THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 186 OF 2010

JOHN KATTO::PLAINTIFF

VERSUS

1. **MUHLBAUER AG**
2. **MUHLBAUER UGANDA LTD::DEFENDANTS**

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff brought this suit to recover from the defendants 10% of the contract value for provision of National Security Information System (NSIS) between the 1st defendant and the Government of the Republic of Uganda (herein after referred to as GoU) and quantum meruit for services for procurement of Biometric Voter Registration System to the GoU through the Electoral Commission, all due to the plaintiff as commercial agent or finder's fees or commission, general damages for breach of contract or in the alternative, quantum meruit for services rendered, interest on all pecuniary awards at commercial rate and the costs of the suit.

It is the plaintiff's case that he was contracted by the defendants to help secure two projects namely a biometric voter registration system with the GoU through the Electoral Commission and NSIS with the GoU. The plaintiff contends that he carried out various meetings, presentations and negotiations in this regard. He avers that while the biometric voter registration bid was unsuccessful, the 1st defendant was awarded the NSIS project as a result of his efforts. He contends that he was promised 10% of the contract value as commission or finder's fees by the 1st defendant. As regards the 2nd defendant, it is the plaintiff's contention that it contracted him prior to its incorporation and is a beneficiary of his services hence the claim against it.

The defendants deny that the plaintiff helped secure the NSIS contract although they admit that some work was done by the plaintiff on the biometric voter registration bid project which was unsuccessful.

The following issues were framed for the determination of the court.

1. Whether a contract for services existed between the plaintiff and the defendants.
2. Whether the plaintiff performed services for the defendants.
3. Whether the plaintiff is entitled to the remedies claimed.

At the hearing of this case, Prof. Edward Fredrick Ssempebwa together with Mr. Arthur K. Ssempebwa represented the defendants while Mr. Okello Oryem Alfred appeared with Ms. Kisakye Ruth for the plaintiff. Each party called one witness. The plaintiff tendered in 200 exhibits which are mainly emails spread out over a period of a year. The defendant relied on the same documents. Upon closure of hearing evidence, the parties filed written submissions based on the above agreed issues.

Issue 1: Whether a contract for services existed between the plaintiff and the defendant

The plaintiff testified that he was engaged by the defendants in 2009 for two projects and promised 10% of the contract value as commission, agent's fees or finder's fees. He stated that he agreed with Mr. Dietmar Ernemann who had earlier introduced himself to him as the Vice President of Muhlbauer AG that he would receive a commission of 10% of whatever deal is signed between the GoU and Muhlbauer AG (the 1st defendant).

In that regard, it was submitted for the plaintiff that a valid contract for services existed between the plaintiff and the 1st defendant which is enforceable against the 1st and 2nd defendants because the 1st defendant owns and controls Muhlbauer ID Services GMBH and in the case of the 2nd defendant because it is owned by Muhlbauer Holdings and both of them are controlled by Muhlbauer Holdings. The plaintiff's counsel also argued that the entire group is a beneficiary of the NSIS contract.

Counsel for the plaintiff pointed out that in the joint scheduling notes the defendants accepted that the plaintiff performed some work on the provision of the biometric voter registration bid but the same was not successful and there was no contract for the performance of that work. The plaintiff's counsel took the view that the defendants do

not contest the existence of a contract for service; they only contend that no contract existed for the terms of payment.

Counsel for the plaintiff further argued that by Exhibit P 7 (i), Dietmar Ernemann confirmed that they were working on a Memorandum of Understanding (MoU) of the plaintiff's relationship with the Muhlbauer Group which they had discussed earlier but had not been put in writing. The record indicates that this came after the plaintiff had already done a lot of work for the defendants. He explained that the MoU referred to in the email was about his relationship with Muhlbauer AG. Counsel for the plaintiff submitted that the parties had discussed the matter extensively and reached agreement that the plaintiff would receive a commission of 10% of whatever deal signed between GoU and Muhlbauer AG.

