

THE REPUBLIC OF UGANDA
IN THE HIGHCOURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 584 OF 2015

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1. SAMUEL SSEGUYA
2. MOSES ATWOREKA
3. FESTO TURINAWE----- PLAINTIFFS

VERSUS

10 AIRTEL UGANDA LIMITED-----DEFENDANT

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

JUDGMENT

15 The Plaintiffs herein brought this suit against the Defendant (a body corporate) jointly and, or severally for breach of contract, seeking for the following declarations and orders:

- 20 a) A declaration that the acceptance by the Defendant of the 1st Plaintiff's bid to purchase the Defendant's items and, or goods with Reference No: Disposal SCM/APRIL -01 (herein after referred to as "the goods") and unconditional acceptance and receipt of UGX 752,000,000/= being part of the purchase price for the goods constituted a valid and enforceable contract (hereinafter referred to as "the Contract") between the Defendant and the 1st Plaintiff.
- 25 b) A declaration that the 1st Plaintiff lawfully and effectively assigned the rights, benefits and interests arising under the Contract to the 2nd and 3rd Plaintiffs (hereinafter referred to as "the assignment").
- c) A declaration that the Defendant acquiesced in and acknowledged the assignment.
- 30 d) A declaration that the Defendant's purported unilateral revocation of its acceptance of the 1st Plaintiff's bid to purchase the goods is null and void and of no legal effect.

- e) A declaration that the Defendant breached the contract by failing to deliver the goods or any part thereof to the Plaintiffs or any of them.
- f) An order for refund of the monies paid by or on behalf of the 1st plaintiff to the Defendant and retained by the Defendant.
- g) Special, general and aggravated damages for breach of contract.
- h) Interest on money paid to and retained by the Defendant and, on special, general and aggravated damages.
- i) Costs of the suit.

The Defendant in its written statement of Defense denied each and every allegation set out in the plaint and prayed that this honorable court be pleased to dismiss the plaintiffs' suit with costs.

The brief facts of this case as agreed by the parties are set out in the joint scheduling memorandum filed on 26th October, 2016 as follows;

That on the 20/04/2015, the Defendant by an advert in the New Vision Newspaper, invited interested persons to bid for goods. The 1st Plaintiff submitted a bid to purchase the goods.

That on the 25th/05/2015, the Defendant, in writing accepted the 1st Plaintiff's bid to purchase the goods at a total price of UGX1,350,000,000/=, subject to the following terms and conditions: -

- a) Payment of a commitment fee of 10% within 24 hours of receipt of the acceptance of the offer.
- b) Upon receipt of the commitment fee referred to above and approval of the offer, payment of the balance within 7 days. In the event that the offer is not approved, the commitment fee of 10% to be refunded.
- c) In case of failure to pay the remaining 90% after the offer is approved, the initial 10% to be forfeited.

That UGX 135,000,000/= was paid to the Defendant as the 10% commitment fee. That a further UGX 617,000,000/= was paid into the Defendant's Bank Account. That a total of UGX 752,000,000/= has been returned to the Plaintiffs by the Defendant.

The disputed facts in this case are that while the Plaintiffs contend that the acceptance by the Defendant of the 1st Plaintiff's bid to purchase the Defendant's items /goods with reference No: Disposal SCM/April -01 (herein after

referred to as "the goods") and unconditional acceptance and receipt of UGX 752,000,000/-being a part of the purchase price for the goods constituted a valid and enforceable contract (herein after referred to as "the Contract") between the Defendant and the 1st Plaintiff and that the 1st Plaintiff lawfully and effectively assigned the rights, benefits and interests arising under the Contract to the 2nd and 3rd Plaintiffs and the Defendant acquiesced in and acknowledged the assignment.

The Defendant on the other hand contends that the acceptance of the 1st Plaintiff's bid offer on the 25th/05/2015 was strictly made in his favor and the liability to comply with the conditions therein including payment of the commitment fee strictly lay on him alone and that the acceptance of the said contract was conditional as it had to be approved for any contract to take shape.

The Defendant further contends that the bid offer was never approved, thus there was no contract concluded with the 1st Plaintiff and that there was no valid or any other conceivable assignment of the conditional acceptance of the bid offer to any person. That the Defendant has never acquiesced in any assignment.

The Defendant further still, contends that the Plaintiffs are not entitled to any relief as the acceptance of the bid offer was revoked on 16/06/2015 and that as such the Defendant never assumed any obligation to deliver any goods whether to the 1st Plaintiff or any other person whatsoever.

The following issues were agreed upon by the parties for court's determination in accordance with the joint scheduling memorandum:

1. Whether the acceptance of the bid offer dated 25/05/2015 and the subsequent conduct of the Defendant constituted a valid and enforceable Contract?
2. Whether the 1st Plaintiff lawfully and effectively assigned any rights, benefits and interests arising from the acceptance of the bid offer and subsequent conduct of the Defendant to the 2nd and 3rd Plaintiffs?
3. Whether the Defendant's non delivery of the goods to the Plaintiffs or any of them amounted to breach of contract?
4. What are the remedies available to the parties?

