



**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**

**CS No. 191 of 2016**

**NAREN MEHTA.....PLAINTIFF**

**VERSUS**

**1. GIDS CONSULT LIMITED**

**2. BERNARD AHIMBISIBWE.....DEFENDANTS**

**BEFORE HON. MR. JUSTICE RICHARD WEJULI WABWIRE**

**JUDGMENT**

**A. BACKGROUND**

1. The Plaintiff's claim against the Defendants is for a declaration that the Defendants breached their contractual obligations, recovery of USD

250,000 that the Plaintiff paid to the Defendants, general damages, interest and costs of the suit.

2. In their written statement of defence, the Defendants denied the Plaintiff's claim and raised a preliminary objection that the Plaintiff has no cause of action against them.
3. On 1<sup>st</sup> July 2019 the parties orally agreed to terms of a consent judgment which were put on court record. However, the Defendants neither endorsed them nor honored them and as a result of which the matter was recalled.
4. The Plaintiff prayed for the matter to proceed ex parte following the Defendants' constant non-appearance despite being duly served and was granted leave of Court to do so.

## **B. REPRESENTATION**

5. The Plaintiff was represented by M/s TASKK Advocates while the Defendants were represented by M/s M.Mugimba & Co. Advocates. In their Joint Scheduling Memorandum, the Plaintiff agreed to the following issues for determination;
  - I. Whether the plaint discloses a cause of action?
  - II. Whether the Defendants breached the M.O.U dated the 29<sup>th</sup> day of July 2011?

III. Whether the Plaintiff is entitled to the reliefs sought?

### **C. DETERMINATION BY COURT**

I have carefully considered the Plaintiff's written submissions and evidence presented and find as follows;

#### **ISSUE 1: WHETHER THE PLAINT DISCLOSES A CAUSE OF ACTION?**

6. The Plaintiff submitted that the plaint discloses a cause of action. That the Plaintiff in his plaint states that he is entitled to recovery of USD 250,000 at a rate of 2% per month from the date of the termination of the agreement as agreed by the parties under the agreement dated the 1<sup>st</sup> day of June 2015. That under paragraphs 3, 4 and 5 of the Plaint is stated that the Plaintiff and Defendants entered into an undertaking on the 29<sup>th</sup> day of July 2011 for the conditional sale of Land comprised in plots 73 and 75 on 6<sup>th</sup> street industrial area for a consideration of USD 450,000. That the Parties agreed that the 1<sup>st</sup> Defendant, upon being offered the Land by U.L.C would execute a Sale of Land Agreement with the Plaintiff and after that effect a transfer of the Land into the Plaintiffs names.

7. The Plaintiff's Counsel further submitted that under the M.O.U and the Addenda the Plaintiff advanced a total sum of USD 250,000 to the Defendants. That the Defendants upon failing to fulfill their obligations

under the M.OU agreed under the Refund Agreement to refund the USD 250,000 paid by the Plaintiff within a period of 6 months at an interest rate of 2% per month. That in his examination in chief and in paragraphs 19 of his Witness Statement PW1 submitted that the Defendants to date had only paid a sum of USD 12,000 of the total principal amount of USD 250,000 with accrued interest and without justification has failed to pay the balance. That the Plaintiff had a right under the Refund Agreement to be refunded money paid to the Defendants under the M.O.U which right the Defendants have without justification violated.

8. A cause of action is defined as every fact which is material to be proved to enable the Plaintiff succeed or every fact which if denied, the Plaintiff must prove in order to obtain a judgment. (See; *Read vs. Brown* 22 QBD P.31). In the case of **AG Vs. Oluoch 1972 EA 392 at page 394**, Justice Oder (JSC) held that;

*“The question whether the plaint discloses a cause of action must be determined upon a perusal of the plaint alone together with anything attached so as to form part of it, and upon the assumption that any allegations or implied allegations of fact in it are true. This definition, in*

*my view, applies to complaints as well as to petitions, as pleadings for instituting court actions."*

9. **0.7 r.11 (a) of the Civil Procedure Rules** provides for the rejection of a claim where the statement of claim in the suit discloses no cause of action. In **Auto Garage vs Motokov (No. 3) [1971] E.A. 514, at p. 519** Spry V-P held as follows;

*"If a claim shows that a Plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed..."*

10. According to Paragraph 5 of the claim, on 1<sup>st</sup> June 2015 the parties executed an agreement in which the Defendants agreed to refund USD 250,000 effective 30<sup>th</sup> June 2015. This is stipulated under PEX4 which is guaranteed by the 2<sup>nd</sup> Defendant.

11. In Paragraph 6 of the claim, the Plaintiff stated that the Defendants have without any justification failed to fulfill their obligations under the agreement. From the claim, and its annexures it is clear that the Plaintiff was entitled to a refund of his \$250,000 from the Defendant. This right was violated by the Defendant when they without any justification failed to refund the said sums to the Plaintiff.