The plaintiff also testified that in relation to the contract between himself and the 1st defendant, Dietmar Ernemann sent him Exhibit P77 which he described as the Muhlbauer standard teaming agreement which was attached to the same exhibit. He stated that this is the agreement that the 1st defendant signed with parties in other countries where they are going to be working as a team towards a common goal. He noted that Exhibit P77 itself acknowledges that it does not fit in their agreement and did not resolve the issue of his work and his payment because it was talking more about a partnership and he was not going to be a partner with them. The plaintiff was asked specifically how he resolved the issue of his work and payment then and he testified that eventually they agreed that it would just be a flat 10% of the bid amount. In the end there was no formal agreement signed because according to the plaintiff, at a certain point Dietmar Ernemann left the company and then he wrote to the plaintiff Exhibit P 199, informing him about the handover that he had done and that they were all well aware about the 10% commission.

In cross examination in relation to Exhibit P 190, the plaintiff explained that he knew from the very beginning that Dietmar Ernemann had bosses. However, he explained that the scope of his involvement was to get the 1st defendant to be able to negotiate a deal with the GoU. Further, that what they had been pursuing up to then was to get Mr. Muhlbauer to meet with the President of Uganda so that they could discuss it. He testified that by the time Exhibit P 190 was authored part of the transaction had been accomplished and that is why Dietmar Ernemann stated in Exhibit P 190 that Mr. Muhlbauer will be dealing with the President himself. The plaintiff explained that even with Dietmar Ernemann out of the way, he was not very much worried about his contract

for the 10% commission because he believed up to that point he was dealing with an honourable company that would honour its obligation.

It was the submission of counsel for the plaintiff that the defendants adduced no specific evidence in rebuttal of the plaintiff's evidence arguing that it was Mr. Wolfang Gerhard Maurer who only denied knowledge of the plaintiff's claim and maintained that it lacked merit because he did not know about it. Mr. Wolfang had testified that he is not aware of any money which was given or promised to the plaintiff in relation to the Voter Registration Project tender or the NSIS contract. According to him, since he was the one involved in negotiations for the NSIS contract, if there was such a promise he would have known. He added that the company's fiscal policy, financial procedures and auditors would never accept a verbal agreement for the amount the plaintiff is claiming.

In cross examination, Mr. Wolfang Gerhard Maurer testified that he first came to Uganda early March 2010 for final negotiations of the NSIS contract pursuant to the power of attorney given to him the day before he left for Uganda. The contract was signed 18 days after his arrival. He also testified in cross examination that at the time of his employment, Dietmar Ernemann was not reporting to him but was reporting to Joseph Muhlbauer and Hubert Foster who are at the top management of the companies. It was argued for the plaintiff that certainly the witness did not replace Dietmar Ernemann so he would not know what agreements Dietmar Ernemann made in Uganda between April, 2009 and January 2012 when he left. Further, that the power of attorney by which the witness came to Uganda actually confirms this at page 82 of Exhibit P 198 because it was issued specifically for the NSIS project. Counsel contended that this means by the time it was issued, the NSIS contract had already been secured. Consequently, there is no merit in the testimony of Mr. Maurer that he single-handedly negotiated the NSIS contract from beginning to end.

On the other hand counsel for the defendants highlighted the evidence of the plaintiff who testified that Muhlbauer had signed a contract with the GoU and when tasked by the court to clarify which Muhlbauer he was referring to, he stated that there were many Muhlbauers but that they all fell under Muhlbauer AG. He also testified during examination in chief that he understood all Muhlbauers to be falling under the 1st defendant.

In addition, counsel for the defendants argued that during cross-examination the plaintiff testified that he sent an email to Mr. Muhlbauer himself about his oral arrangement

however for reasons unexplained, that email did not form part of the 200 exhibits. It was submitted for the defendants that the only exhibit, which mentions the oral commission contract is Exhibit P199, a letter purportedly written by Dietmar Ernemann and dated May 2010. Counsel for the defendants submitted that it is not in dispute that by the time he allegedly wrote the letter he was no longer an employee of the 1st defendant and therefore could not have been writing it on behalf of the 1st defendant. Consequently, its value, if any, to the plaintiff is to show that some sort of understanding for the payment of 10% existed between him and Dietmar Ernemann. It is the argument of the defendants that none of the exhibits relate or allude to a commission contract of 10% or any other percentage. It was contended that even when the mode of communication was mainly by email, not a single email mentions the oral commission contract. It was therefore contended that Exhibit P199 is a mere afterthought that does not fit in the sequence of events and should be disregarded by this court.

