

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0001 OF 2014
(Arising from Arua Grade One Magistrates Court Civil Suit No. 051 of 2001)

ANDREW AKOL JACHA APPELLANT

VERSUS

NOAH DOKA ONZIVUA RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

Sometime during December 2001, the appellant sued the respondent before the Grade One Magistrates Court of Arua, for breach of an agreement of sale of land entered into between the two parties in early 1993. The appellant's case was that the respondent undertook to sell to the appellant a piece of land situated at Awindiri Village in Arua Municipality, measuring slightly over an acre, at the price of shs. 2,500,000/=. Between 16th July 1993 and 5th May 1994, the respondent made part payment of shs. 1,000,000/=, failed to pay the balance and instead resorted to grabbing the land by force from the appellant.

In his written statement of defence filed on 24th December 2001, the respondent denied the appellant's claim and instead contended that he duly performed his part of the contract, having paid the agreed purchase price in full. He stated that the agreed purchase price for the piece of land was shs. 1,000,000/= which he paid in three instalments; the first one of shs 800,000/= on 16th July 1993, the second one of shs. 100,000/= on 4th November 1993 and the last one of shs. 100,000/= on 5th October 1994.

During the hearing of the suit the appellant testified that in 1993, he was approached by the respondent, asking for land to buy. The appellant took the respondent around the land; they

negotiated the price and agreed on a sum of shs. 2,500,000/=. The respondent accepted the offer and said he would look for the money. He returned on 16th July 1993 and paid shs 800,000/=. There was no agreement as to when the balance was to be paid. The respondent subsequently paid shs. 100,000/= on 4th November 1993 and shs. 100,000/= on 5th October 1994. Before the last payment was made, the two of them signed a typed agreement on 16th July 1993. The respondent has never paid the balance since then.

P.W.2 Andrea Afidra Nero, the L.C.1 Chairman at the time of the transaction, testified that the appellant was the Vice Chairman of the L.C.1 at the time. Sometime in 1994, the two parties had gone to him with an agreement of sale of land by the appellant to the respondent which they required him to stamp. The respondent said he would pay the balance later upon which a proper agreement would be signed, but the parties did not tell him what the amount was remaining or when it was to be paid. He duly stamped the agreement presented to him by the parties. The appellant closed his case after the testimony of this witness.

The respondent died before he could testify. In his place, his son testified that his father bought the land in issue from the appellant on 24th January 1994 at the price of shs. 1,000,000/=. At the time he bought it, there were eucalyptus trees on the land, a potato garden, and a two-roomed unfinished brick house at beam level. The agreed purchase price of shs. 1,000,000/= was paid in three instalments of shs 800,000/= on 16th July 1993, shs. 100,000/= on 4th November 1993 and shs. 100,000/= on 5th October 1994. The respondent's father took over possession of the land after payment of the last instalment and began engaging in construction and agricultural activities thereon until 2001 when the appellant stopped them, claiming he had sued them. The appellant had gone ahead to harvest the eucalyptus trees on the land.

D.W.2. Akasa O. Buga testified that around July 1993, the late Noah Doka Onzivua invited him to see the piece of land he had recently identified for purchase. He was present when both parties signed the documents tendered in evidence as Exhibit P.1 and P.4 and showed the court his signature as a witness to both. His understanding of the agreement Exhibit P.5 was that the appellant had sold the land and developments thereon to the respondent. The agreed price was shs. 1,000,000/- The defence closed its case after this witness.

In his judgment, the learned trial magistrate found that the parties had entered into an oral agreement of sale / purchase of the land in question. After considering all the documents subsequently signed by the parties in the course of the transaction, the court came to the conclusion that by the agreement dated 24th January 1994, the appellant had sold all that piece of land together with the developments thereon, to the respondent. The court observed that the respondent had taken possession of the land sometime in 1994 yet the appellant had waited until about seven years later to file the suit seeking recovery of what he claimed to be the outstanding balance. The court did not find any basis for the claimed balance of shs. 1,500,000/=. To the contrary, it found the respondent's version that the agreed purchase price was shs. 1,000,000/= to be well corroborated and therefore the sum agreed upon as the purchase price. Ambiguities in the agreement were resolved in favour of the respondent, the court found that the respondent had not breached the agreement and dismissed the suit with costs.

