THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL.

HCT-01-CV-CS NO. 041 OF 2022

MABALE GROWERS TEA FACTORY LIMITED :::::::::::::::::: PLAINTIFF

VERSUS

1. MIAN AHMAD RAZA

2. A.R. AUTO LIMITED

:::::::::::::::::::::::::::: DEFENDANTS

BEFORE HON MR. JUSTICE VINCENT EMMY MUGABO

EX PARTE JUDGMENT

The plaintiff company filed this suit against the defendants for breach of contract, an order of specific performance or in alternative an order for a refund UGX. 100,000,000/= being money advanced to the defendants, general damages, interest, and costs of the suit.

Background

The case for the plaintiff company is that on the 14th day of June 2019, it entered into a sale-swap agreement with the 1st defendant under which the 1st defendant undertook to procure and supply a motor vehicle of at least 2005 Model and mileage below 40,000 kilometres in consideration of UGX. 130,000,000/= part of it being a plaintiff company's Motor vehicle Reg. No. UAN 640J, valued at UGX. 40,000,000/=.

Immediately after execution of the agreement, the 1st defendant took possession of the said vehicle and by 25th November 2020 the plaintiff company had paid the defendant additional UGX. 60,000,000/= (Uganda shillings sixty million shillings) to facilitate the procurement and delivery of the motor vehicle. However, the defendants failed or deliberately refused to deliver the motor vehicle to the plaintiff company or make a refund to UGX. 100,000,000/= as money advanced to them, despite several demands, which prompted the filing of this suit.

The defendants did not file any written statement of defence to rebut the claims of the plaintiff company.

Representation and hearing

The hearing proceeded ex parte without the defendants who could not be traced. Court summons to the defendants were through substituted service made in the Daily Monitor Newspaper of the 25th day of November 2022. At the hearing, the plaintiff company was represented by Mr. Mugabi Geoffrey of *Acellam Collins & Co. Advocates*. Counsel for the plaintiff company filed written submissions which have been considered by this court.

Issues for court's determination.

Counsel for the defendant company submitted on three issues which this court has modified under Order 15 rule 5(1) of the ***Civil Procedure Rules*** for proper determination of matters of controversy between the parties herein. The issues for consideration are:

1. Whether there was a contract between the plaintiff and the defendants.

2. Whether the defendants breached the contract executed with the plaintiff.

3. What are the remedies available to the parties?

Burden and Standard of Proof

In civil matters, the burden of proof rests on the plaintiff who must adduce evidence to prove his or her case on the balance of probabilities to obtain the relief sought (***See: sections 101-103 of the Evidence Act Cap 43).*** Court must be satisfied that the plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that the more probable conclusion is that for which the plaintiff contends (**See:** ***Lancaster Vs Blackwell Colliery Co. Ltd 1982 WC Rep 345*** and ***Sebuliba Vs Cooperative Bank Ltd (1982) HCB130***)

Consideration by Court

Issue 1: Whether there was a contract between the plaintiff and the defendants.

This issue was framed at the discretion of the court as an additional issue based on the contents of documents produced by the plaintiff company, specifically, ***Plaintiff Exhibit No.1***, a motor vehicle sale-swap agreement executed on the 14th day of June 2019.

In his witness statement, PW1, the plaintiff company's General manager, led evidence under paragraph 3 that o*n 14th June 2019, the plaintiff company entered into a sale-swap agreement with the 1st defendant who is one of the directors of the 2nd defendant to acquire a motor vehicle of Model 2005 and mileage below 40,000 kilometres at a consideration of UGX.*

130,000,000/= (Uganda shillings one hundred and thirty million only." ***(A copy of a sale-swap agreement was adduced in evidence and admitted as plaintiff exhibit No.1).***

By definition, a contract is "***an agreement made with the free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound" (see section 10(1) of the Contracts Act 2010).*** Section 10(2) of the same Act is to the effect that a contract may be oral, written or partly oral and partly written or may be implied from the conduct of the parties.

In the instant case, the contract was written. A scrutiny of the plaintiff's exhibit No.1 shows that it was executed between the plaintiff company and Mr. Mian Ahmed Raza, the 1st defendant, of address A.R. Auto Limited, Jambo Auto Mart (ICD), Jinja Road Kyambogo Kampala Uganda. It is also signed by the 1st defendant in his capacity as a "purchaser." Nonetheless, I take note of the fact that the agreement bears the stamp of A.R Auto Limited and that the receipts of payment issued to the plaintiff company have the address of A.R Motors Limited.