Representation:

Mr. Kimuli Moses of M/s United Advocates and M/s Niwagaba & Mwebesa appeared for the Plaintiff while the Defendant was represented by Mr. Bwayo Richard of M/S Nangwala, Resida & Co. Advocates; both Counsel filed written submissions.

The plaintiffs in court relied on the evidence of 2 witnesses and the Defendant relied on the evidence of 1 witness.

Issue 1: Whether the acceptance of the bid offer dated 25/05/2015 and the subsequent conduct of the Defendant constituted a valid and enforceable Contract?

Counsel for the Plaintiffs submitted that the payment of the commitment fee was performance of the term of the contract and not a condition and that in any event it was paid as per the agreed facts and receipt marked Exhibit PE6 at p.23 of the Trial bundle. That the requirement and, or condition for "approval", whatever that means, is idle verbiage without any legal significance. That the Defendant made an open invitation to members of the public to bid for the goods and not for pre-qualification; in this kind of situation, the purported approval becomes superfluous and devoid of legal significance.

Counsel further submitted that, DW1 in cross examination confirmed that PE4 which is the acceptance of the 1st Plaintiff's bid and, or offer did not indicate the following; what the 1st Plaintiff had to do to secure the approval, how the approval was to be made or communicated and the time frame within which the approval was to be made or communicated. That DW1 further confirmed that the Defendant did not at any time communicate to the 1st Plaintiff that his bid/offer had not been approved. That according to Exhibits marked PE14 & PE18, the 10% commitment fee was refunded not because of lack of approval but because of the alleged irregularities.

That the Defendant purportedly revoked its acceptance of the 1st Plaintiff's bid/offer because the 1st Plaintiff had assigned the acceptance to the 2nd and 3rd Plaintiffs without the Defendant's consent which the Defendant termed "irregularities"; but there is no mention of lack of approval.

Counsel further submitted that contrary to DW1's evidence that the Defendant never approved the 1st Plaintiff's offer, the Defendant's conduct of accepting payment of Ugshs. 617,000,000/- quite a substantial amount of money and unconditionally issuing receipts exhibited as PE6, PE7 & PE8 is sufficient and

uncontroverted evidence that if approval was required, the same was circumstantially given or can be inferred.

Counsel referred to the provisions of section 8 of the Contracts Act No. 7 of 2010 which states that:

- 5 "The performance of the conditions of an offer or the acceptance of any consideration for a reciprocal promise which may be offered with an offer, is an acceptance of the offer"

Counsel further cited section 114 of the Evidence Act, Cap 6 which provides as follows;

- 10 "When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceedings between himself or herself and that person or his or her representative, to deny the truth of that thing." to support his argument.
- 15 Counsel averred that in this case the Defendant, knowingly accepted and receipted payments three times and is estopped from contending that the acceptance was not approved, if at all the approval was necessary.

- Counsel further relied on the case of **Julie Nanyonjo Vs Namitala Musoke HCCS No. 1350 of 2000 [2002] KALR 563**, wherein Lugaizi, J (as he then was) observed that:
- 20

- " Indeed the Defendant accepted all the above payments, one of which did not maintain the earlier position under the agreement in question. Having done so, the Defendant could not turn back and insist on the original term of the agreement. She had, by conduct, waived that term. She was, therefore estopped from insisting on it (see the doctrine of estoppel under section 113(now 114) of the Evidence Act (Cap 46) (now Cap 6)."
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- Counsel submitted that the 1st Plaintiff's bid /offer was accepted by the Defendant and such acceptance coupled with the subsequent conduct of the Defendant constituted a valid and enforceable contract in accordance with the principles of contract and prayed that this issue be answered in the affirmative.
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In reply, Counsel for the Defendant submitted that there was no contract between the Plaintiffs or any of them and the Defendant. That in this case, the Defendant's acceptance of the 1st Plaintiff's offer was conditional upon payment of the commitment fee within 24 hours (not later than 26th May,2015) and the

Defendant's grant of the approval as seen in Exhibit PE4 shows that the offer was not absolute.

Counsel cited the provisions of the Law on acceptance of an offer stipulated under Section 7 of the Contracts Act, 2010 which states as follows;

5 7. Acceptance to be absolute.

(1) An offer is converted into a promise where the acceptance is: -

a) absolute and unqualified; and

b) expressed in a usual and reasonable manner, except where the offer prescribes the manner in which it is to be accepted."

