

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

COMMERCIAL COURT DIVISION

CIVIL SUIT NO. 351 OF 2009.

PAL AGENCIES (U) LTD:.....:PLAINTIFF

VERSUS

1. SOROTI MUNICIPAL COUNCIL

2. SOROTI LOCAL COUNCIL III

(EASTERN DIVISION):.....:DEFENDANTS

BEFORE HON. LADY JUSTICE HELLEN OBURA.

JUDGMENT.

The plaintiff, Pal Agencies (U) Ltd brought this suit against Soroti Municipal Council and Soroti Local Council 111, hereinafter referred to as the 1st and 2nd defendants respectively for breach of contract, loss of revenue and unlawful termination of the contract between them and the defendants. The plaintiff seeks damages for breach of contract, interest and costs of the suit.

The facts giving rise to the suit according to the plaintiff as gleaned from the plaint are that:-

1. The plaintiff was contracted by the 1st defendant to manage, levy, charge, and collect parking fees from Soroti taxi / bus park on behalf of the 1st defendant for the financial years (F/Y) 2006/2007 and 2007/2008;
2. The 1st defendant issued a notice for the award of tenders for the F/Y 2008/2009 whereupon the plaintiff and other bidders submitted bid documents for the tender of collecting revenue from the taxi park in Soroti Municipality.

3. Before the tender process would be awarded, two complaints were raised over the tendering process and as such, an Administrative Review Committee was constituted to handle the matter.
4. While awaiting the Committee's report, the 1st defendant through the Town Clerk extended the plaintiff's contract on 27th June, 2008 to collect revenue from the bus/taxi park for purposes of continuity. The plaintiff accepted the award/extension and continued to collect the revenue until the 1st defendant terminated the contract on 1st July 2009.
5. The 1st defendant had, on 3rd July, 2008, also permitted Teso Coaches Bus Company Limited to operate a parallel bus/taxi park, collect revenue therefrom and remit the same to the 1st defendant.
6. It is upon the termination of this arrangement that the plaintiff brought this suit.

On the other hand, the defendants denied the plaintiff's claims in their written statement of defense and contended that:-

1. They neither executed a contract nor have they breached any contract with the plaintiff.
2. They gave the plaintiff a temporary interim administrative extension to collect revenue fees on behalf of the 1st defendant and that the extension was not a permanent contract. That extension was subject to the laws of procurement binding Local Governments.
3. They claimed by way of counterclaim a sum of Shs.119,000,000/= being money collected from buses and taxis in the F/Y 2008/2009 but was never remitted to the defendants and sought recovery of that sum and general damages arising from breach of contract.

At the hearing Mr. Omongole Richard represented the plaintiff while Mr. Peter Masaba from Attorney General's chambers assisted by Ms. Akware Carol from M/S Osilo & Co. Advocates represented the defendants.

The issues for determination by this court as were agreed to by both parties during the scheduling conference are:

1. Whether there was a contract between the parties?

2. If so, whether the defendants breached the contract by;
 - a) Acquiescing to the running of the parallel park (bus/taxi) by Teso Coaches.
 - b) Terminating the temporary administrative extension before the action of the administrative review committee.
3. Whether or not the plaintiff owes the defendant Ushs.119,000,000/=(Uganda Shillings One Hundred Nineteen million) as claimed in the counterclaim?
4. What are the remedies available to the parties?

The plaintiff called five witnesses namely; Ariong Patrick its managing director (PW1), Mr. Okello Joseph (PW2), Mr. Juma Opolot (PW3), Mr. Otim Paul (PW4), and Mr. Ogwen Emmanuel (PW5). The defendants called four witnesses namely; Omoko Paul (DW1), Omer Paul (DW2), Oryokot Abraham (DW3) and Atwoko Ambrose (DW4).

Issue 1: Whether there was a contract between the parties.

PW1 testified that the Town Clerk wrote to the plaintiff to continue collecting revenue from 1st July 2008 and by conduct, the plaintiff accepted the award and immediately undertook to manage the bus/taxi park as per the contractual terms in the letter.

It is therefore the plaintiff's case that there was an extension of their contract on 27th June, 2008 through a letter allowing them to continue the collection of revenue. The said letter is Marked Ex. P1 and it reads;

“TENDER FOR REVENUE COLLECTION AT BUS/TAXI PARK.

