IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 021 of 2015

In the matter between

DIGITAL DISPLAYS LIMITED ..... PLAINTIFF

VERSUS

1. TIM CONSTRUCTION COMPANY LIMITED }
2. OTIM JOSEPH } .....DEFENDANTS
3. GULU DISTRICT LOCAL GOVERNMENT }

Heard: 16 April, 2019.
Delivered: 16 May, 2019.

Contract *— Privity of contract - A third party neither acquires rights nor liabilities under any contract — a memorandum of understanding which is in the nature of a contract and fulfils its essentials, will be enforceable — multiple writings not referencing each other, each of which could stand on its own, may nevertheless be read together or construed as a single integrated document, once it is established that they form part of a single transaction and were designed to effectuate the same purpose.*

Companies *— Lifting the veil - when a corporation is a device or sham used to disguise wrongs, obscure fraud, or conceal crime, the veil of incorporation will be pierced.*

Partnerships *— A partnership formed only to carry out one business venture or to complete one undertaking is known as a single adventure partnership — In a partnership, each partner has a legal duty to act in the partnership's best interests, as well as the best interest of the other partners—a partnership formed for a single venture dissolves at the termination of that single adventure or undertaking —an act performed by one partner for the purpose of carrying on the ordinary course of business of the firm binds the firm and his or her partners, unless the partner so acting does not have authority to act for the firm in the particular matter.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The plaintiff's suit against the defendants jointly and severally is for recovery of general damages, special damages and costs for breach of contract and trust. The claim is that the plaintiff and the first defendant entered into a single venture partnership agreement worth shs. 329,000,000/= for the rehabilitation of Teladwong Primary School in Patiko sub-county. Following that agreement, they executed a memorandum of understanding by which they shared duties, agreed upon measures for financial management, and the sharing of proceeds of the business, among other issues. Under the agreed terms, the first plaintiff was entitled to shs. 25,000,000/= after deduction of all outgoing and the balance was to go to the plaintiff. In breach of that agreement, the defendants failed or refused to remit the agreed funds to the plaintiff.

[2] The third defendant did not file a written statement of defence. In the joint written statement of defence of the first and second defendant, the second defendant denied having executed any agreement with the plaintiff. The 1st defendant admitted having won a tender for the rehabilitation of Teladwong Primary School and executing the memorandum of understanding with the plaintiff. The company contends however that under that agreement, the plaintiff undertook to provide shs. 150,000,000/= to the joint business which it failed to do, prompting the first defendant to incur expense on mobilisation of construction material and labour.

[3] The first defendant counterclaimed for breach of contract based on the plaintiff's failure to raise the shs. 150,000,000/= it undertook to in the memorandum of understanding dated 7th September, 2012. As a result, the 3rd defendant revised the contract sum from shs. 597,942,450/= reducing it to the execution of works worth shs. 329,000,000/= and the rest was sub-contracted. The plaintiff failed to correct defects in work rejected by the third defendant, forcing the first defendant to undertake the rectifications on its own. The first and second defendants thus prayed that the suit be dismissed with costs.

The plaintiff's evidence;

[4] P.W.1 Ekolot Leonard testified that he supervised execution of building works at Teladwong Primary School on behalf of the employer, Northern Uganda Development of Enhanced Local Governance, Infrastructure, and Livelihoods (NUDEIL), as part of a project financed by the United States Agency for International Development (USAID). The construction was done by the first defendant TIM Construction Company Limited. They later sub-contracted some of the work to another firm, "Leisure Masters," which undertook to construct two teachers' houses, two kitchens, two classroom blocks and two drainable latrines. This was prompted by delayed execution of the contract. Execution of the works was planned to start in a period of two weeks but three weeks after execution of the agreement the first defendant had not even started the construction. After one month, the third defendant threatened to terminate the contract. Works started but took over one year yet they had been planned to take six months. P.W.1 would make periodical reports. He would point out defects that required rectification. At one time the first defendant had problem with its casual labourers at the site who went on strike and the employer was forced to mediate. The third defendant paid them directly by payment of a certificate in accordance with measured works.

[5] P.W.2 Odong Felix testified that he executed construction works at Teladwong Primary School on behalf of the plaintiff as the site foreman from 2013 until April, 2014. He did the masonry work up to roofing level. At the time he got engaged the foundation had already been excavated. He took over from that stage until the completion of the project. It was Stephen Kahuma and Keith Legesi, both of the plaintiff company, who would purchase the building material used at the site. The second defendant would occasionally come to the site as part of the team that did the weekly inspections but never took part in payment of labourers or purchase of material. He was not aware of any strike by labourers at the site.

[6] P.W.3 Stephen Kahuma testified that his company executed a job building two classroom blocks and two stance latrines. The second defendant Mr. Otim was one of the people they worked with. They had a memorandum of understanding to the effect that the plaintiff would execute the work on the ground and would pursue payment of the certificates. The plaintiff's role was to finance and execute the project. He was working for the plaintiff and was the interface between the plaintiff, the first defendant Tim Construction Company Limited, the men on the ground and P.W.1 Ekolot Leonard, the NUDEIL supervisor of the project. He would create the flow of information for all the parties

[7] It was the obligation of P.W.3 to ensure that the men on the ground do not run out of material and receive payments on time until completion. To the partners he would give then reports on the progress of the work. He would give the first defendant Tim Construction Company Limited progress reports through their M.D Mr. Otim, the second defendant, as P.W.3 was also signatory to his account where the project certified payments were to be made. He would also keep the supervisor Engineer P.W.1 Ekolot Leonard informed on the progress. The funds were coming from Digital Displays Limited. They completed the work assigned to them and thereafter handed over the school to P.W.1 Engineer Ekolot Leonard as the project supervisor. The next stage was to pursue payment of certificate of completion of the work and this was the role of the second defendant, Mr. Otim Joseph. To-date the payment has never been received by the plaintiff. He knows this because he was signatory to the Tim Construction account. He did not sign for any money for the completion of the works. It is alleged that the money was diverted to another account opened by the second defendant, Mr. Otim Joseph. This would violate our contract and our controls we had put in place as Digital Displays to protect our interest.

