

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(LAND DIVISION)**

**CIVIL SUIT NO. 504 OF 2012**

**KEN PAPER (E.A) LTD:..... PLAINTIFF**

**VERSUS**

**THE REGISTERED TRUSTEES OF**

**KAMPALA ARCHDIOCES:..... DEFENDANT**

**BEFORE: HON. MR. JUSTICE J.W. KWESIGA**

**JUDGMENT:**

25/11/2016

The Plaintiff, a private Limited Company C/o. Bazirengede and Co. Advocates sued the Defendant, a body Corporate alleging that the Plaintiff applied to the Defendant for a lease for land measuring 4.5 Acres, part of the Defendants' land known as FRV 57 Folio 14 at Nsambya Gaba Road. On or about 19<sup>th</sup> October 2011 the Defendant responded and communicated terms of the would be lease.

On 28<sup>th</sup> November 2011 the Plaintiff paid/deposited Shs. 470,000,000/= and requested for the offer or draft lease agreement.

On 8<sup>th</sup> December 2011, the Defendant wrote to the Plaintiff acknowledging receipt of Shs. 250,000,000/= and added, conscionable terms or deadlines. The above was followed by several meetings and communications but the Defendant did not come up with a formal offer for the promised lease.

The Defendants' Servants who included Bishop Seperiano Kizito Lwanga suggested they were interested in the Plaintiffs' intended project and proposed a joint venture.

The Plaintiff requested the Defendant to avail him with a photocopy of the Land Title and a draft lease agreement to enable him finalise payment but this was not forthcoming. The Defendant instead cancelled the offer for the lease alleging breach of contract by the Plaintiff and refunded to him Shs. 700,000,000/=. This was refunded to the Plaintiffs' account.

Based on the above, the Plaintiff filed this suit alleging that the Defendant had made to him fraudulent mis-representations for which he seeks reliefs.

In defence, the Defendant agrees that in October 2011 the Plaintiff applied to lease 4.5 Acres out of the land, FRV 57 Folio 14. The Plaintiff gave specific offers that;-

- (a) Land required was 4.5 Acres.
- (b) Would pay Shs. 1.175,000,000/= per Acre.
- (c) To pay 10% of the premium as a commitment fee.
- (d) To pay 60% within 45 days from the date of receiving the offer for a lease.

The Defendant avers that through its' Lawyer offered the Plaintiff a lease on it's proposed terms above. That the Plaintiff paid the commitment fee, but breached other conditions the parties had agreed on. The Defendant terminated/cancelled the transaction and refunded Shs. 700,000,000/= that the Plaintiff had deposited.

In the joint scheduling memorandum there were two issues agreed upon by the parties;-

1. Whether the Defendants fraudulently mis-represented to the Plaintiff thereby inducing it to pay Shs. 700,000,000/=?
2. Whether the Plaintiff is entitled to remedies prayed for.
3. Whether DW1 (Paul Ziwa) had authority and legal competence to give evidence on behalf of the Defendants in this case.

***I will first resolve the issue of whether DW1 Ziwa Paul could legally give evidence for the Defendant in this suit. The Plaintiffs' Advocate relied on Order 31 rule 1 of the Civil Procedure Rules and argued that because Ziwa Paul was not one of the Trustees could not validly testify on behalf of the Defendant. The rule relied on states;- "In all suits concerning property vested in a Trustee, Executor or Administrator, where the contention is between the persons beneficially interested in the property and a third person, the Trustee, Executor or Administrator shall represent the person so interested and it shall not ordinarily be necessary to make them parties to the suit but the Court may if it thinks fit Order them or any of them to be made party".***

In my view the person, DW1, Ziwa Paul did not appear as a person representing the Defendant but as a mere witness. A witness can be any person with facts or knowledge of the matters under trial and he or she does not necessarily have interest in the matter. It is immaterial what his/her religion would have been provided he can testify.

*The Evidence Act does not discriminate or restrict persons capable of being competent witnesses. Section 7 of the Evidence Act states;- "All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions, by tender years, extreme old age, disease —".*

It is a party to a suit that decides on what evidence or witness he/She needs to call to support his or her case. It is not mandatory that the Trustees had to testify or even be present when testimonies were being received in the presence of their Advocate. The Plaintiffs' Advocate misapplied to provisions of Order 31 rule 1 which is only concerned with who can sue and not who can testify.

In view of the above, there was nothing whatsoever that would legally bar DW1 Ziwa Paul from testifying in the instant case.

