THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 564 OF 2014

DRATA ALIO JEANPAUL::PLAINTIFF

VERSUS

HYDRAHOMES (U) LTD::DEFENDANT

BEFORE: HON. JUSTICE CORNELIA KAKOOZA SABIITI

JUDGMENT

The plaintiff sued the defendant for recovery of USD $26,000 paid for the purchase of a Block Making Machine and costs of the suit.

The facts constituting the plaintiff's claim are that; on the 13th day of June, 2012, the plaintiff entered into a contract with the defendant for the purchase of a Block Making Machine (Hydrautec Block) worth USD 52,000 by the plaintiff. On the 15th day June 2014, the plaintiff paid half of the total amount to USD 26,000 on the defendant's Stanbic account 0240566774801 receipt of which the defendant acknowledged by issuing a receipt vide receipt no.15/06/2012. The defendant failed to deliver the machine to the plaintiff after payment of the said sum consequently the plaintiff used hired machines throughout the time of his work. The defendant upon several reminders and verbal communications has ignored or refused to deliver the machine and now the plaintiff seeks for the refund of his money.

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The defendant filed an amended written statement of defence and a counterclaim. In its defence, the defendant pleaded that it is not indebted to the plaintiff in the sum claimed. That sometime in June 2012, it entered into a purchase agreement for Hydrautec Block Making Machine with the plaintiff. That according to the agreement the plaintiff was supposed to pay a total sum of US $ 52,000 as the total cost of machine. That the plaintiff deposited US $ 26,000 as the installment for the value of the machine. That the defendant on several occasions informed the plaintiff to come, pay for and collect the ordered Hydrautec Block Making Machine from its offices but this was ignored by the plaintiff. That the defendant was supposed to hand over the said machine to the plaintiff upon payment of the balance of US $ 26,000 by the plaintiff and it has never been done by the plaintiff despite many reminders from the defendant. That the defendant in furtherance of the terms of the said agreement, it hired an M7 Twin with Crusher Machine to the plaintiff, which has never been returned, nor have the daily hire fees for the same been paid by the plaintiff. That the plaintiff is not entitled to all or any of the remedies sought in the plaint.

Under the counterclaim, the defendant contends that upon receipt of the pre-ordered Hydrautech Block Making Machine, it informed the respondent on several occasions to come and pick it from its offices, where it is still parked to date, and to pay the last installment of the purchase price but this was ignored by the respondent. That the respondent's machine has never been returned and its daily hire fees have never been paid despite the counter claimant's demand of the same. That the said actions of the counter-defendant constitute breach of contract, for which the counterclaimant prays for special and general damages. The counterclaimant pleaded particulars of the special damages and also prayed for general damages, punitive damages, order directing the counter-defendant to return the M7 Twin Block Making Machine that he hired, interest and costs of the suit.

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In reply to the written statement of defence and counter-claim, the plaintiff pleaded that the defendant has never informed him of the arrival of the new Hydrautec Block making machine. That the defendant to date has never availed him with the ordered machine despite repeated demands for the same. That he returned the hired M7 Twin Machine to the defendant in early February and paid the entire daily hire fees for the said machine. The plaintiff denied the claims in the counter-claim.

Representations.

The plaintiff/counter-defendant was represented by **Okecha Baranyanga & Co** and the defendant/counter-claimant by **Akampuriira & Partners Advocates and Legal Consultants.**

Proposed issues:

i) Whether the defendant breached the agreement of sale?
ii) Whether the plaintiff breached the agreement of sale?
iii) Whether the M7 Twin Block Machine was returned to the defendant?
iv) Whether the plaintiff paid the daily hire fees for the M7 Twin Block Making Machine from the defendant"?
v) What other remedies are available?

To prove his case, the plaintiff called Pw1 Grace Nuwagaba, Pw2 Muhamood Khalifa and Pw3 the plaintiff, on the other hand, the defendant called one witness to defend against the claims and prove its counterclaim. At closure of the defence's case, this court directed parties to file their submissions in the timelines provided. Both parties have their submissions on file.

Resolution of the issues.

Issue 1: whether the defendant breached the agreement of sale?