Counsel for the defendants further submitted that the plaintiff has failed to prove that a contract for service which was essentially a commission contract, existed between him and the defendants. In the alternative, it was argued that if such a contract for service existed, it was made contingent upon a contract that was never executed and is therefore unenforceable because there is no agreement between GoU and the 1st defendant.

In rejoinder, counsel for the plaintiff maintained that the defendants do not dispute that the NSIS contract was for both the Voter Register and National Identity Cards projects however they argue that since the NSIS was not signed between the 1st defendant and the GoU, it means the work of the plaintiff never materialized. It was submitted for the plaintiff that the defendants' argument that apart from Exhibit P199, there is no other evidence on record to prove that a commission contract existed between the defendants and the plaintiff, is misconceived. The plaintiff's counsel contended that the plaintiff testified that the subject of his pay was discussed numerous times between him and Dietmar Ernemann who was Vice President at the Muhlbauer Group. He pointed out Exhibits P7 (i) and P77 which he described as the Muhlbauer standard teaming agreement which was attached to Exhibit P77 but could not work for them and Exhibit P77 itself acknowledges that it does not fit their agreement. Counsel argued that Exhibit P199 was the culmination of the discussions between the plaintiff and Dietmar Ernemann. He contended that none of this evidence was rebutted because Dietmar Ernemann did not testify for the defendants but instead DW1, Mr. Wolfang attempted to give some academic reasons why the promise referred to in Exhibit P 199 could not have been made on behalf of the defendants.

I have reviewed the pleadings, documents and all the evidence in relation to this issue. I have also considered the submissions of both counsel on the same. Whereas the plaintiff claims that a contract for service existed between him and the defendants under which he was to earn 10% of the contract sum as commission, the defendants challenge his claim arguing that there is no proof of the existence of such a contract between the parties.

It is not in dispute that the plaintiff and Mr. Dietmar Ernemann had some dealings whereby the former did a number of things which I will unpack while dealing with the 2nd issue. In fact the defendants' counsel argued in the alternative that if at all there was any contract of service between the plaintiff and the 1st defendant, then it was made contingent upon a contract that was never executed and is therefore unenforceable because there is no agreement between GoU and the 1st defendant. To my mind, it is possible that the plaintiff was promised some consideration by Dietmar Ernemann for his service and that is why he got so involved in the process. However, as to whether the plaintiff and Dietmar Ernemann entered into a contract to pay 10% that binds the defendants is another matter which this court needs to determine.

The plaintiff is relying on Exhibit P77 that made mention of the Muehlbauer Standard Teaming Agreement, which this court never even had the benefit of looking at as it was never tendered in evidence, to support the argument that when the said standard agreement was found not to be suitable, they orally agreed on a 10% commission on the contract sum. The plaintiff has not adduced any other evidence or written communication that alludes to that fact except Exhibit P199 which was written by Mr. Dietmar Ernemann after he had left the company. If indeed the plaintiff and Mr. Dietmar Ernemann had agreed on that commission why did he not formalise it before he left the Muehlbauer Group or even make mention of it at least in one of the numerous e-mails apart from Exhibit P199? Besides, did he even have the authority as an individual to orally commit his company to such a colossal sum of money and keep quiet about it until he left?

In that regard, I have found very useful the evidence of Mr. Wolfang who testified that he was not aware of any agreement or promise to pay the plaintiff money for the NSIS contract based on following major reasons. Firstly, that after Mr. Ernemann left the company in January 2010, he (Wolfang) was the one who took over the responsibility of the Government Solutions, was involved in the NSIS from the beginning, and during all this time but he never communicated with the plaintiff over the matter yet he was the one negotiating with the GoU on Muhlabauer's side. Indeed there is no evidence of any

communication between the plaintiff and the witness who testified that if there had been any commission agreement he would have known about it by virtue of his office.