12. Therefore the plaint discloses a cause of action against the Defendants. Issue no.1 is answered in the affirmative.

**ISSUE 2: WHETHER THE DEFENDANTS BREACHED THE MEMORANDUM OF UNDERSTANDING DATED THE 29<sup>TH</sup> DAY OF JULY 2011?**

13. The Plaintiff's Counsel submitted that the Defendants breached the M.O.U where the parties had agreed that the Defendants would procure Land comprised in plots 73 and 75, 6<sup>th</sup> Street, Industrial Area by way of a Public-Private Partnership arrangement with the Ministry of Education through Uganda Land Commission and sell the Land to the Plaintiff. That pursuant to that, the Plaintiff agreed to pay a consideration of the sum of USD 450,000 to facilitate the process and cover the cost of the Land but the Defendants still failed to fulfil their obligation under the M.O.U. That this amounted to breach of contract as defined by the Contracts Act. That the parties also entered into a Refund agreement dated the 1<sup>st</sup> day of June 2015, wherein under the Recitals, the Defendants acknowledge that they had breached the M.O.U. dated the 29<sup>th</sup> day of July 2011 and agree to refund monies received from the Plaintiff. The Plaintiff also prayed for judgment on admission for the recovery of USD 250,000 against the Defendant less

USD 12,000 so far paid leaving an outstanding balance of USD 238,000 as testified by PW1 during the trial.

14. **S.10 of the 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. Evidently the Memorandum of Understanding dated the 29<sup>th</sup> day of July 2011 entered between the parties amounted to a contract. The question herein is whether that contract was breached.
15. **Section 33(1) of the Contracts Act of 2010** clearly states that the parties to a contract shall perform or offer to perform their respective promises, unless the performance is dispensed with.
16. **Black's Law Dictionary 8<sup>th</sup> Edition at page 200** defines breach of contract as a legal cause of action in which a binding agreement is not honored by a party to the contract by non-performance or interference with the other party's performance. This was further elaborated in the case of **Nakana Trading Co. Ltd versus Coffee Marketing Board, CS No. 137/1991** where court defined a breach of contract as where one of the parties fails to fulfil the obligations imposed by the terms of the contract.

17. According to PEX1 which is the Memorandum of Understanding dated 29<sup>th</sup> July 2011, the Plaintiff and Defendants entered into an agreement where they agreed as follows;
18. That at the date of executing the MOU, the 1<sup>st</sup> Defendant had secured a conditional No Objection from the Ministry of Education and Sports (MoES) subject to the 1<sup>st</sup> Defendant agreeing to re-roof a classroom block at Kyambogo College School and that upon obtaining the full No Objection from MoES, the 1<sup>st</sup> Defendant was to construct alternative suitable premises for MoES on Land to be provided by the U.L.C. or MoES. That upon being offered the Land, the 1<sup>st</sup> Defendant was to execute a Sale of Land Agreement with the Plaintiff and effect the transfer of the Land into the Plaintiff's name.
19. The Plaintiff agreed to pay the 1<sup>st</sup> Defendant a total sum of USD 450,000 as the full consideration for the purchase of the land. It was agreed that the Plaintiff would pay an initial sum of USD 10,000 upon the signing of the Memorandum, which was duly paid to the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant. Then subsequently pay USD 115,000 upon the 1<sup>st</sup> Defendant obtaining the full No Objection from MoEST, then USD 125,000 upon the 1<sup>st</sup> Defendant obtaining the transfer of the Land from U.L.C and USD 200,000 (United States



Dollars Two Hundred Thousand) upon the 1<sup>st</sup> Defendant causing or effecting the transfer of the Land into Plaintiffs name.

20. In his testimony PW1 testified that the Plaintiff made an advance payment of USD 250,000 to the Defendants who have still failed to fulfill their obligation under the MOU. That as a result, on the 1<sup>st</sup> day of June 2015 the Plaintiff and Defendants executed an agreement for termination of the M.O.U and the refund of monies paid to the Defendants.

21. In PEX4 which is the agreement dated 1<sup>st</sup> June 2015, under clause 1.1, the 1<sup>st</sup> Defendant acknowledged that it received USD 250,000 from the Plaintiff and agreed to refund it by 30<sup>th</sup> June 2015. The repayment of this amount was guaranteed by the 2<sup>nd</sup> Defendant.

22. Basing on the definition of breach of contract above, the Defendants' failure to repay the USD 250,000 amounted to breach of the memorandum of understanding.

### **ISSUE 3: WHETHER THE PLAINTIFF IS ENTITLED TO THE RELIEFS SOUGHT?**

23. The Plaintiff's Counsel submitted that it is entitled to a refund of USD 250,000 from the Defendants as agreed under the Refund Agreement.

24. In paragraph 4 of their Written Statement of Defence, the Defendants stated that the actual amount received is USD 225,000 as USD 25,000 was retained by the Plaintiff as his brokerage fees.