Counsel for the plaintiff submitted on the prerequisites of a valid and enforceable contract cited the case of **William Kasozi Vs DFCU Ltd HCCS No. 1326 of 2000**; where it was held that "*once a contract is valid; it creates reciprocal rights and obligations between the parties to it. I think it is law that when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation, the party signing it is bound by its terms.* " counsel continued to state that breach of contract is the breaking of the obligation which a contract imposes on a party and this confers a right of action for damages on the injured party, counsel referred to the case of **Ronald Kasibante Vs Shell Uganda Ltd HCCS No. 542 of 2006.**

Counsel argued that when a party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy. That the plaintiff and defendant entered into an agreement for sale and purchase of Hydrautec Block making machine worth USD 52,000. The plaintiff was in immediate need, he made an initial deposit of USD 26,000 leaving a balance of $26,000 USD, to be paid later upon which the defendant would deliver the block machine to the plaintiff. That under **Section 2(4) of the Sale of Goods Act,** the contract was a mere agreement to sale because the property was to pass to the plaintiff later and the said machine was a future good in accordance to **Section 6(1) of the Sale of Goods Act**, the machine was to be acquired by the defendant after execution of the purchase contract.

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Counsel submitted that it was never the intention of the defendant to first receive the balance of the purchase price of the machine and then import the machine. That as per the plaintiff, the defendant was to import the machine prior to receiving the balance of the purchase price. That there was never any machine imported or intended to be delivered to the plaintiff and the defendant accordingly

defaulted on performance of the contract despite their express knowledge of the plaintiff's need to use the ordered machine as indicated under the agreement.

On the contrary, defendant counsel asserted that the plaintiff complied with clause 1 of the agreement but failed to comply with clause 2 and 3 of the Memorandum of understanding. That according to the testimony of Pw1 and Dw1, the plaintiff has never paid the balance of USD 26,000. The supply of the machine was upon payment of balance of USD 26,000. This was a condition precedent and failure to comply with this condition constitutes breach of contract on the part of the buyer. Counsel cited the case of **Cargo World Logistics Ltd Vs Royale Group Africa HC Commercial Division Civil Suit No. 157 of 2013.**

I have considered the argument by counsel. The plaintiff and defendant entered into an agreement that was rather simple and brief. It ran along these lines.

"Whereas Mr. Drata Alio Jean Paul is desirous of purchasing a block making machine worth USD 52,000 from Hydrahomes Ltd; considering that Mr. Drata is not in position to pay the whole amount at ago; further considering that despite these facts, Mr. Drata has immediate need to use the block making machine; two parties agreed thus;

i) *That Mr. Drata effects a deposit in 1 above of $26,000 for the new machine (Hydrautec Block Making Machine).*

ii) *That upon effecting the deposit in 1 above, Hydahomes Ltd releases a block making machine (M7 Twin with Crusher) to Mr. Drata for temporary use in the Democratic Republic of Congo on daily hire at $100 per day.*

iii) *That upon payment of the balance of $26,000 by Mr. Drata, Hydrahomes Ltd will deliver to him (CIP Kampala) the brand new Hydrautec Machine, upon which he will immediately return the M7 Twin Machine to Hydrahomes premises. Mr. Drata will then pay (in*

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arears) the daily hire fees stated in 2 above considering the duration he will have used the M7 Twin machine."

According to the evidence adduced, it is undisputed that the plaintiff and the defendant entered into a contract, where the plaintiff was to purchase a brand new Hydrautec block making machine worth $52,000 from the defendant. It is also not rebutted that the plaintiff made an initial deposit of $26,000 for the said new machine. It is further undisputed that the plaintiff hired another machine (M7 Twin with Crusher) for temporary use from the defendant. This implies that clauses (i) and (ii) of the parties' contract are not in issue.

Factual controversies in this suit mainly revolve around clause iii of the agreement.

That upon payment of the balance of $26,000 by Mr. Drata, Hydrahomes Ltd will deliver to him (CIP Kampala) the brand new Hydrautec Machine, upon which he will immediately return the M7 Twin Machine to Hydrahomes premises. Mr. Drata will then pay (in arears) the daily hire fees stated in 2 above considering the duration he will have used the M7 Twin machine."

A plan regard of the above term, the payment of $26,000 by the plaintiff preceded the delivery of the brand new Hydrautec Machine, however, a review of the evidence, there were further silent terms agreed upon by the parties in relation to the above. Pw1, the then manager of the defendant testified that; the defendant did not have the said machine but the same had to be imported, in the mean-time, the plaintiff would hire the M7 twin block making machine from the defendant for temporary use at USD 100 per day in DRC. That it was the understanding between the parties that upon importation and arrival of the new block machine, the defendant would inform the plaintiff to inspect and satisfy himself with the

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imported machine, complete payment on the new machine, takes the same and return the hired machine upon payment of the rent arrears.

