particular version. It was all left too vague. There are many cases in the books of what are called illusory contracts, that is, where the parties may have thought they were making a contract but failed to arrive at a definite bargain. It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain."

The role of the court in a commercial dispute is to give legal effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy. To hold that a clause is too uncertain to be enforceable is a last resort or, [….], "a counsel of despair…..It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered … To decide that [the clause] has "no legal content"…. would be for the law deliberately to defeat the reasonable expectations of honest men …The conclusion that a contractual provision is so uncertain that it is incapable of being given a meaning of any kind is one which the courts have always been reluctant to accept, since they recognise that the very fact it was included demonstrates that the parties intended it to have some effect…….Where parties intend to create a contractual obligation, the court will try to give it legal effect. The court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give to the agreement (or that part of it) any sensible content."

Applying the approach set out in the authorities to which I have referred, one can draw certain conclusions which apply to the present case. First, the parties plainly intended the words of exhibit P. Ex.2 to have some effect. It follows from this that, if the document is treated as being so vague and unclear as to give the plaintiff no rights, it would defeat the intent of the document. Examination of exhibit P. Ex.2 reveals that it has both printed and hand written content. It is a rule of construction that where a contract is partly written and partly printed, the written parts control the printed parts, and if the two are absolutely repugnant, the latter must be so far disregarded. Therefore if a contract is comprised of a pre-printed form and handwritten or typed modifications, the handwritten or typed material will prevail. Having analysed the document, I find that whereas

the printed parts outline the scope of material and services and their cost or value, the handwritten part relates only to the mode of payment. I have not found any repugnancy between the two parts of the document. They will be construed as composite elements of the whole agreement.

While an agreement does not require to contain all minute details, it should nevertheless be complete insofar as the vital or essential terms are concerned. For a contract for the provision of material and services, the essential terms will include; (i) specification of the material to be supplied; (ii) the cost or value of the materials; (iii) the cost or value of the services to be rendered; (iv) the place of delivery of materials and performance of the services; (v) the key responsibilities of the provider; (vi) the duration of the agreement; (vii) the obligations of the client; (viii) the terms of payment.

I find in this case that exhibit P. Ex.2 incorporates; - a specification of the material to be supplied (items (b), (c) in respect of the Church and then (1) – (14) in respect of the studio building); the cost or value of the materials (each item has a value in shillings attached); the cost or value of the services to be rendered (this is only in respect of item (a) regarding the Church where it is described as "balance on live coverage"); the place of delivery of materials and performance of the services (this was supplied by the oral testimony of the plaintiff, his two witnesses and D.W.1 as being the Church and Studio of the defendant at Kawaala); the key responsibilities of the provider (described in the hand written part as "will finish the work"; the duration of the agreement (it is open ended until the work is "finished"; the obligations of the client (being to "pay shs. 5,000,000/= every month to clear the balance of shs. 150,500,000/=); and the terms of payment (as shs. 5,000,000/= every until the balance of shs. 150,500,000/= is cleared). I therefore find that the parties agreed upon the essentials, meaning that the court may supply by appropriate implications, any subsidiary means of carrying out the contract, if found necessary.

As regards the argument of counsel for the defendant that the contract is unenforceable by reason of fraud committed by the plaintiff in its performance, this is premised on some email correspondences sent by the plaintiff to some of the suppliers of the imported studio equipment. For example in the email dated Monday 11th December, 2017 forming part of exhibit P. Ex.3 at page 15 of the plaintiff's trial bundle, upon remitting US $ 210 for the supply of a "4m 6km long

distance point to point 5G 300m" piece of equipment, the plaintiff sent a note to the seller stating that; "Hello, my invoice for shipping put USD 80 because our country taxes are high. Thanks." Similarly, in the email dated Tuesday 12nd January, 2018 forming part of exhibit P. Ex.3 at page 19 of the plaintiff's trial bundle, upon remitting US $ 95.99 for the supply of a "KVM Over IP Extender HDMI No latency Support USB Keyboard Control" piece of equipment, the plaintiff sent a note to the seller stating that; "Hello, please put USD 50 on my shipping invoice. Taxes are high in my country. Best regard. Solomon." These are two out of six email correspondences.