Being dissatisfied with the decision, the appellant appeals on four grounds, namely;

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby coming to the wrong conclusion that the respondent did not breach the agreement to purchase the suit land.
2. The learned trial magistrate erred in law and fact when he wrongly construed the agreement between the parties that the said agreement was for the purchase of land and not for compensation for the brick wall house, eucalyptus trees and other developments thereon thereby causing the appellant a miscarriage of justice.
3. The learned trial magistrate erred in law and fact by holding that the purchase price for the suit land was shs. 1,000,000/= and not shs. 2,500,000/= thereby occasioning the appellant a miscarriage of justice.
4. The learned trial magistrate further erred in law and fact when he relied on extraneous evidence to hold that the title to the suit land had passed to the respondent thereby occasioning the appellant a miscarriage of justice.

Submitting in support of the appeal, counsel for the appellant Mr. Donge argued the first three grounds together and abandoned the last one. He stated that the trial court had erred in interpreting the agreements. The court should have found that the minds of the parties did not

meet and therefore there was no agreement. One party thought the subject matter of the agreement was the land while the other thought it was the developments on the land. The proper construction was that the agreement related to developments on the land. The respondent failed to pay the balance of the purchase price agreed upon and this compelled the appellant to file the suit. He prayed that the appeal be allowed.

In response, counsel for the respondent argued that the appeal was filed out of time and without an order of extension of time issued court, since the judgment was delivered on 17th January 2014 yet the memorandum of appeal was filed on 11th June 2014. In the alternative, he argued that the trial court properly evaluated the evidence and came to the correct decision. The trial magistrate evaluated both the oral and documentary evidence and found the appellant's evidence incredible. He was therefore right to dismiss the suit with costs. He prayed that the appeal be dismissed with costs.

The duty of a first appellate court was appropriately stated in *Selle v Associated Motor Boat Co.* [1968] EA 123, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).

This court therefore is enjoined to re-evaluate the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material

feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

In the first place, the court notes that the appellant took a rather eclectic approach in asserting his claim before the court below and this court, which further complicated an already fluid transaction from which the court is required to extricate the real intentions of the parties. The applicant in one stance challenges the very existence of a contract between him and the respondent, at another acknowledges its existence but seeks its interpretation to be limited to developments on the land rather than the land itself, he then he seeks to introduce into it an additional shs. 1,500,000/= by way of oral evidence, he then claims that sum as the balance due under the agreement and finally also seeks to prevent the respondent from utilising the land that is the subject matter of the agreement. Despite the apparent lack of focus in the appellant's claim, it is the duty of this court to give a proper interpretation to a transaction which has three clear aspects; initially it was entirely oral, then documents evidencing the transaction were introduced making it partly oral and partly in writing and finally it crystallised into a written contract.

In the initial stages of the transaction, when the parties first met in 1993, the appellant testified at page 7 of the record of proceedings that the respondent "came to my home at Awindiri asking for some land to be bought." The appellant took the respondent around the land and a price was negotiated. The appellant claims that the price agreed was shs. 2,500,000/= yet the respondent claims that it was shs. 1,000,000/=. Both parties do not in their evidence allude to any stipulation of agreed time within which the price was to be paid. All negotiations were done orally with nothing reduced to writing at that stage.

Later in the course of the transaction the parties introduced documents evidencing the transaction in the form of acknowledgements of payment of instalments of the purchase price. These are in respect of payments of shs 800,000/= paid on 16th July 1993, shs. 100,000/= made on 4th November 1993 and shs. 100,000/= paid on 5th October 1994. The appellant contends that this was a part payment of the agreed purchase price while the respondent contends that it was payment in full of the agreed purchase price. At this stage the agreement was partly in writing and partly oral.