10 Counsel referred to **Osborn's Concise Law Dictionary**, 6th Edition pg. 86 by John Burke, Sweet and Maxwell on the definition of the term condition as:

" A provision which makes the existence of a right dependent on the happening of an event; the right is then conditional, as opposed to an absolute right ---", to support his contention that in this case, the crystallization of any contract
15 depended upon two events; that is the payment of commitment fee within 24 hours (not later than 26th May 2015) and the Defendant's grant of approval. That the inclusion of the above two events in Exhibit PE4 clearly placed it within the ambit of section 7 with the result that the offer was not absolute.

20 That the questions posed by the Plaintiffs in their submissions in respect to the approval are accordingly futile.

Counsel for the Defendant in regard to the Plaintiffs' argument that receipting of the unsolicited money by the Defendant amounted to approval as to complete the conditional acceptance argued that, in this case clear approval had to be given through the clear means of communication between the parties that had
25 been well stipulated by either an email or a telephone call to Mr. Walugembe Robinson – Manager of the Defendant's Ware housing and Logistics as seen in Exhibits marked PE1, PE2 and PE3.

That this was not done and thus the payment of the monies into the Defendant's account cannot and could not be said to have been an approval.

30 That the Defendant neither requested for the money nor took benefit of the money as it returned or made the money available to the Plaintiffs within four days (on the 16th June, 2016) after learning about its presence and purpose as reflected in Exhibits PE13, PE14 and PE18.

Counsel further submitted that receipting the money did not amount to representation that there was an approval considering that the 1st Plaintiff knew and even acknowledged in cross examination that he had to be told when to pay any other money to the Defendant. That in this case, the Plaintiff deposited
5 the money into the Defendant's accounts by telegraphic transfer, of which it had no control and as such it cannot be held liable and that besides that there was clear written communication to the 1st Plaintiff as to the circumstances under which he would be required to pay any other money to the Defendant that is the 90% referred to in Exhibit PE4 which was only upon approval through the agreed
10 means of communication.

Counsel cited the case of **Barclays Bank of Kenya Vs Jandy [2004]1EA 8(CCK)** where money had been paid into the customer's account and the Bank reflected it as a matter of procedure and the Court held that;

*" The fact that the Bank confirmed the Customer's account Balance did not
15 amount to a positive representation that the credited funds belonged to the customer since the customer was aware of the true position, the money was not paid for any consideration and the balance was unusual and unexpected"*

That in this case, DW1-Dennis A. Kakonge testified that the monies noticed in Exhibits PE5 to PE8 were receipted by a cashier, a one Kukundakwe Marion who
20 was not involved in the approval process and did the receipting as a routine accounting procedure for money coming into the Defendant's Bank accounts.

Counsel further submitted on the case of **Barclays Bank of Kenya Vs Jandy(supra)** that the Court relied on the doctrine of 'ex turpi causa non oritur action' that is, one cannot seek to benefit from an illegal or unlawful transaction.

That in this case, the 1st Plaintiff's action of taking advantage of the fact that he had the Defendant's Bank account and without any request made to him unilaterally and in a sense voluntarily deposited the sum of UGX 617,000,000/-in breach of the conditions in Exhibit PE4 and without instruction which this Court should find so. That this is confirmed by PWI in cross examination where he states
30 that after paying the commitment fee, he had to wait to be told when to pay any balance.

Counsel further cited the case of **Karim Hirji versus M/s Pan African Insurance Corporation [1990-1991] Kampala Law Reports 184 at pg.191**, wherein counsel contends that the court was faced with facts similar to those in this case. That the
35 Plaintiff had bid for the purchase of a house from the Defendant but the offer was

conditionally accepted. The Defendant expected a letter of guarantee from the Plaintiff and also had to seek a Board resolution before the contract would be concluded. In dismissing the Plaintiffs suit and the claim for damages, the court held that:

5 "However, be that as it may, I think in case of doubt as to whether there is acceptance or not, one should have recourse to the rule that an offer that has been made should be accepted by an acceptance that would leave no doubt on the matter....so far what one had here is one exchange of conditional
10 promises and this would not upon principle be the same thing at all...all that I have before me is a bargain of a highly conditional nature. I reiterate the rule of the Law is that where there remained anything to be done to indicate acceptance and the adoption of what had been suggested by the other party, there is no contract constituted. The Plaintiff can hardly rely on the availability of funds to date as he put it to support this action in view of his prior written specific
15 instructions signified by ExhD1 and the time lag."

That in that case, court found that Karim didn't utilize the available communication channels and took into further consideration the lapse of time and made a comment that;" I must perhaps further mention that it was unbusinesslike on the part of the plaintiff to assume that a transaction of this
20 nature could have been finalized verbally. He conceded during cross examination that there is no written agreement"

Counsel for the Defendant averred that in this case, it was un business like for the Plaintiff to imagine that making unilateral surreptitious payments into the Defendant's accounts would constitute a contract.

