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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

CIVIL SUIT NO.381 OF 2019

2M CAPITAL LIMITED..... PLAINTIFF

10

VERSUS

NATIONAL CEMENT COMPANY UGANDA LIMITED.....DEFENDANT

BEFORE: HON. DR. JUSTICE HENRY PETER ADONYO

JUDGMENT

1. Background:

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Roni Marcovici, is the Chief Executive Officer of the plaintiff company and Lokesh Kumar is the Commercial Head of National Cement Co. Ltd (a company incorporated in Kenya and with offices in Nairobi Kenya). The two are said to have two met in Nairobi, Kenya and executed a contract dated 16th September 2017.

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The plaintiff asserts that it did enter a contract with the defendant and thus seeks amongst others a declaration that the defendant's acts of not implementing the

5 contract between the two parties amounted to a breach of contract, general and aggravated damages for breach of contract and Interest at the rate of 25% per annum.

The defendant known as National Cement Company Uganda Limited incorporated in Uganda denies having had any business dealings with the plaintiff company, 10 assigning or allowing any of its officers to meet, negotiate or enter into a contract with the plaintiff. aggravated damages at the rate of 25% per

2. Facts:

The plaintiff is stated to have on 16th September, 2017 entered into a contract with the defendant for supply of 700 -1100 metric tons of crushed pozzolana per day at 15 the Defendant's factory in Tororo for a consideration of USD 12.00 (United States Dollars Twelve) per metric ton a period of 5 (five) years stating from 7th April, 2018.

The contract was signed by Mr. Roni Marcovici, the Managing Director of the plaintiff and a one Mr. Lokesh Kumar who is stated to have signed on the behalf of the defendant.

20 On the 9th March 2018 National Cement Company Uganda Limited is said to have learnt that the plaintiff company through Mr. Ronnie Marcovici and Mr. Lokesh

5 Kumar had signed the contract referred to above which had the effect of binding it. The defendant is said to have immediately on 9th March 2018 notified Lokesh Kumar halt any action relating to the contract on the basis that it had not been authorized and therefore invalid.

Mr. Lokesh Kumar then wrote to Mr. Ronnie Marcovici about the directions he had
10 received from the defendant company. Mr. Ronnie Marcovici, a representative of the plaintiff company insisted that the contract was valid and bound both parties and that the action of the defendant in obstructing its performance by halting activities related it and then later awarding it to a Kenyan mining company was illegal for breached the contract between the plaintiff and the defendant.

15 The defendant maintained its position and so the plaintiff being aggrieved wit the action of the defendant filed this instant suit against the defendant before this court for a declaration that the defendant's act was breach of a valid contract and warranting this court to award against it general and aggravated damages, interest on the damages at 25% per annum and costs of the suit.

20 The defendant denied that it breached any contract alluding to the fact that it could not have done so for it never entered any with the plaintiff given that Mr. Lokesh Kumar who allegedly signed the contract on its behalf was neither its

- 5 employee nor its director but was an employee of National Cement Company Limited of Kenya based in Nairobi, Kenya which was a different entity yet for it was known as the National Cement Company Uganda Limited incorporated in Uganda and based in Kampala, Uganda and does all its business in Uganda with the said Lokesh Kumar having no authority to sign any contract on its behalf at all.
- 10 The dispute being as above was thus set for trial by this court.

3. Representation:

- Mr. Geoffrey Ojok Odur and Mr. Derrick Bazekuketta of Ms. Gem Advocates (Formerly Geoffrey Ojok & Co Advocates, Kampala, Uganda) represented the Plaintiff while Ms. Sharon Tem of Ms. Tem Advocates, also of Kampala, Uganda
- 15 represented the Defendant.

- Counsels representing both sides ably presented witnesses, a number of documents and made written submissions with pointed authorities in respect of this matter. The testimonies of the witnesses, the documents and authorities relied are on record and have been considered in determining the instant dispute
- 20 between the parties.

5 **4. Witnesses:**

The Plaintiff presented the evidence of one witness called Mr. Ronnie Marcovici (PW1) in support of its case and similarly the defence presented the evidence of only Dr. Narendra Ramesh Raval Kumar alias Guru (DW1).

5. Issues:

10 During the scheduling of the suit the following issues were framed by parties.

a) Whether the parties entered into a valid contract?

b) whether there was breach of contract?

c) whether the parties are entitled to any remedy

5. Parties Case and prayers:

15 a. **The Validity of the Contract entered into between Ronnie Marcovici and Lokesh Kumar:**

On whether the plaintiff and the defendant entered into a valid contract, it was the plaintiff's case that the parties did execute a valid on the 16th day of September 2017 for the contract contained all the elements of a valid contract provided for

20 Section 10 of the Contract Act 2010 which provides that;

5 **Section 10 (1) of the Contract Act:**

"A contract is 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."

To prove its case the plaintiff referred court to the evidence of Ronnie Marcovici
10 who testified in court that after making contact with Lokesh Kumar, they met in
Nairobi, Kenya and executed a binding contract on behalf of the Defendant
company for Lokesh Kumar was representing the defendant and even copied
several e-mails between both to one Dr. Narendra Ramesh Raval Kumar alias Guru
(DW1) who is the director and shareholder of the defendant company who neither
15 stopped the further entering into the contract nor stopped the dealing on the basis
that Lokesh Kumar was not an employee nor represented the defendant.