## **Was there any contract between the**

**parties?** Although this issue was initially not part of the issues agreed on at the scheduling conference, the evidence received and the reliefs sought make it pertinent and it will be examined under that background. A contract is constituted when there is an agreement between two or more parties creating obligations that are enforceable or otherwise recognisable in Law. The elements of a contract are;-

- (a) There must be an offer and acceptance.
- (b) Each promise or obligation must be supported by a consideration passing from a party to another.
- (c) The parties must have the intention to create a legal relationship.
- (d) Each party must have the capacity to contract.
- (e) The terms of contract must be apparent and complete.
- (f) Any special formalities required by Law in particular contracts must be complied with.
- (g) The agreement must not be rendered void either by some Common Law or statutory rule or by some inherent defect. See;- *Halsbury's Laws of England (HLE<sup>4th</sup> Edition, Vol 9)(Page 12. - Vincent Karuhanqa Versus NTC & URA* **U.L.R 666.**

In view of the above unless the essential ingredients of a contract are agreed up or are present in the dealings under examination, there would be no binding or enforceable contract.

In the instant case the Plaintiff applied for a lease offer as evidenced by Exhibit P.2 for 4 Acres. The Defendant, through it's Lawyers offered 4.5 Acres out of FRV 57 Folio 14 at Nsambya and the terms were set out in the Defendant's offer.

The Plaintiff responded to the offer in a letter admitted as Exhibit P.4. The response in Exhibit P.5 from the Defendant noted that:-

- The Plaintiff had failed to honour the terms of the offer letter especially did not deposit 10% of the premium upon receipt of the offer letter.
- There was a change for deposit of premium from 60% to 70%.
- The lease agreement and memorandum of understanding are prepared upon payment of the commitment fee of 10%.

The Plaintiff did not fulfil the terms set out in Exhibit P.3. The Defendant gave an offer but the Plaintiff did not pay the 10% as required of him in the offer (Exhibit P.3). In my view there was no meeting of minds. The Plaintiff insisted that the Defendant gives it a lease documents and a Memorandum of Understanding (M.O.U) before payment of 10% because it needed these documents to solicit for more funds. At this stage of negotiation, there was no valid contract concluded.

The evidence available shows that later on, the Plaintiff put in another application, See Exhibit P.10 as a follow-up of the earlier application where the Defendants had offered the Plaintiff 4.5 Acres at Shs.

5,400,000/= out of which the Plaintiff paid 479,000,000/= and the balance of Shs. 4,921,000,000/= was payable by 16<sup>th</sup> May 2012. The other terms remained as stated in Exhibit P.3. The Plaintiff failed to pay, the parties did not conclude a contract enforceable in Law. It is my conclusion that there was no contract.

The next issue to consider is whether the Defendant fraudulently misrepresented to the Plaintiff thereby inducing the Plaintiff to pay shs.

700,000,000/=.

***Misrepresentation is "an untrue statement of fact made by one party to the other in the course of negotiating a contract that induces the other party to enter into the contract — false statement of Law, opinion or intention does not constitute a misrepresentation nor does a statement of fact known by the Representee to be untrue". See Dictionary of Law 3<sup>rd</sup> Edition, Oxford University Press, 1944 of Page 254.***

In *Derrv Versus Peek (1889<sup>^</sup> 14 A.C at Page 374* settled that a fraudulent misrepresentation means a false statement made knowingly or without belief in its truth or recklessly, carelessly whether it be true or false, a Representor is not liable however, until the Representee has acted on the representation and thereby suffered loss.

The Plaintiff listed several acts of misrepresentations which will deal with below;-

1. The Plaintiff contends that M/s. Buwule & Mayiga Advocates who wrote the lease offer terms Exh. P.2 was not valid because they did not have Powers of Attorney as required by Section 146(1) of RTA. My view is that the requirements of S. 146(1) are relevant when it comes to acting on behalf of a registered Proprietor when leasing, mortgaging or transferring the land. It was not mandatory in the pre-contract matter such as communicating the lease offer on behalf of the Advocates' Clients who actually instructed them to do this pre-contract communications.

In the Exhibit P.6 the Defendant acknowledged that the Defendant had instructed the Advocate. There is no falsity or fraudulent misrepresentation.

Even if it had to be held that it was a fault in Law not to give a Power of Attorney, which is not the case, this would not amount to fraudulent misrepresentation but a fault in Law.

According to examination of exhibits P3, P4, P5, P6 and P8, the parties never reached an

agreement. There were offers and counter-offers until finally the deal was cancelled by the Defendant. Failure for the parties to reach a contractual agreement does not amount to fraudulent misrepresentation. The parties clearly finally agreed to end the transaction. This is evidenced by the Defendant's Advocates' letter to the Plaintiff dated 7<sup>th</sup> June 2012 which reads in part "***Our Client was compelled to cancel the lease offer extended to you and heeded to your request vide your letter dated 25<sup>th</sup> March 2012 and refunded and/or/ transferred Shs. 700,0,000/= vide RTGs onto Accounts in Barclays Bank***".

(See Exhibit P.7) and Px(f). This is corroborated by Px(g) dated 28<sup>th</sup> March 2012 in which the Plaintiff demanded;-

***"(i) Refund all monies so far paid and given to the Land Board in respect of the 4.5 Acres of Land amounting to over Shs. 700,000,000/=***".

