

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CIVIL DIVISION)

CIVIL SUIT NO. 244 OF 2015

ODONGO ALFRED-----PLAINTIFF

VERSUS

1. FUFA SUPER LEAGUE LTD
2. KITANDWE TADEUS LUTAAYA-----DEFENDANTS

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The facts of the plaintiff's case are that on the 19th day of November 2014 he made contact with a one Mr. Torrington by email about sponsorship of elite competitions such as boxing and football so as to boost their market viewership.

The plaintiff alleged that through tireless efforts by way of negotiations and brokerage acumen secured the approval of all club owners and the Board FUFA Super League, that resulted in a sponsorship deal executed between the board of FUFA Super League, Club Owners and Azam Media t/s Azam TV for exclusive rights to sponsor, name, cover, air and or broadcast, live telecasts of the Fufa Super league.

The sponsorship package to a tune of US \$ 1,900,000 was agreed over a period of 3 ½ seasons effective February 2015. The plaintiff further contended that the 1st defendant at all material times had urged the plaintiff to carry on the negotiations with Azam Media and intimated that it would execute a formal agreement but it reneged on this promise.

It was the plaintiff's case that the defendants intimated that he would promptly receive his 10% commission or USD \$190,000 for a period of 3 ½ years.

The 1st defendant denied any agreement between themselves and the plaintiff and contended that the plaintiff was privy to the contract executed between the 1st defendant and 2nd defendant. The 1st defendant specifically denied any contract between themselves and the plaintiff.

The 1st defendant was approached by the 2nd defendant about a sponsorship deal with Azam TV and as a result the 1st defendant picked interest in the arrangement and the 2nd defendant procured

execution of the agency/commission Agreement on 1st November 2014 for a commission of 15%.

The 2nd defendant single handedly proceeded and procured the sponsorship between the 1st defendant and Azam Television. As the duly recognised agent he was present in all negotiations until the deal was concluded between the parties and the plaintiff was never involved in the said negotiations.

AGREED FACTS

- a) The 1st and 2nd defendants executed a commission agreement in relation to sponsorship of the Uganda National Super League matches by Azam Pay TV Limited.

AGREED ISSUES.

(1) Whether plaintiff is entitled to any commission from the 1st defendant and if so in what sum?

(2) What remedies are available to the parties?

At the trial the plaintiff led evidence of Two (2) witnesses, that is himself, PW1 and Richard Omongole, PW2. The 1st and 2nd Defendant, each, led evidence of One (1) witness, Bernard Bainamani, DW1 and the 2nd Defendant as DW2 and other evidence was by way of documentary evidence that were exhibited at trial.

Issue 1

Whether plaintiff is entitled to any commission from the 1st defendant and if so in what sum?

The plaintiff's PW 1 testified that he was the rightful claimant of the commission accruing from the Azam TV Sponsorship of the FUFA Super League. He claimed to have organised a meeting between Mujib Kasule, Kitandwe Tadius, Lukwago Jimmy and other Azam managers.

The plaintiff during cross-examination claimed that he had an agreement to receive a commission of 10% between himself from the 2nd defendant. He stated he does not have a written agreement in relation to the 10% commission but had communication in relation to that. On further cross examination he stated that they agreed verbally and confirmed that he had never travelled to meet Azam at their head office in Tanzania. He also confirmed that the 2nd respondent wrote a sponsorship proposal although he claimed to have had a hand in it.

During the cross-examination by 1st defendant's counsel, the plaintiff further confirmed that there was no formal official written appointment as an agent. Neither was there any agreement with Fufa Super league for a commission.

The plaintiff's second witness was Omongole Richard who testified that there were no other commission agreements. He stated during cross examination that he was aware when the sponsorship materialised, there were a number of players who enabled it materialise.

He also claimed to have been aware of an existing oral agreement between the plaintiff and the 2nd defendant. That they agreed to share the commission; on further cross examination, he stated that he was not aware of any details of sharing between the plaintiff and the 2nd defendant.

This witness also confirmed that the plaintiff never attended any of the negotiation meetings both in Kampala and in Dar es Salaam. He also confirmed that the Commission agreement with the 2nd defendant came first before the deal was executed with Azam.

The defendant's counsel submitted that it is an agreed fact that the Commission Agreement in respect of the sponsorship deal between Azam and the 1st Defendant is executed with the 2nd Defendant. In cross-examination PW1 testified that indeed he had no agreement with the 1st Defendant but that he had a verbal agreement with the 2nd Defendant wherein he alleges that 2nd Defendant agreed to pay him 10% of the sponsorship sums from Azam. The Plaintiffs pleadings do not anywhere state that the Plaintiff had an agreement with the 2nd Defendant and this evidence is a departure from his pleadings which should be disregarded.