25 Similarly, counsel submitted that in the case of **Masha versus Tol Ltd [2003]2 EA 593 (HCT)** the Plaintiff had also bid to purchase a house from the Defendant and indeed made some payment. Notwithstanding the part payment, the Plaintiff had been required to comply with the other matters expressly stated in the conditional acceptance she had given, the court dismissed her claim that there
30 was a contract and an entitlement to damages holding that:

"By accepting the Plaintiff's bid to purchase the suit property, the Defendant made an offer to the Plaintiff on the terms contained in the letter. The Plaintiff in paying part of the purchase by cheque and tendering a bank guarantee for the remainder, went outside the terms of the offer. There was no effective
35 acceptance of the Defendant's offer by the Plaintiff. An acceptance, in order to constitute an agreement, must in every respect, meet and correspond with the

offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. In the absence of such an acceptance, subsequent words, acts or conduct of the parties cannot create a contract." (Emphasis added)

5 On reciprocal promises, Counsel for the Defendant submitted that while the Plaintiffs placed greater reliance on the provisions of section 8 of the Contracts Act, which provides for acceptance by performing conditions or receiving consideration, that this provision is inapplicable in the circumstances of this case because the facts and circumstances of this case do not show any reciprocal
10 promises within the context and meaning of section 8 of the Contracts Act. That a promise under section 2 of the Contracts Act 2010, means an offer which is accepted and the acceptance must be unconditional which is not the case here, where the facts do not show reciprocating offers between the parties that are unconditionally accepted by any of them.

15 Counsel also submitted that section 114 of the Evidence Act is quoted out of context as the facts and circumstances here are different. That the 1st Plaintiff had prior communication as to how any communication would be eventually concluded but he did not utilize the channels of communication that were at his disposal having admitted in cross examination that, he did not call or meet with
20 Mr. Walugembe Robinson who was indicated in all documents as the Defendant's contact person for all questions relating to the tender.

Counsel further submitted that the case of **Julie Nanyonjo Vs Namitala Musoke(supra)** as cited by Counsel for the Plaintiffs is distinguishable and inapplicable to this case as in that case, court dealt with the issue of whether the
25 rescission of the contract was a breach while in this case, the court is to determine whether there is a contract or not.

Further still in that case, the court established that the sale was conclusive and payment was expected while in this case, nothing was conclusive as to payment.

In addition, in that case the Defendant kept the Plaintiff's money and also
30 remained in possession of the property while in this case money was unilaterally and surreptitiously deposited on the Defendant's account and it was promptly returned to the Plaintiffs.

Counsel further submitted that while the terms of a contract must be clear and unambiguous for it to be existent, that in this case there was only a conditional
35 acceptance of an offer and no clear contractual terms can be spoken about as

the essential terms of the contract had not or were not agreed upon because of the requirement for further approval. That the payment of 10% was not a term of any contract but a commitment fee which could become a contractual term upon approval; that although the plaintiffs argue that the sum of UGX617,000,000/= which they deposited on the Plaintiff's account constituted consideration, that the defendant had not agreed to receive any part payment and to release the goods in any specific manner as seen in Exhibit P11, that the revocation in itself meant automatically no approval and that there was also no contract because the advert calling for bids did not include the exact date, time and conditions relating to any contract.

Counsel for the Defendant referred to the definition of the term contract as per the provisions of section 10(1) of the Contracts Act, 2010 as, "an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound."

He further stated that the essentials of a contract were illustrated in the case of **Green Boat Entertainment Ltd Vs City Council of Kampala HCT-00-CC-CS-0580-2003** where Justice Yorokamu Bamwine (as he then was) stated that;

" In Law, when we talk of a contract, we mean an agreement enforceable at Law. For a contract to be valid and legally enforceable, there must be: capacity to contract; intention to contract; consensus ad idem; valuable consideration, legality of purpose and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract.

Counsel also cited a Supreme Court decision in **Uganda Telecom Ltd Vs Tanzanite Corporation Civil Appeal No. 17 of 2004** where Court upheld the principle of the law of contract that unless the essential terms of the contract are agreed upon, there is no binding and enforceable obligation, to support his contention that in this case one cannot argue that there is certainty of terms or any clear terms that the Plaintiffs would want the Court to hold as constituting a contract between them and the Defendant.

Counsel for the Defendant thus prayed that with regard to this issue, Court finds that there was no contract between the 1st Plaintiff and the Defendant or between any of the Plaintiffs and the Defendant.

In rejoinder, Counsel for the Plaintiffs referred to Section 47 of the Contracts Act which provides that: -

“(3) Where a contract is voidable on account of the failure by the promisor to perform his or her promise at the agreed time and the promisee accepts performance of the promise at a time other than the agreed time, the promisee shall not claim compensation for any loss occasioned by the non- performance of the promise at the time agreed.

(4) subsection (3) does not apply if at the time of acceptance of performance at a time other than the agreed time, the promisee gives notice to the promisor of his or her intention to claim compensation.”