Citing *Betty Kizito v. David Kizito Kanonya and seven others, S. C. Civil Appeal No. 8 of 2018*; *Frederick. J. K Zaabwe v. Orient Bank and five others, S. C. Civil Appeal No. 4 of 2006* and *Samuel Kizito Mubiru and another v. G. W. Byensiba and another, [1985] HCB 106*. it is counsel for the defendant's submission that any transaction designed to defraud government of its revenue is illegal, thereby rendering the plaintiff's contract unenforceable.

As a general rule, courts will not enforce an illegal contract or provide for any other remedies that arise out of it. However, in determining the consequences of illegal acts carried out pursuant to a contract, the courts will distinguish between those contracts that are said to be illegal at their formation, and those that are illegal through performance. If the contract was unlawful at its formation or if there was an intention to perform the contract unlawfully as at the date of the contract, then the contract will be unenforceable. Two broad policy reasons for this persist: first, a claimant should not be allowed to profit from his own wrongdoing and second, the Courts wish to avoid undermining the law, by condoning illegal conduct. This was enunciated in *Holman v. Johnson (1775) 1 Cowp 341; [1775] EngR 58; (1775) 98 ER 1120* thus;

> The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes: not for the sake of the Defendant, but because they will not lend their aid to such a Plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.

There are two main policy reasons for allowing illegality to be a defence to civil claims. First, no one should be allowed to profit from their own wrongdoing. Secondly, the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand. However, a contract which need not necessarily be performed in an illegal manner, but which is ultimately performed illegally by one of the parties, will be considered slightly differently from those that are illegal at formation. If at the date of formation the contract was perfectly lawful and it was intended to be performed lawfully, the effect of some illegal performance is not automatically to render the contract unenforceable (see *Colen and another v. Cebrian (UK) Limited [2003] EWCA Civ 1676; [2004] ICR 568*). The test instead, is whether the method of performance chosen and the degree of participation in that illegal performance is such as to turn the contract into an illegal contract. The question therefore is whether, in this case, the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country.

According to section 203 (b) and (e) of *The East African Community Customs Management, 2004* any person who in any matter relating to Customs, makes or causes to be made any declaration, certificate, application, or other document, which is false or incorrect in any particular or in any way is knowingly concerned in any fraudulent evasion of the payment of any duty, commits an offence and is liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand dollars. Therefore the plaintiff's emails dated Monday 11th December, 2017 and Tuesday 12nd January, 2018 constitute a prima facie violation of that provision. Illegality bars a claim only if the plaintiff has to rely upon the illegal element to make out the claim (see *Tinsley v. Milligan [1994] 1 AC 340; [1993] 3 WLR 126; [1993] 3 All ER 65)*. Therefore the plaintiff cannot recover any payments made in respect of these two items.

On the other hand, it has not been demonstrated that these two incidents turned the entire contract into an illegal contract. In *Coral Leisure Group Ltd v. Barnett [1981] ICR 503*, the court was asked whether any taint of illegality affecting part of a contract necessarily rendered the whole contract unenforceable by a party who knew of the illegality where the contract was not for an illegal purpose or prohibited by statute. It was held that it did not. The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from

further enforcing that contract unless the contract as entered into with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of his performance) is prohibited by law.

Therefore the proper scope of the common law rule relating to fraud in the performance of an otherwise moral and lawful contract, which does not affect the entire contract, is to forfeit that part of the claim to which the fraud relates. Illegality does not defeat claim unless the illegality goes to the root of the claim. There are three key considerations suggested by *Patel v. Mirza [2016] UKSC 42* when assessing whether allowing a claim would be contrary to the public interest and so harm the integrity of the judicial system: (i) the underlying purpose of the law which has been broken, and whether that purpose would be enhanced by denying the claim; (ii) whether there were any other relevant public policies which might be made ineffective or less effective by denying the claim; and (iii) whether denying the claim would be a proportionate response to the illegality.