To back up its case the plaintiff pointed out that Section 50 and 53 of the Companies
Act 2012 allows a company to contract with others by the execution of an
agreement under its seal with a person is acting under its authority which action
20 when carried out would not require a person dealing with such a company to
inquire into the internal management of the company he or she is dealing with for
that would mean delving into the indoor management of another party which the

5 plaintiff was not required to undertake given the internal management of a company rule principle.

To prove its case further , the plaintiff the pointed out that since negotiations were held between its officer Ronnie Marcovici and Lokesh Kumar who was an officer of the defendant which negotiations subsequently led to the execution of contract
10 between the parties which process did not only involve both physical relations and email correspondences but the bringing on board a one Dr. Raval Narendrakumar Rameshchandra (DW1), the Managing Director of the Defendant's company also known as Guru which fact was admitted by this witness during cross examination that indeed copies of all emails communications between the Ronnie Marcovici ,
15 the plaintiff's representative and Lokesh Kumar , the defendant's representative were indeed sent to him. This admission, it was pointed out by the plaintiff, was further cemented by the fact that even Article 49 of the defendant's Article of Association conferred the management and control of the defendant company on DW1 in addition to the stamp used on the contract Exhibit PExh.1 which was the
20 defendant's though DW1 tried alluded to the fact that it was merely a stamp and not the seal of the company which point should be disregarded for as was pointed out in the case of *Habre International(K) LTD vs Hajji M. Maggid Bagalaliwo & Anor HCCS No.468 of 2006* a valid contract could be suitably proved irrespective

5 of the type of seal used with the type of writing embarked on only being matters within the domain of the internal management of a company to which a party relying on it could not inquire into their validity and legality. Thus given the fact that defendant's director (DW1) was actively involved in the negotiations and even met the plaintiff's director in Kenya and was copied in all email correspondences
10 which led later to the execution of the contract between the plaintiff's agent and the defendant's agent, the plaintiff company urged this court to find that the defendant was estopped by DW1's conduct from denying the existence of the contract per Section 114 of the Evidence Act 6 because DW1's actions acquiesced to and was authority to Mr. Lokesh Kumar to negotiate and execute the contract
15 on the behalf of the defendant company and if there were any irregularity in the negotiation and the final signing the contract then that should not affect the outcome of the transaction for indeed a valid contract was signed contract which this court should find so with the only issue left for this court to delve into being the denial by the defendant that Lokesh Kumar was neither an employee nor a
20 director of the defendant company which issue is neither here nor there for this very same reason was raised even by the Defendant in **National Cement Co.(U) Ltd vs 2M Capital Ltd HCMA No.772 of 2020 at page 12) HCMA No. 772 of 2020** which this Court ruled upon on 1st day October of 2020 when it held that where a person

5 appears to act on behalf of a company then it was not for another party to look any further into the internal management of the other to inquire into the in-house management procedures of the other party which ruling benefited the plaintiff. That being the case, it was argued the only question left to be investigated by court would be whether the dispute between the parties was now *res judicata* in terms
10 of the provision of **Section 7 of the Civil Procedure Act, Cap 71** which provides thus;

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try
15 the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.”***

And in relations to the above provisions of the law, the plaintiff urged this court to find the issue of *res judicata* had been resolved by this court when it pronounced itself in ***National Cement Co.(U) Ltd vs 2M Capital Ltd HCMA No.772 of 2020 at
20 page 12) HCMA No. 772 of 2020*** and so there should be no further inquiry the matter since it was now *res judicata* given the fact that this court had already found out that where a person appears to act on behalf of a company it was not for a

5 plaintiff to look further into the internal management of another party to inquire about its in-house management procedures by the provision of Section 7 of the Civil Procedure Act (above).

The defendant on the other hand urged this court to find that indeed no valid contract was executed between it and the plaintiff given that the person who
10 allegedly executed it, that is, Mr. Lokesh Kumar, was neither its employee nor a director and had no authority to bind the defendant to a contract which was negotiated and signed in Nairobi, Kenya in the offices of National Cement Company Limited (Kenya) which was outside the jurisdiction of Uganda and which is a separate entity to the defendant which fact was confirmed by Ronnie Marcovici
15 (PW1) and was signed with a person who was neither authorised or an employee of the defendant with that particular action being in contravention of Sections 57(1) and (2) of the Companies Act which provides that;

***(1) a company may, by writing under its common seal or signature by a person acting under its authority empowers any person either generally or
20 in respect of any specified matters as its attorney, to execute deeds on its behalf in any place not situated.***

5 ***(2) a deed signed by an attorney under subsection (1) on behalf of the
company and under his or her seal shall bind the company and have the
same effect as if it were under the common seal or the company.***

In addition to the above , it was the defendant's case that the alleged contract
executed outside the jurisdiction of Uganda , an act which would require a specific
10 power of attorney to show that the person claiming to have authority or to be an
authorized signatory for the defendant company was governed under the Ugandan
Companies Act yet this was not the case in the instant matter for even during the
trial of the case witnesses agreed that there was no express authority from the
defendant to Mr. Lokesh Kumar to do what he did in addition to his having no
15 defendant company board resolution authorising him to act on behalf of it as is
provided for by **Section 50 (1) (a) of the Companies Act** which states that a
company may make a contract, by execution under its seal or on behalf of the
company, by a person acting under its authority, express or implied with the
alluded contract being unknown to the defendant for in the instant matter even
20 the stamp and or seal affixed on the contract was not even close to that of the
defendant.