It is a fundamental principle of company law that a company is a separate and distinct entity from its members or managers. In the case of ***Kashillingi v Sembule Steel Mills Ltd & 3 Ors Misc. Appl. No. 460 of 2016*** Hon. Justice Stephen Musota quoting with approval the case of ***Salmon Vs Salmon & Co. Ltd (1897) A.C 22 HL*** stated thus:

> ***"[a] company is at law a different person altogether from its subscribers to the memorandum of association and though it may be that after the incorporation, the business is precisely the same as it was before and the same persons are managers and the same persons receive***

profits, the company is not in law the agent of subscribers or trustees for them nor are subscribers as members liable in any form or shape except to the extent and in the manner provided by the Act."

It is also a trite law that the interpretation of any written instrument such as a contract should be done in accordance with the rules of interpretation. These rules vary but generally, they include the following: (i) words used must be given their natural and ordinary meaning, (ii) a document must be read as a whole, (iii) the intention of those who are responsible for producing the document must be established, and (iv) if the intention of the framers of the document can't be established from the document itself, then it may be necessary to refer to other matters outside the text ***(see: (National Commercial Bank Jamaica v Guyana Refrigerators [1998] UKPC 14; Charter Reinsurance Co v Fagan [1997] AC 313; and*** **Deutsche Genossenschaftsbank v Burnhope** ***[1995] 1 WLR 1580 at 1587).*** In all cases, the starting point is to always give the words used their natural and ordinary meaning in their relevant context considering the purpose of the instrument concerned.

In the case of ***Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 at 912,*** Lord Hoffmann held thus:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

In the instant case, the wording of the contract is very clear; it is between the plaintiff company and the 1st defendant. Besides, the defendant signed on his behalf and not on behalf of the 2nd defendant. This was indeed confirmed by PW1 under paragraph 3 of his witness statement.

On the intention of parties, Lord Wilberforce in the case of ***Reardon Smith Line v Yngvar Hansen-Tangen [1976] 1 WLR 989 at 996*** held thus:

> ***"When one speaks of the intention of the parties to the contract, one is speaking objectively—the parties cannot themselves give direct evidence of what their intention was—and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."***

In the instant case, if the plaintiff company had intended to enter a contract with the two parties, I.e., the 1st and 2nd defendant, then the agreement would have stated so. Based on the wording of the contract and subsequent conduct of the 1st defendant, it is possible that the 1st defendant, being a director of the 2nd defendant, used the 2nd defendant's stamp for purposes of address and obtaining credibility before his clients (the plaintiff company herein) but it was never the 1st defendant's intention to make 2nd defendant a party to the agreement. Similarly, the plaintiff company, through its general manager, knew it was signing the agreement with the 1st plaintiff since the 2nd plaintiff is not mentioned in the agreement, as a party.

In the case of ***Charter Reinsurance Co v Fagan (Supra)***, lord Mustill held thus:

> ***"There comes a point at which the court should remind itself that... to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court."***

Based on the words used in the contract and what could have been the intention of the parties, no inference can be made that the 2nd defendant was a party to the contract in issue. In the premises, I find that the contract for the sale-swap of the motor vehicle dated 14th June 2019 was between the plaintiff company and the 1st defendant.

Issue 1: Whether the Defendants breached the contract executed with the plaintiff.

The plaintiff's case is that the defendants breached the contract. But since I have already found that the plaintiff company had a contract with the 1st defendant, I shall determine this claim as against the 1st defendant only based on the doctrine of privity of contract. In the case of ***Hon. Justice Anup Singh Choudry Vs Mohinder Singh Channa & Another Civil Suit No. 335 Of 2014*** Justice Ssekaana Musa quoting ***Halsbury's Laws of England 4th Edition*** held that the doctrine of privity of contract is that, generally, parties to a contract are those who reach an agreement, and a contract cannot confer rights or impose obligations on strangers to it.

In his witness statement, PW1, the plaintiff company's General Manager led evidence that on the 14th of June 2019, the plaintiff company entered into a sale-swap agreement with the first defendant to acquire a motor vehicle of at least model 2005 and mileage below 40,000 kilometres in consideration of UGX. 130,000,000/=.

PW1 further led evidence that, as part of the sale-swap deal, the plaintiff company handed over Motor vehicle Reg. No. UAN 640J, Toyota Hilux Double Cabin Pick-up Model; Hilux PN 133JV, Engine No. 2KD6294357, Chassis No. PN 133JV2508517394 golden in colour valued UGX. 40,000,000/= to the 1st defendant, leaving the balance of the purchase price at UGX. 90,000,000/=.

PW1 further led evidence that it was a term in the agreement that the plaintiff company would pay an instalment of UGX. 20,000,000/= to enable the procurement process and another UGX. 20,000,000 to be paid upon production of the bill of lading while the remaining balance of UGX. 50,000,000/= was to be paid in three instalments upon registration of the motor vehicle in Uganda.