[8] Under cross-examination, he stated that the memorandum of understanding signed on 7th September, 2012 (exhibit D. Ex.2) did not indicate how much money the plaintiff was to inject into the project. He was a joint signatory to an

account with the second defendant. They would sign the cheque together and we would use the money for execution of the work. On 5th March, 2014 they withdrew shs. 40,500,000/= (exhibit D. Ex.1). For the third stage, he received shs. 30,340,000/= (exhibit D. Ex.3). All these payments were for work done. He recalled a sum of about shs. 70,000,000/= that he received. Mr. Otim later decided to sub-contract the two teachers' houses and the two stance pit latrine, hence the second MOU dated 3rd December, 2013 (exhibit P. Ex.1.) which saw a reduction in the amount of work the plaintiff had to do. What was left to the plaintiff to do under the second MOU was in the region of shs. 320 million. The plaintiff was left with two classroom blocks and two five stance pit latrines. The agreement with NUDEIL was that we would be paid for measured work as per certificates. He clarified that the two payments he acknowledged were not in relation to the final certificate. They relate to certificate thee and four. The plaintiff's claim is about payment of the certificate completion and the retention monies.

[9] P.W.4 Keith Legesi testified that he met the second defendant Otim Joseph in Kampala. He was looking for someone to finance his company. The contract value was shs. 597,942,420/= The second defendant had won a tender but he did not have the funds to do the work. They negotiated over two to three days and came up with a partnership deed. They got an engineer who appraised the site. The second defendant had at that time dug the foundation trenches. We agreed that we would pay about shs. 60,000,000 upon completion of the full contract. This is the second MOU dated 7th September, 2012.

[10] The plaintiff company was supposed to finance and execute the works. They estimated it would require the plaintiff to provide shs. 150,000,000/= out of which the second defendant would receive shs. 60,000,000/= The plaintiff put in shs. 260,000,000/= of the gross capital of shs. 329,000,000/= required. One of the terms stated in the partnership deed was that the plaintiff would become a signatory on the first defendant's account in DFCU. This was done. At a later

stage the first defendant sub-contracted and what was left was worth about shs 329,000,000/= Consequently the second defendant's take home was reduced from shs. 60,000,000/= to shs. 15,000,000/= They signed a second MOU to that effect on 3rd December, 2013 with a contract sum of shs. 329,000,000/= Under that agreement, they were supposed to remit 25,000,000/= to the first defendant Tim Construction which in instalments of 15,000,000/= and shs. 10,000,000/= At the completion of the works, they paid shs. 10,000,000/= leaving a balance of shs. 14,000,000/=

[11] They had agreed that payments received from the district were to be made to the joint DFCU bank account but the second defendant opened up an account in Barclays Bank. One such payment is dated 19th August, 2014. The second defendant received 58,842,128/= The copy was signed at the District level (document P. ID.1). By that time all the works had been done. The defendants received all the money payable by the third defendant under the contract as indicated by the payment certificate dated 9th July, 2014 (document P. ID.2). He prayed that the court awards the plaintiff shs. 250,000,000/= This is because the contract sum was shs. 389,000,000/= By the time the second defendant contacted the plaintiff, he was late on the contract by about four months. He was warned but he signed the memorandum just ten days later. He signed the contract with the District on 19th June, 2012 and signed the memo on 7th September, 2012 and the warning was a week after on 14th September, 2012. He did not disclose to the plaintiff that he was late. P.W.4 noted that the second defendant was late but he assured the plaintiff that he had rectified the delay. He prayed for interest on the sum claimed. He also prayed for general and aggravated damages and the costs of the suit.

[12] Under cross-examination, he admitted that the plaintiff was supposed to pay the defendants shs. 25,000,000/= and they paid only shs. 10,500,000/= conditionally. The co-director of P.W.4 was on site from the time the plaintiff began performance of the contract. There are three directors in the plaintiff company.

He inspected the site about seven times. He was not aware of any strike. His partner was paying for the material and labour and sometimes through Felix his Foreman. That was the close of the plaintiff's case.

The defendants' evidence;

[13] The second defendant Otim Joseph testified as D.W.1 and stated that the plaintiff was once his partner in business of construction of two classroom blocks and ten stance drainable latrines. This was pursuant to a memorandum signed on 7th September, 2012 (exhibit D.Ex.2). Their employer was Gulu District Local government. The contract sum was slightly over shs. 597,000,000/= A month before the signing he had already been connected with P.W.3 Stephen Kahuma and negotiations took place during that month. The plaintiffs were aware that he was already out of time. His commission was supposed to be shs. 60,000,000/= He was to supervise the work as they executed it. After signing the contract, the plaintiffs took more than two weeks before reporting to site.

[14] On arrival, the plaintiff found that he had already mobilised about 80% of the construction material; lake sand, river sand, aggregate, hard core etc. He had spent about shs. 14,000,000/= P.W.3 Stephen Kahuma sat him down and told him he had failed to raise the money expected. P.W.3 Stephen Kahuma suggested that D.W.1 persuadeS the workers and suppliers to do so on credit. The debts of labour and material kept on accumulating. Each time they received money, P.W.3 Stephen Kahuma would take the lion share as he said he was to collect more material from Kampala and that D.W.1 should persuade them to wait. They had a partnership agreement (exhibit D. Ex.3).

[15] Their resources were limited and D.W.1 had to engage sub-contractors until they competed the second stage. They were paid shs. 67,000,000/= with a 6% withholding tax reducing it to shs. 63,000,000/= out of which P.W.3 Stephen Kahuma came up with claims that construction materials were cheaper in

Kampala and he went with shs. 45,000,000/= D.W.1. proceeded with what was left. P.W.3 Stephen Kahuma said he had to buy cement and iron bars. The money D.W.1 was left with was not enough to continue with the other buildings. P.W.3 Stephen Kahuma disappeared for some time and D.W.1 raised him on phone but he could not come. D.W.1 had in the meantime been given two prior warnings and was advised to sub-contract the untouched part of the project at foundation level. When P.W.3 Stephen Kahuma took the money he did not deliver any material.

