

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT GULU
HCT – 02 – CV – CS – 0133 – 2003

OCHAN JUSTINE :::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

1. OCEN MORIS

2. EREO MOSES O. :::::::::::::::::::::::::::::::::::DEFENDANTS

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

The plaintiff sued both defendants jointly and severally for breach of contract by reason of which he sought by way of reliefs Ug. Shs. 20,488,000/= special damages, general damages, and interest.

The defendants, after attempts by plaintiff’s counsel to effect personal service to each one of them with summons to file a defence to the suit had failed, were served by way of substituted service pursuant to a court order dated 19.10.2007. Substituted service for the hearing date of 08.02.2008 was effected through the New Vision newspaper of 27/11/2007 page 28 and the Etop newspaper of 15-21.11.2007.

The hearing of the suit proceeded on 08.02.2008 in absence of both defendants who never showed up in court in answer to the substituted service.

Three issues were framed at the hearing:-

1. Whether or not the plaintiff advanced money to the defendants for their classroom construction project on the basis that the advanced money was to be repaid within a particular period; or within a reasonable period.
2. Whether the advanced money is still due and owing
3. Whether the plaintiff has suffered any damages.
4. What are the remedies available to the parties.

As to the first issue, plaintiff testified that on 14.07.2001 he executed a written agreement with the first defendant where by he, the plaintiff, was to provide financing for the execution of a contract of construction of three (3) classrooms in Pajule that had been awarded to the first defendant by Kitgum District Local Government. The three (3) classrooms were to be constructed at Amokolagwai Primary School, Palwo, Pajule, then Kitgum District, but now Pader District.

The total contract price was shs 20,488,000/=. The first defendant had been awarded the contract by Kitgum District Local Government on 18.12.2000. The contract between the first defendant and the Kitgum District Local Government was tendered in evidence as exhibit P2 and the agreement of understanding between the plaintiff and the first defendant as exhibit P1.

According to the agreement: exhibit P1, the plaintiff and first defendant agreed that the plaintiff was to buy all the materials and fiancé all the works of the construction up to completion. The plaintiff was also to supervise the works until completion. A sum of shs 1,000,000/= was to be given by the plaintiff to the first defendant as working capital for the first defendant to begin his business.

The reason why the plaintiff had to finance the execution of the works was because the first defendant did not have the required money to finance the execution of the works under the contract awarded to him by Kitgum District Local Government: exhibit P2.

Plaintiff's evidence is that he availed the money by buying the materials and meeting all the expenses that were required to execute the works and the works were executed to completion. Plaintiff used to go to the site of construction and supervised the execution of the works.

After the works had been executed to completion the first defendant was paid the contract price of shs 20, 488,000/= by Kitgum District Local Government, where upon the first defendant disappeared with the money without passing over the same to the plaintiff ; as the one who had financed the execution of the works under the contract.

The plaintiff retrieved copies of the payment vouchers whereby Money under the contract was paid by the Kitgum District Local Government to the first defendant, with the second defendant signing for the vouchers. The same were tendered in evidence as exhibit P3. though the total value of the vouchers exhibited is shs 15,000,000/= plaintiff was emphatic that he had found out from the Kitgum District Local Government authorities that the total contract price of shs .20,488,000/= had been paid out to the first defendant, with the second defendant signing for the vouchers.

Later the plaintiff discovered that both the first and second defendants had on 15.02.2002 executed an agreement between themselves as to the expenditure of this money.

Both defendants later undertook to pay the money to the plaintiff. The first defendant in particular wrote to the plaintiff on 15.01.2002, 01.07.2002 and on an unstated date: exhibit P5 (D2, D3, D4 and D5) undertaking to pay the money and giving reasons as to why payment was not being effected.

Later both plaintiffs disappeared without paying the money and stopped communicating with the plaintiff to date.

No defence was filed by the defendants to the plaint and no evidence has been adduced in answer to the evidence of the plaintiff.

Failure to file a defence raises a presumption or constructive admission of the claim made in the plaint and as such the plaintiff's evidence is accepted as the truth: see: **H.C.C.S. No. 623 of 1992: Francis Babuzabirwa vs. Faud Ali t/a Muhamed's Garage,**

and also

H.C.C.S No. 1230 of 1998: Agad Didi vs James Namakajo, both cases unreported

This court therefore holds that, on the basis of evidence adduced, the plaintiff is entitled to receive a sum of shs 20,488,000/= less shs. 1,000,000/= being the contract price money paid in respect of the contract to construct three (3) classrooms, awarded by Kitgum District Local

Government, as consideration, for the plaintiff's having availed the money to execute and supervised the execution of the said contract.