*The contracts committee issued the intention to award Tenders for 2008/2009.
This has been displayed for 10 days for public viewing as provided by Law.*

*However for this particular source, two complaints have been raised and an
Administrative Review Committee has been constituted to handle the matter.*

*For the purpose of continuity, w.e.f from 1st July, 2008, you will continue
collecting revenue from bus/taxi park under the following terms;*

- *Period –will remain temporal until final decision will be taken by Administrative Review Committee.*
- *Amount- At your offer of Shs. 25,016,000 (twenty five million sixteen thousand only) VAT inclusive which should be paid to the division by cheque and not cash”*

In submitting that there was a contract between the parties, counsel for the plaintiff referred to **S.2, S.10 and S. 19 of the Contracts Act 2010** to define a contract. He also relied on a passage from **Prof Bakibinga’s Book, Law of Contract in Uganda at pg 11-13** and on the authority of **Green Boat Entertainment Ltd v Kampala City Council HCCS No. 580/2003** where Yorokamu Bamwine, J (now PJ) stated thus:-

“In law when we talk of contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable there must be: capacity to contract, intention to contract consensus adidem, valuable consideration, legality of purpose and sufficient certainty of terms. If in any given transaction any of them is missing, it could as well be called something other than a contract.”

On the other hand it is the defendants’ case that there was no contract between the plaintiff and the defendants. Counsel for the defendants submitted that the arrangement between the parties was irregular and ultra vires thus void for being contrary to the provisions of the **Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006**. In particular, counsel points out regulation 2 (1) which provides that:

“ These Regulations shall guide and regulate Local Government Councils, Administrative Units and other entities using public funds in functions and operations relating to procurement of goods, services, works and disposal of public assets under the Local Government Act, Cap 243 and the Public Procurement and Disposal of Public Assets Act, 2003.”

He further submitted that the regulation makes it mandatory to follow the laid down procedure therein to procure services, which includes the services in issue. He relied on the common law of contract and stated the essentials of a legally binding contract as stipulated in **Harlsbury’s Laws**

of England 4thEdn Vol. 9 (1) page 12 Paragraph 15 and cited in **Dr. Vincent Karuhanga v NIC and URA [2008] U.L.R at page 666** which are;

- “a) There must be an offer and acceptance which correspond with each other.*
- b) Each promise or obligation must be supported by consideration passing from the other party.*
- c) Parties must have intention to create legal relations.*
- d) Each party must have the capacity to contract and if an agent, actual or apparent authority to each contract.*
- e) The terms of the contract must be apparent and complete.*
- f) Any special formalities required by law in particular contracts must be complied with.*
- g) The agreement must not be rendered void either by some common law or statutory rule or by some inherent defect.”*

Counsel for the defendants further submitted that the “administrative extension” was void since it was extending an already concluded enforcement of a consent judgment. The consent judgment (Marked Exhibit D11) was between the parties to the present suit and stated that;

“By Consent of both parties it is hereby agreed that Judgment should be entered in the following terms:

- 1. The plaintiff agrees to award a tender to collect taxi and bus park fees to the plaintiff for the financial year 2006/2007....”*

He added that if there was an extension of the judgment, it should have been done by all the parties to the initial consent. He further submitted that the 2nd defendant was not party to any purported contract between the parties and argued that the 2nd defendant has no contractual capacity and thus could not have contracted with the plaintiff.

In resolving this issue, it is pertinent to trace the origin of the business relation between the parties involved. Based on the consent order - Exhibit D11 dated 19th October, 2005 between the

plaintiff and the 1st defendant together with Eastern Division III, the plaintiff was instructed to collect fees on behalf of the 1st defendant. Paragraph 1 of the consent order, stated thus;

“1. The defendant agrees to award a tender to collect taxi and bus park fees to the plaintiff for the financial year 2006/2007 under the following conditions;

- a) The plaintiff shall on being awarded a tender remit Uganda shillings 17,000,000= per month.*
- b) The plaintiff shall in addition pay value added tax at 18% on every monthly remittance.*
- c) The said order shall be renewable after one year.*
- d) In case of any problem, dispute or pending issue the same shall be referred to the technical committee...”*

The consent order in essence formed the basis of a contract between the plaintiff and the defendants. The three basic essentials of a contract: agreement, contractual intention and consideration may be said to exist; **Chitty on Contracts, 28th Edition, Vol 1 at page 89.**

All the essentials as stipulated generally in **Chitty on Contracts** (supra) are met by the above mentioned order and I therefore derive the conclusion that there was a contract between the parties for that period despite the method used. For the financial year 2007/2008, it was the testimony of DW3 that **“Pal Agencies was given to manage the facility for two years 2006/2007 and 2007/2008 which they completed.”** There is no evidence other than the testimony of DW3 as to the contract for the F/Y 2007/2008 being given to the plaintiff. That evidence was also not rebutted in re-examination so am inclined to conclude that there was a valid contract between the parties for the F/Y 2007/2008 since the consent judgment also allowed renewal of the order for one year.