[16] The second stage was for shs. 39,000,000/= and after the 6% holding tax deduction they received shs. 37,000,000/= on their account. D.W.1 retained shs. 18,777,736/= They used that to purchase material that could not be borrowed like iron sheets where they spent shs. 10,000,000/= which D.W.1 bought from Gulu. D.W.1 played the part of obtaining material on credit. The third stage was worth shs. 51,000,000/= reduced to shs. 49,000,000/= by withholding tax deduction paid on 29th August, 2013. Out of that shs. 18,140,000/= was used to pay for timber for trusses from Gulu at a timber shop. D.W.1 retained about shs. 6,000,000/= for part-payment of labour and the rest was taken by P.W.3 Stephen Kahuma. From that time up to December, 2013 P.W.3 Stephen Kahuma was not seen again in Gulu. Work stalled as the defendants had no money. D.W.1 heard that the plaintiffs had another contract in Amuru.

[17] On 13th December, 2013 D.W.1 served P.W.3 Stephen Kahuma with a termination letter terminating services of Digital Displays Limited and requested him to refund part of the money. P.W.3 Stephen Kahuma organised and rushed to the site and did work that was un-supervised yet D.W.1 was the one supposed to be monitoring the work. After the plaintiff resumed work D.W.1 resumed his relationship with them and they continued to work together. When the final works were measured shs. 51,000,000/= was paid out of which P.W.3 Stephen Kahuma took 40,500,000/= and left behind shs. 10,500,000/= with D.W.1. He expected P.W.3 Stephen Kahuma to come back and they complete the remaining part of

the job and the accumulated labour. He never came back and things got worse. The local community mobilised themselves and wanted to demonstrate. The labour office intervened and arranged a sitting and D.W.1 was told to invite his colleague P.W.3 Stephen Kahuma. P.W.3 instructed D.W.1 to handle what he could. D.W.1 wrote a letter to P.W.3 Stephen Kahuma via email and he received it. The building was at painting stage, the windows and doors were fitted and a lot of corrections had to be made. D.W.1 was told they had done only 40% of the finishing works. The labour office said they would henceforth pay directly to the claimants but through his account. D.W.1 was not to touch the money.

[18] On the day of payment the District Engineer and labour officer were present and shs. 32,000,000/= for both labour and material was paid to creditors. It was the Secretary works who paid them. D.W.1 handed over the site to the District personally. D.W.1 received shs. 6,000,000/= after the creditors were paid. D.W.1 suffered as the local people beat him at one time and he prayed for shs. 70,000,000/= as compensation. The plaintiffs gave him only shs. 10,000,000/= He is a sole proprietor. In his view he should have been the one to sue Digital Displays. He did not have a lawyer during the transaction. He prayed that the suit should be dismissed with costs .

[19] Under cross-examination he testified that he approached the plaintiffs to re-enforce him with finance. He needed shs. 150,000,000/= He did not include that sum it in the partnership deed. It was his first time to deal with a sub-contractor. That term was not included but that is what he wanted. They signed a MOU on 7th September, 2013. The one of 3rd December, 2013 does not have the term of shs. 150,000,000/= He had by that time spent shs. 14,000,000/= of his own already to mobilise the material on site, part of which was borrowed and part of which was purchased. He had mobilised 80% of the material. The total value was about shs. 35,000,000/= His target was to undertake all the work concurrently, i.e. handling all the structures.

[20] The plaintiff showed up with shs. 6,000,000/= after delaying to come to the site. The plaintiff began by building a store and disappeared again. The plaintiff then came back after fourteen days. Certificate one was for shs. 63,000,000/= They did the work together for that certificate. Under the MOU of 3rd December, 2013 (exhibit P. Ex.1) clause ten D.W.1 is referred to as the first party. Clause 11 is about the obligations of the plaintiff. As to the MOU of 7th December, 2013 (exhibit D. Ex.2) para 3 thereof relates to duties. D.W.1 retained shs. 18,000,000/= on the account and we used to withdraw gradually. The plaintiff had paid for cement before the first certificate, about 100 bags and some reinforcement bars worth shs. 3,600,000/= from Kampala he was supposed to purchase reinforcement bars, iron sheets and wire mesh for the floor, A96 about 13 roles. P.W.3 Stephen Kahuma delivered material of about 22-23 million. He said he had borrowed from money lender and he had to pay back before the interest increases.

[21] Exhibit D. Ex.1 dated 5th March, 2013 is in respect of certificate number four. Out of it, the plaintiff took shs. 40,000,000/= and D.W.1 retained shs. 10,000,000/= P.W.3 Stephen Kahuma took that on condition the he was to complete the remaining works. Certain things were handled through mutual understanding. Money of all certificates up to the fourth certificate was paid into the jointly operated account. The money for the final certificate went to the right hands because the plaintiff thought labour was not important. D.W.1 was left with small portion of the money on every certificate to do the work. Both parties in the partnership were depending on money coming from the district to finance the construction works. The plaintiffs lied to D.W.1 that they would buy material but they did not. P.W.3 Stephen Kahuma told D.W.1 that he was borrowing money from money lenders. He initially came with shs. 6,000,000/= and then he came with shs. 11,000,000/= later.

[22] D.W.1 invited the plaintiff five times before the District Officials intervened. He called him thrice on phone and the fourth time by mail. The email of D.W.1 is

Jodetim2001@yahoo.co.uk. That of P.W.3 Stephen Kahuma too is on Yahoo. The supervisor was Mr. Obwoya Jimmy, Leonard Ekoloit representing UEDIL and several others. Leonard was responsible for quality control, monitor progress, monitor specifications, etc. D.W.1 interacted with him times. His point of view on technical matters in believable. On observations regarding progress of work he could also be able to report. The balance of certificate four was paid to the creditors in the sum of shs. 32,868,400/= It was paid into an account where D.W.1 was sole signatory but from there the money was paid directly to the creditors. Under certificate five they received shs. 66,000,000/= and certificate six was for retention in the sum of shs. 14,664,404/= The account D.W.1 opened up was in Barclays. Document P.ID.1 does not indicate the true personal account number of D.W.1. He possesses documents to show the beneficiaries were Okwera Peter, Onen and others (four people) who received shs. 32,00,000/= They represented the rest of the people. The four were the foremen acting on behalf of the rest. That was the close of the defence case.

