THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. 014 OF 2021

KABACO (U) LTD :: PLAINTIFF

VERSUS

TURYAHIKAYO BONNY :: DEFENDANT

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT (EXPARTE)

Introduction:

The plaintiff brought this suit against the defendant for breach of an agreement dated 30th September 2020 seeking orders inter-alia;

(a) A declaration that the defendant breached an agreement between him and the plaintiff dated 30th September 2020.

(b) Recovery of shs 65,546,000/= being the money due/unpaid under the agreement.

(c) Interest on the decretal sum at a rate of 20% per annum from 2018- 2019 for 3 years amounting to shs 39,227,600/=

(d) Interest on (b) above at a rate of 25% per annum from the date of judgment till payment in full.

(e) General damages and costs of the suit.

The History:

It was contended by the plaintiff that for a long time, they had dealings with the defendant since 2018 and the defendant became indebted to the plaintiff to the tune of shs 65,546,000/=. That considering his indebtedness, the plaintiff desired to keep the relationship and the two reduced their dealings in a written agreement for supply of goods dated 30th September 2020.

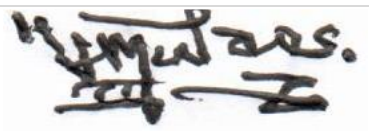
That it was the agreement of the parties that for goods supplied and or delivered or any transaction between the parties, the defendant would make a payment of shs 1,000,000/= as part of the sum he was indebted to the plaintiff. That upon the understanding, the defendant failed to honor his promise and he was still indebted to the tune of the sum claimed as the decretal sum.

That as a commitment to honor his obligations, the defendant pledged his logbook for MV REG No.UBE 353K, Datsun Nissan Double Cabin and a cheque worth shs 65,546,000/= and he allowed the plaintiff to bank the same in the event the money was not paid. That the cheque was banked and it bounced. That the defendant defaulted or failed to pay the sum in default despite several demands. That as a result of the default, the plaintiff has been deprived of their right to use the money and invest in their flourishing business. The plaintiff thus asked for judgment in her favour.

The defendant was served by virtue of the return of service on record and filed a written statement of defense but subsequently failed to appear in the trial despite service. Court went ahead and heard the case ex-parte.

Issues:

1. **Whether or not the defendant breached the agreement he entered into with the plaintiff.**



2. **Remedies available to the aggrieved party in the circumstances.**

Representation and Hearing:

The plaintiff was represented by Counsel Emmanuel Kironde who filed written submissions which I have considered.

Burden and Standard of proof:

The burden of proof is in two broad categories that is the legal burden and the evidential burden. Sections 101 and 102 of the Evidence Act Cap 6 rests the burden of proof on whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which or she asserts to prove that those facts exist or who would fail if no evidence is adduced at all. Therefore, the plaintiff bears the legal burden of proof to prove his or her case on the balance of probabilities.

Section 103 of the Evidence on the other hand places the evidential burden on any party who alleges the existence of a set facts to prove such facts. It provides thus: ***The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

Therefore, whereas the legal burden solely lies upon the plaintiff and does not shift, the evidential burden keeps shifting depending on the facts alleged by either side. I find the dicta by the Supreme Court of Kenya in ***Presidential Election Petition No. 1 of 2017 between RailaAmoloOdinga& Another vs. IEBC & 2 Others (2017) eKLR*** very elaborative on this issue where court observed thus:

"Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the lawor, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law….."

Therefore, even when a suit is not opposed like the one in issue, the legal and evidential burden rests on the plaintiff to prove on a balance of probabilities that they entered into the agreement dated 30th September 2020 and the defendant breached the same. Court is duty bound to examine the evidence presented in line with the pleadings to find whether or not the test is satisfied.

RESOLUTION:

Whether or not the defendant breached the agreement he entered into with the plaintiff.

Section 10 (1) of the Contract's Act No. 7 of 2010, defines a contract as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound. Sub section 2 further adds that a contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties.

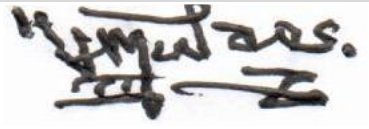
Sub section 3 posits that a contract is in writing where it is—(a) in the form of a data message; (b) accessible in a manner usable for subsequent reference; and (c) otherwise in words. Subsection 5 adds that a contract the subject matter of which exceeds twenty-five currency points shall be in writing.

It follows therefore that where a contract is executed by the parties, it creates binding and enforceable obligations on either party to the same. These obligations cannot be avoided unless the contract is void or against public policy. Section 33 of the Contract's Act provides that:

(1) The parties to a contract shall perform or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act or any other law.

(2) A promise binds a representative of a promisor, in case of the death of the promisor before performance, unless a contrary intention appears from the contract.