5 Furthermore, the defendant urged this court to find that the alleged contract was invalid for as was confirmed by Mr. Ronnie Marcovici (PW1) during cross examination and also corroborated by Exhibit PE1 (the alleged contract), the same was signed between Ronnie Marcovici and Mr. Lokesh Kumar only with no witnesses present.

10 Additionally, Exhibit D2 at pages 5 and 6 (The Memorandum and Article of Association of the defendant company) shows the shareholders of National Cement Company of Uganda Limited as being Mr. Narendrakumar Rameshchandra Raval and Mrs. Neeta Narendra Raval , both of P.O Box Tororo, Uganda with each holding 51 and 49 shares in the said company with Mr. Lokesh Kumar not
15 mentioned at all as a shareholder and not minutes of the meeting of the shareholders appointing him either as a director in or an employee of the defendant company which would give him authority to sign the alleged contract. In any case, even if he was a director and did the said contract, he would by virtue of the holding in the case of *Nabro Properties Ltd Vs Sky Structures Ltd & Ors. Civil*
20 *Appeal No. 175 of 2000* where it was pointed by court that for a contract on behalf of a company to be valid it must be executed by two directors as is even indicated in paragraph 47 and 51 of the defendant company Memorandum and Articles of Association which provides for the use of power of attorney and the requirement

5 that all deeds on behalf of the company be signed by a director and countersigned
by the Secretary or by a second director which in the instant case of the alleged
contract was never done meaning that the contract was incapable of being
enforced.

Furthermore, the defendant urged court to find that the contract never existed in
10 law and was therefore a nullity since it was never sealed with defendant's company
seal as required by paragraph 51 of the defendant company Memorandum and
Articles of Association but merely endorsed by a rubber stamp which would render
a nullity such a document for it did not only conform with the agreed company
position but was contrary the provisions section 113 of the Companies Act 2012
15 which provides that the seal of a company may only be used by the authority of the
directors or of a committee of the directors authorised by the directors for that
purpose and that every instrument to which the seal is affixed shall be signed by a
director and shall be countersigned by the secretary or by a second director or by
some other person appointed by the directors for the purpose meaning that the
20 since the alleged contract was embossed by a stamp and not a seal is required by
the provisions of section 113 of the Companies Act and paragraph 51 of the
defendant company Memorandum and Articles of Association law then it would
mean that the alleged contract was invalid which this court should find so for it in

5 addition contravened the provisions of Section 10 of the Contract Act which was well expounded in the case of *Green Boat Entertainment Ltd Vs City Council of Kampala HCCS No 580 of 2003 UG. Comm. Cases 2007 (27 February 2007)* that for a contract to be valid it must be made with the free consent of the parties who have the capacity to contract for a lawful consideration and with a lawful object to
10 legally bind each other and with *consensus ad idem* which elements would then make such an agreement enforceable by law but are lacking in the contract signed between Ronnie Marcovici and Lokesh Kumar meaning that the same is invalid which the court should find so.

b. Breach of the contract:

15 On the issue of whether there was a breach of contract, it was the plaintiff's case that the Defendant breached the contract between it with the plaintiff when it stopped the plaintiff from performing its duties under the contract but instead went on to award a similar contract to another company thus failing the plaintiff company from performing its duties under the contract thus the defendant
20 breaching the said contract as pointed out in the case of **SBI International Holdings (U) LTD vs COF International Co. LTD CACA 194 Of 2014 Page 7** where it was held that breach of contract occurs by a party failing to perform any term of a contract,

5 written or oral, without a legitimate legal excuse. In proof of this fact, the plaintiff
alluded to the evidence of Ronnie Marcovici (PW1) who informed court that after
the signing of the contract with Mr. Lokesh Kumar, the defendant company wrote
to the plaintiff via e-mails asking the plaintiff to first halt any activities relating to
the said contract and was to only wait for further instructions which instructions
10 took a very long time to come forcing Ronnie Marcovici (PW1) to seek clarification
from Dr. Narendra Ramesh Raval Kumar alias Guru (DW1) as to when the contract
would commence to only to be told instead that the Defendant company board had
given the said contract to a Kenyan mining contractor as evidenced by email
correspondences with Lokesh Kumar and the minutes of the Defendant's board
15 resolution in support of this position, therefore, arising from the action of the
defendant, the plaintiff asked court to find that indeed there was a breach of
contract.

