THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 183 OF 2017

ASGHAR ABBAS LOKHANDWALA::PLAINTIFF

VERSUS

1. **HIPPO INDUSTRIES LIMITED**
2. **AHMED AMEERUDDIN CHARANIA**
3. **DHARANI BROTHERS:::DEFENDANTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The Plaintiff brought this suit against the defendants for payment of USD 52,795 (United States Dollars Fifty Two Thousand Seven Hundred Ninety Five Only) being unpaid salary to the Plaintiff and unpaid leave pay to the Plaintiff arising out of breach of Memorandum of Understanding, Pay As You Earn benefits amounting to over 19,000,000/= (Nineteen Million Shillings Only), NSSF benefits amounting to over 24,000,000/= (Twenty Four Million Shillings Only), general damages and costs of the suit.

The Plaintiff and the Defendants entered into a Memorandum of Understanding dated 19th December 2014 wherein the plaintiff was employed as the Operations Manager of the 1stDefendant Company 2and was responsible for the day to day operations of the business including but not limited to managing and or running the production, marketing, sales and accounts of the 1stDefendant company.Under the MOU, the Plaintiff was entitled to 25% of the net profit, every 6 (six) months. He was also

entitled to a gross salary of USD 3,500 (United States Dollars Three Thousand Five Hundred Only) per month which was not to be part of the 25% profit share. The Plaintiff was also entitled to a 30 (thirty) days holiday paid for by the company with economy fares every 2 (two) years.

The 1st and 2ndDefendant in their Written Statement of Defence contended that the Memorandum of Understanding entered into between the parties was varied by subsequent correspondence and emails. Further that the Plaintiff agreed to a different salary structure as exemplified by the accounts of which he was in charge.

The defendants also alleged that the plaintiff breached the memorandum of understanding and was not entitled to any of the remedies sought.

The only agreed fact was; The parties entered into a Memorandum of understanding on the 19th day of December 2014.

The parties filed a joint scheduling memorandum wherein they agreed on the following issues to be determined by this court.

1. Whether the Defendant is indebted to the Plaintiff as claimed
2. Whether the Plaintiff breached the memorandum of understanding
3. What remedies are available to the parties in the circumstances

At trial, the plaintiff was represented by *Mr. Birungi Wycliff* and the defendant by *Mr. Kiwuwa John.*

The parties filed final written submissions that were duly considered by this court.

Issue 1; Whether the defendant is indebted to the plaintiff as claimed.

The parties agreed that their relationship is governed by the Memorandum of Understanding that was executed on the 19th day of December 2014. According to that MOU, the parties agreed that the plaintiff was entitled to a gross salary of USD 3500, 25% of the net profit and 30 days Holiday paid by the company.

The defendants however contend that the MOU was varied and the plaintiff agreed to a new salary of UGX 2,500,000. DE4 was produced by the defendants to show that the plaintiff had agreed to a new salary of UGX2,500,000.

PW1 testified that no variations to the MOU were ever made. He testified that he never received full salary that he was entitled to as he was always promised by the company that the rest of the monies would be paid eventually.

However during cross examination, the plaintiff's evidence was shaken as he stated that the contract was varied to UGX 2,500,000.

Counsel for the plaintiff submitted that the allegation of the Defendants in regards to the voucher having the effect of amending the Plaintiff's terms or proof that the Plaintiff accepted a lesser payment such evidence is not truthful and rather weak and unlawful and not based in truth its probative value is low. It is the Plaintiff's contention that the he only signed the payment voucher as an acknowledgment of receipt of the amount indicated therein. This did not in any way imply that the Plaintiff had agreed to receive a lesser sum than what was agreed upon in the Memorandum of Understanding.

Furthermore it is important to note that since there is a written agreement between the parties the Parole evidence rule is applicable in this case. In the case of **D.S.S MOTORS LIMITED v AFRI TOURS AND TRAVELS**

LIMITED AND AMIN TEJANI HCT-00-CC-0012-2003. Honourable. Justice Yorokamu Bamwine. Held that the Parole Evidence Rule is to the effect that evidence cannot be admitted (or even if admitted it cannot be used) to add, to vary or contradict a written instrument. this same position was maintained in the case of **Akugoba BodaBoda Transport Services Ltd And Another v Hajji Swaibu Kizito and AnotherHCT-00-CC-CS-0501-2006 and HCT-00-CC-CS-0759-2006 .**

In the case **FUTURE STAREINVESTIMENTS (U) LTD v NUSURU YUSUFCIVIL SUIT No. 0012 OF 2017,** Hon Justice Steven Mubiru held that;*the common law parole evidence rule is to the effect that once the terms of a contract are reduced to writing, any extrinsic evidence meant to contradict, vary, alter, or add to the express terms of the agreement, is generally inadmissible (see Halsbury's Laws of England (4thedn.) 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). A contract without ambiguity is to be applied, not interpreted."*