The most contested “contract” is the “administrative extension” based on Exhibit P1 which the plaintiff relied on to bring this action to court. In determining whether it amounted to a contract between the parties, I must refer again to the basics of the essentials of a valid contract at common law.

In that regard, I agree with the submissions of counsel for the defendants when he cites **Harlsbury's Laws of England 4thEdn Vol. 9 (1) page 12 Paragraph 15** and the case of **Dr. Vicent Karuhanga v NIC and URA [2008] U.L.R at page 666** as noted above. I will examine the essentials of a contract listed in those authorities in relation to Exhibit.P1.

a) There must be an offer and acceptance which correspond with each other.

At common law the offer comes from a person who submits the tender and there is no contract until the person asking for the tenders accepts one of them. This rule may however be excluded by evidence of contrary intention - **Chitty on Contracts 28th Edition at page 98.**

It is my opinion that no such evidence of contrary intention was adduced. Exhibit. P12 is an Etop News Paper extract dated 8th-14th May, 2008 for the F/Y 2008/2009 showing the procurement notice calling for tenders. From the facts in the matter before me, it is clear that the offer was to come from the bidders on submission of tenders and acceptance was by the 1st defendant.

Exhibit P1 states;

“.... Amount – At your offer of shs.25, 016,000 (twenty five million sixteen thousand only) VAT inclusive ...”

This shows that there was an offer from the plaintiff and the letter (Exhibit P1) as a whole amounts to acceptance by the 1st defendant. Therefore the elements of offer and acceptance are held to exist in the facts before this court.

b) Each promise or obligation must be supported by consideration passing from the other party.

It is also clear from the facts that there was consideration from the plaintiff to the defendants being Shs. 25,016,000= and the consideration from the defendants to the plaintiff was them being agreeable to the continued collection of revenue from the bus/taxi park for purposes of continuity. The element of consideration is also present in the facts before this court.

c) Parties must have intention to create legal relations.

“In commercial transactions it will be presumed that the parties intended to create legal relations and make a contract. But the presumption may be rebutted.” **Cheshire & Furmston’s Law of Contract at page 126.**

Furthermore, **Scrutton LJ in Rose and Frank v Crompton [1923] 2 KB at 288** said:

“It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties. In social and family relations, such an intention may be readily implied, while in business matters the opposite result would ordinarily follow....”

From the above cited authorities it is clear that the intention to create legal relations and make a contract is presumed in commercial transactions unless it is expressly stipulated that the parties do not intend that their agreement shall give rise to legal intentions. The administrative extension did not have such a clause and so it is presumed that the agreement was intended to give rise to legal relations because it was a commercial transaction.

d) Each party must have the capacity to contract and if an agent, should have actual or apparent authority to contract.

The plaintiff is a registered company and therefore has legal capacity to contract. The 1st defendant was the other party to the contested contract and it derives its authority and existence from the Local Governments Act Cap. 243. Part 2 of the Second Schedule of the Act empowers local Authorities to enter contracts by them and on their behalf.

e) The terms of the contract must be apparent and complete.

Assuming a contract has been validly created, it is necessary to consider the extent of obligations imposed on the parties by the contract. The exact terms of a contract must be determined and their comparative importance evaluated; **Chitty on Contracts 28th Edition at pg 583.**

Ex.P1 is clear in its terms when it stipulates that,

“For the purpose of continuity, w.e.f from 1st July 2008, you will continue collecting revenue from bus/taxi park under the following terms;

- Period- will remain temporal until final decision will be taken by Administrative Review Committee.*
- Amount – At your offer of shs. 25,016,000 /= (Twenty five million sixteen thousand only) VAT inclusive which should be paid to the division by cheque and not cash.”*

The above elements were not exactly contested by counsel for the defendants in his submissions but he argued that Exhibit P1 lacks the essential elements of a contract stipulated as (f) and (g).

- f) Any special formalities required by law in particular contracts must be complied with.***
- g) The agreement must not be rendered void either by some common law or statutory rule or by some inherent defect.***

It is the defendants’ submission that the Town Clerk acted *ultra vires* when he obtained services of the plaintiff without following the mandatory procedures under the **Local Government (Public Procurement and Disposal of Public Assets) Regulations 2006**. Counsel also argued that contracts from *ultra vires* exercise of powers are void *ab initio*. He submitted that the procurement methods stipulated in Part V, Part VII, Part VI and regulation 61 of the Regulations were not met by the “administrative extension”. Counsel cited **Paragraph 574 Harlsbury’s Laws of England 4th Edition Vol. 9 (1)** and the case of **Ashbury Railway Carriage and Iron Co. v Riche (1875) L.R 7 H.L 653** to support his submissions.