The last aspect of the transaction is marked by the attempt by the parties to crystallise the agreed terms into writing. Two documents were presented to the trial court; the agreement dated 16th July 1993 and the other dated 24th January 1994. Regarding the first one where the appellant was the author, the appellant contends its proper interpretation is that the subject matter was the developments on the land and not the land itself. In the second one prepared by the respondent, the respondent contends the subject matter of the contract was the land together with the developments on the land. Both parties signed both agreements.

This was a single transaction and all evidence relating to the transaction in the different aspects mentioned above must be evaluated as a whole as such with the aim of giving effect to the proper intention of the parties. The court in doing this has to bear in mind that when two parties have made a contract and have expressed it in writing, to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. This is in substance what is called the "parol evidence rule." Marvin A. Chirelstein, in *Concepts and Case Analysis in the Law of Contracts* (5th ed. 2006) at p 98, explains the rationale as follows;

Since the completion and execution of a written contract is typically the concluding point in the bargaining process, one's ordinary expectation is that the document itself will contain all the conscious and important elements of the deal....The parol evidence rule assumes that the formal writing reflects the parties' minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document, even though apparently accepted an earlier stage, were not intended by the parties to survive.

That rule applies only to written agreements which are intended by the parties to be "a complete integration of the terms of the contract" and was intended to be "final." In such cases, a court will refuse to use evidence of the parties' prior negotiations in order to interpret a written contract unless the writing is (a) incomplete, (b) ambiguous, or (c) the product of fraud, mistake, or a similar bargaining defect. The party presenting the writing will testify to its execution and to its accuracy and completeness. The form and substance of the document may strongly corroborate the party's testimony; or it may not. There may be disinterested witnesses who corroborate or contradict the party. There may or may not be corroboration by virtue of other circumstances that

are proved. When the other party testifies to the contrary on any of these issues, that party too should always be heard; but does not have to be believed. Any of the parties' testimony may be so overwhelmed that it would be credited by no reasonable man; or it may not. This is a question of weight of evidence, not of admissibility.

The parol evidence rule did not apply to the first and second phases of the transaction. At the first phase, the agreement was entirely oral and at the second stage phase, only evidenced in writing. At none of these stages was there a written document which the parties intended to be to be a final and complete integration of the terms of the contract. When an agreement is partly in writing and partly oral, the parol evidence rule does not apply. The trial court therefore did not err in admitting oral evidence to explain the nature of the terms agreed upon at those stages. The evidence adduced pitted the word of the appellant against that of the respondent as regards the subject matter of the agreement, (as to whether it was sale of land or developments on the land), and the contract price (as to whether it was shs. 2,500,000/= as claimed by the appellant or shs. 1,000,000/= as claimed by the respondent).

The decision on this point turned entirely on the credibility of the witnesses. Where a decision rests entirely on the credibility of a witness, an appellate court will give a lot of weight to the view of the trial court as to where credibility lies. However, the appellate court may interfere with a finding of fact in that respect if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. I have scrutinised the evidence of the two parties regarding this transaction at these two stages. I have found ample evidence to support the trial court's inclination to believe the respondent rather than the appellant.

The transaction started with the respondent looking for "some land to be bought." The appellant did not explain at what stage it degenerated to developments on the land instead. The documents relating to the payments made were consistent with the amount the respondent claimed to be the agreed purchase price rather than that claimed by the appellant. The appellant's conduct thereafter in allowing the respondent undisturbed possession and user of the land for nearly or slightly over seven years is more consistent with a transaction over land than mere developments

on the land. This is coupled with the appellant's subsequent harvesting of the eucalyptus trees which he claims to have sold to the respondent, which is not conduct of an honest seller, even for the developments only on the land as he claimed. I am satisfied that the trial court came to the right conclusion in deciding which of the two parties to believe.

The last aspect of the transaction regards the two documents which each of the parties claimed to have been the final agreement. When an agreement is intended to be final and was intended to be the complete agreement, the parol evidence rule applies, except where there is need to explain ambiguities, the meaning of terms by custom and usage, and such other exceptions alluded to before in this judgment. In *F L Schuler AG v Wickman Machine Tools Sales Limited*, [1973] 2 All ER 39, Lord Wilberforce stated:

The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used.