Secondly, the defendants' witness testified that Muhlbauer Group is a public stock listed company and as such all legal company within Muhlbauer group need to be audited by independent auditors such as KPMG and so it is not possible to conclude any such agreement in the amount of Euros as stated by the plaintiff on a verbal basis. According to him, the auditors of Muhlbauer would never accept such an agreement. Relatedly, he also testified that each company within Muhlbauer Group is subject to fiscal tax authority which would not accept such agreement which would cause liability worth millions of Euros on verbal basis. That testimony appears logical to me because the alleged oral agreement is for 10% of Euros 64,231,371.49 which translates to Euros 6,423,714.9! I do agree that no serious company would orally commit itself to such huge liability because of the tax and audit implications.

Thirdly, the witness testified that Muhlbauer has internal operating procedures under which no employee or executive is entitled to enter into agreements worth more than Euros 500,000 without the approval of the CEO or CFO of Muhlbauer Group. In this case, the 10% of Euros 64,231,371.49 was way above the Euros 500,000 benchmark for which approval would have been sought prior to entering into this contract. He observed that there is no evidence of seeking any such approval from the appropriate officers of the Muhlbauer Group to authorize the contract. Finally, he stated that as the Acting Contract Manager for the last 6 years he would have known about the contract if there was one since he is obligated to review contracts before they are signed by the Board.

I would be inclined to believe the evidence Mr. Wolfang Gerhard Maurer on this issue as highlighted above because to my mind it makes a lot of sense. It was the duty of the plaintiff to convince this court that there is a 10% commission contract between him and the defendants but I am afraid this court cannot come to that conclusion on the basis of the evidence on record.

For those reasons, I am inclined to agree with counsel for the defendants that the plaintiff has failed to prove on a balance of probabilities that a contract for services existed between him and the defendants and I so find thus answering the 1st issue in the negative.

Issue 2: Whether the plaintiff performed services for the defendants.

From the pleadings and the evidence adduced, it is the plaintiff's case that there was one contract of service for two projects, that is, the biometric voter registration bid and the NSIS contract for which it was agreed that remuneration would be 10% of whatever deal the 1st defendant signed with the GoU.

In his examination in chief, the plaintiff testified that the 1st defendant came to Uganda looking for business. He also testified that his role was to know the requirements by GoU, help the 1st defendant to identify the tenders available and help them to win the contracts with the GoU through tendering processes. In cross examination, the plaintiff maintained that his approach was to have a good bid and maintain contact with decision makers. He explained that his agreement with the main technical man was that if the bid was good enough, it would be pushed on to the next level. He disagreed with counsel for the defendants that what he did amount to corruptly influencing the bidding process.

In cross examination, the plaintiff accepted that his valuable contribution to the 1st defendant was to get documents relating to the bid and submit them to his contact Dietmar Ernemann. He also accepted that his other valuable contributions were listening and gathering information as to what was going on so that he would inform Dietmar Ernemann, getting technical inquiries from his contacts and passing them on for answer to the 1st defendant's experts. He however maintained that these were neither minor nor the only contributions he made to the 1st defendant's contract. It was also his testimony that the evidence of his contribution is contained in Exhibits P1 up to Exhibit P 199 as admitted and testified on. He admitted that he made no contribution to the technical aspects of the bid because they were too technical.

The plaintiff also explained in cross examination that he did not consider his method of work to be illegal and added that all his actions were at the request of the 1st defendant's officials. He added that he insisted on a good proposal to be prepared by the 1st defendant rather than any other under hand means of winning the tender because the bid should speak for itself. He explained that in his experience the best bid does not always win the tender and so they discussed their chances of winning the bid in Exhibit P11 and Exhibit P111.

Furthermore, that he also offered Dietmar Ernemann his opinion on the giving of some gifts and performed tasks detailed in Exhibit P108 to Exhibit P110. The gifts were eventually delivered by the plaintiff as per the details in Exhibit P118, Exhibit P119 and

Exhibits P120 and P122. In re-examination the plaintiff testified that the gifts he was accused by counsel for the defendants of giving and breaking the law were Muhlbauer memorabilia consisting of things like dairies, pens and paper wallets, all being things that are used in the office. He explained that the idea actually came from Dietmar Ernemann who thought it would assist them in their day to day running of the office and help keep the name of Muhlbauer up front.