Pw3 corroborated Pw1's statement and told court that the machine he had purchased was not available for viewing to satisfy himself whether indeed it was the machine of his specifications in order to pay the balance. That one of the officials of the defendant told him that the machine was still in voyage to Kampala and he would be contacted when it arrived so as to pay the balance and take the same. That he waited for the defendant to invite him to view the machine and also remined the defendant of the urgency to acquire the said machine but in vain.

Dw1, director to the defendant, does not dispute that the machine had to first be imported, but rather asserts that the defendant company imported the hydrautec block making machine for delivery to the plaintiff and immediately informed the plaintiff. That the defendant informed the plaintiff to pick the machine from its office where it is still parked but this was ignored by the plaintiff. During cross examination, he said that the machine was imported and delivery of the same was to the defendant's office. That he had no receipt for the purchase of the imported machine by the defendant and he had no evidence of the purchase of the same. That the delivery evidence of importation was also not available. That he communicated to the plaintiff physically and had no evidence of any writings to the plaintiff informing him.

Section 2(4) & (5) of Sales of Goods Act is to the effect that;

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4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition to be fulfilled later, the contract is called an agreement to sell.

(5) An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred.

The agreement in this instant case was one of an agreement to sell. In my view, it was an implied term in the contract that the defendant first imports the machine, have it at its premises, then upon seeing it the plaintiff pays the balance, that's when it is delivered. Upon this, the property in the machine would pass. An implied term is that in the eyes of either of the parties would obviously not need inclusion in the written terms of the contract because it is something that would be taken as obvious. **See: Pan Afric Impex (U) Ltd Vs Barclays Bank Ltd HCMA No.804-2007**, Justice Egonda Ntende cited the holding by of **Mackinnon L.J. in Shirlaw v Southern Foundries (1926) Ltd and Federated Foundries Ltd [1939](2) All ER 113 at page 124**, *"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying."*

The defendant did not dispute that he had an obligation to import the machine for the plaintiff to complete his payment. It in-fact contended that it imported the same but with no evidence of importation.

A review of the evidence, I am convinced that the property in the machine never passed to the plaintiff. The evidence adduced points to the fact that the defendant never imported the Hydrautec block machine for the plaintiff to complete his payment of the remaining $26,000. Breach of contract is violation of a contractual obligation, either by failing to perform one's own promise or by interfering with another party's obligation. **See: Blacks law dictionary, 7th Edition at page 182.** The defendant breached the contract.

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This issue is answered in affirmative.

Issue 2: Whether the plaintiff breached the agreement of sale?

Counsel strongly submitted that the plaintiff performed his obligations to the contract. That the plaintiff executed his obligation to pay the initial deposit of $26,000 on the purchase price. That when the plaintiff hired a block making machine, he made payments of the daily hire fee of $100, Pw1, the manager of the defendant banked the same on the defendant's account. That it was also confirmed by Pw1 that hydrautec block machine (M7 Twin with crusher) that was rented by the plaintiff for temporary use in DRC was returned into the control and ownership of the defendant. Counsel contended that, the plaintiff did not renege on his obligation but was merely frustrated by the defendant's failure to import the machine hence loss of business, reason and interest to purchase the machine.

On the other hand, counsel for defendant contented that the defendant counterclaims against the plaintiff for failure to pay the balance of USD 26,000 and the hiring charges for the second machine of USD 75,000. That the testimony of Pw1 was to the effect that the hiring charges have not been paid and confirmed by Dw1. The machine has never been returned to the defendant. That the contract in clause 2 was clear on fees for hire and failure of which constitutes a breach.

According to the contract between parties, given that the plaintiff urgently needed the Hydrautec block making machine, it was agreed that the plaintiff hires an M7 twin block making machine with a crusher from the defendant for temporary use at a rate of USD 100 per day for use in DRC till arrival of the machine he had purchased. These facts were undisputed by both parties. Dw1 testified that the machine hired by the plaintiff has never been returned by the plaintiff despite the defendant's demand for the same. That the plaintiff has not paid the daily hire fees for the M7 Twin Block Making Machine despite the defendant demanding the same. That the outstanding amount as daily hire fees for the machine from 1st

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July 2012 – 31st July 2014 is $75,400. This was the main controversy raised in defence's counterclaim.