The court therefore must first remind itself of some of the other relevant cardinal canons in the interpretation of contracts, where it becomes necessary to ascertain the intention of the parties. The first one is that the words used by the parties should be given their ordinary meaning in their contractual context. In *Multi-Link Leisure Developments Ltd v Lanarkshire Council*, [2011] 1 All ER 175, the parties disputed the effect of an option clause in a lease, and particularly whether, when fixing the price, potential for development was to be included. The clause required the 'full market value' to be paid. The tenant appealed. Lord Hope held:

The court's task is to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise.

Secondly, the court should construe the contract with a businesslike intention or a commercial sense. The case of *Mitsui Construction Co Ltd v Attorney General of Hong Kong*, (1986) 33 BLR 14 is instructive on this point. There Lord Bridge said, “the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and un-businesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis.”

Similarly in *Rainy Sky Sa and Others v Kookmin Bank*, [2011] 1 WLR 2900, [2012] 1 All ER (Comm) 1, when explaining the role of commercial good sense in the construction of a term in a contract which was open to alternative interpretations, the court held that in such a case the court should adopt the more, rather than the less, commercial construction, applying the principle that the ultimate aim in construing a contract is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant; the relevant reasonable person being one who has 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. Lord Clarke said:

The ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant.

In the same decision, Lord Clarke of Stone-cum-Ebony stated:

The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.... the aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant.

Lastly, the court cannot take into account the post-contractual conduct of the parties in order to determine the meaning and effect of the contract. In *F L Schuler AG v Wickman Machine Tools Sales Limited*, [1973] 2 All ER 39, [1973] 2 WLR 683, [1973] 2 Lloyds Rep 53, [1974] AC 235 The parties entered an agreement to distribute and sell goods in the UK. They disagreed as to the meaning of a term governing the termination of the distributorship. It was decided that the court cannot take into account the post-contractual conduct of the parties in order to determine the meaning and effect of the contract. The more unreasonable the result of a particular interpretation of a contract, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make their meaning clear. The fact that an agreement may be, or prove to be, a bad bargain is not a sufficient reason for supposing that the agreement does not mean what it says. Lord Reid said:

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make that intention abundantly clear.

Lord Diplock in the same decisions said: “If detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must yield to business common sense.” A similar decision is to be found in *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd*, [1970] AC 572, [1970] Lloyds Rep 269, [1970] 1 All ER 796, where the parties disagreed as to the curial law of an arbitration agreement. The proper law of the building contract and the arbitration agreement was English but the reference was conducted in Scotland. An application for the appointment of an arbitrator stated that there was a submission to arbitration within the meaning of the Arbitration Act 1950, but the arbitration was held to be subject to the law of Scotland. While evidence of subsequent conduct is admissible to determine the existence of a contract, it is not admissible to determine the terms of a contract. The court decided that evidence of behaviour after a contract is inadmissible to assist in the construction of an entirely written contract. Lord Reid held that:

It has been assumed in the course of this case that it is proper, in determining what was the proper law, to have regard to actings of the parties after their contract had been made. Of course the actings of the parties (including any words which they used) may be sufficient to show that they made a new contract. If they made no

agreement originally as to the proper law, such actings may show that they made an agreement about that at a later stage. Or if they did make such an agreement originally such actings may show that they later agreed to alter it. But with regard to actings of the parties between the date of the original contract and the date of Mr. Underwood's appointment I did not understand it to be argued that they were sufficient to establish any new contract, and I think they clearly were not. As I understood him, counsel sought to use those actings to show that there was an agreement when the original contract was made that the proper law of that contract was to be the law of England. I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.'

Lord Hodson too commented: "I should add that I cannot assent to the view which seems to have found favour in the eyes of the Master of the Rolls and Widgery LJ. that as a matter of construction the contract can be construed not only in its surrounding circumstances but also by reference to the subsequent conduct of the parties." According to Viscount Dilhorne: "I do not consider that one can properly have regard to the parties' conduct after the contract has been entered into when considering whether an inference can be drawn as to their intention when they entered into the contract, though subsequent conduct by one party may give rise to an estoppel." Lastly Lord Wilberforce said: "once it was seen that the parties had made no express choice of law, the correct course was to ascertain from all relevant contemporary circumstances including, but not limited to, what the parties said or did at the time, what intention ought to be imputed to them on the formation of the contract. Unless it were to found an estoppel or a subsequent agreement, I do not think that subsequent conduct can be relevant to this question."

