

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT No. 0607 OF 2017

5 **MUGUMYA JULIUS** **PLAINTIFF**

VERSUS

10 **CHEN LIANREN** **DEFENDANT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

15 a. The plaintiff's claim;

The Plaintiff sued the defendant for recovery of a sum of shs. 135,941,500/= and a title deed. The plaintiff's claim is that he owed the defendant a sum of shs. 34,000,000/= As a means of settling that debt, it was agreed by way of a memorandum of understanding executed on 25th July, 2016 that the defendant would facilitate the plaintiff's payment of that debt by constituting the plaintiff into sole distributor of the defendant's products in the districts of Luwero, Nakasongola, Kayunga Mukono and Buikwe. Under that arrangement, the plaintiff was to earn a commission of shs. 1,000/= for every carton of water sold. As security for the performance of the contract, the plaintiff surrendered to the defendant, his title deed to land comprised in Busiro Block 347 plot 2544. The plaintiff duly performed his side of the bargain and garnered sales entitling him to a commission of shs. 169,941,500/= accumulated between November, 2016 and the termination of the contract on 17th July, 2017. In breach of that agreement, the defendant failed to pay an accumulated commission of shs. 135,941,500/= being the net balance after deduction of the plaintiff's debt of shs. 34,000,000/= The defendant further has refused to return the plaintiff's certificate of title, hence the suit

b. The defence to the claim;

In his written statement of defence, defendant denied the plaintiff's claim. The defendant averred instead that he signed a sales contract with the plaintiff by which they agreed to share the proceeds
5 of sale. During the performance of that contract, the defendant from time to time advanced cash to the plaintiff which was supposed to be offset from the plaintiff's earnings under the contract. At the time the suit was filed, the plaintiff owed the defendant a sum of shs. 40,922,200/= When the defendant presented the title deed for transfer into his name in accordance with the terms of the contract, it was rejected on ground that the land did not belong to the plaintiff, thus rendering the
10 security provided by the plaintiff ineffective. The plaintiff issued multiple cheques to the defendant all of which bounced on being presented for payment. The plaintiff further failed to account for shs. 11,322,000/= being proceeds of sales. The plaintiff still owes the defendant the sum of shs. 34,000,000/= The defendant thus counterclaimed for a total sum of shs. 86,244,200/= general damages for breach of contract, interest and costs.

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c. The issues to be decided;

In the parties' joint memorandum of scheduling, the following were framed as the issues to be decided by court.

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1. Whether the defendant breached the commission agreement between the parties.
 2. What remedies are available to the plaintiff?

d. The submissions of counsel for the plaintiff;

25 M/s S and L Advocates, counsel for the plaintiff submitted that the plaintiff adduced documentary evidence of the memorandum of understanding constituting the contract between the parties. To support his claim to the accumulated commission on sales made by the plaintiff under the contract, the plaintiff relies on exhibit P. Ex.8 which is a record of sales he kept, which was verified regularly by the defendant's manager. The plaintiff acknowledges the debt of shs. 34,000,000/= and when
30 that is deducted from the total outstanding commission of shs. 169,941,500/= it leaves an outstanding credit balance of shs. 135,941,500/= in favour of the plaintiff. The title deed to the

land comprised in Busiro Block 347 plot 2544 at Nalumunye was intended to serve as security for performance of the contract and since the plaintiff has discharged his obligations thereunder, the title deed ought to be returned to him. The plaintiff is therefore entitled to the reliefs sought.

5 e. The submissions of counsel for the defendants;

When the suit was called for hearing, the defendant and his counsel was not in court. The plaintiff was granted leave too proceed ex-parte whereupon the plaintiff called only on witness and closed its case. Consequently, counsel for the defendant did not present any final submissions.

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f. The decision;

1st issue; whether the defendant breached the commission agreement between the parties.

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

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. The plaintiff relies on a memorandum of understanding dated 25th July, 2016 (exhibit P. Ex.1). By that memorandum, the
25 plaintiff acknowledged indebtedness to the defendant in the sum of shs. 34,000,000/= The plaintiff undertook to be a distributor of the defendant's products as a means of servicing that debt. Hr further offered security in the form of a title deed to land comprised in Busiro Block 347 plot 2544 at Nalumunye. However, further perusal of the memorandum shows that it is silent on any commission payable on sales. It was the testimony of P.W.1 Mr. Mugumya Julius that the
30 commission was agreed upon orally.