The Plaintiff's claim against the Defendants jointly and severally is premised on an alleged Agency relationship. According to **Halsbury's Laws of England, 4th Edition, Reissue**, agency is defined as follows;

"the terms 'agency' and 'agent' have in popular use a number of different meanings, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties' (emphasis mine)

DW1 testified that the Plaintiff and the 1st Defendant had no contractual relations with the Plaintiff. PW2 admitted during cross examination that the Plaintiff had no contract with the 1st Defendant. DW2 confirmed in his evidence, that the 1st Defendant executed a Commission Agreement, Exh. D1 with him wherein it was agreed that the 1st Defendant pays the 2nd Defendant a commission of 15% of the Sponsorship sums paid to the 1st Defendant by Azam.

In his evidence in cross examination on the above payment, PW1, the Plaintiff testified as follows;

"I have never seen the commission agreement between the 1st and 2nd Defendant and I do not know the real terms of the Agreement"

The Plaintiff cannot in law claim agency fees on a contract he was never privy to and should therefore have no benefit of the contract between the 1st and 2nd Defendant. In his evidence DW2 confirms that the 1st Defendant had never dealt with Plaintiff.

In a letter dated 22nd October 2015, Exh. D3, the 1st Defendant's former Chairperson, Mr. Abbas Kaawaase confirms that it was the 2nd Defendant who procured the Agreement with Azam and that's why they executed an Agreement with him. The relevant excerpt of this letter states as follows;

"I solemnly declare if it was not Mr. Kitandwe Tadeous to bring it to our attention and to work out follow up documents of the Azam Sponsorship deal, we would not have got it. My Secretary (PW2) and I therefore signed an agreement with him as our commission agent before he could convince Azam Authority to take up the sponsorship..."

It is strange that the Plaintiff claims money from the Defendant without any agreement to this effect. None of the Defendants has ever agreed with the Plaintiff to be paid the sums of money claimed in the Plaint. The Plaintiff therefore has no right to make a claim on the contract between Azam and the 1st Defendant or the 1st Defendant and the 2nd Defendant as a contract cannot confer rights or obligations on strangers to it. The Learned Authors of **HALSBURY'S LAWS OF ENGLAND 4TH EDITION** address this particular situation as follows;

"The doctrine of privity of contract is that as a general rule at common law, a contract cannot confer rights or impose obligations on strangers to it, that is persons who are not parties to it. The parties to a contract are those who reach agreement ... (emphasis mine)"

Accordingly, the Plaintiff is not entitled to commission in the sums stated in the Plaint against any of the Defendants. He had no contract with any of them and there is no scintilla of evidence to demonstrate that any of the parties agreed with him to be paid the sums of money set out in the Plaint. We pray that this issue is answered in the negative.

Determination

When this matter came up for hearing on 13th September 2018, the plaintiff and his lawyer did not turn up in court and yet the matter had been adjourned in presence of all parties. In the interest of justice, the matter was stood over in order to allow the plaintiff and his counsel take part in the proceedings.

The plaintiff later appeared in court at 15:23 and informed court that his counsel had called him before the hearing at 14:45 to inform him that he had flu and cough. Court rejected his plea and proceeded to hear the defence witnesses and if the plaintiff wished to cross examine the defence witnesses he was at liberty to do so.

At the close of the 2nd defendant's case, the court ordered the parties to file written submissions and court set a date for the judgement as 16th November 2018.

The plaintiff through his counsel filed an application 576 of 2018 seeking among other to be allowed to cross examine the defence witnesses which the court in the interest of justice allowed to be done on 12th November 2018.

When the matter came up for hearing, a new advocate appeared in court and claimed that he had been instructed on a Friday and the previous lawyer had refused to hand over files to him. So he sought an adjournment. Which the court rejected and court proceeded under Order 17 rule 4 of the Civil Procedure Rules.

The plaintiff jointly sued the 1st defendant and the 2nd defendant in this matter challenging the commission agreement between them as being illegal and *void ab initio*.

The plaintiff did not lead any evidence to show that the said commission agreement was void or illegal. The said agreement was indeed executed on 1st day of November 2014.

The plaintiff in his pleadings paragraph 4(e) of the plaint stated as hereunder;

“On or about the 19th November 2014, the plaintiff made the first contact to Mr. Torrington by email whereupon he proposed, and or suggested that Azam media takes up the elite competitions such as boxing and Football as the same would boost their market viewership”

It can be deduced from the above that by the time the 1st and 2nd defendant made the said commission agreement, the plaintiff was not in the picture and was not known to either party.

The plaintiff was not privy to the contract and cannot seek to claim any benefit from it. This would therefore mean that the plaintiff had no cause of action against the 1st defendant.

The suit against the 1st defendant is dismissed with costs.

The main issue for determination was whether the plaintiff is entitled to any commission from the 1st defendant.

In the determination of this issue it is important to appreciate the basis of the plaintiff’s claim as pleaded. It appears the issue that was raised was not addressing the exact dispute that the plaintiff presented in court.

Since the plaintiff had no agreement with the 1st defendant, he could not have any claim against them although he laid claim against the 2nd defendant whom he allegedly dealt with and allegedly promised him a share of the commission or the whole of it.

The better issue in the circumstances would be whether the plaintiff is entitled to any commission from the 2nd defendant.