In relation to a contract of this nature, the rule means that where a contract has been reduced to writing neither party can rely on evidence on terms alleged to have been agreed, which is extrinsic, that is not contained in it.The rationale of the parole evidence is that parties who have reduced a contract to writing should be bound by the writing alone. Although the parole evidence rule does not prevent extrinsic evidence intended to prove that there was no agreement at all, fraud, illegality, want of due execution, want of capacity, to clarify an ambiguity, to prove a condition precedent, etc, the parole evidence of either party on this aspect in the instant case is not covered by any of the exceptions. To admit any extrinsic evidence to show that this particular stipulation, that is not expressly provided for in the contract, was part of the contract, would be to introduce the mischief

that both clause 7 of the memorandum of understanding and the parole evidence rule were designed to avoid. The parole evidence rule prevents the admission of extrinsic evidence to prove that some particular term was agreed upon out of the written agreement, such evidence is inadmissible.

Counsel for the defendant in response submitted that The plaintiff made salary vouchers of 2,500,000 Ugandan shillings where he appended his signature to that effect. During cross examination PW1, Asghar Abbas Lokhandwala stated that he was responsible for the payment of salaries, NSSF contributions and PAYE of all the employees of the Company, which included himself as employee. He further conceded that he agreed to vary the Memorandum of Understanding to be paid UShs. 2,500,000 per month as opposed to the USD. 3,500 under the agreement. This is evidenced by the salary payment vouchers marked DE4 bearing the Plaintiff's signature.The Contracts Act 2010 provides for variation of contracts. It states as follows;

Where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract.

In the absence of statutory or common law restrictions the parties have freedom to agree whatever terms they choose to undertake and can do so in a document, by word of mouth or by conduct. In***Globe Motors Inc. & others v TRW Lucas Varity Electric Steering Limited & another 2016 EWCA Civ 396*** court noted that an oral variation or a variation by conduct could be effective where the evidence establishes - on the balance of probabilities - that the variation was agreed. As long as the law or the contract itself does not say otherwise, parties to a contract can change it by oral or written agreement.The emails coupled with the subsequent

correspondence which included the payment of NSSF remittances and the salary vouchers by the Plaintiff amounted to a variation of the agreement and a waiver of his salary under that agreement. The emails contained account projections as prepared by the Plaintiff as operations manager to the Defendants. The projections contained falsehoods showing very high returns whereas not.

It was the Defendants' submission that the Plaintiff agreed to the varied salary of 2,500,000 million shillings. This is shown in the accounts of which he was in charge and he is therefore not entitled to any salary arrears as claimed.

I have reviewed the evidence adduced by the parties. It is a well-established principle of law that evidence cannot be admitted (or even if admitted it cannot be used) to add, to vary or contradict a written instrument. See ***D.S.S Motors Limited V Afri Tours And Travels Limited And Amin Tejani Hct-00-Cc-0012-2003.*** This is the parole evidence rule.

The Parole evidence rule has been applied in various cases some of which are ***L'Strange vs Gracoub Ltd [1934]2 KB 394*** where **Scrutton LJ** in his lead judgment underscored the principle that once an agreement is reduced into writing and executed by the parties, the parties are bound and it is wholly immaterial whether the parties read the Document or were not aware of the contents of the same. **Scrutton LJ** also noted the exceptions to the rule which would include Fraud and misrepresentation. In ***Jacobs vs Batavia & General Plantations Ltd [1924] 1 Ch. 287*** P.O Lawrence stated that, *"It is firmly established as a rule of law that parole evidence cannot be admitted to add to, vary or contradict a deed or other written instrument ……..".*

From the above legal principles, it is clear that once parties have executed agreements, they are bound by them and evidence of the terms of the agreement should be obtained from the agreement itself and no extrinsic

evidence shall be admitted or if admitted, shall be relied on to contradict, add to, vary, subtract from the terms of a contract except where there is fraud, duress, illegality, lack of consideration, lack of capacity to execute the contract or mistake. See***Golf View Inn (U) Ltd vs Barclays Bank (U) Ltd (CIVIL SUIT NO. 358 OF 2009)***

From the testimony of DW1, the variation was made due to the fact that the parties realized that the projections made by the plaintiff showed high returns on the investments whereas not. The defendants contended that due to the delay in the commencement of the project and given the high preliminary expenses the plaintiff agreed to a different salary structure.

Under **section 67 of the Contracts Act 2010** it is provided that where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract.

We have to note that this MOU was executed before the project was commenced. This means it is more likely than not that after the project commenced the parties realized that high returns projected could not be achieved. I find it more likely on a balance of probabilities that the MOU was varied to fit the actual financial capacity of the parties.

The parties have a right to vary the contract under **Section 67 of the Contracts Act** and the variation can be express or by course of dealing between the parties. The payment Voucher coupled with the PAYE and NSSF remittance indicate a variation in the contract. PW1's in his testimony during cross examination also conceded to the fact that contract was varied. In this case, allegations of he said she said have arisen and it is the duty of court to evaluate the evidence and determine what happened so as it determine this matter to its logical conclusion.