The issues to be decided;

[23] The following issues to be decided by court were agreed upon by the parties in their joint scheduling memorandum, namely;

1. Whether the second defendant was a party to the contract.
2. Whether the first and second defendant jointly or severally breached the contract.
3. Whether the plaintiff is entitled to the sum of shs. 105,000,000/=
4. What remedies are available to the parties.

Submissions of counsel for the plaintiff;

[24] In his final submissions, counsel for the plaintiffs argued that contrary to the terms of the memoranda of understanding, the first defendant without consent of the plaintiff opened up another bank account for purposes of receiving payment

from the 3rd defendant. A total of shs. 53,532,804/= was diverted and deposited on that account in three instalments. As a result a balance of shs. 39,066,000/= due under the contract was never accounted for by the defendants. He prayed that judgment be entered against them in that amount.

Submissions of counsel for the 1st and 2nd defendants;

[25] Counsel for the first and second defendants replied in his submissions that the second defendant was a mere signatory to the memorandum of understanding on behalf of the first defendant, a limited liability company, as its managing Director and therefore is not personally liable for its terms. It is the plaintiff who breached the memorandum of understanding resulting in the main contract being withdrawn and works sub-contracted out by the employer. The plaintiff undertook to finance the project but failed to do so. Directors of the plaintiff failed to turn up at a crisis meeting following site workers' strike over pay constraining the first defendant to cause payment out of the outstanding certificate. The defendants did not engage in any fraud. the plaintiff is not entitled to any payment under the contracts. Instead it is the defendants who are entitled to shs. 25,000,000/=

First issue; Whether the second defendant was a party to the contract;

[26] It is contended by counsel for first and second defendants that the second defendant was a mere signatory to the memorandum of understanding on behalf of the first defendant, a limited liability company, as its managing Director and therefore is not personally liable for its terms. Privity of contract is a doctrine of the law of contract that prevents any person from seeking the enforcement of a contract, or suing on its terms, unless they are a party to that contract. The general rule at common law is that a contract creates rights and obligations only as between the parties to such contract. A third party neither acquires rights nor liabilities under any contract. For a person to be able to enforce a contract, he or

she must have given consideration to the promisor (see *Dunlop Pneumatic Tyre Co Ltd v. Selfridge Ltd [1915] AC 847at 853*).

[27] In the instant case, the contract sought to be enforced dated 3rd December, 2013 (exhibit P. Ex.1) is entitled "memorandum of understanding." The fact though that the parties refer to an agreement as a memorandum of understanding does not prevent the existence of a binding contract. The nature of the document is not decided on the heading but on the content that is written (see *Nanak Builders And investors Pvt. Ltd. v. Vinod Kumar Alag [1991] AIR 315*;). The enforceability and binding nature of a memorandum of understanding depends upon the content, nature of agreement, language and intention of the parties to it.

[28] In cases where the memorandum of understanding is in the nature of a contract and fulfils its essentials, it is held to be enforceable (see *Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th793*). An agreement will usually fall into this category if it is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable. There is also a longstanding maxim of equity that “equity looks at the substance rather than form”. In the same vein, if the agreement is described as memorandum of understanding but in substance and from all indications is an enforceable contract, the courts will enforce the apparent memorandum of understanding as a contract with its attendant legal consequences.

[29] The terms of the agreement will be assessed objectively, and intention will be assessed by the content, not the title or label of the document. A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. One of the cardinal principles of construing non-statutory documents is deciphering the intention as expressed in the document or as can be gathered from the four corners of the document. Having perused the memorandum of understanding relied upon by the respondent, I find that it contains all the essential terms and that it is devoid

of vagueness. All terms can be identified with such certainty and definiteness that the court can clearly ascertain the precise acts which were to be performed by both parties. It is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable.

[30] The memorandum of understanding in the instant case is in the nature of a contract and fulfils its essentials. It did not give any room for further negotiations, it left nothing for future negotiations and it has no non-binding parts. Where a memorandum of understanding satisfies all the essential conditions of a valid contract, namely: the presence of an offer and acceptance, intention to create legal relations, the capacity of the parties to contract and consideration, it will be enforced in the same way as a contract. There is a strong presumption that parties intend to create a legally binding contract if the terms are certain, clearly defined and supported by consideration. I find that the document dated 3rd December, 2013 (exhibit P. Ex.1) although entitled "memorandum of understanding," is an enforceable contract between the parties privy to it.

[31] The court then has to determine the nature of relationship between the parties, that arises from that contract. According to section 3 (d) (iv) of *The partnership Act, 2 of 2010,* the existence of a partnership may be determined from agreements or other documents, formal or otherwise, which disclose the partnership relationship. A partnership is the relationship which subsists between or among persons, not exceeding twenty in number, who carry on a business in common with a view to making profit (see section 2 (1) of *The partnership Act, 2 of 2010*).

[32] A partnership between two people arises when they run a business together with the intention of sharing the profits amongst themselves. However, there are various types of partnerships according to their duration or the intent of their creation. In the agreement dated 3rd December, 2013 (exhibit P. Ex.1), the parties are named as the plaintiff and the first defendant who agreed to carry out

a business in common; the rehabilitation of Teladwong Primary School in Patiko sub-county. Before that the parties had on 7th September, 2012 signed a partnership agreement (attachment to exhibit D. Ex4) where the parties expressly stated in clause 2.0 that the partnership was to "continue until completion of the project." When a partnership is formed only to carry out one business venture or to complete one undertaking such a partnership is known as a single adventure partnership. The parties to that agreement therefore entered into a partnership for a single adventure or undertaking, with the implication that upon the completion of the said venture or activity, the partnership would be considered dissolved.

