THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CS-0037-2019

1. **VIVO ENERGY UGANDA LTD**
2. **ASHWINKUMAR VITHALADAS CHOTAI ---------- PLAINTIFFS**

VERSUS

1. **SAMUEL BLACK**
2. **MOUNT MERU PETROLEUM UGANDA LTD ---------- DEFENDANTS**

Before: Hon. Justice Nshimye Allan Paul M.

JUDGMENT

REPRESENTATION

The Plaintiffs were represented by Adv. Waniala Allan of S&L Advocates; the 1st Defendant pleadings were filed by Geoffrey Nangumya & Co Advocates, then later was represented by Adv. Denis Kwizera of Kwizera & Co Advocates and the 2nd Defendant was represented by Adv. Caleb Mwesigwa from Mwesigwa Associated Advocates.

INTRODUCTION

1. This suit was first filed in the Commercial division of High court of Uganda vide Civil suit 507 of 2018. The file was on 31st May 2019 transferred by the Registrar High court to the Mbarara High Court Circuit as the court with the territorial jurisdiction. The file was then entered into the Mbarara High court registry system as HCT-05-CV-CS-0037-2019.
2. On 03rd July 2018, the plaintiffs filed a suit against the defendants. They based the claim on breach on agreement as against the 1st defendant, who

they allege breached the terms of the Retailer Supplier Agreement and Novation Agreement dated 14 March 2014 and 29 July 2016 respectively (See paragraph 4.1 & 4.2 of the plaint). The claim against the 2nd defendant in plaint is based on a claim that it is liable for inducement of breach of both Retailer Supplier Agreement and Novation Agreement between the plaintiffs and the 1st defendant (See paragraph 4.7 to 4.10 of the plaint).

3. On 26th September 2018, the 1st defendant filed a written statement of defence , denying the allegations in the plaint and claimed there is no cause of action against him. He contended that he entered into a contractual relationship with the 2nd defendant after terminating the relationship he had with the 1st plaintiff, paying the outstanding loan owed to the 1st plaintiff, which was followed by the 1st plaintiff releasing the mortgage it had on the 1st defendant's property, that it was holding as security. (See paragraph 6 & 7 of the 1st defendant's written statement of defence).
4. On 9th March 2023, the 2nd defendant filed an amended written statement of defence, denying the allegations in the plaint and claimed there is no cause of action against him. It stated that in June 2018, the 1st defendant approached it offering to lease his property comprised in Shema block 2 plot 226 and 287 at Kabwohe. That after a search that showed that the properties were not encumbered, they executed a lease agreement dated 25th June 2018 with the 1st defendant creating a lease of 15 years starting from 1st July 2018 and was subsequently given possession (See paragraph 7.1 to 7.8 of the amended written statement of defence of the 2nd defendant.)
5. On 16th May 2022 the parties filed a joint scheduling memorandum (JSM) and scheduling was done on 07th September 2022, when the JSM was admitted on court record.

ISSUES

The parties agreed on four issues in the JSM, but during submission dropped one, thus the issues for determination by court are;

1. Whether the 1st defendant breached the retailer supply and novation agreement with the plaintiffs?

2. Whether the 2nd defendant induced the breach of the 1st defendant's agreements with the plaintiffs?
3. What remedies are available to the parties.

WITNESSES

The hearing of the witness's evidence commenced on 21st October 2022 and closed on 10th January 2023 with the close of the 2nd defendant's case. The plaintiff presented one witness, **Mr Stephen Chomi (PW1)** the company Secretary of the 1st Plaintiff. The 1st defendant presented one witness, himself, **Mr. Samuel Black** (DW1) . and the 2nd defendant also presented one witness **Mr Daniel Mushabe (DW2)** the General Manager of the 2nd Defendant.

SUBMISSIONS

The parties filed written submissions.

Plaintiffs' submissions

On the first issue, counsel submitted that the retailor supply agreement between the 1st Plaintiff and 1st Defendant commenced on 14th March 2014 and was intended to be in force until 13th March, 2019, but the 1st Defendant breached the agreement when he evicted the Plaintiffs before expiry of the contractual period (see PEX4, DEX8 and DEX9). That there is nothing to show that the 1st Defendant was excused from the agreement and thereby he breached the agreement.

Regarding issue two, counsel relied on **MWEKUR ISLAND SHIPPING CORP VS LAUGHTON (1983) 2 ALLER 189** for the elements of the tort of actionable interference with contractual rights. He submitted the Daniel Mushabe DW2, knew that the Plaintiffs were in occupation of the suit premises before he executed a lease agreement with the 1st Defendant and that the 2nd Defendant provided money to the 1st Defendant to pay his outstanding arrears which induced the latter to evict the Plaintiffs.

On the issue of remedies, counsel for the plaintiffs prayed for general and punitive damages worth UGX300,000,000/=. He also prayed for costs of the suit.

1st Defendant's submissions

On issue one, Counsel submitted that the 1st Defendant paid the sum of UGX139,630,000/= which released his title from the mortgage he had with the 1st Plaintiff and thereby ended the contractual relationship they had.