The plaintiff's counsel submitted that the plaintiff did perform the bulk of the work related to the Electoral Commission voter registration bid although his assignment did not include winning the tender because that depended on the merits of the bid itself.

As to whether the plaintiff performed services for the defendants leading to the award of the NSIS contract, the plaintiff's counsel submitted that there is overwhelming evidence that the plaintiff performed services for the defendants leading to the award of the NSIS contract. According to the plaintiff, even if he did not participate in the preparation of the new bid, he believed some of the documents that formed part of the new bid were the ones prepared by him.

It was argued for the plaintiff that what started as the Electoral Commission voter register tender was cancelled and revised into the bigger NSIS contract and then awarded to the defendants by direct procurement. It is the plaintiff's argument that the building blocks for the relationship between the defendants and the GoU which eventually led to the award of the NSIS contract were procured by him. Consequently, it was argued that the plaintiff's services brought the defendants to Uganda and secured for them the NSIS contract.

Counsel for the plaintiff further contented that there is no doubt the plaintiff did not single-handedly get the NSIS contract for the defendants as there were other players on the side of the defendants and the GoU. There is also no doubt that the plaintiff did not participate in the final negotiations of the final terms of the NSIS contract. The plaintiff's counsel however submitted that the above contention is irrelevant because by the time Mr. Wolfang Maurer was sent to Uganda the contract had already been secured and the power of attorney in Exhibit P198 confirms this as it was given in specific reference to the National Security Documentation of the Republic of Uganda project which had already been secured. It was argued for the plaintiff that it is not true that Wolfang Maurer negotiated the contract afresh because he only came to sign the contract and other related documentation.

In response, counsel for the defendants argued that the 1st defendant acknowledged that the plaintiff performed some work on the biometric voter registration however the work done is tainted with illegality and the plaintiff should not benefit from his illegal actions. It was also argued for the defendants that, in any event, the 1st defendant did not benefit from that work as the voter registration bid was unsuccessful and since it is the plaintiff's case that he agreed on a commission of whatever deal was signed between the 1st defendant and GoU, he is not entitled to make any claims.

Additionally, the defendants' counsel submitted that the alleged services performed are tainted with illegality. He referred to the evidence of the plaintiff who testified during examination in chief that the Electoral Commission had advertised for a tender for provision of voter cards while DW also testified in examination in chief that the 1st defendant submitted a bid for the biometric voter registration tender process.

In his submission the defendant's counsel highlighted Exhibit P7 (iv), where the plaintiff states in an email to Dietmar as follows:

> *"One of the guys on the technical evaluation committee is my wife's cousin!! I will meet him on Thursday to discuss further. Keep this to yourself. We now have a person on the inside who I can trust, and where most firms are going to lose out."*

It was contended by counsel for the defendants that during cross-examination the plaintiff declined to name his wife's cousin yet he never explained why it was necessary for Dietmar Ernemann to keep this information to himself if there was no impropriety involved in their correspondence.

Counsel for the defendant also referred to the email in Exhibit P17 where the plaintiff wrote to Dietmar Ernemann as follows:

> *"What I can assure you is that we are now dealing directly with the evaluation team for the EC Bid. They are the ones who choose the winning bidders and if our bid is good, it will be short listed for sure".*

He further highlighted Exhibit P108, which is an email from Dietmar Ernemann to the plaintiff indicating that he was sending *"the bigger gift especially for "mr.p" (you know what I mean) will come when we are in the next round…"*

In Exhibit P111, which is a reply to Exhibit P110 in which Dietmar Ernemann sought for information regarding their chances of winning the bid, the plaintiff replied as follows:

> *"Winning contracts in Uganda needs 2 things. First the quality of the bid document and second, contact with bid decision makers…As for contact with the team, I believe we are very well positioned. We have an agreement with the main technical man and our liaison person there has talked to people on the evaluation committee and contracts committee to bring them on board."*

Based on the plaintiff's testimony during cross-examination where he admitted that he knew it was improper to deal with members of an evaluation team during a tendering process, the defendants' counsel submitted that there is no other plausible explanation why the plaintiff would be dealing directly with members of an evaluation team during a tendering process and have someone talk to the members of the evaluation committee to "bring them on board" if not to influence the outcome of the bidding process.