The first agreement is dated 16th July 1993 and was tendered in evidence as exhibit P.1. I was written in the appellant's own hand and the material part of the agreement reads as follows;

I Andrea Akwol Jacan, have received the sum of shs. 800,000/= (eight hundred thousand only) from Doka Noah Ajobe, being first part payment out of 1 million, being agreement to compensate, house, eucalyptus trees, mango tree, cassava, and sweet potatoes, maize in the land I have offered to him.

The second agreement is dated 24th January 1994 and was tendered in evidence as exhibit P.4. It is a typed with a manual typewriter and the material part of the agreement reads as follows;

I Mr. Andrew Jacan of Joago Oluko in the presence of the RCs and neighbour of Onzivu Sub-parish; Awindiri village, today the 24th January, 1994 do hereby sell my brick wall house and plantations (one mango tree; four eucalyptus trees) on my piece of land to Mr. Noah Doka Ajobe of Arua Town.

I have this 24th January, 1994 declared that I will no longer re-claim this piece of land, house and plants thereon.

Both agreements are signed by the appellant and the respondent. It is from these two documents that the intention of the parties must be ascertained. The court must determine first whether or not they were intended to be the final and the complete agreement between the two parties, in which case the parol evidence rule applies to exclude extrinsic evidence in their interpretation. Then the court will proceed to give the words contained therein their ordinary meaning in their contractual context, construing them at the same time to yield a businesslike or commercial sense without resorting to subsequent conduct to determine the terms of a contract.

The agreement dated 16th July 1993 uses the expression “I have offered to him” which in its ordinary meaning does not import finality to the transaction. An offer anticipated a future acceptance which may be given orally, in writing or inferred from conduct. From that perspective, in respect of this agreement, extrinsic evidence would be inadmissible except to explain any ambiguities or the meaning of terms by custom and usage, found in the agreement. However, from another perspective, considering that by the same agreement the appellant acknowledges receipt of shs. 800,000/= that payment would constitute the respondent’s acceptance of the offer in which case the expression “I have offered him” would in essence or practically mean “I have sold him.” Similarly, within the context of the transaction, the expression “being agreement to compensate” could only have meant “being agreement to sell”. Adoption of the latter meanings is the only way the agreement can be given a commercial sense. There was finality to this agreement and for that reason extrinsic evidence is inadmissible in its interpretation. I find the ordinary meaning of the rest of the content to mean that the appellant sold to the respondent the “house, eucalyptus trees, mango tree, cassava, and sweet potatoes, maize” then on the land. I have not found any ambiguities in it as would require resort to extrinsic evidence to determine the meaning of the words used.

That agreement was however subsequently either supplemented by or superseded by the one dated 24th January, 1994. The expression “I have declared that I will no longer re-claim this piece of land, house and plants thereon” in its ordinary meaning imports finality to the transaction for which reason extrinsic evidence would be inadmissible, except to explain any ambiguities or the meaning of terms by custom and usage, found in the agreement. This time round, the agreement not only referred to sale of the “brick wall house and plantations (one mango tree; four eucalyptus trees)” on the land by the appellant to the respondent, but also included a declaration by the appellant that he would “no longer re-claim this piece of land, house and plants thereon.” I have not found any ambiguities in it as would require resort to extrinsic evidence to determine the meaning of the words used. I find that the ordinary meaning of the content to mean that the appellant sold to the respondent the “house, eucalyptus trees, mango tree, cassava, and sweet potatoes, maize” then on the land and also relinquished to the appellant all interests in the land.