In his evidence the plaintiff did not testify whether he paid the shs. 1,000,000/= to the first defendant as agreed upon in the "agreement of understanding between Ocan Justine and Ocen Moris" exhibit P1. It follows therefore that in absence of proof of payment to first defendant, pursuant to the terms of that agreement a sum of shs. 1,000,000/= remained due from the plaintiff to the first defendant and is therefore deductible from the total sum of shs. 20,488,000/= leaving a balance of shs 19,488,000/= as due to the plaintiff.

Court, in absence of contrary evidence, accepts the evidence of the plaintiff that the money due to was to be paid to him as soon as the Kitgum District Local Government paid it for the completed works of construction of the three classrooms.

According to exhibit P3 (1-3),s the payment vouchers, payment of the money by the Kitgum District Local Government was effected between 04.02.2002 and 15.06.2002. Court therefore holds that it is during this period or soon thereafter that the money should have been paid to the plaintiff.

As to whether defendants are liable to pay this money to the plaintiff, the plaintiff adduced no straight forward evidence as to why he was claiming payment from the second defendant, Ereo Moses. O.

Plaintiff's evidence is that the vouchers of payment of the suit money by Kitgum District Local Government: exhibit P3 (1-3) were signed for by the second defendant and also that second defendant picked one of the cheques in the names of first defendant of payment from the Kitgum District Local Government and that the first defendant got the money from his account and gave it to second defendant who then disappeared with the money. There was an agreement between the first and second defendant about the money. The first defendant then wrote several hand written chits: exhibit P5 (D2, D3, D4 and D5) to plaintiff undertaking to pay, but also giving reasons for non-payment.

There is no evidence that the plaintiff ever advanced any money to the second defendant or that second defendant undertook to repay any money to plaintiff.

The burden is upon the plaintiff to prove on a balance of probabilities those aspects of the claim that establish liability upon the defendants: **see Sebuliba vs Co-operative Bank Limited (1982) HCB 129.**

On the evidence adduced, this court holds that the plaintiff has not proved on a balance of probabilities that the second defendant is liable to the plaintiff in the sums of money claimed.

Court, however, is satisfied that the plaintiff has proved, on a balance of probabilities that the first defendant was advanced the money and is liable to him in the said amount.

The first issue is answered that the plaintiff advanced money to the first defendant for the classroom construction project on the basis that the advanced money was to be repaid as soon as the Kitgum District Local Government paid the money between 04.02.2002 and 15.06.2002, or within a reasonable period thereafter, and that the said money has never been paid to the plaintiff.

The second issue: whether the advanced money is still due and owing, court, from the resolution of the first issue hold that the said money became due and owing to the plaintiff from the first defendant only as from the period 04.02.2002 – 15.06.2002 to date.

The third issue is whether the plaintiff has suffered any damages.

The plaintiff spent money on financing the execution of the construction of the three classroom project. He was to make good what he spent by taking the money paid as contract price, less the shs 1,000,000/= he was to pay to the first defendant.

The plaintiff is therefore entitled to shs 19,488,000/= from the first defendant.

As to general damages, the plaintiff a businessman has been deprived use of the money by reason of non-payment since 2002.

The general principle for an award of general damages is to try to place an injured party in as good a position in money terms as that party would have been in had the wrong complained of not occurred: see **H.C.C.S. No. 0154 of 2005**

UNITED BUILDING SERVICES LTD VS YAFESI MUZIRA T/A QUICKSET BUILDERS & CO., unreported.

In Nakawa Trading Company Ltd. Vs Coffee Marketing Board: H.C. C.S. No. 137/1991: (1994) 11 KALR 15: shs. 5, 000, 000/= was awarded for breach of contract in 1994. While general damages of shs. 4,000,000/= for breach of contract for non-payment of shs 8,000,000/= for a period of about two (2) years were awarded in the United Building Services Ltd case.

In this case the non payment is of a sum of shs.19,488,000/= and has gave on for 6 years.

In the circumstances, the plaintiff is awarded general damages of shs 5,000,000/=

In conclusion the plaintiff's suit is dismissed against the second defendant, but judgment is entered for the plaintiff against the first defendant Ocen Moris for:-

- a) shs 19,488,000/= special damages,
- b) shs. 5,000,000/= general damages
- c) interest on (a) and (b) above at the rate of 22% p.a. from 04.02.2002 in respect of the special damages, and from the date of judgment in respect of the general damages, till payment in full.

The plaintiff is awarded the costs of the suit against the first defendant. No order is made as to costs of the suit dismissed against the second defendant since the second defendant never took any steps in the proceedings and also never attended court.

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Remmy K. Kasule

Judge

11th July 2008