

**THE REPUBLIC OF UGANDA**

**THE HIGH COURT OF UGANDA AT MBALE**

**HCT-04-CV-CS-05 OF 1998**

**JACOB MASUBA.....PLAINTIFF**

**VERSUS**

**JAMES KAFABUSA KHAYIKHAYI.....DEFENDANT**

**JUDGMENT**

The plaintiff sued the defendant for breach of contract. He sought general and special damages, interest and costs of the suit. The facts constituting the cause of action arose as follows. The defendant entered into a contract with the plaintiff for the sale of a tractor, Mersy Ferguson 209, at the price of shs. 6,000,000/-. This tractor was being used by or under the custody of one Charles Khaukha, DW3, a brother of the defendant. The tractor belonged to the son of the defendant, Hon. Werikhe.

There is a dispute as to what exactly transpired on 21<sup>st</sup> December 1997, when the contract was due for execution. According to the plaintiff, he was required to deposit half of the contract price of shs. 3 million, and take possession of the tractor. The rest would be paid later. He duly paid shs. 1.9 million, and insisted on inspecting the tractor before paying the balance of shs. 1.1 million to complete the 1<sup>st</sup> installment of 3 million.

He was taken to the home of Charles Khaukha who passed them away stating that the defendant had no tractor to sell. In any event, he wanted part of the money from the sale as he had purchased spares for that tractor. The defendant assured the plaintiff that he would contract his son Werikhe; the owner of the tractor, and the tractor would be delivered promptly. The parties then wrote the agreement exhibit P3 in order to protect the plaintiff as there was nothing in writing up to that time.

It was stated in that agreement that the tractor would be delivered on 23<sup>rd</sup> December 1997, and that failure to make delivery would subject the defendant to a penalty of 10% per day of the amount paid.

The defendant did not live up to his promises, to the extent that the plaintiff lodged a complaint with the police, in fear that he had been defrauded of his money. He even drew a bank draft for the sum of shs. 4.1 million in favour of the defendant as the balance of the full contract sum, but the defendant failed to deliver the tractor. Hence the suit. PW2 Isaya Shibuta confirmed the plaintiff's testimony.

By the time this suit came up for the hearing, the defendant had refunded the sum of shs. 1.9 million, which the plaintiff paid.

The defendant on the other hand testified that on 21/12/97 he contracted to sell the plaintiff a tractor, in the presence of Lawrence Makhasu DW2, the Sub-County Chief and brother in law to the plaintiff, and Isaya Shibuta PW2 who wrote down the agreement p3.

The tractor was in Muyembe under the custody of Charles Khaukha DW3, the agreed purchase price was shs. 6 million. The defendant believed that the plaintiff had already inspected the tractor. He was paid him shs. 1.9 million and promised the balance of shs. 4.1 million upon handing over the tractor.

They proceeded to Muyembe, together with Isaya Shibuta and Lawrence Makhasu. Charles Khauka in whose custody it was brought the tractor, and the plaintiff inspected it to his satisfaction.

The defendant reported the details of the transaction to Charles Khauka who had no objection. The defendant for the balance demanded for the balance of shs. 4.1 million so that he could hand over the tractor. The plaintiff did not have the money then and requested for 2 days to source the same. The defendant granted the 2 days, and this was reflected in the agreement, which was written by Lawrence Makhasu DW2 and witnessed by Isaya Shibuta PW2.

It was agreed that failure to hand over tractor by the defendant would result in a penalty of 10% of the sum paid. On 23/12/97 when the balance was due to be paid, in the company of Makhausu the defendant looked for the plaintiff, but failed to trace him. He satisfied that upon that failure,

he sold the tractor Massey Ferguson red in colour, registration No. UXS 156, with horse Power 290 to Steve Namonyo. After he was reported to the police, he refunded the shs. 1.9 million to the plaintiff.

DW2 Lawrence Makhausu confirmed the testimony of the defendant in all material particulars. DW3 Charles Khaukha denied chasing the parties from his home. He in effect corroborated the testimony of the defendant.

At the commencement of the suit, it was agreed by both parties that there was a contract where the defendant agreed to sell, and the plaintiff agreed to buy a Mersey Ferguson tractor with its plough for a sum of shs. 6,000,000/-. It was agreed that part of the terms of that contract were reduced in writing, and the agreement in that regard was exhibited as P3. It reduced in writing, and the agreement in that regard was exhibited as P3. It was also agreed that the sum of shs. 1.9 million was refunded to the plaintiff.

Three issues were set down for determination by court as follows;

1. What were the terms of the contract between the parties.
2. Whether the defendant is in breach of any of those terms.
3. If so, what remedies are available to the Plaintiff.

I will start by clarifying two matters. One was in respect of the registration number of the tractor and the other was in respect of its ownership. The agreement P3 talked of the tractor registration No. UXS 651. From the evidence both plaintiff and defence, the tractor in question had registration No. UXS 156.