It is thus my considered opinion that where a contract sets out a bundle of promises to be performed by either party to a contract, in the event the same are not performed as per the terms of the contract without any justification as provided for under the contract, a party at fault is said to have breached the contract. The learned Authors of one of the celebrated texts in contract law, **CHITTY ON CONTRACTS,**



25th Edition, vol. 1, para. 1399 gave the trigger that Court is to look out for in ascertaining whether there was breach of contract thus:

"***Entire and divisible contract. In an entire contract, complete performance by one party is a condition precedent to the liability of the other...***"

In other words, a party who alleges breach of a contract must have fully performed his bargain of the contract. A party who is the cause of the breach or whose failure to perform his or her obligations partly led to the breach cannot competently sustain a claim for breach of contract. Therefore, where a party has fulfilled the terms of the bargain and has not in any manner contributed to the breach, he has a remedy at law to sue for breach of contract.

Section 61 of the Contracts Act provides a remedy to a party who is disadvantaged as a result of the breach of a contract and it provides thus:

Compensation for loss or damage caused by breach of contract

(1)Where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her.

(2)The compensation referred to in subsection (1) is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3)Where an obligation similar to that created by contract is incurred and is not discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if that person had contracted to discharge it and had breached the contract.

(4)In estimating the loss or damage arising from a breach of contract, the means of remedying the inconvenience caused by nonperformance of the contract, which exist, shall be taken into account.

Section 61 can be summarized and put into perspective by the old and long standing common law principle that where a party sustains any loss or damages by reason of breach of a contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed ***(see Robinson v. Harman (1848) 1 Exch 850 at 855, [1843-60] All ER Rep 383 at 385).***

In this case, the plaintiff testified through PW1 Mr. Ssengonzi Jovan that in the year 2018, the plaintiff's company started doing business with the defendant to wit, supply of Cement at an agreed price. That the business did not work out as orally agreed since most deliveries were not paid for. That as a result, the amounts kept rising until delivery was halted by the plaintiff in August 2019. A copy of the supply and payment schedule was admitted as PE1.

That on 30th September 2020, the outstanding sum was shs 66,546,000/= and a copy of an acknowledgement where the defendant admitted being indebted to the said sum was admitted as PE4. That considering the sum in arrears and the desire by the company to continue doing business with the defendant, the parties reduced their understanding in writing in form of a supply of goods agreement. The agreement was tendered in and marked as PE2.

That it was agreed that for every delivery or supply made, the defendant would pay shs 1,000,000/= to clear the sum in arrears and also pay for the on-going transactions in any case within fourteen days. That the defendant handed over to the plaintiff a

copy of the logbook for motorvehicle M/SV Reg. No. UBE 353K Datsun Nissan Double Cabin and a signed cheque for shs 66,546,000/= as security for the payments. That upon default, the cheque was presented to the Bank for payment and it bounced. PW1 tendered in the logbook which was admitted as PE3 and the bounced cheque as PE5. That despite the several reminders to pay, the defendant paid a deaf ear. PW1's testimony was supported by that of PW2 whose testimony was in tandem with that of PW1.

I have examined the contract (PE2) dated 30thSeptember 2020 to supply cement from Hima Cement between the plaintiff and the defendant. It is clear from the pleadings that the sum claimed by the plaintiff accrued before the said agreement dated 30th September 2020. It is thus my considered view that the said agreement cannot be executed to recover the sum claimed by the plaintiff. However, in PE4, the plaintiff acknowledged being indebted to the plaintiff to the tune of shs 66,546,000/=. This acknowledgement is further supported by PE5 being the cheque issued by the defendant as security for the sum claimed by the plaintiff.

Whereas PE2 cannot support the claim, it strengthens the evidence that there were dealings between the plaintiff and defendant involving cement. The existence of the contract is further supported by PE1 which reflects a breakdown of the sum due from the defendant. Therefore, in my considered view there was an understanding between the plaintiff and the defendant and I am satisfied that there was a valid contract between the plaintiff and the defendant that the defendant breached. I therefore resolve this issue in the affirmative.

Remedies:

Since the plaintiff has succeeded in proving his claim, the same succeeds with the following orders:

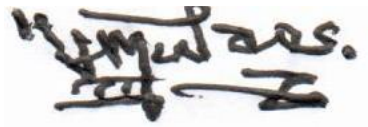
(a) The plaintiff is awarded a sum of shs65,546,000/= (Sixty-Five Million Five Hundred and Forty-Six Thousand Shillings).

(b) The defendant is awarded interest on the decretal sum at 8% per annum from the date of the judgment till payment in full.

(c) I decline to award damages. The plaintiff did not demonstrate in my view the inconveniences they have suffered.

(d) I award the plaintiff costs of the suit.

It is so ordered.



Vincent Wagona

High Court Judge

FORTPORTAL

DATE: 13/102023