

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[LAND DIVISION]**

**CIVIL SUIT NO. 250 OF 2005**

**UGANDA PETROLEUM CO. LTD:.....:PLAINTIFF**

**VERSUS**

**KAMPALA CITY COUNCIL:.....:DEFENDANT**

**BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW**

**JUDGMENT**

**UGANDA PETROLEUM CO. LTD** (hereinafter referred to as the “plaintiff”) brought this suit claim against **KAMPALA CITY COUNCIL** (hereinafter referred to as the “defendant”) claiming the recovery of USD 557,600 as compensation for breach of contract, special and general damages, survey and valuation fees of Ug.Shs.5,400,000/=, interest thereon at 20% per annum, and costs of the suit.

***Background***

The plaintiff’s case is that it is the registered owner of land comprised in **LRV 559 Folio 4 Plots 60-76, 78-80 Fifth Street and Plot 1 Kibira Road, Kampala Industrial Area**, (hereinafter referred to as the “suit land”) valued at approximately USD 557,600. On 30<sup>th</sup> April, 1998, the plaintiff entered into a Memorandum of Understanding (MoU) with the defendant whereby the plaintiff surrendered 0.8 acres (0.321 hectares) of its land comprised in **Plot 60-80 Fifth Street, and Plot 1 Kibira Road** to the defendant for purposes of the latter constructing and enlarging of the Nakivubo Channel and its reserve.

According to the MoU, the defendant was supposed to compensate the plaintiff for the 0.8 acres by allocating it land of the equivalent value elsewhere. However, the defendant purported to compensate the plaintiff with **Plot No. M10** comprised in **LRV 2808 Folio 23** measuring only

approximately 0.30 acres (0.121 hectares) which was valued at just USD 30,000; a figure reflecting property of far less the value than the one which plaintiff surrendered, and whose title has also never been surrendered over to the plaintiff by the defendant.

The plaintiff also claimed that the expansion of the Nakivubo Channel affected and extended to a much bigger area on the plaintiff's land contrary to the MoU. The plaintiff thus claims to have lost valuable land, and also that some of its land was rendered unusable as a result. The plaintiff further claims that it suffered massive special damage its structures on the land as a result of the defendant's actions.

The defendant for its part denied the plaintiff's claims, and averred that it duly compensated the plaintiff with **Plot M10** comprised in **LRV 2808 Folio 23** which the plaintiff accepted, and as such that the plaintiff has no claim against the defendant.

The plaintiff adduced evidence of three witnesses to wit; PW1 Mohamood Nordin Thobani, the Managing Director in the plaintiff company, PW2 Richard Mungati a surveyor, and PW3 Magembe Kato Tonny, a Government Valuer. The defendant on the other hand did not adduced evidence of any witness to support in its defence. Counsel for both parties filed written submissions to argue the respective cases for their clients, and I have considered them in the resolutions. Two main issues were framed for court's determination by Counsel for the plaintiff **M/s. Makeera & Co. Advocates**, as follows;

- 1. Whether the defendant acted in breach of the memorandum of understanding between the parties, and if so, how?**
- 2. What remedies are available to the parties?**

On the other hand, Counsel for the defendant **M/s. Sendege, Senyondo & Co. Advocates**, raised four issues as follows;

- 1. Was there any breach of contract?**
- 2. What was the disparity in monetary terms between the value of the area taken over by the defendant for enlargement of the channel and the land it gave to and registered in the name of the plaintiff as compensation thereof?**

3. *Apart from the land surrendered by the plaintiff to the defendant, are there any pieces of land which were rendered useless or valueless by the enlargement of the channel?*
4. *Was any damage caused to the plaintiff's buildings/ structures by the construction works?*

I find that the issues, though framed different in wording by the respective Counsel for the parties, are intrinsically interrelated. I will therefore resolve them some simultaneously and others by joining them basing on their similarities.