While it is possible that some procedures were not followed by the defendants while issuing the administrative extension to the plaintiff, it is my firm view that any such irregularity does not vitiate the contract. It is not in dispute that the plaintiff was the contractor for the F/Y 2007/2008 which was coming to an end and it was still on the ground collecting revenue. In view of the complaints that arose from the procurement process continued collection of revenue was necessary so as not to leave a gap as the Administrative Review Committee made a decision on the complaints.

In the circumstances, it would have been impractical to follow the procurement process to the letter yet the Council just needed a temporary solution as they conclude the procurement process they had earlier started. It would be illogical and illegal to commence another procurement process just for the bridging period when the ongoing one had not yet been completed.

Counsel for the defendants relied on the decision in **Clear Channel Independent Ltd v PPDA Misc Application 380/2008 arising from Misc. Cause 156/2008** to show that irregularities in the procurement of contract make the award contrary to law , void and a nullity on account of non-compliance with the provisions of the PPDA Act.

However, the above case is distinguishable because much as the administrative extension could have not met the procurement methods, it was necessary in the exceptional circumstances that presented to the plaintiff in this case. It cannot also be said that the 1st defendant behaved like the Public Procurement and Disposal of Assets Act did not exist or that if it existed, it was not necessary to be followed because from the facts we see that the procurement process was already on course when it had to be halted to pave way for a review of the process. The administrative extension only became necessary to bridge the gap as the Committee carried out the review. In essence there was no award of a new contract that required a procurement process but rather an administrative action was taken to extend an already existing contract as the name even suggests.

It is therefore my well considered view based on the above facts that the last elements (f) and (g) were proved because they existed in the contract that was extended administratively.

It is also pertinent to note that it is a well-established principle that where a person who has no control enters into dealings with those whose duty it is to promote the intentions of the legislature, and they do not, any dispute under resolution would be resolved more strictly against those whose duty it was to ensure the following of procedure. This was well enunciated by **Sir Arthur Channel in Montreal Street Ry Co. v Normandin [1917] AC at Page 381** in these words;

“On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the

essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only.”

See also **Edward Makubuya t/a M. Edward Engineering Works vs Kampala City Council Kawempe Division HCCS No. 59 of 2003** where Ogoola J. as he then was stated that:-

“.....It is evident therefore that any breach or violation of the law relating to the tendering of the suit services could not have been perpetuated by the plaintiff-a mere third party.....”

I must also point out at this juncture that the law allows direct procurement in exceptional circumstances. **Section 85 of the Public Procurement and Disposal of Assets Act** provides thus:

Section 85

“(1) Direct procurement or disposal is a sole source of procurement or disposal method for procurement or disposal requirements where exceptional circumstances prevent the use of competition.

(2) Direct procurement or disposal shall be used to achieve efficient and timely procurement or disposal, where the circumstances do not permit a competitive method.”

In effect, a direct procurement can be used to achieve an efficient and timely procurement in exceptional circumstances like it was in this case. Therefore a direct award of the contract to the plaintiff under such exceptional circumstances would not be illegal.

In light of the foregoing discussions, it is my finding that the contract was complete and enforceable between the plaintiff and the 1st defendant notwithstanding any irregularities surrounding it.

I also considered the fact that counsel for the defendants submitted that the basic ingredients of a contract do not exist between the plaintiff and the 2nd defendant. It was submitted for the plaintiff

in their rejoinder to the defendants' submissions that the 2nd defendant was not a party to the purported contract.

I have also carefully examined the pleadings and evidence and I have not found any evidence to prove that there was a contract between the plaintiff and the 2nd defendant. I therefore find that there was no contract between the plaintiff and the 2nd defendant. The suit against the 2nd defendant is hereby dismissed with costs as it was wrongly dragged to court.