When considering proportionality, there were various different factors to be considered such as the seriousness of the conduct, its centrality to the agreement, whether it was intentional and whether there was a marked disparity in the parties' culpability. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate. In the instant case there appears to be no logical basis why considerations of public policy should require the plaintiff to forfeit his entire claim, on basis of two incidents of expressions of intent to evade the tax payable on two items, and which has not been shown to have succeeded. Such a result would not be a just and proportionate response to the nature and scope of the illegality in the performance of this contract as a whole. I therefore find that save for those two items, the rest of the contract is enforceable.

2nd issue; <u>whether the plaintiff performed his obligations under the contract</u>.

The key obligation of the plaintiff as described in the hand written part of exhibit P. Ex.2 was to "finish the work" and the duration of the agreement was open ended until the work would be "finished." According to the plaintiff, the work involved the acquisition, installation and

maintenance of television broadcasting equipment for ABS Television, and training in-house technicians in the use and repair of the equipment. Sixteen items of equipment are listed in that document. P.W.2 Mr. Lukwago Frederick Igombe, testified that he saw the plaintiff setting up the broadcasting equipment agreed upon. P.W.3 Mr. Ntale Reagan, too testified that he together with other staff of ABS Television participated during the plaintiff's installation of that equipment. D.W.1 Mr. Jengo Andrew, too admitted that he saw the plaintiff from time to time come for installation and repair work and that he would be paid shs. 100,000/= in cash on each visit. There is no evidence to controvert this. No evidence has been adduced to show that he never completed the work.

The fact that the studios are in use and the television is on air is proof that he at a minimum achieved substantial completion. Substantial completion is the stage in the progress of the work when the work or designated portion is sufficiently complete in accordance with the contract terms so that the owner can occupy or use the work for its intended purpose (see *Westminster Corp v. J Jarvis & Sons Ltd [1970] 1 W.L.R. 637* and *University of Warwick v. Balfour Beatty Group Ltd [2018] EWHC 3230*). Substantial completion triggers the contractor's right to payment of the full contract amount minus retention. I therefore find that the plaintiff performed his obligations under the contract.

3rd issue; <u>whether the defendant breached its obligations under the contract</u>.

The defendant's obligation was to pay shs. 5,000,000/= every month to clear the balance of shs. 150,500,000/= According to the plaintiff, the defendant defaulted on this obligation. Sometime during the year 2017 the defendant's Managing Director, the late Pastor Augustine Yiga attempted to pay off this debt in kind by offering the plaintiff ten acres of land situated In Mukono but that arrangement failed. P.W.2 Mr. Lukwago Frederick Igombe, corroborated the evidence relating to the failed payment in kind. P.W.3 Mr. Ntale Reagan, too testified that he was aware of that transaction and the fact that it failed due to the fact that the land was the subject of a caveat by a one Captain Roy.

The plaintiff having made out a *prima facie* case of non-payment, the defendant had to discharge its evidential burden to prove that the debt was extinguished by payment in full. The only evidence before court in that regard is that of D.W.1 Mr. Jengo Andrew, who testified that he saw the plaintiff from time to time come for installation and repair work and that he would be paid shs. 100,000/= in cash on each visit. No evidence has been adduced to show that as from 22nd May, 2019 the day exhibit P. Ex.2 was executed, the defendant paid the plaintiff shs. 5,000,000/= every month or that the balance of shs. 150,500,000/= was cleared as undertaken. I therefore find that the defendant breached its obligations.

4th issue; what remedies are available to the parties?

Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract.

i. Special damages.

The plaintiff seeks recovery of professional fees in the sum of shs. 35,000,000/= and shs. 150,500,000/= as the cost of equipment installed. The law is that not only must they be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*).