It was PW1's testimony that after delivering the vehicle in the sale-swap deal to the defendants, the plaintiff company started paying the remaining balance: on the 29th day of July 2020, it made a payment of UGX. 30,000,000/= by cheque No. 000659 and was issued receipt No. 1536 by the defendants, and on the 25th of November 2020, the plaintiff company made another payment of UGX. 30,000,000/= to the defendants and was issued receipt NO. 1224 as confirmation of payment ***(Payment receipts were adduced in evidence and admitted as the plaintiff's exhibit 2).***

PW1 further stated that the plaintiff company thereafter started demanding the vehicle so that it could pay the balance of UGX. 30,000,000/= but the defendants could not deliver the vehicle. And on the 22nd day of April 2020, the plaintiff's lawyers issued a demand notice to the defendants, but it was ignored.

It is trite law that once a contract is valid, it creates reciprocal rights and obligations between parties. This position of the law was further

expounded in the case of ***William Kasozi Versus Dfcu Bank High Court Civil Suit No.1326 Of 2000*** where Lady Justice C.K. Byamugisha (as she then was) held thus:

> ***"Once a contract is valid, it creates reciprocal rights and obligations between the parties to it. I think it is the 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."***

Section 33 (1) of the ***Contracts Act, 2010*** provides that ***"parties to a contract shall perform or offer to perform, their respective promises unless the performance is dispensed with or excused under this Act or any other law."***

As per plaintiff's exhibit No.1, the following were part of the terms of the agreement:

> *"1. That in pursuance of this agreement, and in consideration of the sum of UGX.40,000,000 (shillings forty million only), in a swap deal for a good vehicle of model 2005 and above of mileage below 40,000 kilometres valued at UGX. 130,000,000/=, it is agreed for procurement to commence the company pays an addition of UGX. 20 million and the balance to be paid as follows:*
>
> - *20 million upon production of a bill of lading*
> - *Upon arrival and registration in Uganda the remaining balance of UGX 50 million is paid in three equal instalments."*

It is therefore clear from the terms of the agreement that the plaintiff company performed its part of the bargain by: (i) delivering the swapped

motor vehicle, and (ii) making a payment of UGX. 60,000,000/= to the 1st defendant. To the contrary, there is no indication that the 1st defendant fulfilled any part of his bargain. No inference can be made that the 1st defendant shipped the motor vehicle and thereafter registered it in Uganda or delivered possession of it to the plaintiff company, as a way of fulfilling his obligations under the contract.

In the case of **Kasibante v Shell (u) Ltd HCCS No. 542 of 2006 reported in (2008) HCB 162** Bamwine J (as he was then) held thus:

> ***"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 its performance impossible or substantially fails to perform his promise. The victim is left with suing for damages, treating the contract as discharged or seeking a discretionary remedy."***

This legal precedent is directly relevant to this case. In the absence of anything to show that the 1st defendant was excused from fulfilling part of his bargain and having found that the plaintiff company fulfilled its part, I find the 1st defendant to be in breach of the contract executed with the plaintiff company when he failed to fulfil his bargain as per the terms of the contract.

Issue 3: What are the remedies available to the parties?

Counsel for the plaintiff company submitted that since the plaintiff company had fulfilled its part of the bargain, this court should find it fit and proper to issue an order of specific performance requiring the

defendants to deliver the motor vehicle or, in the alternative, order the defendants to refund UGX. 100,000,000/= as money received from the plaintiff company.

Counsel also prayed for general damages. It was the submission of counsel that in cases of breach of contract, section 61(1) of the ***Contracts Act 2010*** entitles the aggrieved party to compensation for loss or damage caused to him or her. Counsel submitted that the plaintiff company is dealing in tea processing and trading, and it intended to use the motor vehicle to run its business, but the defendants frustrated the whole plan. Counsel proposed general damages in sums of UGX. 30,000,000/=.

Counsel for the plaintiff also prayed for interest on the decretal sum and damages. Counsel submitted that section 26(2) of the ***Civil Procedure Act cap 71*** gives the court discretionary powers to award interest in any decree for the payment of money. Counsel proposed an interest of 24% per annum from the date of judgment until payment in full.

Section 64(1) of the Contracts Act 2010 is to the effect that ***"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 fulfil his or her promise under the contract.*** While section 64(2) of the same Act provides exceptions to the grant order of specific performance, I find that those exceptions do not apply to the plaintiff company.

Nonetheless, an order of specific performance is generally available where damages are not adequate. In the case of ***Ewadra Emanuel Vs Spencon Services Limited Civil Suit No. 0022 Of 2015*** Hon. Justice Stephen Mubiru quoting with approval the case of ***Manzoor v. Baram [2003] 2 EA 580)*** held that ***"the basic rule is that specific performance will not be decreed where a common law remedy, such as damages,***

would be adequate to put the plaintiff in the position he would have been but for the breach."