According to section 92 of *The Evidence Act*, when the terms of any such contract have been proved, no evidence of any oral agreement or statement may be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. However, one of the exceptions is stated in sub-section (b) thereof as follows;

- (b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document

In the distributor-dealer relationship, the distributor acts as a middleman between a vendor supplier and dealers. The distribution contract defines the terms of the agreement, including the cost of the goods or the commission rate, the length of the contract, where the distributor may operate and other important details. One of the most important details in a distribution agreement is how the distributor will earn money, whether it's through commission related to selling the products or profits left after buying the products wholesale and then selling them for a profit. However the contract is set up, the contract should also detail what will happen with unpurchased inventory and if there are any minimum or maximum prices for which the distributor must sell the products.

In the instant case, it is clearly the intention of both parties that the plaintiff was to earn an income from the sole distributorship arrangement, from which earnings he would pay off the outstanding debt. The memorandum though is silent as to whether such earning was to be by way of a commission or selling at a profit. Such a provision can only be inserted by implication. When the parties to a bargain sufficiently defined to be a contract omit a term that is essential to a determination of their rights and duties, a term that is reasonable in the circumstances is supplied by the court. Material or essential terms may be implied by court in order to give rise to the deemed intentions of the contracting parties by way of validating the express terms. A term is implied in fact when it is implied into the contract in order to give effect to what is deemed by the court to be the unexpressed intention of the parties. The court will use the business efficacy test or the officious bystander test.

In every case in which it is said that some provision ought to be implied in an agreement, the question for the court is whether such a provision would spell out in express words what the agreement, read against the relevant background, would reasonably be understood to mean (see *Attorney-General of Belize v. Belize Telecom Ltd* [2009] 2 All ER 1127). The notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. This principle will apply even where the term to be implied is one that relates to the subject matter of the contract.

When the court adopts the business efficacy test, the term in question is considered essential to include in order to gain business efficacy within the contract (see *The Moorcock* (1889) 14 PD 64). When the court adopts the officious bystander test, the term left to be implied should be something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common “oh, of course!” (see *Southern Foundries (1926) Ltd v. Shirlaw* [1940] AC 701). The contract does not make business sense as a distributorship agreement without the term. I consider that in that instant case, providing for the plaintiff’s mode of income from the distributorship meets the requirements of the business efficacy test, in order to avoid a failure of consideration that the parties cannot as reasonable businessmen have intended. Guidance can be found from the decision in *United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera*, (2008) 10 SCC 404, where it was observed that:

An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves

It was the testimony of P.W.1 Mr. Mugumya Julius that the commission was agreed upon orally at the rate of shs. 1,000/= per carton. This is corroborated by a record he kept and which was

countersigned by the defendant's agent (exhibit P. Ex.8). The total outstanding commission by that record is shs. 169,941,500/= The plaintiff acknowledges the debt of shs. 34,000,000/= and when that is deducted from the total commission due, it leaves an outstanding credit balance of shs. 135,941,500/= in favour of the plaintiff. A breach occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. The defendant not having advanced a plausible reason for his failure to honour that obligation, this issue is answered in the affirmative.

2nd issue: what remedies are available to the plaintiff?

The defendant included what appears to be a counterclaim in his written statement of defence. But not having adduced any evidence in support thereof, that claim is dismissed with costs to the plaintiff. Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract. For that reason the plaintiff is entitled to recover the title deed that was given to the defendant as security for his due performance of his part of the agreement, the amount outstanding, interest thereon since the filing of the suit and the costs of the suit. Consequently, judgment is entered in favour of the plaintiff against the defendant in the following terms;

- a) Return forthwith of the title deed to land comprised in in Busiro Block 347 plot 2544 at Nalumunye.
- b) A sum of shs. 135,941,500/=
- c) Interest thereon at the rate of 20% per annum from the date of filing the suit, i.e. 3rd August, 2017 until payment in full.

Dated at Kampala this 20th day of May, 2021

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Stephen Mubiru
Judge,
20th May, 2021.