That the 1st Defendant informed the 1st Plaintiff to remove all its properties from the fuel station and also informed them that he had leased the suit land to the 2nd Defendant and a representative of the 1st Plaintiff witnessed the handover to the 2nd Defendant. Counsel prayed for this issue to be determined in the negative.

On the issue of remedies, counsel contended that the Plaintiffs are not entitled to any remedies because they failed to establish any claims against the 1st Defendant. Counsel prayed for the dismissal of the suit with costs.

2nd Defendant's submissions

Counsel argued issue 2 relying on the case of **OBG LTD VS ALLAN AND OTHERS [2007] UKHL 21** for the ingredients of the tort of inducing breach of contract. Counsel contended that the 2nd Defendant was invited by the 1st Defendant who handed it the suit property after satisfying itself that the 1st Plaintiff did not have proprietary interest therein, which was confirmed after conducting due diligence.

Counsel contended that there was no eviction of the Plaintiffs but that it was a peaceful handover wherein no inducement can arise. Counsel prayed for this issue to be held in the negative.

On issue 3, counsel prayed for dismissal of the suit with costs.

DETERMINATION

Issue 1 Whether the 1st defendant breached the Retailer Supply and Novation agreement with the plaintiffs.

It is the law in section 10(1) of the Contracts Act 2010 that "A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound." It thus follows that it is a principle of law that courts of law will hold parties bound to the lawful contracts that they freely execute as was held by Sir George Jessel in **PRINTING NUMERICAL CO. VS SIMPSON [1985] LR 19 EQ 462**.

The evidence on court record shows that two main agreements were executed by the parties, these are;

1. PEX1 is a Retailer Supply Agreement executed on 14th March 2014 by the 1st plaintiff and 1st defendant.
2. PEX2 is a Novation Agreement executed on 29th July 2016 between the 1st defendant and the plaintiffs in respect to the Retailer Supply Agreement that was on executed 14th March 2014 by the 1st plaintiff and 1st defendant.

It is not in doubt that the 1st defendant signed the Retail Supplier Agreement dated 14th March 2014 and it created obligations on him as a **retailer** in **Kabwohe.** These rights as a Retailer were by way of a novation agreement dated 29th July 2016 transferred to the 2nd plaintiff, who is called the "new obligor" in the novation agreement (see the preamble of the novation agreement exhibited as PEX2). In fact, clause 1(a) of the novation agreement that deals with Transfer, Release, Discharge and Undertakings states that;

> "**The original obligor** (The 1st defendant) **is released and discharged from further obligations to the obligee** (The 1st plaintiff) **with respect to the Retail Supply agreement** and the original obligor's obligations are hereby cancelled provided that such a release and discharge shall not affect any rights, liabilities or obligations of the obligee with respect to payments or other obligations due and payable or due to be performed by the original obligor

on or prior to the novation date, and such payments and obligations shall be paid or performed by the new obligor (2nd plaintiff) in accordance with the terms of the Retail Supply Agreement." (bold emphasis mine)

The above clause 1(a) of the Novation agreement released the 1st defendant from the obligations of the Retail Supplier Agreement with the 1st plaintiff. Those obligations and rights were on 29th July 2016 transferred to the 2nd plaintiff by the Novation agreement.

The outstanding issue in the relationship between the 1st plaintiff and 1st defendant was the outstanding business development fund that was confirmed by the 1st plaintiff on 19th June 2018 to be UGX 139,630,000 (See D1EX5) and was paid by the 1st defendant in full on 25th June 2018 (See D1EX6), leading to the 1st plaintiff issuing a release of mortgage dated 27th June 2018 to the 1st defendant (See D1EX7).

It is a principle of law that where the parties to a contract agree to substitute for the original contract a new contract or to rescind or alter the original contract, the original contract need not be performed as is stipulated in section 51 of the Contracts Act 2010 dealing with effect of a novation, rescission and alteration of contract.

I find that the evidence on court record shows that a Novation agreement was executed on 29th June 2016, this means that as of the date of the Novation agreement, the parties freely agreed to release the 1st defendant from the obligations of the Retail Supplier Agreement.

The plaintiff has alleged that the 1st defendant breached the Retail supplier agreement and Novation agreement, I have perused the court record and I have failed to find any evidence adduced by the plaintiffs to show that prior to 29th June 2016, when the novation agreement was signed, the 1st defendant breached the Retail Supplier Agreement. I have already taken the position that after 29th June 2016 when he signed the novation agreement, he was released from any obligation

in that agreement save the repayment of the money due to the 1st plaintiff which he did. No evidence of breach of agreement while it subsisted has been produced on court record.

The plaintiffs also alleged that 1st Defendant breached the agreement when he evicted the Plaintiffs before expiry of the contractual period in the Retailer Service agreement, which according to the plaintiff would have run until March 2019. I note that clause 8.7 of schedule 4 to the Retail Supplier agreement providing the general terms and conditions states that where the retailer is not the owner of the site, they (retailer) will get confirmation from the landlord in respect to VIVO Energy (1st plaintiffs) property and rights at the site. This provision was not saved in the Novation agreement, and I have not seen any obligation in the Novation agreement binding on the 1st defendant as the landlord of the station land to observe any obligations in that capacity.