[33] Exhibit P. Ex.1 dated 3rd December, 2013 in essence is a single venture partnership agreement, where the parties are named as the plaintiff (the first party) and the first defendant (as the second party). In the partnership deed dated 7th September, 2012 (attachment to exhibit D. Ex4) the parties still are named as the plaintiff and the first defendant. In none of the two partnership agreements is the third defendant named as a party, yet the terms of these agreements are sought to be enforced against it. Since the third defendant is not privy to any of the two agreements, the suit against the 3rd defendant is misconceived. It is dismissed with no order as to costs, considering that the 3rd defendant neither filed a written statement of defence nor was represented or appeared during the trial.

[34] Whereas it is a well established principle of the law that incorporation shields a company's directors, officers and shareholders from personal liability (see *Salomon v. A. Salomon and Co Ltd [1897] AC 22*), however, there are circumstances in which directors and officers may lose this protection. Sometimes the principles of consideration and privity of contract must yield to practical justice. This is because "…a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes

may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation….." (see *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co. Ltd, [1915] AC 705*). Therefore, where it is established that a company's director, officer or shareholder wields undue dominion and control over the corporation, such that the corporation is a device or sham used to disguise wrongs, obscure fraud, or conceal crime, the veil of incorporation will be pierced.

[35] Courts are willing to look behind the corporate veil as a matter of law so as to establish the directing officer behind the decisions and actions taken by the company. "Lifting the veil" is allowed only in certain exceptional circumstances. Ownership and control are not sufficient criteria to remove the corporate veil. The Court cannot remove the corporate veil only because it is in the interests of justice. The corporate veil can be removed only if there is impropriety. Even then, impropriety itself is not enough. It should be associated with the use of the corporate structure to avoid or conceal liability (see *Merchandise Transport Ltd v. British Transport Commission [1962] 2 QB 173, at 206–207*; *Trustor v. Smallbone (No 2) [2001] WLR 1177*; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852* and *Antonio Gramsci Shipping Corp and others v. Stepanovs [2011] 1 Lloyd's Rep 647*). The court will then go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.

[36] The courts have in the rare circumstances ignored the corporate form and looked at the business realities of the situation so as to prevent the deliberate evasion of contractual obligations, to prevent fraud or other criminal activities and in the interest of public policy and morality. In order to remove the corporate veil, it is necessary to prove the presence of control, and the presence of impropriety, that is, the use of the company as a "facade," "cloak" or "sham" to hide violation of

law. This is proved by showing that; (i) there was a fraudulent misuse of the company structure, and (ii) a wrongdoing was committed "dehors" the company. The court will treat receipt by a company as receipt by the individual who controls it if both conditions above are satisfied. It enables a claimant to enforce a contract against both the "puppet" company and the "puppeteer" who at all times was pulling the strings.

[37] An example of such a case being established is *Fairline Shipping Corp. v. Adamson [1975] Q.B. 180* where the plaintiffs sued the defendant, a director of a warehousing company, for the negligent storage of perishable goods. The contract was between the plaintiff and the company. But Kerr J. (later Kerr L.J.) held that the director was personally liable. That conclusion was possible because the director wrote to the customer, and rendered an invoice, creating the clear impression that he was personally answerable for the services. If he had chosen to write on company notepaper, and rendered an invoice on behalf of the company, the necessary factual foundation for finding an assumption of risk would have been absent.

[38] In the instant case, in the case of the small one-man company that the first defendant is, the second defendant as the managing director will almost inevitably be the one possessed of qualities essential to the functioning of the company. Therefore when the second defendant knowingly received funds through an account where he was sole signatory for the purpose of avoiding the first defendant's liability under a contract already entered into and breached by the first defendant, he was not acting as a servant, representative, agent or delegate of the first defendant. This was not a routine act by a director for and through his company. To the contrary, by opening up that bank account and diverting funds payable under the contract to that account, the second defendant acted outside his mandate thereby accepting a personal commitment or an assumption of personal responsibility to account for those funds, as opposed to

the known company obligation, in which case he can be held personally liable on that contract.

[39] Piercing the corporate veil is the process whereby the court ignores the principle of corporate personality and holds the shareholders or directors liable for their actions so that they meet the company obligations in their personal capacities. The courts will pierce or the “veil” were the corporate structure has been used as an instrument of fraud or to circumvent the law. Where a person knowingly appropriates another's property, he or she will not escape a finding of dishonesty simply because of the principles of consideration and privity of contract.

[40] For example in *Royal Brunei Airlines SDN BHD v. Tan, [1995] 2 AC 378;[1995] 3 All ER 97,* the facts were that in 1986, Royal Brunei Airlines (Royal Brunei) appointed Borneo Leisure Travel Sdn Bhd (Borneo) to be its agent for booking passenger flights and cargo transport around Sabah and Sarawak in Malaysia. Mr Tan was Borneo’s managing director and main shareholder. Borneo was receiving money for Royal Brunei, which was agreed to be held on trust in a separate account until passed over. But Borneo, with Mr Tan’s full knowledge and assistance, paid this trust money into its current account and used it for its own business. Borneo travel failed to pay on time, the contract was terminated, and Borneo went insolvent. Royal Brunei claimed the trust money back from Mr Tan. The fundamental issue in the case was the proper role of equity in commercial transactions. It was whether Royal Brunei could claim the trust money back from Mr Tan, due to his knowing assistance of a breach of trustee duties and the knowing receipt of trust property. It was held that that the money was recoverable since it was the dishonest assistant’s state of mind which matters. The test for being liable in assisting breach of trust must depend on dishonesty, which is objective. Knowledge depends on a “gradually darkening spectrum.” It was irrelevant what the primary trustee’s state of mind was, if the assistant was himself dishonest. He caused or permitted his company to apply

the money in a way he knew was not authorised by the trust. His conduct was dishonest. The appeal was allowed and relief was granted.