Counsel for the defendants argued that the plaintiff made it clear that one of the prerequisites of winning bids in Uganda is "*contact with bid decision makers***"** yet he had earlier stated in Exhibit P17 that the members of the evaluation team are the ones who choose the winning bidders therefore by bid decision makers he was making reference to the evaluation committee of the Electoral Commission. He also highlighted the evidence of the plaintiff who testified during cross-examination that once a bid is submitted in accordance with the law, there would be no need of dealing directly with the evaluation committee as the bid would speak for itself. It was therefore submitted for the defendants that this lends credence to the fact that the only other reason for dealing with the evaluation committee during a tendering process would be to influence their decision. Further that there is no other explanation why Dietmar Ernemann insisted that the bigger gift should be reserved for Mr. P when they move to the next round presumably of the tendering process.

Counsel for the defendants also referred to Exhibit P.118 where the plaintiff stated that he received the gifts and passed them on to the others. He further relied on the testimony of

the plaintiff who admitted during cross-examination that the recipients of the gifts were officials of the Electoral Commission. Although the plaintiff explained that the "gifts" were limited to memorabilia, counsel for the defendant argued that this attempt fails miserably because of the context in which the gifts were given. It is the defendants' contention that from the evidence referred to above, the gifts had the objective of corruptly influencing the bid process yet the pens and diaries do not achieve this objective.

Additionally it was submitted for the defendants that the plaintiff's evidence as to the nature of the gifts was an afterthought since in cross-examination, the plaintiff disclosed that these were innocent gifts yet he declined to name his wife's cousin, an indication that the cousin was a tool in the corruption scheme.

Counsel for the defendants further relied on Section 5 of the Anti Corruption Act, 2009 which deals with bribing public officials as well as ***Harlsbury's Laws of England 3rd Edition Volume 8 at page 125*** which states:

> *"There are several classes of contracts, which though perfect in point of form, cannot be enforced at law. These include contracts, which are illegal at common law as involving the commission of a crime or tort, and contracts, which are unlawful as being contrary to public policy. Contracts, which belong to these classes are void and have no legal effect. Where the illegality is criminal or contra bonos mores (against good morals) such a provision if an ingredient in the contract will invalidate the whole of it even if there may be many other provisions in it".*

Counsel for the defendants referred to the case of ***Parkinson v. College of Ambulance [1925] 2 K.B. 1***, where the secretary of a charitable society told the plaintiff that he was in a position to procure the knighthood for him if he would make a contribution to the society. He gave 3000 pounds but received no knighthood, which was for the government to bestow. He sued to recover the money. The court held that the substance of the agreement was illegal and the plaintiff could not recover money paid out to the defendant nor recover damages for breach of contract.

In that regard, counsel for the defendants argued that the essence of the plaintiff's case as relates to the Biometric Voter Registration Bid was that he was contracted by the defendants to secure the aforesaid bid since he admitted that he was never involved in the

technical aspects of the bid. The defendants contended that the documents the plaintiff tendered into court in support of his case illustrate that he did or attempted to illegally obtain a favourable outcome by presenting gifts to the decision makers in the tendering process. He also flaunted the basic principles of public procurement and disposal enshrined in section 43 of the Public Procurement and Disposal of Public Asset Act 2003 as amended by Act 11 of 2011 by maintaining contact with members of the evaluation team of an on going tendering process for purposes of influencing a favourable outcome.

With due respect to counsel for the defendants, the Public Procurement and Disposal of Public Asset Act 2003 as amended by Act 11 of 2011had not yet come into force as at the time of delivering this judgment and so reference to it was irregular.