25. In the case of **M.T.N. Uganda Limited versus G.Q. Saatchi & Saatchi Ltd Civil Appeal No 0098 of 2017**, court held as follows;

*"In Contractual interpretation, Court will be seeking to determine what the parties meant by their agreement. Court will therefore apply the principles relating to contractual construction or implication of terms where necessary....the need for contractual interpretation arises when the parties disagree about the meaning of a clause(s) in their contract. However if one party asserts a matter which is not expressly referred to in the contract, the matter moves into the realm of contractual implication and out of that of contractual interpretation. This is because a party will be asking the Court to imply a term, not explicitly stated in a contract".*

26. A perusal of the MOU does not show that the parties expressly agreed to a brokerage fee as alleged by the Defendant. In PEX4 the 1<sup>st</sup> Defendant acknowledged that it received USD 250,000 from the Plaintiff and agreed to refund it by 30<sup>th</sup> June 2015. In my view, this is a precise and unambiguous admission which warrants entering a

judgment on admission. However, PW1's testimony changes everything as he testifies that the Defendants to date had only paid a sum of USD 12,000 of the total principal amount of USD 250,000. The Court will therefore offset USD 12,000 from the USD 250,000, leaving an amount of USD 238, 000.

27. It is my finding therefore, that the Plaintiff is entitled to a refund of USD 238,000 from the Defendants.

#### **D. INTEREST**

28. The Plaintiff's Counsel submitted that the Plaintiff is entitled to interest of 2% on the sum of USD 250,000 from the date of termination of the M.O.U till payment in full as expressly agreed in the Refund Agreement. According to PEX3, the parties under Clause 2 of that Addendum agreed that if the Defendants had not fulfilled their obligations under the M.O.U by the 23<sup>rd</sup> day of June 2012, the Plaintiff should have the right to terminate the M.O.U and the Defendants shall be obliged to pay all money received together with an interest of 2% per month from the date of termination of the MOU. The Defendants failed to fulfill their obligations under the M.O.U and the Plaintiff terminated the MOU effective the 31<sup>st</sup> day of December 2015 as per Clause 2 of PEX4.

29. In paragraph 11 of their Written Statement of Defence the Defendants stated that the interest of 2% per month on foreign currency transaction is unconscionable and illegal. That if any interest rate is applicable to the transaction, then the bank of Uganda interest rate on foreign currency transaction should be the applicable rate.
30. In the case of **Sharif Osman Versus Hajji Haruna Mulangwa SCCA No.38 of 1995**, it was held that the interest rate agreed to by the parties is lawful and the Court respects the notion and sanctity of freedom of contract for which reason they do not make contracts for parties but only give effect to the clear intention as gathered from the agreement.
31. The parties agreed in PEX3 that if the Defendants had not fulfilled their obligations under the M.O.U by the 23<sup>rd</sup> day of June 2012, the Plaintiff should have the right to terminate the M.O.U and the Defendants be obliged to pay all money received together with an interest of 2% per month from the date of termination of the MOU. The parties agreed to an interest rate of 2% per month from the date of termination of the MOU. There is no reason why the Court would have to interfere with the freedom of contract.

32. The Plaintiff is entitled to and is accordingly granted interest of 2% on the sum of USD 238,000 from the date of termination of the M.O.U till payment in full.

#### **E. GENERAL DAMAGES**

33. The Plaintiff prayed for general damages of Ugshs. 500,000,000/ for the inconvenience caused to the Plaintiff. That the Plaintiff has incurred expenses and suffered inconvenience to recover the money. That the Plaintiff did not make any profit from investing his money which he lost in 2011 and to date has been denied access to the money he is entitled to. That the Defendants deliberately delayed the hearing of the matter since 2016 with unnecessary adjournments and deliberately misleading the Plaintiff and Court that the parties had entered a consent and later refused without justification to endorse the consent agreement all with the intent to inconvenience the Plaintiff further.

34. In the case of **Uganda Commercial Bank versus Kigozi (2002) EA 305**, Court held;

*“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.”*

35. PW1 at paragraphs 19, 20 and 21 of his Witness Statement stated that the Defendants have, without justifiable cause, failed to repay money owed to the Plaintiff despite several extensions of time for payment, reminders and requests since 2015. The Plaintiff has been kept out of his money since 2011 to date.

36. The Defendants have delayed the hearing of the matter with unnecessary adjournments while misleading the Plaintiff and Court that the parties had entered a consent and later refusing without justification to endorse the consent agreement. Indeed PEX2 and PEX3 are addenda in which the Defendants' time of payment was extended but still the Defendants didn't comply. This is serious inconvenience that the Defendants have subjected the Plaintiff to for close to 7 years.

37. On that basis, I find it reasonable to award the Plaintiff general damages of Ugshs. 150,000,000/ (one hundred and fifty million only).

## **F. COSTS**

38. **Section 27(2) of the Civil Procedure Act** provides that costs of any action, cause, or matter shall follow the event unless Court for good cause orders otherwise. In the case of **Ssempe versus**

**Kambagambire, CS No. 408/2014**, court held that the Plaintiff being the successful party was entitled to costs of the suit.

30. The Plaintiff being the successful party in this suit is accordingly awarded the costs of the suit.

Delivered at Kampala this 24<sup>th</sup> day of June 2022.

Richard Wejuli Wabwire

**JUDGE**