[41] Similarly in the instant case, by diverting part of the payments under the contract to an account in Barclays Bank where he was sole signatory, the second defendant in his capacity as a director of the contracting company may be held liable since it is established by evidence that by that act he assumed personal liability. He applied the money in a way he knew was not authorised by the partnership agreement. His conduct was outright dishonest or a manifestation of a dishonest and fraudulent design. The company was being used by him as its controller in an attempt to immunise himself from liability for his wrongdoing which existed entirely dehors the company. It was a fraud on the company itself.

[42] Any officer deemed to have knowingly used the company business structure to defraud creditors will be personally liable for the debts of the company. The plaintiff can reasonably look to the second defendant for indemnification of any loss caused by his breach of the contract they had with the first defendant. The second defendant is therefore jointly and severally liable with the first defendant, on the contract.

Second issue; Whether the first and second defendant jointly or severally breached the contract.

[43] The partnership agreement between the plaintiff and the first defendant comprises two documents; the partnership deed dated 7th September, 2012 (attachment to exhibit D. Ex.4) and the memorandum of understanding dated 3rd December, 2013 (exhibit P. Ex.1). Where contractual writings are sequential, court needs to determine whether or not the two or more were executed as part of the same transaction, which may then necessitate the construing of multiple writings as one agreement or as a single instrument. Where the terms of a contract are spelled out in several documents, all those documents are

admissible. Prior writings admissible if subsequent writings were executed pursuant to the prior writings and there is proof the parties intended the prior writings to be part of the contracts (see *Body-Steffner Co. v. Flotill Prods., Inc., 147 P.2d 84, 87 (Cal. Ct. App. 1944*).

[44] Moreover, multiple writings not referencing each other, each of which could stand on its own, may nevertheless be read together or construed as a single integrated document, even if the documents themselves do not explicitly so provide, even though they were executed on different dates and were not all between the same parties, once it is established that they form part of a single transaction and were designed to effectuate the same purpose be read together, (see *Steinke v. Sungard Fin. Sys., Inc., 121 F.3d 763, 771 n.5 (1st Cir. 1997*).

[45] In the instant case, although executed on different dates, both the partnership agreement of 7th September, 2012 and the memorandum of understanding of 3rd December, 2013 were between the same parties. Both relate to construction works to be carried out at Teladwong Primary School in Patiko sub-county. They contain more or less similar terms. I therefore find that the attachment to exhibit D. Ex.4 and exhibit P. Ex.1, related to the same transaction, were each intended to be binding on the same parties, and were intended to impose the same obligations on each of the parties, even though they were set forth in different documents.

[46] Where several instruments are made as part of one transaction they will be read together, and each will be construed with reference to the other; and this is so although the instruments may have been executed at different times and do not in terms refer to each other (see *Neville v. Scott, 127 A.2d 755 (Pa. Super. 1957* and *Marso v. Mankato Clinic, Ltd., 278 Minn. 104, 114, 153 N.W.2d 281 , 289 (1967*). Both documents clearly were regarded by the parties as parts of the same general transaction and should have been read together in determining the relations of the parties to this suit, with respect to the subject matter here

involved. In construing the two documents the position of the parties, the objects they had in view, and the circumstances surrounding and connected with these transactions must be considered.

[47] When construing the meaning of contractual terms, courts attempt to ascertain the intention of parties on an objective basis. The court must look for “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” (see Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society, [1998] 1 WLR 896*). The construction of a contract has to determine the common intention of the parties or, if no such intention can be determined, the meaning that reasonable parties of the same kind as the parties would give to it in the same circumstances, taking into account, in particular, the nature and purpose of the contract, the conduct of the parties and the meaning commonly given to contract terms and expressions in the trade concerned.

[48] In clause 5.0 of the partnership deed dated 7th September, 2012 (attachment to exhibit D. Ex.4) regarding "partnership bank accounts," it is stipulated that; "the partnership shall maintain bank accounts in such banks as the partners agree and the Managing Partner of Digital Displays Limited shall become signatory to all the bank accounts which include DFCU Gulu Branch." Similarly, in clause of the memorandum of understanding dated 3rd December, 2013 (exhibit P. Ex.1), 10 thereof it is stipulated that; "the first party's obligations shall include quality assurance, obtaining certificates, and the bank withdrawals together with the second party."

[49] Construed together, and adopting the meaning which the two clauses 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, it was the intention of the parties that for the

duration of the partnership, the plaintiff's Managing Director was to become an authorised joint signatory to the first defendant's bank accounts. This means that the plaintiff's Managing Director was to become privy to all transactions relating to those accounts. Indeed in his defence as DW,1 the second defendant stated that money of all certificates up to the fourth certificate was paid into the jointly operated account.

[50] It is contended by the plaintiff that whereas under the agreed terms, the first plaintiff was entitled to only shs. 25,000,000/= after deduction of all outgoing and the balance was to go to the plaintiff, in breach of that agreement, the defendants failed or refused to remit the agreed funds to the plaintiff. The second defendant instead opened up an account in Barclays Bank Limited Gulu branch where he was sole signatory, to which the sum claimed in this suit was diverted.

[51] On the first and second defendant's part, it is contended that the plaintiff was in breach of the contract in that it failed to raise the capital contribution of shs. 150,000,000/= and also failed to pay the wages of labourers, yet it was obligated to do both under the contract. Whereas the partnership deed dated 7th September, 2012 (attachment to exhibit D. Ex.4) is silent as to the duties of the partners, clause 11 of the memorandum of understanding dated 3rd December, 2013 (exhibit P. Ex.1), specifically states that; "the second party's obligations shall include procuring of supplies, execution of the works, payments of verified labour costs, employing labourers and paying labourers as well." It is noteworthy that in none of the two documents are the parties' capital contributions specified.