According to the above provision, counsel submitted that it was open to the Defendant to avoid the contract on account of the 1st Plaintiff's breach of promise to pay within a particular time which it did not do, but accepted and receipted the commitment fee and other payments at the time or times other than what was indicated in Exhibit PE4. That the Defendant is estopped from claiming any breach occasioned by such delay unless, of course, at the time of such delayed payments, it had given notice to the Plaintiff of its intention to rescind and, or claim compensation on that account and that the Defendant has not shown in any way that it was prejudiced by the delay.

Counsel further argued that in this case it does not make sense to say that the acceptance of the 1st Plaintiff's bid and, or offer to purchase the subject goods was conditional upon the Defendant's acceptance as the requirement for approval has no legal content or significance.

Counsel further averred that in this case, the 1st Plaintiff did not require clarification or assistance from Walugembe Robinson regarding the purported approval and that contrary to what counsel for the Defendant said, the 1st Plaintiff did not acknowledge in cross examination that he had to be told when to pay any other money. That the 1st Plaintiff did what he had always done in his dealings with the Defendant, that is pay in instalments until the full amount is done and that the Defendant had the right to reject the payments made by the Plaintiff or to receipt them with a disclaimer or under protest but that it did not do so.

Counsel for the Plaintiffs while contending that Exhibits PE5 to PE8 as rightly referred to by Counsel for the Defendant are receipts which clearly state the purpose for which the money was receipted, defined a receipt as per **Osborn's Concise Law Dictionary, Eleventh Edition** by Mick Woodley to mean

“An acknowledgement of the receipt of money paid in exchange for goods or services, or for money paid in discharge of a debt...”

That the Defendant did not, before or after receipting the money, remitted to its Bank account as payment for the subject goods, advise the 1st Plaintiff that it was receipting the money conditional to the approval under protest and that there is no evidence of a disclaimer or protest on the face of Exhibits PE5 to PE8. That the Defendant only returned the money after it had failed to deliver the goods and because of the assignment without its consent as shown in Exhibit PE14. That the money was not returned because of lack of approval and that the Defendant's argument that it had no control over the payments is legally untenable.

Further in rejoinder, Counsel for the Plaintiffs submitted that given the purported revocation of the Defendant's acceptance which took place on (16/06/2015) after the issuance of the last receipt PE8 on the 4/06/2015, the Defendant adopted a mode of acceptance by conduct under section 8 of the Contracts Act, 2010 which renders section 7 of the Contracts Act inapplicable in the circumstances and obviates the requirement or condition for approval, if indeed there was such a requirement or condition.

Counsel further referred to the case of **Barclays Bank of Kenya Vs Jandy(supra)** as relied on by Counsel for the Defendant who submitted that, one cannot seek to benefit from an illegal or unlawful act as the Plaintiffs' acts of depositing money were illegal and, averred that the facts in that case are totally distinct from the present and that the acts of the Plaintiffs in this case cannot by any grain of imagination be classified as unlawful or illegal acts.

Counsel further submitted that the case of **Karim Hirji Vs M/s Pan African Company** (supra) cited and relied on by Counsel for the Defendant is distinguishable. In that case the Defendant company indicated that it would only consider the Plaintiff's offer if the Plaintiff backed it with a letter of guarantee after a board resolution and that, there was clearly no acceptance of the Plaintiff's offer as the Defendants' Board of Directors had not accepted the Plaintiff's offer but in this case, there was an acceptance of the 1st Plaintiff's bid and, or offer buttressed by the subsequent conduct of the Defendant in issuing detailed and unqualified receipts without protest or disclaimer.

Counsel averred that the Defendant cannot rely on the fact that the entire consideration was not paid within 7 days in accordance with Exhibit PE4 as the Defendant did not in its pleadings or evidence complain about this and cannot thus bring it up at this stage, (See section 47(3) of the Contracts Act).

Counsel further averred that the Defendant accepted the 1st Plaintiff's offer and subsequently acknowledged receipt of payment of the same and, it cannot therefore argue that the subject matter of the contract or the terms thereof were unclear or uncertain. That if there was anything unclear, the Defendant should
5 have communicated to the Plaintiffs before issuing receipts. Counsel for the Plaintiff made further reference to Exhibits PE1, PE2 and PE4 to support this argument.

Counsel further submitted that the Defendant's assertion that there was no contract because the advert calling for bids did not include the exact date, time
10 and conditions relating to any contract, is legally untenable as a contract only comes into existence when the offer is accepted and the other elements of a valid contract are present. It does not depend on the advert calling for bids/offers.

Counsel averred that in the case of **Masha versus Tol Ltd**(supra), a persuasive
15 authority, the facts are clearly very different from the facts of this case before court though it supports the contention that the Defendant's acceptance of the 1st Plaintiff's offer, dated 25/05/2015 and the subsequent conduct of the Defendant constituted a valid and enforceable contract.