The defendant company on the other hand through the testimony of Dr. Narendra
Ramesh Raval Kumar alias Guru (DW1) asked court to ignore the contentions of
20 the plaintiff insisting that no breach of any contract occurred given the fact that the
defendant company did not at all sign any contract as alleged signed given that
Lokesh Kumar had no company authority to do so given that he was neither a
director nor an employee of the defendant company but was an employee and or

5 director of a different legal entity altogether as proven by Exhibits PE2 and PE3
which showed that Lokesh Kumar was a Commercial Director of National Cement
(Kenya) Ltd, located off Mombasa Road opposite Lukenya Hills in Nairobi yet the
defendant company was known as National Cement Company Uganda Limited, a
Ugandan company with its head office based in Industrial Area of Kampala in
10 Uganda and with its factory in Tororo even though the plaintiff tried to connect the
defendant by virtue of a misconception that since some emails were copied to Dr.
Narendra Ramesh Raval Kumar alias Guru (DW1) then that could validate the
contract ignoring the fact of the said DW1 being a director in the Kenyan and the
defendant company which facts the court should find in the favour of the
15 defendant as signifying the non breach of any contract.

c. Remedies:

The plaintiff sought for reliefs as against the defendant which included the
following;

- i. A declaration that the defendant's acts amount to breach of contract.
- 20 ii. General and aggravated damages.
- iii. Interest at the rate of 25% per annum.

5 In making the its case for the remedies listed above, the plaintiff urged this
honourable court to find that it had proved that a valid contract existed between it
and the defendant which was breached by the defendant and thus the plaintiff was
entitled to damages for which the court should be guided by the principle of
restitutio in integrum which means that the law will endeavour so far as the money
10 can do to place the injured person in the same situation as if the contract had been
performed as was pointed out in the case of ***Simon Mbalire vs. Moses Mukiibi HCCS
No. 85 of 1995*** which was cited with approval in ***Mwesigye Warren vs. Kiiza ben
HCCS No.320 of 2015*** at page 3 in addition to noting that as was pointed out in
Harry Sempa vs. Kambagambire David HCCS No. 408 of 2014 at page 4 while citing
15 ***Bank of Uganda vs. Fred William Masaba & Others SCCA No. 3 of 1998***, “ ... the
*general damages available for breach of contract are measured in a similar way as
loss due to personal injury. You should look into the future so as to forecast what
should have been likely to happen if he never entered into the contract...*”

Given that general damages is presumed by the law to be the direct natural
20 probable consequence of the act complained of with the court, while quantifying
damages would bear in mind the fact that the plaintiff must be put in the position
he would have been in had he not suffered the wrong with the basic measure being

5 restitution as was held in the case of **Robert Coussens v Attorney General SCCA No. 8 of 1999** at page 5.

To support this position, the plaintiff pointed to the evidence of Ronnie Marcovici (PW1) who stated that in anticipation of performing the contract, the plaintiff made preparations and mobilised equipment and other machinery and further secured
10 materials to commence supply to the defendant in addition to entering into arrangements with bankers to get finances to meet financial requirements for the supply of raw materials to the defendant in addition to going to the extent of terminating its contract with its longtime client, Hima cement Ltd so as to give full attention to the contract with the defendant since the process of mining pozzolana
15 was capital intensive.

Arising from the foregoing and given that the plaintiff had incurred expenses and suffered inconveniences in preparation for performance of the contract which resulted in great loss the plaintiff thus sought compensation since it was able to, ready and willing to supply the defendant with 1,100 metric tonnes per day at a
20 price of USD 12 which would result in its earning USD 4,752,000 per year which evidence was unchallenged and is presumed accepted as was held in the case of **Womoli Denis v Uganda HCCA No. 18 of 2020** at page 8.

5 Additionally, the plaintiff urged court to consider grant to it special damages which according to its director PW1 given that the said director is said to have travelled from Kampala, Uganda to Nairobi, Kenya three times to meet the defendant's Managing Director which travels involve expenses such as transport and accommodation.

10 Given all the above, it was the case of the plaintiff that since the contract was to run for five (5) years, the court should award it general damages amounting to USD 23,760,000 being the amount it could have earned in the five (5) years.

The defendant case was that the plaintiff had miserably failed to prove their case on a balance of probabilities as it was incumbent to discharge that burden of proof
15 that it had a valid contract and so given that position it was not at all entitled to the remedies prayed for under the plaint.

3.2 Following the case of Easo Standard Vs. Semu Amanu Opio SCCA No.3 of 1993
It therefore follows that for this court to award the plaintiff punitive damages, the defendant must have committed an act that necessitates the court to impose
20 damages as a form of punishment.

5 3.3 Considering the weak case that has been presented by the plaintiff and its witness, it's impossible for a reasonable person to suggest that that this court awards the plaintiff punitive damages.

In respect of this position, the defendant pointed out that it is trite law that damages are the direct probable consequences of the act complained of as was
10 noted in the case of *Storms Vs. Hutchison [1905] AC 515* and that such consequences could be loss of profit, physical inconvenience, and suffering as was held in the case of *Assist (U) Ltd Vs. Italian Asphalt & Haulage & Anor, HCCS No. 1291 of 1999* at 35.