In my opinion, the implication of clause 8.7 of schedule 4 to the Retail supplier agreement providing the general terms and conditions, is that after executing the novation agreement the plaintiffs would have engaged and executed an agreement with the landlord (1st defendant) that bars him from leasing the land to anyone. It is important to restate that after 29th June 2016 he was released from obligations in the Retail Supplier agreement save for payment of the business development fund, which he did. I also note that the 2nd plaintiff did not testify, or state that he was denied access to the land where the station is located. I also further note that the handover of the station was peacefully done without any objection or protest, the handover was well documented in a document exhibited on court record signed by the parties' representatives on the day of handover. I have therefore not seen any evidence of breach of the novation agreement on court record.

I therefore find that based on the evidence on court record, the plaintiffs have not executed their evidential burden to prove that the 1st defendant breached the novation agreement or that he breached the Retail supplier agreement prior to 29th June 2016, when he was released from its obligations by the novation agreement.

Issue 2: Whether the 2nd defendant induced the breach of the 1st defendant's agreements with the plaintiffs?

The plaintiff alleged that the 2nd defendant committed the tort of actionable interference with contractual rights. In support of their arguments they relied on the case of **MPEIRWE V ALSACO INTERNATIONAL LTD & 2 ORS (HCCS 440 of 2014) [2016]** that refers to **MERKUR ISLAND SHIPPING CORP VS LAUGHTON (1983)2 ALLER 189**.

The economic torts include liability for inducing a breach of contract established in the case of **LUMLEY V GYE (1853) 2 E & B 216** and liability for causing loss by unlawful means as stated in **GARRET V TAYLOR (1620) CRO JAC 567**. In the case at hand before this court the plaintiff pleaded the tort of inducing a breach of contract against the 2nd defendant.

The principle laid down in **LUMLEY V GYE (1853) 2 E & B 216** is that a person who procures another to commit a wrong incurs liability as an accessory. As Erle J put it (at p 232):

> *"It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of."*

In **MERKUR ISLAND SHIPPING CORP VS LAUGHTON** [1983] 2 ALL ER 189 Denning MR stated that the interference is not confined to the procurement of breach of contract but extends to a case where a third person prevents or hinders one party from performing his contract.

I have considered the decisions in **D C THOMSON & CO LTD V DEAKIN [1952] 2 ALL ER 361, OBG LIMITED & ORS V ALLAN [2007] UK HL 21 AND MPEIRWE V ALSACO INTERNATIONAL LTD & 2 ORS HCCS 440 OF 2014** and I find the elements required to establish a prima facie tort of inducing a breach of contract are;

(1) existence of a legal contract,
(2) knowledge of the contract by defendant at the time of interference,
(3) intention to interfere,
(4) conduct amounting to an inducement, and
(5) conduct causing the breach

Counsel for the plaintiff submitted that the plaintiffs were in occupation of the suit premises before the execution of a lease agreement between the 1st Defendant and the 2nd Defendant, he further contended that the 2nd defendant provided money to the 1st Defendant to pay his outstanding arrears which induced the latter to evict the Plaintiffs.

It is not contested that on 25 June 2018 the 1st defendant leased the land where the station selling the 1st plaintiffs products in located to the 2nd defendant (See D2EX7). I have perused the Retail Seler agreement and find that clause 19.3 of schedule 4 to the Retail supplier agreement providing the general terms and conditions required that the retailer wishing to lease the site ought to give the first offer to Vivo Energy (1st Plaintiff) , but as earlier discussed in issue 1 upon signing of the novation on 29th July 2016, the 1st defendant was released from such obligations. This means that by the time the 1st and 2nd defendant signed the lease the need to give the 1st plaintiff a right to first offer was not applicable.

I also agree with counsel for the 2nd defendant that having carried out a search on the land and found no indication of any notice as to any rights of the 1st plaintiff that would have acted as a bar to the lease agreement, the lease was legal.

I find that the lease agreement was correctly executed, and at the time it was executed the 2nd defendant was not under the obligation of the Reteil service agreement, so there was no legal contract between the 1st plaintiff and the 1st defendant to interfere with when the 1st defendant approached the 2nd defendant in June 2018, offering to lease his property comprised in Shema block 2 plot 226 and 287 at Kabwohe.

Regarding the allegation that the 1st plaintiff was evicted, I find that the evidence on court record shows that the plaintiff took part in handing over possession of the station, as shown in the report of taking possession exhibited on court record as D2EX8. If indeed it was an eviction, the plaintiff would have in accordance to its rights communicated a breach warning letter as provided in clause 11 of schedule 4 to the Retail supplier agreement or in the event that they agree to leave but still do it in protest, they would have noted their protest on the hand over document. I find that a look at D2EX8 , shows that there is no sign to show that this was not a peaceful handover by the 1st plaintiff.

I find that the evidence on court record does not prove the five elements necessary to show that the 2nd defendant induced the breach of the 1st defendant's agreements with the plaintiffs.

Issue 3 Remedies

In conclusion, I order that the suit is dismissed with costs.

NSHIMYE ALLAN PAUL

JUDGE

20-10-2023