Although both items of special damages were specifically pleaded the claim for shs. 35,000,000/= has not been strictly proved. Although strict proof does not necessarily always require documentary evidence, I have found no justifiable reason as to why this item was never included in exhibit P. Ex.2 signed on 22nd May, 2019 where the parties outlined the outstanding obligations, yet the plaintiff claimed it was a sum that had been agreed upon as way back as the year 2017. The only component of a similar nature is itemised as "balance on live coverage." This claim therefore is disallowed.

As regards the claim for shs. 150,500,000/= it was specifically pleaded in paragraph 5 of the plaint. In terms of proof, the plaintiff relies on his testimony and that of P.W.3 Mr. Ntale Reagan to the effect that he purchased most of the equipment on the understanding that he would be reimbursed. This is corroborated by exhibit P. Ex.2 signed on 22nd May, 2019 which itemises the equipment and its cost. Although by the plaintiff's own admission some of the equipment was paid for by the late Pastor Augustine Yiga, all the available receipts in that name and that of the defendant predate the agreement of 22nd May, 2019. They include that dated 23rd March, 2017 in the sum of shs. 9,700,000/=; that dated 12th August, 2018 in the sum of shs. 10,300,000/=; and that dated 15th November, 2017 in the sum of shs. 3,958,327/=. The inference is that they were taken into account before the parties established the sum due and owing to the plaintiff as being shs. 150,500,000/= Other supporting documentary evidence is found in exhibit P. Ex.3 comprising email correspondences of money paid for importation of some of the equipment, proforma invoices and receipts. I therefore find that the plaintiff has provided sufficient proof of hi claim.

However, by reason of the fact of the evidence of tax evasion on two purchases, the sums involved in that regard will be deducted. These are US $ 210 spent on "4m 6km long distance point to point 5G 300m" as per the email of Monday 11th December, 2017 and US $ 95.99 spent on "KVM Over IP Extender HDMI No latency Support USB Keyboard Control" as per the email of Tuesday 12nd January, 2018, hence a total of US $. 305.99 At the current exchange rate of US $ 1: 3,540/= the amount deductible is shs. 1,083,204/= The amount recoverable by the plaintiff accordingly is shs. 149,416,796/=

ii. General damages and interest.

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. In determining a just and reasonable rate, courts take into account "the ever 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 (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*).

Interest can be demanded only by virtue of a contract express or implied or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid. Interest falls due when money is wrongfully withheld and not paid on the day on which it ought to have been paid (see *Carmichael v. Caledonian Railway Co. (1870) 8 M (HL) 119*). If a party does not pay a sum when it falls due the aggrieved party is entitled to interest from the time payment is due to the time of payment. The other justification for an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. An award of interest is compensation and may be regarded either as representing the profit the plaintiff might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation (see *Riches v. Westminster Bank Ltd [1947] 1 All ER 469 at 472*).

Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. As per the coerced loan theory, the plaintiff was effectively coerced into providing the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly

represents the loss of use of that currency (see *Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm*). The borrower typically pays interest on a loan at a rate equal to the base rate plus an agreed applicable margin.

The defendant undertook to pay shs. 5,000,000/= per month from 22nd May, 2019 until payment in full, which makes a total of 31 instalments. By the time the suit was filed on 30th October, 2020 the defendant had defaulted on 17 instalments. By the time of this judgment the defendant had defaulted on a further 11 instalments, hence a total of 28 instalments constituting a sum of shs. 140,000,000/= Since the last three instalments are not yet due, the plaintiff will be awarded interst on the decretal sum at the court rate of 6% per annum in lieu of general damages, from the date of judgment until payment in full. The plaintiff is not entitled to any additional general damages

iii. Costs.

The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) The sum of shs.149,416,796 as outstanding under the contract.
b) Interest thereon at the rate of 6% p.a. from the date of filing the suit, i.e. 30th October, 2020 until payment in full.
c) The costs of the suit.

Delivered electronically this 4th day of October, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
4th October, 2021.