Issue 2: If so, whether the defendants breached the contract by

- a) Acquiescing to the running of parallel parks (bus/taxi) by Teso Coaches**
- b) By terminating the temporary administrative extension before the action of the Administrative Review Committee.**

A breach of contract is defined as a violation of contractual obligations by failing to perform one's own promise, by repudiating it or by interfering with another party's performance. **Black's Law Dictionary 8th Edition Page 200.**

In **Ronald Kasibante v Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690** breach of contract was defined as; *".....the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party..."*

- a) Acquiescing to the running of parallel parks (bus/taxi) by Teso Coaches**

In his submissions, the plaintiff's counsel acknowledged that the 1st defendant was in charge of authorizing parks and also that there was one gazetted park in Soroti Municipal Council. In a case earlier decided by this Court, **Pal Agencies (U) Ltd v Teso Coaches LTD & Another HCCS NO 221/2008** it was stated that;

"It is noteworthy that Soroti Municipal Council as a local government is responsible to provide some services as specified in Part 2 of the 2nd Schedule to the Local Government Act, Cap. 243. Section 13 (e) thereof stipulates provision and management of public vehicular parking"

This is a statutory obligation and I am of the view that the 1st defendant can in conformity with the law gazette as many public vehicular parking as it deems necessary and this had nothing to

do with the contract between the plaintiff and the 1st defendant whose terms as contained in Exhibit P1 were very clear that for purposes of continuity, with effect from 1st July 2008, the plaintiff would continue to collect revenue from the then only gazetted bus/taxi park.

The above terms of the contract did not limit the 1st defendant to operating only one bus/taxi park which was to be managed by the plaintiff. Neither was it a term of the contract that the plaintiff would be collecting revenue from all the bus/taxi parks in Soroti Municipality including those to be gazetted in future. Whether or not the proper procedure for establishing public vehicular parking was followed by the 1st defendant in allowing Teso Coaches to operate its own park is immaterial for purposes of this suit because it was not one of the issues canvassed before this court.

It is therefore my finding that since the defendants did not stop the plaintiff from collecting revenue from the park referred to in Exhibit P1, there was no breach of contract when the defendants allegedly acquiesced to the running of the parallel park by Teso Coaches Ltd.

b) By terminating the temporary administrative extension before the action of the Administrative Review Committee.

On this sub-issue, counsel for the plaintiff submitted that Exhibit P1 did not specify the date of termination of the contract and also that the contract was supposed to run until the decision of the Administrative Review Committee was made and communicated to the plaintiff. He relied on Exhibit P1 to support that position. He also further submitted that the defendants were in total breach when they wrote Exhibit P4 terminating the services of the plaintiff. He also relied on the evidence of PW1 Ariong Patrick and DW1 Omoko Paul to support his submissions.

On the other hand, counsel for the defendants submitted that the termination of the administrative extension was subject to law and was by operation of the law. He relied on **Section 81 of the Local Governments Act Cap. 243** which provides that;

“81. Financial Year.

The financial year of local government councils shall be the period beginning from the 1st day of July and ending on the 30th day of June in the year following.”

He further submitted that the administrative extension was not to run in perpetuity and also that paragraph 1 of Exhibit P1 gave a background that the contracts committee issued the intention to award tenders for 2008/2009.

I agree with counsel for the defendants on both submissions. It is clear from the previous contracts between the plaintiff and the defendants that they would run for one F/Y. Exhibit D11 being a consent order clearly showed it was the revenue collection contract for the F/Y 2006/2007. Similarly, the contract for the following F/Y 2007/2008 was also for one year and when that F/Y was coming to an end a new procurement process was commenced for the F/Y 2008/2009 and the contract was due to be awarded when a complaint was made and an Administrative Review Committee set up to look into it. That led to the administrative extension and by operation of the law since the F/Y 2008/2009 was coming to an end, it was appropriate for the 1st defendant to notify the plaintiff accordingly to pave way for a new procurement cycle despite the fact that the Administrative Review Committee had not yet made its decision. The plaintiff company which was the contractor for two F/Ys was very much alive to this fact as its managing director (PW1) in his evidence stated that the contract would run for one F/Y.

Although Exhibit P1 stated that the period of the extension would remain temporal until final decision will be taken by the Administrative Review Committee, it is the firm view of this court that that position would only apply to the F/Y whose tendering process was under review by the Committee. When the F/Y ended, another procurement process was expected to commence. At that point therefore, the decision of the Administrative Review Committee regarding complaints raised in the previous procurement process was not necessary as it would have been overtaken by events. Therefore, the contract could not be left to subsist in perpetuity awaiting a decision of the Administrative Review Committee which would never be made since the affected F/Y had ended. That would indeed be contrary to the law which requires the Local Governments to conduct fresh procurements for services for each F/Y.

Accordingly, I find that there was no breach of contract arising from the 1st defendant's notification to the plaintiff that the temporary contract for that F/Y was due to expire on 30th June 2009, a fact that was well within the knowledge of the plaintiff as stated above. In the premises, there was nothing irregular or illegal about that communication and it cannot by any stretch of imagination be considered an illegal termination of the contract. In any event, a thorough perusal of the letter does not even reveal any alleged termination of the contract.