Pw3, testified that Dw1 and Pw1 travelled to DRC to get business for the company but failed and Dw1 left DRC leaving the manager Pw1 to ensure that the machine he had hired is taken back to Kampala. That the manager Pw1 escorted the machine to Arua and a one Muhamood Khalifah returned the hired machines to the defendant and Heifer International respectively. He stated that he paid the entire hiring fees of the machine hired from the defendant. This testimony was corroborated by Pw1 who confirmed that the plaintiff gave her USD 7,500 as rent fees for the hired block making machine and she banked it on the defendant's bank account. That in early 2013, herself and Dw1 went to DRC to inspect on the machine, but Dw1 was not happy with the state of the machine so he instructed that the same be returned to the defendant's premises in Kampala.

That Pw1 and the plaintiff computed the amounts due and the plaintiff paid a further USD 4,200, which were received by Pw1 on behalf of the defendant. In Cross-examination Pw1 told court that she banked the USD 4,200 onto the defendant's account in Tropical bank but had no deposit slip. That the plaintiff transported the machines he hired from DRC to Kampala and while in voyage, she communicated with the defendant's employee who confirmed that the machine was delivered at a garage in Kibuli. Pw2, Muhamud Kalifa, a driver testified that he was contacted to deliver two machines from Arua to Kampala. That the plaintiff directed that one machine is delivered along Nakaseero Hill Road and the other in a garage in Kibuli next to Shell in the company of a turn man and the gentleman responsible for the machines. During re-examination he testifies that on reaching, the gentleman in charge of the machine called a woman and informed her and the woman directed they offload the machine.

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On analysis of the above evidence as a whole, I am convinced on a balance of probability that the machine M7 Twin with a crusher was delivered to the defendant, considering this was also confirmed by Pw1, the then manager for the defendant.

Regarding payment of the hired machine, on record, there is evidence (PEx4) of payment of USD 7500 dispatched to the defendant as was testified by Pw1 & Pw3. However, I have closely looked at the PEx5, acknowledgement of the balance of $ 4,200 received by Pw1, there is no indication that the money was dispatched to the defendant on the face of it. I am not convinced that it was paid to the defendant, also considering that during cross-examination it was brought out that Pw1 had resigned from working with the defendant at the time. To this end, the plaintiff is also in default of the car hire arrears to a tune of $ 4,200.

Issue: 3 and 4.

Counsel averred that, these issues have been answered in the affirmative while submitting on issue 2.

Issue 3 was that; whether the M7 Twin Block machine was returned to the defendant? I agree with plaintiff counsel, this issue was answered in affirmative in issue 2 above.

Issue 4 is that; whether the plaintiff paid the daily hire fees for the M7 Twin Block making machine hired from the defendant. As already determined under issue two, there is clear evidence of payment of USD 7,500 to the defendant but no evidence of payment of the balance of USD 4,200 as monies owed to the defendant as rent due from the time the plaintiff hired the machine to the time the machine was delivered back.

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Issue: what remedies are available to the parties?

i) Refund of $ 26,000 paid as the initial deposit on the purchase price.

Counsel submitted that **section 6(1) of the Contracts Act, 2010**, is to the effect that; where there is breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. Counsel also relied on the case of **Dies Vs British & International Mining (1939) 1KB 724 Stable** where it was held that *where there is a sale of goods and a part payment for the goods is made, but no goods are delivered or tendered by reason of the default of the buyer, the seller's only remedy is to recover damages for the default, while the buyer, not withstanding that it is only by reason of his default that the contract has not been performed, is entitled to recover the purchase price that he has paid, subject possibly to the right of the seller to set off against that claim the damages to which he can establish his title.*

In relation to the above, counsel contended that the plaintiff paid $26,000 on the machine and the defendant undertook to deliver, which it defaulted, it is only fair that the defendant returns the deposit of USD 26,000 to the plaintiff for the Hydrautec Block making machine he did not import.

It was undisputed that the plaintiff made an initial deposit of $26,000 on the Hydrautec machine out of its purchase price of $5,200, PEx2. **Denning L J in Stockloser vs Johnson (1954) I.A.E.R 630 at 637,** held thus:

"...if money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross claim by the seller for damages.....".