***Resolution of the issues.***

***Issue No.1:***

- *Whether the defendant acted in breach of the MoU between the parties and if so, how?*
- *Was there any breach of contract?*
- *What was the disparity in monetary terms between the value of the area taken over by the defendant for enlargement of the channel and the land it gave to and registered in the name of the plaintiff as compensation thereof?*

According to the evidence on record, the MoU exhibited as P2 states that:

***“...WHEREAS the first party is desirous of acquiring 0.8 acre (0.321 hectares) of land comprised in plots 60-80 Fifth Street and plot 1 Kibira Road, the said land being the property of Uganda Petroleum Company for the purpose of constructing a channel reserve.***

**AND**

***WHEREAS the second party is desirous of surrendering 0.8 acres (0.321 hectares) of the land comprised in plots 60-80 Fifth Street and plot 1 Kibira Road to the first party.***

***IT IS HEREBY AGREED as hereunder stated that the first party shall acquire the said 0.8 acres (0.321 hectares) of the land comprised on plots 60-80 Fifth Street and Plot 1 Kibira Road from the second party for the purpose of construction and enlargement of the channel reserve.***

***The first party hereby covenants with the second party as follows:-***

***(a) To adequately compensate the Uganda petroleum company (the second party) for all the 0.8 acre (0.321 hectares) which is to be acquired by the second party...***

***(b) The nature of compensation shall be in form of land of the equivalent value...*  
***[Underlined for emphasis].*****

PW1 Mohamood Nordin Thobani, the Managing Director, in his evidence stated that the defendant in a bid to compensate the plaintiff, in accordance with the MoU, issued the plaintiff with a leasehold certificate of title for land comprised in ***LRV 2808 Folio 23 Plot M10 off Port Bell Road, Industrial Area Kampala*** measuring only approximately 0.121 hectares (0.30 acres). This evidence was neither denied nor rebutted to by the defendant. *Exhibit P6*; a survey and valuation report done by the defendant on ***Plot M10*** shows that it measures approximately 0.121 hectares (0.299 of an acre) in size and is encroached upon by an access road measuring 0.041 acres; which was also reflected in the joint survey report marked *Exhibit P4A*. Interestingly, Counsel for the defendant in his submissions in relation to this issue stated that;

***“We are not conceding this issue. The losses complained of were as a result of confusion in the camp of KCC. It was not deliberate. This is reflected in the serious attempts made by the defendant on numerous occasions to settle the matter amicably...”***

From the above, the clear implication is that the defendant breached the terms of the MoU between itself and the plaintiff by failing to adequately compensate the plaintiff with land equivalent to the 0.80 acres as surrendered by the plaintiff to the defendant. Instead the defendant gave the plaintiff land measuring only 0.30 acres which was less by 0.50 acres that the plaintiff was entitled to under the MoU. The plaintiff certainly had nothing to do with the “confusion in the camp of KCC” if at all there was such a confusion, and it is immaterial that the breach was

not deliberate as submitted by Counsel for the defendant. What matters is that there was breach and the defendant is liable to the extent of the damage.

It is further noted from the evidence that there was also encroachment by the defendant on **Plot M10**; which made it even much lesser than what was agreed upon by the parties in the MoU to adequately compensate the plaintiff. The net effect of the evidence before court is that I would answer *Issue No.1* in the affirmative and hold that there was breach of the contract (MoU) between the parties by the defendant.