That the court in **Masha versus Tol Ltd** emphasized that "*the acceptance, in order
20 to consummate an agreement, must in every respect meet and correspond with the terms and conditions of the offer.*"

That in the instant case, the terms and conditions of the 1st Plaintiff's offer was to buy the subject goods at UGX 1,350,000,000/=. The Defendant's acceptance did not fall short of or go beyond that amount and the purported conditions did not
25 in any way vary the amount of the offer, they only facilitated the process of payment of the amount offered. The subsequent conduct by the Defendant of accepting and receipting monies paid as part of the total consideration is consistent with the Defendant's acceptance of the offer by the 1st Plaintiff to buy the subject goods at the offer price.

30 **Resolution of issues.**

Issue No. 1: Whether the acceptance of the bid offer dated 25/05/2015 and the subsequent conduct of the Defendant constituted a valid and enforceable Contract.

I have looked at the pleadings on Court record together with the accompanying documents, submissions of both Counsel and the evidence adduced by the parties to this suit and make the following findings;

Section 10(1) of the Contracts Act defines a contract as; -

- 5 *"An agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound"*.

In the case of **Green Boat Entertainment Ltd Vs City Council of Kampala C.S No. 0580 of 2003** Justice Yorokamu Bamwine (as he then was) stated that; -

- 10 *"In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable there must be: capacity to contract; intention to contract; consensus ad idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract"*.

- 15 From the above definitions of a contract, it is explicit that, all the above essential terms of a contract must exist to render the contract enforceable at law.

In this case, the 1st Plaintiff contends that the acceptance by the Defendant of his bid to purchase the Defendant's items /goods with reference No: Disposal SCM/April -01 Exhibit Marked PE1 and unconditional acceptance and receipt of
20 UGX 752,000,000/=being part of the purchase price for the goods receipted in Exhibits marked PE5, PE6, PE7 and PE8 constituted a valid and enforceable contract between the Defendant and the 1st Plaintiff.

The Defendant on its part argues that the acceptance of the 1st Plaintiff's offer was conditional to payment of the commitment fee as seen in the acceptance
25 marked PE5 and that the offer had to be approved. That the offer has never been approved by the Defendant. That the sum of UGX 752,000,000/= erroneously deposited by the 2nd and 3rd Plaintiffs was properly and regularly returned by the Defendant to the source and therefore, there was no contract concluded with
30 the 1st Plaintiff who had assigned his rights and interests to the 2nd and 3rd Plaintiffs without the express consent of the Defendant (see the Notice of Assignment marked Exhibit PE12) and the response by the Defendant on Exhibit marked PE17.

The Defendant further avers that be that as it may, the 1st Plaintiff did not pay the purchase price of UGX 1,350,000,000/=as would have been required had the contract been concluded.

I have perused through Exhibit marked PE 4, the acceptance of the bid offer by Airtel vide ref: Airtel /SCM-Tender /15/01 dated 25th May,2015, which inter alia states as follows;

5 "Reference is made to your bid response for the disposal of Airtel items with reference number Disposal SCM/April-01.

Airtel Uganda hereby accepts your offer of UGX 1,350,000,000/= (One Billion Three Hundred and Fifty Million Shillings) inclusive of VAT subject to the following terms and conditions:

- 10 1. You are required to pay a commitment fee of 10% within 24 hours of receipt of this acceptance of your offer.
2. Upon receipt of the commitment fee referred to above and approval of your offer, you will be required to pay the balance within 7 days. In the event that your offer is not approved, the commitment fee of 10% shall be refunded to you if the offer is not approved.
- 15 3. If you fail to pay the remaining 90% after the offer is approved, the initial 10% shall be forfeited.

We therefore hereby invite you to deposit the initial 10% commitment fee before 01:00pm on the 26th of May, 2015. Please pay to Standard Chartered Bank Account name Airtel (Uganda) Limited and Account number 010-44-1077-5400.

20 Should you require any clarification and or assistance, please contact our warehousing and Logistics Manager, Mr. Walugembe Robinson on telephone +256752605006 or at Robinson. Walugembe @Ug. Airtel. Com....."

Looking at the foregoing terms of the acceptance, it is clear that the acceptance made by the Defendant was subject to the 1st Plaintiff's fulfilment of the three (3) conditions stated in 1-3 above.

Section 7 of the Contracts Act,2010 in regard to acceptance provides as follows;

"7. Acceptance to be absolute.

(1) An offer is converted into a promise where the acceptance is -

- a) absolute and unqualified; and
- 30 b) expressed in a usual and reasonable manner, except where the offer prescribes the manner in which it is to be accepted."

In this case, it is not disputed that the commitment fee of 10% was paid by the 1st Plaintiff to the Defendant amounting to UGX 135,000,000/=, which was the first condition. However, before approval, by a letter dated 16th June, 2015, the Defendant revoked the acceptance which it had prior given to the Plaintiff because the 1st Plaintiff had assigned the acceptance to the 2nd & 3rd Plaintiffs without the express consent of the Defendant and that the commitment fee was also paid by the said third parties.