It was the contention of the defendants' counsel that from his training, qualifications and job description, it is not clear how the plaintiff would have the access he alleges to have to various officials of GoU or why the 1st defendant would use him instead of contacting the officials of GoU through the official means. Furthermore, it is not clear in what capacity the plaintiff was arranging a visit for the Head of State to another sovereign State, which is a preserve of officials of GoU or officials of the other sovereign State. The inference that can be drawn is that the plaintiff hoped to or indeed did use his "connections" to execute his alleged roles.

While relying on Section 8 of the Anti Corruption Act 2009, the defendants' counsel submitted that the alleged role in the procurement of the NSIS contract amounted to influence peddling, which is an offence under the laws of Uganda. For that position the defendants also cited the case of ***Montefiore v. Menday Motor Components Co. [1918] 2 K.B. 241*** where the essence of the impugned contract was similar to the present case, it was held that it is contrary to public policy that a person should be hired for money or valuable consideration to use his position and influence to procure a benefit from the Government, and a contract for that purpose is therefore illegal and void. It was further held that where it appears from the evidence during that hearing of a case that the contract sued on is contrary to public policy, it is the duty of the judge to take objection that the contract is illegal and void.

The other argument raised by the defendants' counsel was that the plaintiff never performed any services in regard to the biometric voter registration or the NSIS contract. It was argued that the plaintiff's evidence is contradictory and should be disregarded by this Honourable Court because it is beyond comprehension how the 1st defendant's failure

in obtaining Biometric Voter Bid metamorphosed into the award of a NSIS contract which was awarded not as a result of a competitive tendering process but was a result of a direct procurement. It was submitted that in the event that the plaintiff performed any services, those services amounted to commission of various offences under the laws of Uganda and the essence of the contract is illegal and or contrary to public policy and should not be enforced by this Honourable Court. The defendants' counsel relied on the decision of the Court of Appeal in the case of ***Makula International & Others Vs Cardinal Nusbuga & Others (1982) H.C.B 11.***

In rejoinder to those submissions, the plaintiff's counsel argued that the submissions of counsel for the defendants on this issue are unfortunate because the entire claim of illegalities and crimes allegedly committed by the plaintiff is based on innuendos, insinuations and conjecture and not cogent evidence to prove even on a balance of probabilities the particulars of illegality or ingredients of the alleged offences. He contended that in the first place the plaintiff is not on trial for committing offences under the Anti Corruption Act No. 6 of 2009. His view is that the court cannot make a finding that the plaintiff committed offences under the Act, in a civil case, on a balance of probabilities because the standard of proof is beyond reasonable doubt and applies to criminal trials.

The plaintiff's counsel submitted that there are no incidents of gifts, relatives, contacts with evaluation committee members and all those incidents claimed by counsel for the defendants to be particulars of illegality and or crime committed by the plaintiff. He argued that the so called actions of the plaintiff and gifts delivered by the plaintiff related to the Electoral Commission bid which was never successful and not the NSIS contract whose relation with the Electoral Commission bid is that it incorporated the voters register which was the purpose of the Electoral Commission bid. This is the basis of the plaintiff's claim because although the defendants did not secure the Electoral Commission contract through their initial bid, they eventually secured it through the NSIS contract, again with participation of the plaintiff.

Counsel for the plaintiff took the view that there is nothing remotely illegal or criminal about the actions of the plaintiff since the evidence on record proves that all the actions of the plaintiff and the gifts delivered by the plaintiff were at the proposal and request of the defendants' officials, and were to the eventual benefit of the defendants as Mr. Wolfang Maurer actually confirmed that this was normal business practice of the Muhlbauer Group.

He submitted that counsel for the defendants have cited several cases whose facts are distinguishable from the present case. He contended that while it is good law that a court of law cannot sanction what is illegal there must be proof of illegality and the illegality must affect the contract. He contended that in the present case the contract between the plaintiff and the defendants for services in return for a commission has not been affected by any illegality at all as there is no allegation of illegality in relation to that contract at all.