On the other hand, I have also considered the circumstances surrounding the relationship between the plaintiff and the 1st defendant as the contract subsisted which was characterized by the plaintiff's default in payment of revenue to the defendants as expressed in Exhibit D3 dated 18th February 2009, which stated:

"...This is to notify you that you have defaulted on Payment of Ugx 67,032,000/= which is amount due to Soroti Municipal Council..."

Furthermore, Exhibit D4 dated 28th April 2009 stated:

"This is to inform you that the Executive Committee in its meeting held on 28th April 2009 under Minute 25/Ex/2009 recommended that the services of the tenderers mentioned below be terminated before 1st May, 2009.

This is due to failure to make full payments which is a violation of the Agreements they signed with the council

| <i>Firm</i> | <i>Tender</i> | <i>Amount Defaulted</i> |
|---------------------|----------------------|--------------------------------|
| <i>PAL Agencies</i> | <i>Bus/Taxi Park</i> | <i>87,048,000."</i> |

Both letters, which were not disputed by the plaintiff, show that the 1st defendant was aggrieved by the plaintiff's failure to remit the revenue collected and there was an intention to terminate their business relationship. However, to show good will on the part of the 1st defendant, that intention was never actualized so the plaintiff continued to collect revenue until 26th June 2009 when it was notified that the administrative extension would expire on the 30th June 2009.

In light of the foregoing, it is my finding and conclusion that the 1st defendant did not terminate the contract in the first place and did not breach the contract between itself and the plaintiff when

it lawfully notified the plaintiff about the expiry of the administrative extension and requested it to leave the park with effect from 1st July 2009 and proceeded to evict it when it failed to comply.

Issue 3: Whether or not the plaintiff owes the defendants Ushs. 119,000,000/= (Uganda Shillings One Hundred Nineteen Million) as claimed in the counterclaim.

It was submitted for the defendant/counterclaimant that the plaintiff/counter defendant was indebted to the defendant/counterclaimant. It was also submitted that the plaintiff obtained all the benefits up to the end of the F/Y as they remained the substantive revenue collectors in the bus/taxi park.

On the other hand, counsel for the plaintiff/counter defendant submitted that the acquiescence by the defendant in allowing other operators to leave the gazetted park and operate in another park estops the defendant from demanding arrears. They further claimed that since the defendants allowed Teso Coaches Ltd to destroy the contractual relationship between the defendants and the plaintiff, the defendants acquiesced and abandoned its right to claim under the contract. In this regard, it is argued for the plaintiff that setting up a parallel park meant that revenue collection would not be done by the plaintiff/counter defendant alone, which was the only authorized agent for the defendants, and that this amounted to breach of the administrative extension by acquiescence. It is also argued for the plaintiff that the defendants did not adduce any evidence in form of an audit report to show how the outstanding sum of Ushs.119,000,000/=(Uganda Shillings One Hundred Nineteen Million) arose.

I have carefully perused the pleadings and evidence adduced in support of this issue. The plaintiff relies on the defense of acquiescence against the defendants. I have already found that there is no breach of contract between the plaintiff and the defendants. I have also found that the 1st defendant had the power to permit the running of other parks.

In **Pal Agencies Ltd v Teso Coaches Ltd and Anor (supra)** this court found that;

“It was not in dispute that some motorists were parking along the roadsides in the municipality. In fact Exhibit P5 (now PI D1) indicates that as far back as 25th April 2007 when that letter was written by the Senior Enforcement Officer

Soroti Municipal Council to the Town Clerk, there was already a problem of parking along the road sides hence the directive that all motorists should park their vehicles in the gazetted park. This was in the F/Y 2006/07 before the administrative extension was given to the plaintiff as its contract with SMC was still subsisting.”

This is an indication that a number of vehicles were not parking in the gazetted park then and therefore the plaintiff was not collecting revenue from them but still met its obligation under the contract to remit the agreed funds. The defense of acquiescence does not therefore stand to bar the plaintiff from any indebtedness to the defendant/counterclaimant.

It is the evidence of DW3 that the plaintiff started defaulting after 3 months into the contract. It is also his evidence that by June 2009, they were in default by Ushs.119,000,000/= (Uganda Shillings One Hundred Nineteen Million). It should be noted that Exhibit D3, a letter dated 18th February 2009 from the Town Clerk of the 1st defendant to the plaintiff indicates that it was in default on payment of Shs. 67, 032,000/=. It states thus:-

“...This is to notify you that you have defaulted on Payment of Ugx 67,032,000/= which is amount due to Soroti Municipal Council...”