In addition, from the wording of the 2nd condition, it is clear that upon the fulfillment of the 1st condition by the 1st Plaintiff, the Defendant would approve the contract; and that if it was not approved, the Defendant would refund the 10% commitment fee. It is also clear that the Defendant returned to the Plaintiffs a total sum of UGX 752,000,000/= since the condition of approval was not yet done by the Defendant, which led to the refund of the sum of UGX 752,000,000/= to the Plaintiffs. This clearly shows that the parties did not reach a consensus ad idem, one of the essential terms that determine a valid and legally enforceable contract. (My emphasis)

I find that the 1st Plaintiff has not discharged the burden of proof to the required standard on a balance of probability that indeed, there was either a contract between him and the Defendant or between the Plaintiffs and the Defendant.

My considered opinion is that, in the circumstances of this case, there was no valid and legally enforceable Contract between the Plaintiffs and the Defendant, as the Defendant's acceptance of the offer was clearly conditional and the Defendant revoked it before it could approve, despite the monies which the Plaintiffs had deposited in its account that were refunded to the 1st and 2nd Plaintiffs; a conduct which I find does not show acquiescence in the contract or the assignment by the Defendant .

Consequently, the acceptance of the bid offer dated 25/05/2015 and the subsequent conduct of the Defendant does not constitute a valid and legally enforceable Contract in this case. This court therefore answers this issue in the negative.

Issue No. 2: Whether the 1st Plaintiff Lawfully and effectively assigned any rights, benefits and interests arising from the acceptance of the bid offer and subsequent conduct of the Defendant to the 2nd and 3rd Plaintiffs.

Counsel for the Plaintiffs submitted that the 1st Plaintiff, lawfully and effectively assigned his rights, benefits, and interests arising from the acceptance of the bid

offer and that the subsequent conduct of the Defendant to the 2nd and 3rd Plaintiffs is an acquiescence by the Defendant to the assignment.

Counsel further submitted that the 1st Plaintiff testified that after the acceptance of his bid by the Defendant, he assigned and transferred his rights, benefits and interests arising therefrom. That the assignment was in writing wherein he authorized the 2nd and 3rd Plaintiffs to pay to the Defendant the bid price of UGX. 1,350,000,000/=being part of the consideration under the assignment and that the Defendant was notified of the assignment as reflected in Exhibits PE11 and PE12.

Counsel averred that since the contract between the 1st Plaintiff and the Defendant is not of the type that was necessarily inherently personal in character to require the consent of the Defendant, the Defendant was not in any way prejudiced by the assignment. (**see R.B Vermeesch & K E Lindgen, Business Law of Australia 5th Edition, Butterworths pg.299 and Bruce versus Tyley [1916] HCA 34; (1916) 21 CLR 277.**)

Counsel further contended that in this case, no express provision or policy was shown that barred the assignment of the 1st Plaintiff's rights to the 2nd and 3rd Plaintiffs. (**see Stein Forbes & Co. versus County Tailoring Co. (1916) 115 L.T 215**). That the Defendant acquiesced in the assignment and is estopped from denying the same according to Exhibits marked PE5, PE6, PE7 and PE8, which the Defendant receipted as payments in the names of the 1st and 2nd Plaintiffs.

In reply, Counsel for the Defendant submitted that there was no contract to assign as a mere correspondence could not be assigned but only a clear contract could be assigned.

That the authorities cited by counsel for the Plaintiff clearly show that an assignment is only envisaged where there is a contract and not negotiations or something of that ilk or genre.

In rejoinder, counsel for the Plaintiffs reiterated that there is a valid and enforceable contract between the 1st Plaintiff and the Defendant and that in law, the Defendant did not have to consent to the assignment of the 1st Plaintiff's rights.

In this case, the fact that approval was one of the three conditions stipulated in the acceptance of the bid offer marked Exhibit PE 4; a condition precedent in furtherance of the obligations enforceable in the contract by the parties, but the approval was not done by the Defendant, the acceptance was not absolute to

render the Defendant liable to the 1st Plaintiff and, the 2nd and 3rd Plaintiffs whom the 1st Plaintiff allegedly assigned his rights, interests and benefits in the purported contract.

5 My finding as above, is that there was no contract between the 1st Plaintiff and the Defendant and, I agree with the assertion by Counsel for the Defendant in this case, that there was indeed no contract which the 1st Plaintiff could have assigned to the 2nd and 3rd Plaintiffs as the contract between the 1st Plaintiff and the Defendant had not yet been approved.

10 Therefore, what ought to have constituted a valid and legally enforceable contract in the circumstances of this case are; the capacity to contract (not disputed, in the absence of contrary facts); intention to contract (see the invitation to bid, the offer and "acceptance of the offer"); the legality of purpose (not disputed, in the absence of contrary facts); sufficient certainty of terms (see the conditions stipulated in the acceptance of the bid offer); however, valuable
15 consideration and the consensus ad idem are missing.