***Issue No.2:***

- ***Apart from the land surrendered by the plaintiff to the defendant, are there any pieces of land which were rendered useless or valueless by the enlargement of the channel?***
- ***Was any damage caused to the plaintiff's buildings/ structures by the construction works?***
- ***What remedies are available to the parties?***

***(a). Compensation.***

It is important to note that in resolving the issue of remedy for the breach of the MoU by the defendant, there is need to consider the various valuation reports exhibited in evidence by the parties. The plaintiff in a valuation report done in 2005 by *M/s.East African Consulting Surveyors and Valuers* admitted in evidence as *Exhibit P3* valued the suit land for compensation at USD 557,600. Further, a joint survey done by the parties on the suit land, *Exhibit P4B*, shows that there was encroachment on the plaintiff's plot of land by the Nakivubo Channel and its reserves. The defendant, on the other hand, in *Exhibit P6* valued *Plot M10* which had been give as alternative plot of land to the plaintiff at UGX 567,000,000/=. Owing to these various valuations that came up with varying figures, court made an order to the effect that;

***“The valuation reports submitted to court by the plaintiff and the defendant respectively, concerning the plaintiff's claims relating to the suit land comprised in LRV 559 Folio 4 Plots 60-76, 78-80 Fifth Street and Plot 1, Kibira Road Kampala Industrial Area AND all other necessary documents deemed relevant by the Chief***

***Government Valuer be handed over to him for his consideration with a view to coming up with a valuation report and recommendations to assist the court in the resolution of the controversies in the case.”***

It is, however, evident from the testimony of PW3 Magembe Kato Tonny, a Government Valuer, that *Exhibit P3* and *Exhibit P6* were not considered by the Chief Government Valuer in his report in accordance with the terms of the court order reproduced above. I find that the evidence since the Chief Government Valuer failed to follow the instructions as were given by court. It needs to be pointed out that in the initial stages when the case came up for defence, Counsel for the defendant informed court that they would seek services of a Chief Government Valuer to reach a fair and just figure with regard to the amounts in issue. Mr. Magala who appeared on behalf of the Chief Government Valuer failed to avail court with a valuation report. What was on record was the plaintiff's valuation report which the defendant failed to rebut by adducing evidence of a contrary valuation. All in all this court was left with the only option to consider the valuation report of the plaintiff by *M/s. East African Consulting Surveyors and Valuers*, which had earlier been admitted in evidence as *Exhibit P3*.

It is trite law that the standard of proof in civil cases is on a balance of probabilities. Further, in the case of *Nsubuga vs. Kavuma [1978] HCB 307* it was held that in civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities. ***Section 101 (1) of the Evidence Act (Cap. 6)*** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

I believe that by adducing in evidence of valuation in *Exhibit P3*, the plaintiff duly complied with the law and discharged its duty. Accordingly, I would find that the plaintiff proved that it is entitled to USD 557,600 as compensation for breach of contract (MoU) by the defendant and award the same amount to the plaintiff. ***(b) Additional damages:***

The plaintiff also claims additional damages of USD 500,600. These are a result of and in relation to the Channel shoulders that extend by an excess portion of 0.378 acres, land measuring 0.052 acres and 0.135 acres between the wall fence and the Channel shoulders, which have as a result been rendered unusable and cannot be utilized by the plaintiff. It is also in relation to the

damage occasioned to the office building of the plaintiff, and boundary wall, anticipated rental income from the office building due to repair works and diminution in the value of land due to horizontal anchors of the channel to the wall.

As earlier observed, no contrary evidence was adduced by the defendant on these issues to deny or rebut the plaintiff's claim. However, Counsel for the defendant in his submissions contended that it was foreseeable by the parties that the enlargement agreed upon in the MoU would inevitably adversely affect adjacent pieces of land belonging to the plaintiff. Counsel also argued that though the damage was caused in 2004, no evidence was adduced to show that to date repairs have been made to enable the court determine the exact cost of repairs, and that what is before court are guidelines of valuers.

After carefully considering the evidence adduced and submissions of both Counsel on this issue, I am unable to agree with the propositions advanced by Counsel for the defendant. Contrary to what he submitted, a valuation report was in fact adduced in evidence by the plaintiff to prove the cost of repairs, and it was not in the least challenged by the defendant's evidence, and cannot merely be by Counsel's addresses. I find that indeed the cost of the damage was clearly indicated in evidence in the plaintiff's valuation report, and the Plaintiff has proved its case for the additional damages of USD 500,600 and the same is awarded.