Furthermore, Exhibit P10 a letter from the Minister of Local Government to the Mayor of the 1st defendant indicates that by 30th March 2009, the plaintiff was in arrears amounting to 67million which was supposed to be paid to the Council.

Additionally, Exhibit D4 indicates that the plaintiff was indebted to a tune of Shs. 87,048,000/= by 28th April 2009. This is a letter showing defaulting tenderers as at that date. Also Exhibit D6 dated 2nd July, 2009, generally shows performance of firms collecting revenue on behalf of the 1st defendant and more specifically shows that from July 2008 – June 2009 the plaintiff was indebted to a tune of Shs. 119,000,000/=.

It is true as indicated by the plaintiff that the defendants did not file an audit report to show how the Ushs. 119,000,000/= arose. However, there is no legal requirement that an audit report must be submitted in proof of indebtedness of one party to another. There is evidence on record showing that the plaintiff was in default of its obligations to remit the revenues collected. PW1

(Patrick Ariong) the plaintiff's managing director in his evidence admitted the sum of Ushs.119,000,000/=(Uganda Shillings One Hundred Nineteen million) as being the sums owed to the defendants. During cross-examination he stated thus:-

“It is true that I testified that I defaulted in revenue payment to Soroti Municipal Council. It was a breach that was caused by circumstances. Shs. 119,000,000/= was not paid at the end of the contract because we were not able to pay.”

From that evidence it is clear that the amount claimed by the defendant/counterclaimant is not in issue but what is in contention is whether it should be paid since the plaintiff claims that it operated at a loss. The plaintiff seeks to rely on the 1st defendant's alleged acquiescence to the running of a parallel park by Teso Coaches Ltd which allegedly led to low revenue collection to justify its failure to remit the revenues collected.

I have failed to be convinced that a company which entered into a contract whose terms stipulated a specific monthly remittance would continue with the contract despite the loss it is incurring without seeking for a review of the contract sum which according to PW1 depended on the amount of revenue collected. Asked whether he complained about the loss and sought to review it, PW1 referred to Exhibit P3 by which the plaintiff complained that the actions of Teso Coaches was affecting revenue collection and payment to the council.

I have read the content of Exhibit P3 and I note that it was written on 14th July 2008 just shortly after the contract in issue had commenced. The plaintiff stated therein that without revenue from Teso Coaches and taxis on station road it would fail to raise the required tender fee. That is the only letter from the plaintiff about the matter adduced in evidence. After writing that letter the plaintiff continued to collect revenue and according to the evidence of DW3 it paid the full contract sum for July, August, and September then started defaulting on payment after the three months. During cross examination DW3 conceded that the failure of Teso Coaches and some vehicles that went to its terminal to pay revenue affected revenue collection by the plaintiff and this could have caused some financial loss but according to him not to the magnitude presented by the plaintiff.

It was the evidence of DW3 that where a contractor is struggling with revenue collection he or she writes to the council lodging a complaint and if no action is taken a reminder is sent then council would sit to review the complaint and verify but the plaintiff did not write from September 2008 when it was struggling. According to him there was an increase in revenue collection at both parks from 2009 because the number of motor vehicles increased.

On the point of a contractor complaining when a problem of revenue collection is encountered, PW1 also testified that when a contractor encounters a problem while performing a contract the normal practice is to notify the employer but the plaintiff did not apply for a review of the contractual sum in view of the problem it was facing because it was not stipulated in the offer letter.

I find this a rather lame excuse because the same argument would apply that it was not stipulated in the offer letter that the contractor would unilaterally determine what it is going to pay the employer. The fact that the plaintiff continued to collect revenue and even had to be evicted from the park when it failed to peacefully hand over after getting notice from the 1st defendant implies that this was a very lucrative business that it never wanted to lose. The plaintiff ought to have known better that continuing with the contract without seeking the review of the contract sum meant it had to comply with the agreed terms. I therefore find it unbelievable that the revenue reduced so much that the plaintiff could not raise enough revenue to meet its obligation under the contract. In any event, if at all there was any loss the plaintiff would have mitigated it by seeking a review of the contract sum and if it was not possible it would have terminated the contract on grounds that it could not raise enough revenue to meet its obligation.