[52] It is an established principle of the law of contract that a contract without ambiguity is to be applied, not interpreted. Where a contract is reduced to writing, neither party can submit evidence extrinsic to the contractual document alleging terms agreed upon but not contained in the document (see *Henderson v. Arthur [1907] 1 KB 10; Halsbury's Laws of England (4th edn.) vol. 9 (1) para 622; Chitty on Contracts 24th Edition Vol I page 338; Jacob v. Batavia and General*

Plantations Trust, (1924)1 Ch. 287; Muthuuri v. National Industrial Credit Bank Ltd [2003] KLR 145; and Robin v. Gervon Berger Association Limited And Others [1986] WLR 526 at 530). The parol evidence rule prevents the admission of oral evidence to prove that some particular term was verbally agreed upon, but had been omitted from the contract. A written agreement supersedes earlier additional oral agreements between the parties.

[53] A breach occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. The duties of the partners are specified in clauses 10 - 12 of the memorandum of understanding (exhibit P. Ex.1) and clauses 2 and 3 of the partnership deed dated 7th September, 2012 (attachment to exhibit D. Ex.4). While the plaintiff was responsible for;- procuring supplies, execution of the works, payment of verified labour costs, employing and paying labourers, ensuring that the works are executed within thirty days; the first defendant was responsible for;- quality assurance, obtaining certificates, and making bank withdrawals jointly with the plaintiff.

[54] In a partnership, each partner has a legal duty to act in the partnership's best interests, as well as the best interest of the other partners. Partners in a partnership must be able to trust and rely on their fellow partners for promoting the success and best interests of the business. Their relationship is built on good faith, honesty, loyalty, and fairness. Each partner has a legal duty to act in the partnership's best interests, as well as the best interest of the other partners. Partners owe one another a fiduciary duty and are thus required to be just and faithful to each other. Fiduciary duties are a combination of: the duty of honesty, the duty of care, the duty of loyalty, the duty of fairness and the duty to act in good faith. A partner is liable to compensate the firm for any damages caused to its business or the firm because of a partner’s fraud in the conduct of the business of the firm.

[55] These duties continue through the life of the business, and they extend to the dissolution and complete settlement of business affairs. In clause 2.0 of the partnership deed, (attachment to exhibit D. Ex4) the partnership was deemed to have begun on 29th June, 2012 and was to continue to exist until completion of the project "or otherwise determined in accordance with *The Partnership Act*," whose relevant provision states as follows;

34. Dissolution by expiration or notice.

(1) Subject to any agreement between or among the partners, a partnership is dissolved—

(a) if entered into for a fixed term, by the expiration of that term;

(b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;

(c) if entered into for an undefined time, by the agreement of the partners to dissolve the partnership.

(2) In the case mentioned in subsection (1) (c), the partnership is dissolved as from the date agreed by the partners for the dissolution to take effect.

[56] This being a partnership formed for a single venture, it would be deemed to be dissolves at the termination of that single adventure or undertaking by virtue of section 34 (1) (b) of *The Partnership Act*. Since retention money is an amount of money withheld by an employer in a construction contract from an amount payable to the contractor, as security for the performance of the contractor's obligation to the employer under the contract, the parties' single venture for the rehabilitation of Teladwong Primary School in Patiko sub-county would come to end with the payment of the retention money by the third defendant, being the employer. Upon receipt of the retention money by the parties, the discharge of all outstanding obligations and sharing of profits in accordance with the terms of the partnership deed, the partnership would stand dissolved.

[57] In the evidence before court, it was not established with any specificity as to when the retention money payable under the underlying construction contract was actually paid. There is no evidence to show that the parties discharged all

outstanding obligations and shared the profits in accordance with the terms of the partnership deed. For all intents and purpose therefore, this partnership had never been dissolved and both parties were still bound by its terms as at the time the suit was filed.

[58] Consequently, when on or about 19th August, 2014 the second defendant caused payment of a sum of shs. 58,842,128/= and later the retention sum of shs. 14,664,404/= due under the partnership agreement between the plaintiff and the first defendant into an account in Barclays Bank, Gulu Branch, to which he was the sole signatory, he was in breach of clause 5.0 of the partnership deed dated 7th September, 2012 (attachment to exhibit D. Ex.4) and clause 10 of the memorandum of understanding dated 3rd December, 2013 (exhibit P. Ex.1) which required income of the partnership under the single venture to be deposited onto the first defendant's bank accounts which included that at the DFCU Gulu Branch, from which withdrawals would be made "together with the second party (the plaintiff)." The second defendant instead withdrew and appropriated that sum to the exclusion of the plaintiff, in breach of the duty of good faith, honesty, loyalty, and fairness owed to the plaintiff.

[59] The second defendant's defence justifying this act is that this was payment in respect of the final certificate and it went to the right hands because the plaintiff had failed to pay the labourers. Out of it, a sum of shs. 32,868,400/= was paid directly to the creditors, represented by the four foremen who included Okwera Peter and Onen. The second defendant though did not account for the balance, yet under clause 5 of the memorandum of understanding dated 3rd December, 2013 (exhibit P. Ex.1) it is stipulated that; "both parties have agreed that the contract sum, less twenty five million (25,000,000/=), less labour and procurement expenses, will be paid to the second party (Digital Displays)." A partner who misrepresents or conceals relevant information from the partnership breaches the fiduciary duty and so does one who keeps a portion of the profits to which he or she is not entitled. This issue therefore is answered in the

affirmative. the first and second defendant jointly or severally breached the contract.

Third issue; Whether the plaintiff is entitled to the sum of shs. 105,000,000/=

[60] Under section 5 (1) of *The partnership Act, 2 of 2010,* every partner is an agent of the firm and his or her other partners for the purpose of the business of the partnership. Subject to the stipulated exceptions, an act performed by one partner for the purpose of carrying on the ordinary course of business of the firm binds the firm and his or her partners, unless the partner so acting does not have authority to act for the firm in the particular matter. Consequently, each partner must act in a reasonably prudent manner when managing or directing operations for the partnership.