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In this case, the defendant being in breach, It is only just that it refunds the $26,000 to the plaintiff as the initial part payment of the machine that was never imported.

ii) General damages.

Counsel argued that the defendant was aware of the urgency with which the plaintiff required the machine, but six months later, the defendant had not imported the Hydrautec Block making machine. That eventually the work for which it was needed was finished and the plaintiff lost interest in acquiring the said machine. That the plaintiff suffered loss as he could not efficiently deliver on his obligations in DRC as the machine needed was never imported. The plaintiff seeks general damages for the loss, inconvenience and embarrassment before his clients. In support of his argument, counsel relied on the case of **Ewadra Emmanuel Vs Spencon Services Limited HCCS No. 22 of 2015.**

This Court is aware that *"in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered"*. See **Uganda Commercial bank Vs Kigozi [2002] 1 EA 305.** And that *"a plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the position he or she would have been if she or he had not suffered the wrong"*.

I note that the plaintiff never prayed for damages in his pleadings but this brought up in submissions, however, considering it is a matter on breach of contract, **Section 61 (1) of the Contracts Act** is borne in mind. The section empowers court to award compensation for any loss or damage caused to one party due to another's breach of contract. And in estimating the loss court has to consider the means of remedying the inconvenience caused by the non-performance of the contract that exist at the time. **S.61 (4) Contracts Act.**

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It has already been held by this Court that the Defendant breached the main term in the contract. From the onset, the urgency of plaintiff's need of the hydrautec machine was intimated in the contract, the plaintiff had to hire a machine to be used in a meantime as he waits for the importation. The plaintiff contended that due to the delay by the defendant, the purpose he needed the machines for was completed and he lost interest in the machine. That he suffered loss as he could not efficiently deliver his obligations in DRC for the machine he needed was never imported. The fact that the plaintiff has suffered inconvenience and loss as a result of the breach can be discerned from the fact that the Defendant never imported the machine and yet it was urgently needed for him to perform his duties.

For this reason, I find general damages of 20,000,000 (twenty million shillings) as sufficient in these circumstances.

iii) Interest.

Counsel submitted that according to **Black's Law Dictionary, 9th Edition P.887**, interest is allowed by law as compensation for delay in paying a fixed sum. Counsel also relied on **Section 26(2) of Civil Procedure Act**, That interest on both the refund of $26,000 and general damages from the date of judgment till full payment should be awarded.

The plaintiff only prayed for interest on the refund of USD 26,000. This interest was never agreed upon. Under S. **26 (1) of the Civil Procedure Act** where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. Refer also to the case of **Mohanlal Kakubhai Radia Vs Warid Telecom Ltd, HCCS 234/2011** where it was held in determining a just and reasonable rate, courts take into account *"the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time*

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one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due".

For this reason, Court will grant interest to the Plaintiff on the $26,000 at the rate of 5% per annum from the date of filing the suit until payment in full. Court takes into account the fact that the Defendant has kept the money of the Plaintiff since 2012.

iv) Costs of the suit.

According to Section 27(2) of the Civil Procedure Act, costs of any cause follow the event unless otherwise ordered by court.

Plaintiff being the successful party in this case is therefore entitled to costs of the suit and they are allowed.

The Defendant had sought for dismissal of the suit with costs and also put in a counter claim for breach of contract, special damages for the daily hire fees for the machines, general damages, punitive damages, interest and costs. However, the Defendant did not prove the special damages as required by law; he only stopped at mentioning the same in its pleading. And since he was in breach of the major term in the contract he is not entitled to general damages or costs either. The defendant is however entitled to a balance of $4,200 that the plaintiff failed to prove that they paid as rental arrears of the hired machine.

In the result, Judgment is entered for the plaintiff against the Defendant in the following terms:

1. The defendant refunds back USD 26,000 to the plaintiff.
2. Interest is awarded on the sum at the rate of 5% per annum from the date of filing the suit until payment in full.

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3. The Plaintiff is awarded general damages of Shs. 20,000,000/-

4. Costs of the suit are also awarded to the Plaintiff.

5. In relation to the counterclaim; the defendant is only entitled to USD 4,200 payable by the plaintiff. The parties are at liberty to off-set the same. No costs awarded to the counterclaimant.

It is so ordered.

CORNELIA KAKOOZA SABIITI
JUDGE

Date: 22nd April 2022