Mitigation of loss was considered in **African Highland Produce Ltd v Kisorio [2001] EA 1** where the plaintiff failed to take reasonable steps to mitigate the loss and it was held thus;

“It was the plaintiff’s duty to take all reasonable steps to mitigate the loss he sustained consequent upon the wrongful act in respect of which he sued, and he could not claim as damages any sum that was due to his own neglect. The question of what was reasonable was not a question of law but of fact in the circumstances of each particular case, the burden of proving being on the defendant.”

For the plaintiff to have continued running the contract as if all was well then come to court to say we did not pay because we did not collect enough revenue is, to say the least, presumptuous.

In conclusion of this issue, I find that the plaintiff has not satisfied this court that the drop in revenue collection was to the extent that it could not collect enough revenue to meet its obligation. On the contrary, I find that the 1st defendant/counterclaimant has proved on a balance of probabilities that the plaintiff is indebted to it to the tune of Ushs. 119,000,000/= (Uganda Shillings One Hundred Nineteen Million) which it failed to remit as per the terms of the contract.

Issue 4: What are the remedies available to the parties?

i. Declarations

The plaintiff sought declarations that:- the defendants breached the contract with the plaintiff, the defendants unlawfully terminated the contract with the plaintiff, and sought damages for breach of contract, loss of revenue, interest and costs of the suit.

However, having found that there was no breach of contract or unlawful termination of the contract since the 1st defendant communicated the expiry of the contract as required by law, the plaintiff is not entitled to any of the reliefs sought.

ii. Counterclaim

The defendants in their counterclaim prayed for special damages, general damages for breach of contract and costs of the suit. Having found that the plaintiff is indebted to the 1st defendant, I find the 1st defendant entitled to its claim of Shs. 119,000,000/=.

iii. General damages

The defendant/counterclaimant prayed for general damages for breach of contract. Much as I found that the plaintiff/counter- defendant breached the contract by failing to remit the revenues collected, I have considered the fact that the 1st defendant tolerated the breach and took no action to mitigate its loss by terminating the contract.

In **African Highland Produce Ltd v Kisorio** (supra) it was held that:-

“The plaintiff did not take reasonable steps to mitigate the loss; he had the opportunity to retrieve his car from the garage after 21 days. The plaintiff was entitled to damages for loss of user for 21 days only, the balance of loss being upon him for failure to mitigate the loss.”

In the instant case, I also decline to award general damages to the 1st defendant because apart from demanding payments from the plaintiff, it sat back and watched as the breach continued from October 2008 to June 2009 well knowing that as a Local Government it has an obligation to provide services for the benefit of the people (public) in its area of jurisdiction and the failure by the plaintiff to pay its revenue would affect the provision of those services.

iv. Interest

Counsel for the defendant/counterclaimant prayed for interest at the rate of 25% from 2009 when the amount of Shs. 119,000,000/= accrued to them. However, it is pertinent to note that this prayer for interest was made from the bar as it was not pleaded in the counterclaim. The purpose which pleadings serve in litigation is to define and delineate with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases, and upon which the court will be called upon to adjudge between them; **Uganda Breweries Limited v Uganda Railways Corporation SCCA 6/2001**

This position was elaborated by **Sir Ronald Sinclair** in the case of **Captain Harry Gandy -vs- Caspair Air Charter Ltd.(1956) 23 EACA 139** when he said:

“the object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.”

I agree with that view which precisely summarises the rationale for the legal requirement that a party should not depart from its pleadings. Accordingly, the defendant/counterclaimant is not entitled to the interest submitted on.

v. Costs

Both parties prayed for costs and according to the principal that costs follow the events the 1st defendant/counterclaimant as the successful party is entitled to costs. I therefore award costs to the 1st defendant/counter defendant as prayed.

In the result, the plaintiff's suit against the 1st defendant is also dismissed for the above reasons and instead judgment is entered in favour of the 1st defendant/counterclaimant in the counterclaim against the plaintiff/counter defendant for orders that:-

1. The plaintiff/counter defendant pays the defendant/counterclaimant special damages of Ushs. 119,000,000/= (Uganda Shillings One Hundred Nineteen).
2. Costs of the suit is awarded to the 1st defendant.
3. For avoidance of any doubt costs is also awarded to the 2nd defendant against whom the case was dismissed for being wrongly sued.

Dated this 20th day of August 2015.

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of:-

1. Ms. Nampola Elizabeth h/b for Mr. Omongole Richard for the plaintiff.
2. Ms. Jacqueline Amsugut h/b for Mr. Peter Masaba and Ms. Najjemba Agnes h/b for Ms. Akware Carol for the defendants.
3. Ariong Patrick, managing director of the plaintiff and Opolot Juma an official of the plaintiff.

JUDGE

20/08/15