I have reviewed the pleadings, documents and all the evidence as relate to this issue. I was rather taken aback by the argument of counsel for the plaintiff as an officer of court in justification of his client's acts and the contention that the plaintiff is not on trial for committing offences under the Anti Corruption Act No. 6 of 2009. I also found very interesting his argument that this court cannot make a finding that the plaintiff acts were illegal in a civil case because the standard of proof in criminal matters is beyond reasonable doubt.

With due respect to counsel for the plaintiff, the principle that an illegal contract is unenforceable and generally that a court of law should not sanction an illegality is well established in our jurisdiction. An illegality once brought to the attention of court overrides all questions of pleading. How then is an illegality brought to the attention of court in a civil matter? To my mind, this does not involve a criminal trial of the party alleged to have committed an illegal act as counsel for the plaintiff would want to portray. Rather it only involves evaluating the evidence before court so as to conclude whether the transaction is illegal for purposes of determining the propriety of the civil claim and not the guilt or innocence of the party alleged to have committed it. It is not and cannot be a criminal trial because a party is not put in the dock.

This position is well explained in **Harlsbury's Laws of England 3rd Edition Volume 8 at page 125** which states;

> *"If the illegality of a transaction is brought to the notice of the court, whether the contract ex facie shows illegality, or it appears in the course of the proceedings, and the person invoking the aid of the court is himself implicated in the illegality, the court will not assist him, even if the defendant has not pleaded the illegality and does not wish to raise the objection."*

With the above position in mind, I now proceed to consider the services allegedly rendered by the plaintiff in the instant case.

I have particularly noted the services the plaintiff alleges to have offered to the defendants as relate to making contacts and delivering gifts and I agree with counsel for the defendants that they are contrary to the laws and public policy of this country. There are a number of emails alluded to by counsel for the defendants which are quoted above. It is quite interesting that the plaintiff had the audacity to produce such communication to support his claim in a court of law.

Section 95 (1) of the Public Procurement and Disposal of Public Asset Act 2003 makes it an offence for anyone who contrary to the Act interferes or exerts undue influence on any officer or employee of the procuring and disposing entity in the performance of his or her functions. It is the firm view of this court that the services the plaintiff alleges to have offered to the defendants implicates the plaintiff in attempting to influence the tendering process.

Section 2(b) of the Anti Corruption Act, Act 6 of 2009 also prohibits the offering or granting, directly or indirectly, to a public official, a gift, for himself or herself or in exchange for any act or omission in the performance of his or her public functions. In addition, section 5 of the Anti Corruption Act prohibits the bribing of Public officials. It is clear from the plaintiff's evidence and the documents on record that upon his advice, the plaintiff allowed himself to be used to offer gifts to officials employed in the Electoral Commission which amounts to corruption. This court cannot sanction such activities as services rendered to the defendants that must be compensated. On the contrary I do find that those activities are contrary to public policy and illegal. Even if they were based on a contract I would declare such a contract unenforceable. See ***Harlsbury's Laws of England 3rd Edition (supra)*** and ***Makula International & Others v Cardinal Nusbuga & Others (Supra).***

I also agree with the defendants' submission that there are government departments/institutions responsible for arranging the President's visit to other States and the plaintiff is not one of the officials in that department . He cannot therefore claim to have organised the President's meeting with the defendants or to have organised for him to travel to Germany because it is not his mandate.

In the circumstances, I find the plaintiff's alleged services to the defendants tainted with illegality which this court cannot sanction by allowing his claim even on a quantum meruit basis. In the result his claim must fail.

Issue 3: Whether the Plaintiff is entitled to the remedies claimed.

Following my findings and conclusion on the above two issues, I do find that the plaintiff is not entitled to any remedies. Consequently, I would dismiss this suit but decline to grant costs to the defendants for reason that its former Vice President Mr. Dietmar Ernemann encouraged the plaintiff to perform the illegal acts some of which benefitted the defendants. In the premises, each party shall bear its own costs.

I so order.

Dated this 5th day of July 2013.

Hellen Obura
JUDGE
Judgment delivered in chambers at 4.00 pm in the presence of Mr. Okello Oryem Alfred for the plaintiff who was also present and Mr. Arthur Kunsa Ssempebwa for the defendants.

JUDGE
05/08/13