***(c) Valuation fees:***

The plaintiff prayed for valuation fees of UGX 2,800,000/=, and surveyors fees of UGX 2,600,000/=. The plaintiff in *Exhibit P9* noted that the agreed fee for valuation of land at **Plot 60-80 Fifth Street Kampala** is UGX 2,000,000/=. The plaintiff however did not prove by receipt or letter the surveyor's fees reflecting the variation from the amount stated in the *Exhibit P9*. Accordingly, the plaintiff is awarded UGX 2,000,000/= as valuation fees.

***(d). General damages:***

In the case of ***Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006*** breach of contract was defined as;

***“The breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party.”***

In the instant case, the MoU stipulated, *inter alia*, that the plaintiff would be compensated for land equivalent to that which it had surrendered. As noted earlier in this judgment this was not met by the defendant. It is trite law that damages are the direct probable consequences of the act complained of as noted in the case of *Storms vs. Hutchison (1905) AC 515*. It was also held in the case of *Assist (U) Ltd vs. Italian Asphalt & Haulage & A’nor, HCCS No. 1291 of 1999 at 35* that the consequences could be loss of profit, physical inconvenience, mental distress, pain and suffering. In the instant case, because of the further encroachment by the defendant on the plaintiff’s land, it caused damage to the plaintiff’s office building and boundary wall. The plaintiff also suffered loss of profit from the anticipated rental income from the office building due to repair works and diminution in the value of land due to horizontal anchors of the channel to the wall.

In the case of *Haji Asuman Mutekanga vs. Equator Growers (U) Ltd, SCCA No. 7 of 1995*, Oder JSC (R.I.P.) held that with regard to proof, general damages in a breach of contract are what a court (or jury) may award when the court cannot point out any measure by which they are to be assessed, except in the opinion and judgment of a reasonable man.

Applying the principles to facts and circumstances of this particular case, taking into account the economic value of the properties involved and the time it has taken for the plaintiff to successfully pursue its rights to logical conclusion, i.e.; from September, 2005, when it filed this action, and general inconvenience occasioned to him, I would consider the figure of UGX 100,000,000 /=, which the plaintiff prayed for in his evidence (witness statement) to be fair and adequate recompense as general damages, and I award the same to the plaintiff. I am reluctant to award UGX 2,000,000,000(Two billion) suggested by Counsel for the plaintiff in his submissions because apart from being too excessive in the particular circumstances of this case, it is not supported by evidence.

***(e)Interest:***



The plaintiff is awarded an interest at a rate of 20% per annum on the amounts in (a) and (b) above from the date of filing the suit until payment in full, and interest at a rate of 20% per annum (c) and (d) above from the date of judgment until payment in full.

***(f) Costs***

The general principle under ***Section 27 (2) of the Civil Procedure Act (supra)*** is that costs follow the event and a successful party should not be deprived of costs except for good reasons. In the instant case the plaintiff has succeeded in the entire case and is awarded costs of this suit. In summary the plaintiff's claim is allowed in the following terms of the orders;

- (a) The plaintiff is awarded USD 557,600 as compensation for breach of contract.***
- (b) The plaintiff is awarded USD 500,600 as additional special damages for the damage occasioned by the defendant to the plaintiff's property***
- (c) The plaintiff is awarded UGX 2,000,000/= as valuation fees.***
- (d) The plaintiff is awarded UGX 100,000,000 as general damages for the breach of contact.***
- (e) The amounts in (a) and (b) above shall attract an interest rate of 20% per annum from the date of filing the suit until payment in full, and 20% per annum on the amount in (c) and (d) above from the date of judgment until payment in full.***
- (f) The plaintiff is awarded costs of this suit.***

**BASHAIJA K. ANDREW**

**JUDGE**

**20/02/2015**