Relating the above position of the courts to the instant matter, the defendant urged
15 this court to find that not only was any of the loss of profit, physical inconvenience, and suffering pleaded but no evidence was presented by the plaintiff in proof that any of the loss it incurred arose from the act of the defendant for as was pointed out by Butagira J in *Fulgensio Semako Vs. Edirisa Ssebuwawo [1979] HCB 15* in an action for damages there should be put before the court material which could
20 enable the court to arrive at a reasonable figure by way of damages which position is also well highlighted in *Halsbury's Laws of England 3rd Edition Volume 11* at page 268 where it is stated that "No damages are recoverable for any loss, injury

5 or damage which is not the direct, immediate or proximate consequence of the act
or omission complained of. Damage which is an indirect consequence is said to be
too remote....”

According to the defendant the plaintiff had failed miserably to provide any
evidence that any loss it suffered arose as a direct result of the defendant’s action
10 and was just demanding to be paid monies which was not backed by any evidence
and thus following the holding in the case of *Esso Standard Vs. Semu Amanu Opio*
SCCA No.3 of 1993 this court should not even award the plaintiff any punitive
damages since the defendant had not committed an act that necessitates the court
to impose damages as a form of punishment considering its weak case and the fact
15 that any loss suffered by it at all as a result of the nonperformance of an illegal
contract could not be attributed to the fault of the defendant and as such the
plaintiff claim for damages should be dismissed by this court accordingly.

d. Costs:

As regards the issue of costs, the plaintiff sought for costs arguing that since it had
20 proved its case as against the defendant then it was entitled to the same given that
the general rule in regards to costs was that costs follow the event as is provided
for under **Section 27 (2) of the Civil Procedure Act** unless a court for good reasons

5 would order otherwise which position was also confirmed in the case of ***Iyamuleme David vs. Attorney General SCCA No. 4 of 2013*** at page 1.

The defendant on the other hand urged this court to find and hold that the plaintiff was not entitled to any costs on the basis of ***Section 27 (1) of the Civil Procedure Act Cap.71*** which provides that “*subject to such conditions and limitations as may*
10 *be prescribed and to the provisions of any law for the time being in force, the costs of, and incident to all suits shall be in the discretion of the court or Judge and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid and to give all necessary directions for the purposes aforesaid*” on the basis that the plaintiff had not proved its case
15 against the defendant for as was noted Kanyeihamba, JSC while considering a similar position in the case of ***Impressa Infortunato Federici Vs. Irene Nabwire Supreme Court Civil Appeal No. 3 of 2000***, the Supreme Court while echoing the holding in ***Uganda Development Bank Vs Muganga Construction Co. Ltd [1981] HCB 35*** noted that; “*Under S.27 (1) costs should follow the event unless the court*
20 *orders otherwise. This provision gives the judge the discretion in awarding costs but this discretion has to exercised judicially.... that a successful party can only be denied costs if it is proved that but for his conduct, the action would not have been brought*”

5 Arising from the court's exhaustive consideration of the fact that a party must be successful for costs to be awarded and given that the plaintiff is not the successful party here then its claim for costs should be dismissed accordingly.

6. **Decision of Court:**

a. **Existence of a valid contract between the parties:**

10 i. **Burden of proof:**

In civil matters it is well settled that the burden of proof rests on a plaintiff who must adduce evidence to prove his or her case on the balance of probabilities if such a plaintiff is to obtain the relief sought before a court of law as is provided for under **Sections 101-103 of the Evidence Act, Cap 6;**

15 **Section 101. Burden of proof.**

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

20

Section 102. On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 103. Burden of proof as to particular fact.

10 *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

The above legal position was expounded by Lord Denning in ***Miller vs Minister of Pensions [1947]2 ALL. ER 372*** at page 373.

15 Burden of proof is thus an obligation by a party to support a contention by presenting adequate evidence. The term is a translation of the Latin *onus probandi* and was used in English courts of law from the late sixteenth century onwards was transferred to any situation in which there was an obligation to prove something, it then became a cliché in the nineteenth century.

5 Legally the burden of proof is a duty placed upon a civil or criminal defendant to
prove or disprove a disputed fact. In civil cases, the plaintiff is normally charged
with the burden of proof, but the defendant can be required to establish certain
defenses. Burden of proof can also define the burden of persuasion or the quantum
of proof by which the party with the burden of proof must establish or refute a
10 disputed factual issue.

See: <https://legal-dictionary.thefreedictionary.com/burden+of+proof>

b. Legal Contract:

The basis of the claim by the plaintiff against the defendant is breach of a contract.
To be a legal contract, an agreement must have all of the following five
15 characteristics:

i. Legal purpose:

A contract must have a lawful purpose to be enforceable. For example, if one
business partner contracted someone to kill another business partner, but the
person took the money without fulfilling the contract, there is nothing that can be
20 done. A contract of murder for hire is illegal and the contract is unenforceable.

5 ii. **Mutual agreement:**

All parties to the contract must have reached an agreement. That is, one party must have extended an offer to which the other parties have agreed. The contract outlines the scope of the work to be performed which must be mutually agreed.

iii. **Consideration:**

10 Each party to the contract must agree to give up something of value in exchange for a benefit. For example, you hire an independent contractor to repave your driveway. You and the paving contractor sign an agreement in which you promise to pay a sum of money in exchange for the paving work. Both you and the contractor have agreed to give up something of value. You have agreed to pay
15 money, and the contractor has agreed to perform the paving work.

iv. **Competent parties:**

The parties to a contract must be competent. That is, they must be of sound mind, of legal age, and unencumbered by drugs or alcohol. If you enter into a contract with a person who is not competent, the contract cannot be enforced.