In my view the parties failed to conclude the lease deal partly because the Defendant did not facilitate the Plaintiff's desired documents for purposes of procuring funds from a third party. The presumption is that at the time the Plaintiff sought to lease the 4.5 Acres of land from the Defendant it had the required funds which was not the case.

The moment the Plaintiff failed to pay the premium as had been offered, the Defendant was perfectly free to lease the land to other parties such as Capital Shoppers Ltd., Desmachine Ltd., Mandela Auto spares, or anybody else.

The Plaintiff did not adduce evidence, that proves that by the time it was being offered 4.5 Acres, the specific piece of land had already been leased to other developers. In absence of this proof there was no fraudulent misrepresentation.

The fact the land that the Plaintiff wanted to lease was encumbered by Proprietary interests was not a misrepresentation. First and foremost, this was not contributory to the Plaintiff's failure to raise the required funds. Secondly PW1 stated that he had visited the land and it had many squatters.

This fact was known to the Plaintiff and therefore, cannot amount to misrepresentation. All the available documental evidence Exhibit P.4 and P.5 shows the Plaintiff banked Shs. 250,000,000/= on the Defendant's account. The Bank statement showed that the Plaintiff made other deposits and all added up to Shs.

479,000,000/= only whereas the required 10% was supposed to be Shs. 520,000,000/=.

The Plaintiff did not provide any proof of other money he claimed he paid to the Defendant. No receipts or documentation or correspondences on this alleged payments. The Plaintiff did not discharge the necessary burden of proof.

There is no evidence that the Plaintiff paid more than Shs.

**479.0.** 000/=. I have considered the fact that the Defendant kept the Plaintiff's money for a period of Seven (7) months.

The several communications in the correspondences forming the parties' Exhibits show that following this deposit the parties engaged in offers and counter-offers of the terms that either party wanted to form the intended contract or lease terms. This consumed considerable time while the money remained in the hands of the Defendant pending the parties' agreement which eventually failed.

In my view it is not part of this trial to determine who of the parties caused the failure to agree, suffice to say that the moment the parties terminated the negotiations, the deposited money Shs. 479,000,000/= was refundable to the Plaintiff.

I have not found any credible evidence that the Plaintiff paid over Shs.

**200.0.** 000/= on top of the above money and that this was not receipted. The particulars of payment and the manner in which payment was done is well proved by the Bank statement Exhibit Px(h).

The other payment of part of the Plaintiff's money was acknowledged in Exhibit P.5. The Plaintiff's claim that he paid Shs. 250,000,000/= to Rev. Father Godfrey Kalule was not proved to satisfaction of this Court. The Plaintiff's PW2 who is supposed to support this allegation stated that he did not see Father Kalule receiving this money. The fact of payment of Shs. 477,000,000/= was communicated to the Plaintiff on 2<sup>nd</sup> May 2012 (See Exhibit P.6).

However, in P.7 already examined above, the Defendant agreed to refund a sum of Shs. 700,000,000/=. In his evidence DW1 under cross-

examination testified that the Plaintiff demanded for refund of all the money he had paid plus costs and interests and that he suggested a sum of Shs. 700,000,000/= to the Defendant.

***He stated;- "—There was demand to return the money dated***

***28<sup>th</sup> March 2012 by the Plaintiff-----we made payment of Shs.***

***700,0,000/= because the Plaintiff had hinted on it in lieu of the land plus costs and interests. We had got misunderstanding with KEN, we wanted to put this to an end. It made business sense to refund the money and the hinted on interest and costs. It was made with consultation with the Arch-Bishop".***

The Plaintiffs' attempt to bring in this suit other costs and losses incurred in the business prospecting and related activities I have found these not available as reliefs to the Plaintiff for the following reasons;-

- (a) The business expenses incurred in preparation for a contract that was never concluded cannot be visited on the other party in negotiation since this Court has not found evidence to condemn the Defendant for the failed negotiations.
  
- (b) There is no proof that the Defendant required the Plaintiff to venture into the areas where he suffered the loss. This Court adjudication according to the pleadings was determination of questions related to lease-offers and breached thereof if any. If there was another business proposal between the Plaintiff and the Arch-Bishop as alleged that triggered the Plaintiff to spend US\$ 150,000 would be a different cause of action that was not specifically pleaded or specifically proved and this Court has not tried it and offers no findings or reliefs based on that allegation.

My view is that it would fall before Courts' in-charge of trials over commercial transactions and because it is not a landlease issue before this Court.

Following the above examination of the evidence and the relevant Law, I find the whole suit to be mis-conceived and it is hereby dismissed with costs.

Dated this 25<sup>th</sup> day of November 2016

J.W. Kwesiga

**Judge**

25/11/2016



- > Mr. Bazilingedde N. For the Plaintiff
- > Ms. Christine M. Nabanja for Defendant
- > Parties not present
- > Irene Nalunkuma Court Clerk.