I hereby find that two essential elements of a valid and legally enforceable contract are lacking namely; valuable consideration (the defendant contends that the 1st Plaintiff ought to have paid after the approval which was not done thus the refund of the monies to the plaintiffs), an argument which I agree with
20 and, the consensus ad idem (their minds were not together as to the conditions of the transaction) i.e. between the 1st Plaintiff and the Defendant which renders the transaction between the Defendant and the 1st Plaintiff a mere bargain and not a contract.

25 The conduct of the Defendant towards the Plaintiffs cannot therefore, amount to a valid and legally enforceable contract. (see **Green Boat Entertainment Ltd Vs City Council of Kampala C.S No. 0580 of 2003** where Justice Yorokamu Bamwine (as he then was) stated that; -

30 "In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable there must be: capacity to contract; intention to contract; consensus ad idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract".

35 Consequently, the 1st Plaintiff did not lawfully and effectively assign any rights, benefits and interests arising either from the acceptance of the bid offer or the subsequent conduct of the Defendant to the 2nd and 3rd Plaintiffs as there was no

contract. Rights, benefits and interests in a contract may be assigned by legal assignment, equitable assignment or by operation of the law (Emphasis is mine). (Refer to **Halsbury's Laws of England, 3rd Edition, Volume 8 pg. 257, Para.449 and Cheshire and Fifoot's Law of Contract by M.P FURMSTON, 9th Edition pg.497**)

5 In other words, once there is no contract between the parties, the question of assignment does not arise because, it's the existence of a contract that creates rights and obligations that are binding and enforceable to the parties in a contract. In this case, the right to assign would only accrue if there was a contract.

10 The case of **Julie Nanyonjo Vs Namitala Musoke (Supra)** is distinguishable on its facts that there was a contract and the court was to determine the claim that the rescission of the contract amounted to breach of contract; in this case, the court is required to determine whether there was a contract or not. Accordingly, I find this case is of no relevance to the instant case.

This issue is resolved in the negative.

15 **Issue No. 3: Whether the Defendant's non delivery of the goods to the Plaintiffs or any of them amounted to breach of contract?**

20 Counsel for the Plaintiffs submitted that the Defendant was obliged to deliver goods to the 1st Plaintiff or his assignees, the 2nd and 3rd Plaintiffs and that the Defendant's failure, refusal or neglect to deliver the goods when requested to do so amounted to breach of contract. That delivery of goods in a contract of sale of goods is without any doubt an obligation imposed on the seller which in this case is the Defendant under sections 27,28 & 29 of the Sale of Goods Act Cap 82 (now repealed in the new Law of the Sale of Goods and Supply of Services Act, 2017).

25 In reply, counsel for the Defendant submitted inter alia that this court finds that there was no contract between the 1st Plaintiff and the Defendant and, the Defendant and the 2nd and 3rd Plaintiffs as there was no assignment to the 2nd and 3rd Plaintiffs by the 1st Plaintiff, thus no breach at all.

30 Taking into consideration the submissions of both Counsel, evidence adduced by the parties, cases cited above and the law applicable, I hereby make the following findings in regard to this issue:

Courts have generally found that where a contract does not exist, the issue of a party having acted in breach of contract doesn't arise (see the decision of Justice Oder JSC (as he then was) in the case of **Uganda Telecom Ltd Vs Tanzanite Corporation (Civil Appeal No. 17 of 2004)**).

5 Similarly, in this case where I have held under issue 1 above that, there was no contract, I am inclined to find that the issue of breach of contract does not arise at all, as there is no contract to breach; the Defendant's non delivery of the goods to the Plaintiffs or any of them does not in any way, amount to breach of contract.

Issue No. 4: What are the remedies available to the parties?

10 Counsel for the Plaintiffs submitted that it's trite law that in case of breach of contract, the innocent or injured party is entitled to damages for the loss of his/her bargain and that the objective of awarding damages is to compensate the injured party for the loss occasioned by the other party's default. (**See Hadley versus Bexandale (1854) 9 Exch 341 at pg. 347**).

15 In reply, Counsel for the Defendant submitted that there was no contract whose terms were breached, as to inform or provide a basis for the different declarations sought for by the Plaintiffs or a ward of any of the remedies in terms of damages.

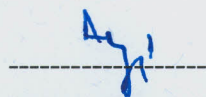
This court having found above that there was no contract between the Plaintiffs and the Defendant and further, that the issue of breach of contract does not
20 arise, finds it untenable to consider the Plaintiffs prayers at this stage.

Accordingly, the Plaintiffs are not entitled to any of the reliefs sought for in the plaint.

This suit is hereby dismissed with costs to the Defendant. I so order.

Judgment signed, dated and delivered by email on the 8th day of July, 2020.

25



SUSAN ABINYO

JUDGE

8/07/20