[61] The total contract sum after part of the work was sub-contracted remained shs. 329,000,000/= Thereafter, a total of six certificates were paid but the parties do not seem to have maintained proper records of the various payments. Evidence regarding these payments is most unsatisfactory. There is testimony by the second defendant that the first certificate was in the sum of shs. 63,000,000/= (hence the balance thereafter was 263,000,000/=). The evidence thereafter consists of admissions by P.W.3 who acknowledged having received instalments of shs. 30,340,000/= and shs. 70,000,000/= without specifying dates and the certificates in respect of which the payments were made. The second defendant then admits having received shs. 58,842,128/= for the fourth certificate, then payment in respect of the fifth certificate in the sum of shs. 66,000,000/= and later the retention sum of shs. 14,664,404/= None of these payments is documented. This then is compounded by the testimony of P.W.3. stating that only the final certificate (possibly meaning the fifth certificate) and the retention money was not paid.

[62] It has been established though by the testimony of the second defendant D.W.1 and that of P.W.1 Ekolot Leonard that at one time the first defendant had problems with its casual labourers at the site who went on strike and the employer was forced to mediate. The third defendant finally paid the labourers directly out of one of the certificates, in accordance with measured works. Despite the plaintiff's refutation of this fact, I am inclined to believe the defence that a sum of shs. 32,868,400/= was paid directly to the creditors, represented by the four foremen who included Okwera Peter and Onen. The implication is that the plaintiff's breach of its obligations under clause 11 of the memorandum of understanding dated 3rd December, 2013 (exhibit P. Ex.1) of "payments of verified labour costs, employing labourers and paying labourers as well" was made good by this payment. Since it was a payment made by one partner for the purpose of carrying on the ordinary course of business of the partnership, and there being no evidence that the first and second defendants were not expressly prohibited from acting for the partnership in paying labourers, that payment binds the partnership and the plaintiff as partner.

[63] The implication is that payment of shs. 58,842,128/= for the fourth certificate and shs. 66,000,000/= for the fifth certificate, and later the retention of shs. 14,664,404/= hence a total of shs. 139,506,532/= was made directly to an the account in Barclays Bank Limited opened by the second defendant and to which he was the sole signatory. Out of this sum, he has been able to account for shs. 32,868,400/= paid to the labourers. This leaves a sum of shs. 106,638,132/= that is yet to be accounted for by the first and second defendants since August, 2014.

[64] It is trite that when a partnership dissolves, the partners share its profits and gains equally; however, they also share equally in the distribution of losses. This is reflected by section 26 (a) of *The partnership Act, 2 of 2010,* which provides that all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm. However, under section 21 of *The partnership*

Act, 2 of 2010, the mutual rights and duties of partners, whether ascertained by agreement or defined by the Act, may be varied by the consent of all the partners, and that consent may be either express or inferred from a course of dealing.

[65] Under clause 5 of the memorandum of understanding dated 3rd December, 2013 (exhibit P. Ex.1) it is agreed that; "both parties have agreed that the contract sum, less twenty five million (25,000,000/=), less labour and procurement expenses, will be paid to the second party (Digital Displays)." P.W.4 Keith Legesi admitted that the plaintiff was supposed to pay the defendants shs. 25,000,000/= and they paid only shs. 10,500,000/= leaving an outstanding balance of shs. 14,500,000/= When this sum is deducted from the sum of shs. 106,638,132/= that the defendants have not accounted for since August, 2014, the balance outstanding and due to the plaintiff then is shs. 92,138,132/= and not the shs. 105,000,000/= sought.

Fourth issue; What remedies are available to the parties.

[66] Upon completion of a specific venture in case, the partnership was formed specifically for that particular venture, the partnership dissolves. According to section 41 (a) of *The partnership Act, 2 of 2010,* upon dissolution of a partnership, the partners are entitled to payment of what may be due to them respectively after deducting what may be due from them as partners to the firm.

[67] The first and second defendants' counterclaim was founded on lack of privity, breach of contract by failure to raise the shs. 150,000,000/= capital, failure to correct defects in work rejected by the third defendant, forcing the first defendant to undertake the rectifications on its own and failure to pay labourers. When a defendant raises a counterclaim against the plaintiff, the burden of proving the counterclaim rests upon the defendant. The second defendant failed on the first limb of the defence and save for failure to pay labourers, for which a remedy was

found by direct payment to them out of the partnership funds, both defendants have not adduced any evidence to prove the alleged breach of contract by the plaintiff. For that reason the counterclaim is dismissed with costs to the plaintiff.

[68] On the other hand, it has been established when resolving the first and second issues that by conduct of the second defendant, specific duties that were owed to the plaintiff by the first defendant, were breached. This entitles the plaintiff to a remedy. The goal in awarding a remedy to a party injured by breach of contract is to place the party in the position he would have been in if the contract had been performed, hence the award of interest on the sum recoverable by specific performance. However, when the corporate veil is lifted, only equitable remedies may be awarded (see *Gilford v. Horne [1933] Ch 935*; *Jones v. Lipman [1962] 1 WLR 832* and *Ben Hashem v. Ali Shayif [2009] 1 FLR 115*. The plaintiff therefore is entitled only to specific performance and not to general damages.

[69] Equity demands that in the case of belated repayments of money, the sum recoverable should be subject to an award of interest which the money would attract during the period of breach, taking the rates of interest and inflation into account (see *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*). Furthermore, under section 26 (1) of *The Civil Procedure Act,* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account "the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*). This being a commercial transaction, the amount recoverable under specific performance of the contract is

to carry interest at the rate of 20% per annum from August, 2014 until payment in full.

Order :

[70] In the final result, the counterclaim is dismissed and judgment is entered for the plaintiff against the first and second defendants jointly and severally for;

a) Shs. 92,138,132/=

b) Interest thereon at 20% p.a. from August, 2014 until payment in full.

c) The costs of the suit and of the counterclaim.

_____

Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the plaintiff : Mr. Masanga Isaac.

For the 1st and 2nd defendants : Mr. Louis Odong.

For the 2rd defendant : unrepresented.