The defendant conceded that the tractor was registered as UXS 156. That was the same tractor which he eventually sold to Namonye in Kenya. PW3 Charles Khaukha who was in custody of that tractor in Muyembe testified that the tractor registration number was UXS 156. DW2 Lawrence Makhausu who wrote the agreement P3 testified that he wrote the registration number UXS 651 in error, as the tractor was not at that time in sight.

Two witnesses for the plaintiff PW3 D/C/ Chelangat and PW4 Gideon Anyango proved conclusively that the registration number UXS 651 did not belong to a tractor, but a pick up Tpyota Stout, belonging to PW4. Details of the vehicle UXS 651 from the Central Motor Vehicle

Registry in Kampala, and a copy of the log book were tendered in court as exhibits and marked P1 and P2 respectively.

I was at a loss at the preoccupation by Counsel for the plaintiff with the correctness or rather lack of the same regarding the registration number of the tractor.

There was no allegation of fraud in the plaint. It is well established that fraud must be specifically pleaded and particulars of the alleged fraud must be stated be specially pleaded and particulars of the alleged fraud must be stated on the faces of the pleading. See B.E.A. Timber Co. v. Inder Singh Gill [1959] E.A. 465 (C.A.) at 469. The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently.

In Fam International Ltd. V. Mohamed Hamid El-Fathith S.C.C.A No. 16/93, it was held that fraud is a serious matter and the party against whom it is alleged must be given sufficient notice to enable him answer the allegation.

As there was no such allegation of fraud in the pleadings this will end the matter of the incorrectness of the registration numbers of the tractor. This was conceded as an error by the person who wrote down the agreement. In any event, the plaintiff was present at the time of writing the agreement. It was clear from the evidence that the details of the agreement were fully explained to the plaintiff, and he did not complain about this matter.

The next matter was in respect of the ownership of the tractor. It came out that the tractor was owned by one Werikhe the son of the defendant. The sale transaction was entered into by the defendant as the owner. There was no dispute that the defendant had authority to sell. The some was an influential party in the contract, but no argument arose that there was incapacity on part of the defendant to enter into the contract for the sale of the tractor. I found that the defendant was indeed the owner of the tractor and had the capacity to sell, as he indeed sold the tractor later to one Namonye in Kenya.

Regarding the first issue, witnesses for both sides told court that there was a contract to sell a Mersey Ferguson tractor 290, and that shs. 1.9 million was paid. The dispute was on the other terms of the contract.

From the evidence, it was clear that there was a verbal contract for the sale of a tractor. There was consideration and part payment was made. Some of the terms of that contract were contained in the agreement exhibit P3. Neither party disputed all this.

The agreement P3 is a short document, and I will reproduce it in full. It reads as follows;

‘I Wmr. Khayikhayi Kafabusa James have received shillings one million nine hundred thousand (190) from Mr. JACOB MASOBA m/o Buyaga T.C. Muyembe S/country being party of six million (6m) for buying a tractor as above and its plough.

Failure to hand over a tractor to the buyer money will be refunded with costs of 10% per day.

NB. It wwill be handed over on Tuesday.’

The agreement was written on 21<sup>st</sup> December 1997. It was signed by both parties and witnessed by PW2 Isaya Shibuta and DW2 Lawrence Makhasu. The defendant and the plaintiff, plus the two witnesses to the agreement told court that the agreement told court that the agreement was for the protection of the plaintiff. What was he being protected from or against?

The plaintiff said that when he went to inspect the tractor at the home of Charles Khaukha, they were chased. Khaukha refused to release the tractor first as he doubled the capacity of his cousin, the defendant to sell, and in any event, he wanted a share of the proceeds of the sale, as he had purchased spares for running for running that tractor.

The defendant referred to his, who would confirm his capacity to sell, and for that reason, asked for money from the plaintiff to travel to Kampala to contact the son. At a certain point both parties went to Kampala for the same purpose at the expense of the plaintiff. This was part of the claim for special damages in the plaint. In spite of all this, the defendant failed to deliver the tractor.

I found that this was a more plausible version than that of the defendant who insisted that he did not deliver the tractor for the only reason that the plaintiff failed to pay the balance as agreed. I found that there was no agreement as to the exact date when the balance was to be paid. It was not in the agreement P3. In any event, after the plaintiff reported to the police, on the device of

his lawyer, he drew a bank draft for the full balance of the contract price, but even then, the defendant failed to deliver the tractor, yet he had not as yet sold it to Namonye.

It was not true that the defendant opted not to deliver the tractor upon failure by the defendant to pay the balance. There was always a fear of non-delivery by the defendant after the disagreement between him and his cousin DW3, hence the agreement exhibit P3. The fear indeed materializes and the defendant frantically sought to recover his money. He reported a complaint to the police. It was only after the intervention of the police that the defendant refunded the money.