20

5 v. **Genuine assent:**

All parties must engage in the agreement freely. A contract may not be enforced if one or more parties have made mistakes. Likewise, a contract may be voided if one party has committed fraud or exerted undue influence over another. For example, you sign a contract in which you agree to sell your house to your next-door
10 neighbor for Ug. Shs. 1. When you signed the contract, your neighbor was threatening you. Clearly, you made the agreement under duress, so the contract is not valid.

The basis of the instant suit is **Breach of Contract** which refers to the non-compliance or violation of an agreement or a contract. The breach of a contract
15 occurs when one of the involved parties does not fulfil the terms specified in the legally binding document that they signed. The act of breach of contract gives rise to a legal cause of action and a type of civil wrong, in which a binding agreement or bargained for exchange is not honored by one or more of the parties to the contract by the nonperformance or interference with the other party's
20 performance.

A breach occurs when a party to a contract fails to fulfill its obligation(s), whether partially or wholly, as described in the contract, or communicates an intent to fail

5 the obligation or otherwise appears not to be able to perform its obligation under the contract.

If one party breaches a contract, the other party may suffer a financial loss. One has several options for obtaining compensation and these could be:

i. **Sue for damages:**

10 You may file a lawsuit against the contractor for damages. For example, you might sue for the cost of hiring another contractor to finish a job which was uncompleted by another contractor plus the costs you have incurred due to the delay.

ii. **Specific performance:**

You can compel the contractor to complete the work required by the contract.

15 iii. **Other remedies:**

If the contractor tricked or forced you into signing the contract, you might convince a court to terminate the agreement or amend its terms.

Most contracts end when both parties have fulfilled their contractual obligations, but it is not uncommon for one party to fail to completely fulfill their end of the contract agreement. Breach of contract is one of the most common reasons
20 contract disputes are brought to court for resolution.

5 In Uganda contract law is governed by the Contract Act of 2010. Before this law was legislated properly in its present form there were two types of court action under the summons system. The Summons of debt- this is where a claim could be brought to court for payment of money or delivery of goods.

The plaintiff herein relied on **Section 10 (1)** of the **Contracts Act 2010** to bring its
10 claim against the defendant. **Section 10 (1)** of **Contracts Act 2010** defines a contract 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"

15 The plaintiff led evidence of one witness and adduced several documents in support to show that a contract executed by the parties. That a contract was executed is not in dispute. What is in dispute is whether the parties which are corporate bodies through representatives made a binding contract. In this case, the defendant disabuses the fact that a third party who is Mr. Lokesh Kumar had its
20 authority to sign a binding contract between it and the plaintiff given that the defendant is a corporate legal entity incorporated under The Companies Act of

5 Uganda with contracts made by companies provided for under Section 50 (1) of the aforesaid law which for avoidance of doubt I reproduce here.

Section 50 (1) of The Companies Act

"A company may make a contract, by execution under its seal or on behalf of the company, by a person acting under its authority, express or implied"

10 **Section 50 (2) of the Companies Act** makes provisions of how and who can make contracts on behalf of a company. It states as follows;

Section 50(2) of the Companies Act

"Contracts on behalf of a company may be made as follows;

15 a) A contract which if made between private persons would by law be required to be in writing, signed by the parties to be charged with, may be made on behalf of the company in writing executed by any person acting under its authority, express or implied."

The fact of how a contract and by whom can be made on behalf of a company was thoroughly reflected in the case of **Arinaitwe vs Africana Clays Ltd Civil Suit No.376**
20 **of 2013** for in there the court while referring to the ruling in **Royal British Bank vs**

5 **Turquand [1856] 6 E & B 327** went on to point that even if no resolution is passed by a company, a company was nevertheless bound by the act of its directors.

The plaintiff herein asserts that a contract was executed between it and the defendant alludes to the fact that this position was already resolved by this court and thus was *res judicata* per the provisions of Section 7 of the Civil Procedure Act, 10 Cap 71 which bars any court from trying an issue that has been previously determined by the same parties. Section 7 of the Civil Procedure Act provides that matters that have been directly and substantially in issue should not be litigated upon in another suit between the same parties. That contention is based on this court's ruling in **Miscellaneous Application No. 772 of 2020** Mr. Lokesh Kumar had 15 the authority to bind the company if he was employed by the instant defendant given that a director of the defendant, one, Mr. Narendrakumar was in the know of the transaction between the plaintiff and the defendant and by his action possibly acquiesced to it given that Section 53 of the Company Act provides that a party is not bound to inquire whether a party to a contract who present himself / 20 herself as representing the company was authorized by the company or was limited in action thus amplification of the indoor management rule which was well articulated in the case of **Royal British Bank vs Turquand's [1856] 6 E & B 327** with court in that case stating that "*... a party dealing with a company is bound to read*