When undertaking that task of evaluating evidence, the court should be mindful of the standard of proof which Lord Nicholls *In re H (Minors) [1996] AC 563 at 586*, explained is a flexible test:

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. ..... this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

In ***Globe Motors Inc. & others v TRW Lucas Varity Electric Steering Limited & another 2016 EWCA Civ 396*** court noted that an oral variation or a variation by conduct could be effective where the evidence establishes - on the balance of probabilities - that the variation was agreed. As long as the law or the contract itself does not say otherwise, parties to a contract can change it by oral or written agreement.

I find it more likely than not in these circumstances that the contract was varied and the plaintiff agreed to a new salary of UGX 2,500,000.

The plaintiff also claimed that the defendants owed him NSSF amounting to over UGX 24,000,000/=. PW1 testified that the defendants did not remit his NSSF benefits of UGX 125,000 per month totaling to a sum of UGX 24,000,000. DE2 however showed the 1st defendant made NSSF payments

of July 2015 for the plaintiff. DW1 also testified that the plaintiff was in charge of the accounts and that no NSSF payments were owed to the plaintiff.

The plaintiff claimed PAYE benefits amounting to over 19,000,000. PW1 testified that the defendants never paid his PAYE. DW1 testified that the PAYE was remitted and produced DE3 that reflected the last payment.

The plaintiff was in charge of the accounts of the 1st defendant and in charge of the remittances of NSSF as well as PAYE. I am not satisfied by the plaintiff's evidence that he paid lesser than the required amounts of these benefits. PW1 testified that he made the cheques and payments of PAYE. I find it unlikely that he never remitted his own benefits thereto.

I therefore resolve this issue in the negative.

Issue 2; Whether the Plaintiff acted in breach of the Memorandum of Understanding.

The defendants alleged that the plaintiff breached the Memorandum of Understanding. DW1 in his witness statement stated that the plaintiff stole company documents from the office like Immigration bond, original company documents stock reports and financial card. He further stated that as a result of the plaintiff's failure in his duties, negligence and outright dishonesty the 1st defendant is on the verge of closing down with a loss of approximately USD 150,000.

The plaintiff denied the allegations. The Plaintiff in his witness statement under paragraph 8 of his witness statement testified that during his employment he worked diligently in all his duties even in great difficulties without any funds due to the Defendants' failure to adequately capitalize the business. That he has never occasioned any loss to the 1st Defendant nor stolen any company property, monies and documents until the time he left

the company.And under paragraph 21 of his witness statement the Plaintiff confirms that he has neither received any caution nor warning letter nor been subjected to any reprimand or disciplinary action during his employment.

Counsel for the plaintiff submitted that the allegation that the Plaintiff breached article 4 of the memorandum of understanding is unsubstantiated and without any evidence whatsoever but merely calculated to evade the Plaintiff's valid claim for his unpaid entitlements.

Counsel for the defendants submitted that the 2nd Defendant states under paragraph 7 of his witness statement that the Plaintiff breached paragraph 4 of the Memorandum of Understanding by failing in all business operations. That he was in fact so negligent as to give credit to unsecured customers and failed to fulfill his obligations under the agreement through a series of actions and or inactions which caused loss to the Defendants' business. These include but are not limited to failing to manage the business as no accounts were forthcoming from him, absconding from duty leading to theft of 10,000 gumboots, stealing of Company documents form the office.

During cross examination PW1 agreed that he deserted his job resulting into loss of Company property. Further that he gave out goods on credit and upon receiving money from creditors, he made payments to himself for his bills to the tune of about UShs. 4,500,000 occasioning further loss to the Company.

Further under paragraph 9 of his witness statement, the 2nd Defendant reiterates that due to the Plaintiff's absconding from duty without handover, a theft of over 10,000 gumboots worth over UShs. 100,000,000 occurred and a Police report was made for causing financial loss vide SD Ref 35/9/11/2016 at Seeta Police Station.

The 2nd Defendant confirmed during re-examination that the Plaintiff crippled the operations of the Company and is running on loans.

The defendants never substantiated their allegations of breach. No evidence whatsoever was adduced to support their allegations. It is true the company was experiencing financial difficulties and this strained the parties relationship. The company was not operating as projected but this did not mean that the plaintiff was in breach of the memorandum of understanding. The plaintiff was trying to ensure that the company gets out of its difficulties and yet the relationship was strained. This should not be interpreted as a breach on the part of the plaintiff.

This issue is therefore resolved in the negative.

Issue 3; Whether the Plaintiff is entitled to the remedies sought.

On the basis of my findings on the above issues, I find that neither parties has satisfied this court to grant them the remedies sought.

The suit is thereby dismissed.

Each party shall bear its own costs.

I so order.

SSEKAANA MUSA
JUDGE
18th September 2020