The defendant was a terrific liar in court. He said he was illiterate, but later conceded under cross-examination that he could after all read only a little English. His cousin testified that the defendant was literate. His own witness DW2 said the defendant was not illiterate as he claimed.

During his testimony, this illiterate defendant was able to answer questions put to him in English language, which he purportedly did not understand, even before translation into his own Lumusaba language. His cousin DW3 was not any less a liar. He claimed to own the tractor as chairperson of the association, which bought the tractor from the Mbale diocese. But he had not a single document to show for this. These two witnesses were not believable at all.

It is settled law that the burden of proof in civil cases lies upon the person who asserts the existence of a state of affairs or facts. A party can only be called to disputed or rebut what has been proved by the other side. This is so because the person who alleges is the one who is interested in the court believing his contention. *Nsubuga v kavuma* [1978] HCB 307 and *Sebuliba v. Coop Bank* [1982] HCB 129.

The Plaintiff's evidence must carry a reasonable degree but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not" the burden is discharged, but if the probabilities are equal, it is not. See *Muller v. Minister of Pensions* [1947] 2 ALL ER 372.

I found that the terms of the contract included delivery of the tractor on 23<sup>rd</sup> December 1997 as set out in exhibit P3. The other terms were agreed by both sides and have already been alluded to in this judgment. The plaintiff proved the terms of the contract on a balance of probabilities. He

discharged the burden of proof as set out in the cases cited above. The takes care of the first issue.

The Law is that a breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms of the contract. See *Nakawa Trading Co. Ltd. v. Coffee Marketing Board*. High Court Civil Suit No. 137 of 1991.

In *Patel v. Madhvani International Ltd.* [1992-93] HCB 189 the High Court held that where one party has deliberately reused to perform or has incapacitated himself from performing his part of the contract he puts it in the power of the other party either to sue for breach of contract or to rescind it or sue on the quantum merit for the work done.

The defendant was clearly in breach when he failed to hand over the tractor. Even if one believed the defendant when he claimed that the balance of shs. 4.1 Million was to be paid at Buyaga upon the plaintiff ascertaining that the tractor was in working condition, there was no such inspection. Charles Khaukha did not allow for any inspection to be done. There was a fear of breach looming such that in order to protect the plaintiff, an agreement was written down in respect of the sum advanced, and a date for delivery of the tractor was agreed.

The two days in the agreement was for the defendant to contact his son in Kampala to sort out the disagreement with DW3. They were not for the plaintiff to look for the money. The plaintiff was even asked to fund the Kampala trip with an extra 10,000/-. He later paid for a special hire to Kampala to see this influence son upon whom the sale of the tractor seemed to stall. All this failed and the defendant was callous about it, so that he stated in court that he sold the tractor to another person, in complete disregard to the one with whom he made the contract of sale in the first place.

The defendant failed to comply with the terms of the contract in the respect, even later when the balance of the contract price was tendered. The plaintiff proved that the defendant breached those terms of the contract to deliver the tractor when the balance price was tendered. The second issue is to be answered positively.

In regard to the remedies available, the defendant claimed for special damages. There were no receipts tendered. The case of *Kyambadde v. Mpigi District Administration* [1983] HCB was

cited, for the proposition that while special damage must be strictly proved, they need not be supported by documentary evidence in all cases. That may well be, but I would be satisfied with the award of special damages where there was some sort evidence in proof thereof.

Absence of any evidence in this regard makes it difficult for the court to make a reasonable assessment of such damages. I will not therefore make any award of special damages for lack of any evidence to that effect.

The defendant is certainly entitled to general damages for breach of contract. There was a stipulation of a penalty of 10% per day of the sum paid under the agreement P3. I don't intend to base the award on that penalty clause. I found that to be a punitive clause and therefore I will not follow it.

I am however satisfied that the plaintiff incurred some expenses in transport costs for himself and the defendant and his party when they went to inspect the tract at Muyembe, and during the Kampala trips. He did not disclose what he intended to use the tractor for, whether for personal farm use, or for commercial hiring out. Whatever the case, he would still be entitled to some damages.

The case of *John Nagenda v. Sbeno Belgian Airlines* [1992] KARL 13, was cited by both sides for the proposition that damages is compensation for the loss of the which the party would have received had the contract been performed.

I would therefore award the plaintiff general damages of shs. 2 million. I would also award him interest on that sum at court rate from the date of judgment till payment in full. I would award him costs of the suit. It is so ordered.

**RUGADYA ATWOKI**

**JUDGE**

**10/05/2005.**

Order: the Deputy Registrar of the court shall deliver this judgment to the parties.

**RUGADYA ATWOKI**

**JUDGE**

**10/5/2005**