5 *the company's deed of settlement (Memorandum of Association) but he is not to do more. It was noted that once a party reading company documents does not find any prohibition, and if the circumstances point to presence of authority, for example, by resolution, then he can rightfully infer that all actions taken are backed by the authority..."*

10 The analysis of the above scenario was carried out by court in the case of **Harriet Arinaitwe vs African Clays HCCS 376 of 2013**, with the court summarizing the principle and purpose in commercial transactions of the indoor management rule in **Turquand's case (supra)** as follows;

- A 3rd party dealing with a company has no access to the company's indoor
15 activities

- It would be very difficult to run a business if everyone who had dealings with the company's internal operations before engaging in any business with the company

- It would be very unfair to the company's creditors if their company could escape liability on the ground that its officials acted irregularly.

20 In the case of **Arinaitwe vs African Clays**, however, it was observed that a plaintiff only had the duty to inquire about the true directors of the company and a

5 resolution and that it was good practice to acquire signed resolutions, showing
authority to enter into a contract. A similar position was taken by court in ***Monitor
Publications vs Kampala Capital City Authority HCCS NO. 460 of 2015*** where the
court while referring to D.J Bakibinga's book titled **Company Law in Uganda** at page
124 went on to note that an individual director may bind the company in
10 transactions with outsiders on the basis of the application of the constructive
notice as articulated in the indoor management rule in addition to the writing at
page 126 of the same publication where it is stated that an officer of the company
who is held out by it as having authority to represent it will bind the company
irrespective of defective appointment or excess of authority, except in
15 circumstances where the outsider is well aware that the said officer is acting in
excess of his authority, and ii) under the circumstances, he is put on inquiry, or
where it is clear from the officer who is held out has no actual authority.

In the ***Monitor Publications case (supra)*** the court went on to find that the
defendant was bound by the acts of its officers who were its employees and who
20 were engaged the plaintiff to offer advertising space in its newspaper. There are,
however, exceptions and limitations to the indoor management rule given that in
the **Monitor Publications** case the court based its finds on the fact that the officers
in question were in fact employees of the defendant company.

5 Given the decision in the Monitor Publication case it would mean that a person dealing with a company is allowed to assume, in the absence of circumstances putting him on inquiry, that all matters of internal management and procedure have been properly complied with.

Relating the above position of the law to the instant matter it is not dispute that
10 both the plaintiff and the defendant are body corporate and therefore the indoor management rule would be applicable under the circumstances mentioned above. The bone of contention, however, between the parties before me is whether as testified to by Ronnie Marcovici (PW1) a valid contract was entered into between the plaintiff and the defendant on the basis that given the fact that meetings and
15 copies of emails were held and sent, respectively to Dr. Narendra Ramesh Raval Kumar alias Guru (DW1).

From the testimony of the witnesses from either side, several e-mail correspondences were exchanged between Mr. Lokesh Kumar and Mr. Roni Marcovici in which the details of the upcoming contract were discussed including
20 direct e-mail correspondences dated 7th March 2018 and 23rd January 2018, between Mr. Roni Marcovici (PW1) had a direct e-mail conversation with Dr.

5 Narendra Ramesh Raval Kumar alias Guru (DW1). These documents were not denied.

Even the fact that final contract Exhibit PEx. 1 bearing the defendant's company stamp tendered in support of the fact a contract between the plaintiff and the defendant was executed between Mr. Lokesh Kumar as the authorized signatory
10 on behalf of the defendant and Mr. Roni Marcovici on behalf of the plaintiff is not in dispute.

However, the question which arise is whether Mr. Lokesh Kumar was in the employment of the defendant company and whether he had authority to bind the defendant company in that respect.

15 The evidence of Dr. Narendra Ramesh Raval Kumar alias Guru (DW1) is that Mr. Lokesh Kumar is a commercial director employed by the National Cement Company of Kenya based in Kenya and that the defendant company known as the National Cement Company of Uganda was based in Kampala, Uganda with its factory in Tororo, Uganda and these two companies were separate legal entity in Uganda and
20 as such since Mr. Lokesh Kumar is a commercial director employed by the National Cement Company of Kenya based in Kenya and the defendant company was

5 incorporated in Uganda then the legal principle in *Salomon vs A Salomon & Co. Ltd* [1897] AC 22 that a company is a separate and distinct entity would come into play.

Dr. Narendra Ramesh Raval Kumar alias Guru (DW1) testified to the fact that Mr. Lokesh Kumar was a commercial director of the National Cement Company of Kenya with **Exhibit PEx.2** attesting so and was not either an employee or director
10 of the defendant company as demonstrated by **Exhibit DEx.1** (Certificate of Incorporation, **Exhibit DEx.2** (Form of Annual Return of a Company having a Share Capital) and **Exhibit DEx.4** (Articles and Memorandum of Association of National Cement Company Uganda Limited) then an any action of Mr. Lokesh Kumar could not bind the defendant given that he was of a different legal entity unless steps
15 had been taken under section 57 of the Companies Act to appoint him to act on behalf of the defendant company as an attorney whereas not, meaning that the contract signed by him could not bind the defendant company.