In the instant case, since the plaintiff company made an alternative prayer of specific damages, I will not make an order compelling the defendant to deliver the motor vehicle to the plaintiff company.

As regards the refund of UGX. 100,000,000/= to the plaintiff company, as payment made to the 1st defendant, section 61(1) of the ***Contracts Act 2010*** provides that where there is a 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.

In the case of ***Cargo World Logistics Vs Royale Group Africa Ltd Civil Suit No. 157 Of 2013*** Justice Henry Peter Adonyo quoting with approval the case of ***Gameca & Another v Steel Rolling Ltd HCCS No. 2228 of 2006*** held thus:

> ***" a party who sues for breach of contract is entitled to recover the amount of loss sustained for such breach and that the defendant is liable to make good such loss"***

In the instant case, the plaintiff company led evidence to show that it delivered Motor vehicle Reg. No. UAN 640J valued UGX. 40,000,000/= to the 1st defendant, and in addition paid UGX. 60,000,000/= to him which adds up to UGX. 100,000,000/=. Therefore, I award special damages to the tune UGX. 100,000,000/= to the plaintiff company against the 1st defendant.

On the prayer of general damages, it is a trite law that damages are the direct probable consequences of the act complained of with such consequences being enumerated to include loss of use, loss of profit,

physical inconvenience, mental distress, pain and suffering ***(see Kampala District land Board & George Mitala v Venansio Babweyana, Civil Appeal No. 2 of 2007)***

In the assessment of general damages, Court is largely guided by the value of the subject matter, the economic hardships that the plaintiff may have been put through and the nature and extent of the harm suffered ***(See Uganda Commercial Bank v. Kigozi [2002] 1 EA 305; and Ewadra Emanuel Vs Spencon Services Limited (supra).***

In the instant case, the plaintiff company deals in tea processing and marketing for profit, and it had planned to use the motor vehicle to carry out its activities. Indeed, without the motor vehicle, the plaintiff company's plans were frustrated resulting in a loss of expected earnings. It was the plaintiff's testimony that a contract for the sale-swap agreement was entered into in June 2019. It is now more than three (3) years since the plaintiff company and the 1st defendant entered into the agreement, but the 1st defendant failed to deliver the motor vehicle which would have facilitated the plaintiff's company business activities.

In the circumstances, the plaintiff company is entitled to general damages, and I am inclined to agree with the sum proposed by the counsel for the plaintiff company. I, accordingly, award general damages in sums of UGX. 30,000,000/= to the plaintiff company against the 1st defendant.

On the prayer of interest, section 26(2) of the ***Civil Procedure Act Cap 71*** provides that where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of

the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

In the instant case, the interest claimed is for the decretal sum and general damages. Counsel proposed an interest of 24% per annum from the date of judgment until payment in full. I would adjust slightly the rate proposed by the counsel for the plaintiff company to 15% per annum. I, accordingly, award an interest of 15% per annum on special damages from the date of filing this suit until payment in full and an interest rate of 15% on general damages from the date of this judgment until payment in full.

On the prayer of costs, section 27(2) of the ***Civil Procedure Act Cap 71*** is to the effect that 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. It is also a trite law that costs follow the event, and a successful party is entitled to costs.

In the case of ***Kivumbi Paul Vs. Namugenyi Zulah Civil Revision No. 10 of 2014***, Hon Lady Justice Elizabeth Musoke (as she then was) citing ***Kiska Ltd Vs De Angelias [1969] EA 6***, noted that ***"A successful party can only be deprived of his costs when it is shown that his conduct either prior to or during the course of the suit has led to litigation, which, but for his own conduct might have been averted."***

In the instant case, if the 1st defendant had fulfilled his part of the bargain in accordance with the motor vehicle sale-swap agreement dated 14th June 2019, the plaintiff company would not have filed this suit and

incurred the resultant costs. In the premises, the costs of this suit are awarded to the plaintiff company.

Consequently, Judgment is entered for the plaintiff company against the 1st defendant in the following terms:

(a) A declaration that the 1st defendant is in breach of the contract executed with the plaintiff company.
(b) Special damages of UGX. 100,000,000/=
(c) General damages of UGX. 30,000,000/=
(d) Interest on (b) and (c) of 15% per annum from the date of filing this suit and the date of judgment, respectively, until the date of final payment.
(e) The costs of this suit are awarded to the plaintiff.

It is so ordered.

Dated at Fort Portal this 23rd day of October 2023

Vincent Emmy Mugabo

Judge