The plaintiff pleaded and tried to lead evidence to show that there existed an oral agreement between himself and the 2nd defendant before the sponsorship deal was concluded between the 1st defendant and Azam Television.

In his evidence he stated that he sent an email to CEO of AZAM about the sponsorship deal on 19th November 2014 and that the conclusion of the deal was all his initiative and persistent communication to AZAM managers to take on the league.

The plaintiff in his evidence in chief/witness statement did not make any reference to an oral agreement between him and the 2nd defendant but rather referred to the challenge he made to FUFA Super league against the 2nd defendant receiving the commission.

It was during the cross examination that he strongly asserted that there was an oral contract between himself and the 2nd defendant. He also acknowledged that the 2nd respondent he was challenging was indeed the author of the sponsorship proposal that was the basis of concluding the sponsorship deal.

It is surprising that in his pleadings he never alluded to this sponsorship proposal made by the 2nd respondent but tries to claim that he also had a hand in it.

This court notes that the evidence given by the plaintiff is a departure from his pleadings and he tried to refine the case and thus ended up clinging on a claim for commission based on an oral agreement.

Be that as it may, the plaintiff's claim of an oral contract between himself and the 2nd defendant has also not been proved on the balance of probabilities.

In general, because of clear written agreement, oral contracts are harder to prove. Therefore, an oral contract is not legally enforceable unless it is provable in court.

This means that in the event of a breach, it is up to the plaintiff to prove the necessary evidence. Whenever an oral contract goes to court, the risk of one side lying about the agreement is a major concern. All parties to the contract could be lying about the terms, creating a major issue for court, likely resulting in the case being thrown out.

The complication the court is likely to run into with such oral contracts is that it must extract key terms of the agreement to enforce, which may prove to be difficult if the two parties did not agree on those terms. ***See Katalamwa Traders Ltd vs Attorney General SCCA No. 2 of 1987 [1997] VI KALR 32***

The party that wants the agreement to be enforced has the difficult task of proving the terms of the agreement as well as the existence of the verbal agreement. A written agreement is itself a proof that there was an agreement, but an oral agreement is merely a verbal communication of proposal and acceptance which is difficult to prove in future if any disputes arise.

The burden of proof totally lies on the person who is claiming the right to prove the existence of an oral agreement. Such oral agreement can be proved either by a recording of such agreement when it took place or a witness before whom such agreement happened.

Oral agreements are risky and not safe as one doesn't know when anyone would back out from his own words. So it is difficult to prove those specific words when a dispute arises. Therefore, it is important that when making an oral agreement, one should be prepared for proving it in future. Both parties should make an evidence of their oral agreement so that it could be helpful to prove their own words.

The plaintiff in this matter had that burden of proving the terms of the said oral agreement that he wanted court to enforce against the 2nd defendant if at all it was ever made.

An oral agreement must as well satisfy the requirements of a valid agreement such as offer, acceptance consideration, capacity to contract etc. See ***JK Patel vs Spear Motors Ltd SCCA No. 4 of 1991 [1991]1 KALR 40***

If an oral agreement becomes the subject of legal proceedings a court is unlikely to uphold that agreement if the essential elements are not satisfied. Although it may seem abundantly clear that these elements are sufficiently certain, the real problem is overcoming the burden of proof. Where a person alleges the existence of an oral contract, that party has the burden of proving the assertion to the satisfaction of the court. This can be incredibly difficult where the only record is something along the lines of phone call and/or notes of the call.

First and foremost, the disputing party will need to give oral evidence of what transpired and what was agreed to. In doing so, there will be an onus to highlight the key terms of the contract and to prove the existence of the essential elements. However, oral evidence alone will not be sufficient and will need to be supported through other means.

The plaintiff has not lead any evidence in support of the purported oral agreement apart from contending that he has an email which alludes to a commission but does not set up any specific terms of the verbal agreement.

Complex oral contracts are more likely to fall apart when held up to the scrutiny of a court, typically because the parties can't reach an accord over the finer points of the agreement. In this case, the 2nd defendant's version of events is totally at variance with the plaintiff's allegations of existence of a verbal contract.

“The 2nd defendant in his evidence stated that in May 2014, while he was serving as the Vice President of Super League Clubs to find a sponsor for National Super League. He was invited by Azam Pay Television Limited for a meeting in Tanzania. He set off around 12th September 2014 and he met Mr. Said Kawembe, CEO of APTL and Yahaya Muhamad a Director in APTL”

By implication, at the time the plaintiff claims to have contacted or sent an email to CEO of AZAM about the sponsorship deal on 19th November 2014, the 2nd defendant had already made contact on 12th September 2014.

Conversely, parties who want to enforce an oral agreement must take measures to document the existence of an oral agreement in the event the other party decided to not uphold their obligations.

The plaintiff has totally failed to prove his entitlement to any commission arising out of the purported oral contract between himself and the 2nd defendant.

The plaintiff's case fails and is dismissed with costs to the defendants.

SSEKAANA MUSA
JUDGE
20th/02/2019