I would agree with this position for the import of the provisions of Sections 57(1) of the Companies Act of Uganda provides that a company may, by writing under its
20 common seal or signature by a person acting under its authority, empower any person either generally or in respect of any specified matters as its attorney, **(emphasis added)** to execute deeds on its behalf in any place not situated within

5 the jurisdiction of that company with such a deed signed by an attorney on behalf of the company and under his or her seal binding the company and have the same effect as if it were under the common seal or the company.

In the instant case, no such power of attorney was produced to show that Mr. Lokesh Kumar had the powers to execute a contract on behalf of the defendant
10 company even if several copies of emails whether direct were copied to one of the directors of the defendant company. Those acts cannot and would not validate legally the fact that Mr. Lokesh Kumar had no authority to act as he did on behalf of the defendant company for although section 57 of the Companies Act is not required to validate a contract that has been signed outside of Uganda, it could be
15 used as proof that the person who executed the contract on behalf of a company had the authority to do so and to bind the company. This was not done leaving the acts of Mr. Lokesh Kumar to be one of a lone bullet without a gun.

This is in addition to the fact that even the contract document itself bore a stamp of the defendant company whereas section 50 (1) of the Companies Act requires
20 that a company could execute a contract under its seal or on its behalf by a person acting under its authority, express or implied which requirements were never shown to have been complied with since Mr. Lokesh Kumar did not have the

5 requisite authority to act execute the contract by seal or on behalf of the defendant company given that Section 10 (1) of Contracts Act 2010 defines a contract 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***”

10 It is also important to note that the canons of a valid contract are well specified in law and these include capacity to contract, intention to contract, *consensus ad idem*, valuable consideration, legality of purpose and sufficient terms of a contract as was pointed out in the case of ***Ebbzworld Limited and Another vs Tonny Rutakirwa HCCS No. 398 of 2013***. If any of these elements are missing then there
15 can never in law be a valid contract and in my view given the fact that Mr. Lokesh Kumar did not have the authority to sign the contract on behalf of the defendant, then the document he signed with Mr. Ronnie Marcovici (PW1) remained extraneous.

Given the above clear finding that the principles of the law relating who, when and
20 how a contract can be signed on behalf of a corporate entity which principles are lacking herein, it is finding and conclusion that no valid contract was executed and

5 is existing between the plaintiff company and the defendant company. This issue is thus resolved in the negative.

c. Breach of the contract:

Breach of contract is defined in **Black's Law Dictionary 8th page 202** as a violation by failing to perform one's promise, by repudiating it or by interfering with another
10 party's performance".

Further in the case of ***Nakana Trading Co. Ltd vs Coffee Marketing Board Civil Suit No.137 of 1991*** the court went on to define a breach of contract as where one or both parties fails to fulfill the obligations imposed by the terms of the contract.

In the present case, the evidence adduced by the plaintiff is that there was a
15 contract for supply of 700-1100 metric tonnes of crushed pozzolana between plaintiff and the defendant which was entered into on the 16th September, 2017. The said contract was to run for a period of 5 years starting from 7th April 2018 which was not to be for the defendant company not only stopped the plaintiff from executing the contract but gave away the same contract to another company.

20

5 I have already made a finding that there was no valid contract between the plaintiff and defendant and thus I would not wish to delve further into the same save for restating that as was pointed the case of **Mogas (U) Ltd vs Benzina HCCS No. 88 of 2013**, the court in Mogas case while citing the case of **Stanbic Bank Uganda Limited vs Haji Yahaya Sekalega T/A Sekalega Enterprises High Court Civil Suit No. 185 of**
10 **2009**, pointed out that “ *a breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract as discharged or*
15 *seeking a discretionary remedy*’.

Given the fact no valid contract existed between the plaintiff company and the defendant I would find that the position in Mogas in relation of breach of a contract do not apply to the instant matter.

d. Remedies:

20 The plaintiff sought a number of remedies such as would apply to a party who is aggrieved upon the breach of a contract by another party to a valid contract such

5 as a declaration that the defendant's acts amount to breach of contract, general and aggravated damages and interest at the rate of 25% per annum.

The defendant pointed out that the plaintiff no proof on a balance of probabilities had been shown by the plaintiff that it is entitled to the remedies prayed for under the plaint as it is thus incumbent upon it to discharge the said burden of proof for
10 it is trite law that damages are the direct probable consequences of the act complained of as was noted in the case of **Storrs Vs. Hutchison [1905] AC 515**.
With **Halsbury's Laws of England** 3rd Edition volume 11 at page 268 providing that
"No damages are recoverable for any loss, injury or damage which is not the direct, immediate or proximate consequence of the act or omission complained of.
15 *Damage which is an indirect consequence is said to be too remote...."*

However, having found that there was no valid contract which existed between the plaintiff and defendant, I would decline to issue to the plaintiff any of reliefs for the reasons I have already specified above.

That being the case this suit fails on all limbs and would be dismissed with costs
20 against the plaintiff.

5 **7. Orders:**

The suit against the defendant is dismissed with costs to the defendant accordingly.

I so order.



10

Dr. Henry Peter Adonyo

Judge

30th March, 2021

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