Where two or more agreements are sequential, they ought to be interpreted as complementary to each other rather than contradictory, considering that they related to the same transaction between the same parties and the parties may have amended their deal in the course of the transaction, except where the intent of the parties is expressly to the contrary. Although none of the two agreements expressly incorporates the other, and were executed at different times, they relate to the same transaction. There is no indication that the subsequent one revoked the earlier one. The two were jointly intended to be the embodiment of the final and complete agreement between the parties. The two documents are to be construed as one. It is the principle of the law that where a contract is memorialized in multiple writings, the writings are to be construed as one, as a single integrated document (see *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 107 (3d Cir. 1986 where it was held that “where two writings are executed at the same time and are intertwined by the same subject matter, they should be construed together and interpreted as a whole). In the instant case, although they were not executed at the same time, they are intertwined by the same subject matter. I construe this interpretative principle as requiring that each writing is to be interpreted in light of the other, or alternatively requiring interpretation as if the language of each writing were set forth in one single instrument.

For example in *Carvel Corporation v. Diversified Management Group, Inc.*, 930 F.2d 229 (2d Cir. 1991), which law, involves a distributorship agreement in which Diversified was to act as Carvel's distributor in a specified territory, servicing new and future franchisees. As part of entering into the distributorship agreement, Diversified delivered promissory notes aggregating US \$1.3 million. On the basis of this theory of construing multiple writings as a single agreement, the court evidently read into the promissory notes cure rights set forth in the distributorship agreement but not set forth in the promissory notes themselves.

Adopting that interpretive approach and considered within the context of the circumstances surrounding the commencement of the transaction where the respondent was looking for "some land to be bought," the combined effect of the two agreements is consistent with the intention of the parties being a sale of the land with all the developments thereon, rather than only the developments on the land. I find this to be the true intention of the parties as reflected in the combined effect of the two agreements.

The trial court appears to have resorted to extrinsic evidence of events which occurred after the transaction and the *contra proferentem* rule in the interpretation of, and attempt to give meaning to the two contracts, which was a misdirection. In *Direct Travel Insurance v McGeown*, [2004] 1 All ER (Comm) 609, it was held that the *contra proferentem* rule is to be invoked only in cases of genuine doubt or ambiguity. Auld LJ said:

A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the *contra proferentem* rule without first looking at the context and, where appropriate, permissible aids to identifying the purpose of the commercial document of which the words form part. Too early recourse to the *contra proferentem* rule runs the danger of 'creating' an ambiguity where there is none.

The *contra proferentem*, canon requires construing or interpreting a contract against the drafter when ambiguities arise. When a contractual provision can be interpreted in more than one way, the Court will prefer that interpretation which is more favourable to the party who has not drafted the agreement (or simply that interpretation which goes against the party who has inserted / insisted on inclusion of the alleged ambiguous clause in the agreement). The Courts expect that

the party who drafts the agreement shall take due care and caution and shall not insert ambiguous provisions in the agreement. The basis of the *contra proferentem* principle is that the person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not. *Contra Proferentem* places the cost of losses on the party who was in the best position to avoid the harm. The doctrine seeks to encourage clear, explicit and unambiguous drafting of the agreement and to avoid latent and hidden meanings of its clauses. There was no basis for invoking it on basis of the facts before him.

The contract price is stated in the agreement dated 16th July 1993 as being one million. This amount was paid in three instalments of shs 800,000/= paid on 16th July 1993, shs. 100,000/= on 4th November 1993 and shs. 100,000/= paid on 5th October 1994. These payments were admitted by the appellant. Since extrinsic evidence was inadmissible to add to or alter the terms of the agreement, the appellant's claim of an outstanding balance of shs. 1,500,000/= was not supported by any evidence. In any event, waiting for seven years after receipt of the last payment before filing the suit for recovery of the balance rendered his action being time barred by reason of the provisions of section 3 (1) (a) of *The Limitation Act* which limits actions for breach of contract to a period of six years from the date on which the cause of action arose. The last payment was made on 5th October 1994 yet the suit was filed on 3rd December 2001 (seven years and two months later). The trial court was therefore justified in dismissing his suit.

I therefore do not find merit in the appeal and hereby dismiss it. The costs of the appeal and of the trial shall be met by the appellant.

Dated at Arua this 8th day of December 2016.

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Stephen Mubiru
Judge