

UGANDA / JUDGMENT

**Al Malik Group Uganda Limited & Another
v Magala & Another (Civil Suit 753 of 2020)
[2024] UGCommC 265 (3 September 2024)
[2024] UGCommC 265**

COURT

Commercial Court of Uganda

BEFORE

Kahigi Asiimwe, J

CASE / FILE NUMBER

Civil Suit 753 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 753 OF 2020

1. AL MALIK GROUP UGANDA LIMITED

2. MALIK AZHAR:.....

VERSUS

1. HAJJI BATTE MAGALA

2. HAJJAT FARIDAH BATTLE MAGALA :.....DEFENDANTS

Before: Hon. Lady Justice Patricia Kahigi Asiimwe**Judgment****Introduction:**

The Plaintiffs sued the Defendants for recovery of UGX. \$1.\$ 88,573,000 being money had and received by the Defendants, general damages, 25% interest on the principal sum from the time of breach, and costs of the suit.

The Plaintiffs case:

- On 17th July 2014 the Plaintiffs entered into a memorandum of understanding with the Defendants under which the Defendants undertook to provide land comprised in Plots 1 Katalima Road and Plot 51 Naguru Road to the Plaintiffs for purposes of establishing a car bond/parking.
- Under the memorandum of understanding the Plaintiffs were required to pay UGX. 8,000,000 per month to the Defendants. The 2nd Plaintiffs advanced a total sum of UGX. 88,573,000, which the Defendants acknowledged, the Defendants refused to avail the said plots of land to the Defendant.

Plaintiffs' case

- In 2016, the Defendants entered into a second agreement with Khan Auto Logistics Ltd for the same plots of land and received UGX. 203,000,000 from them. The Defendants then entered into another agreement with Japan Auto Limited where they also received UGX. 524,000,000 for the years 2017, 2018, and 2019.
- 5. In January 2016, the Plaintiffs demanded for the money they had advanced to the Defendants with interest and the Defendants promised to refund the money.
- 6. In an attempt to resolve the issue amicably, the Plaintiffs and Defendants held the meeting where the Defendants admitted to have breached the contract and undertook to repay the money within five months effective 1st June 2016 which was not done.

The Defendants' case

- 7. The Defendants stated in their defence that under the memorandum of understanding they agreed to provide land comprised in Plot 1 and Plot 51 Katalima road and Naguru road respectively to the Plaintiffs for a car bond business under a joint venture. The Plaintiffs were expected to pay rent amounting to UGX 8,000,000 per month to cover legal fees for evicting non-paying tenants who were occupying the land in question. Upon execution of the agreement, the Plaintiffs advanced the Defendants UGX 88,573,000 in installments which included cash and a vehicle among others.
- The Defendants requested for additional funds to enable them 8. pay their lawyers to conclude Civil Suit No. 73 of 2015 Hajji Batte Magala Mahmood Versus Japan Auto Traders Limited against the tenants but the Plaintiffs refused to advance any more money to the Defendants, but instead demanded for a

refund of the money earlier advanced to the Defendants before the suit could be concluded.

The Defendants opted to enter into another contract with Khan 9. Auto Logistics to get funds to complete Civil Suit No. 73 of 2015 and also refund the Plaintiffs. This agreement was executed after the Plaintiffs had demanded for a refund of their money. The Defendants did not owe the Plaintiffs any money prior to filing of the suit.

Representation:

10. At the hearing the Plaintiffs were represented by M/S ABNO Advocates and the Defendants were represented by Platinum Associated Advocates. Both parties filed written submissions.

Issues:

- 11. The issues for resolution are as follows:
- Whether there was breach of contract by the Defendants I.
- Whether the Plaintiffs are entitled to a refund of the $\mathbf{H}$ monies paid to the Defendants
- What remedies are available to the parties? $\mathbf{III}$.

Evidence

- 12. At the hearing, the Plaintiffs called one witness, Malik Azhar, the 2nd Plaintiff (PW) and a director of the 1st Plaintiff company. PW testified that he advanced a total of UGX. 88,573,000 to the Defendants, but the Defendants refused to execute the joint venture as earlier agreed even after acknowledging receipt of his payment.
- 13. PW also testified that the 1st Defendant breached their agreement by entering into a subsequent agreement with Khan Auto Logistics Ltd and received UGX 203,000,000 for the same property. Furthermore, the 1st Defendant entered into another

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agreement with Japan Auto Limited and also received UGX 524,000,000 for the years 2017, 2018, and 2019 for the same property.

- UGX demanded then-lawyers, PW through his 14. That 120,000,000 as his initial deposit for the bond/parking, inclusive of costs and interest. That in response, the 1st Defendant's lawyers denied receiving UGX 120,000,000 but acknowledged the agreement and stated that UGX 83,000,000 was due, and requested patience from the Plaintiffs.
- 15. PW further stated that during a meeting, the 1st Defendant admitted to breaching the agreement and agreed to write a commitment letter by 16th May 2016 detailing how he would refund the monies advanced by the 2nd Plaintiff within five months.

- 16. The Defendants called one witness, Hajji Batte Magala the 1st Defendant (DW). He stated that he requested additional funds to pay his lawyers handling the case of Hajji Batte Mahmood Magala versus Japan Auto Traders Ltd, but the Plaintiffs refused. When the Plaintiffs began demanding a refund, DW engaged another party willing to repay them. However, the Plaintiffs demanded UGX 120,000,000, including interest.
- 17. DW further stated that the meetings held on 31st October 2015 and 14th May 2016 resulted in an agreement that UGX 88,573,000 was owed to the Plaintiffs, covering all costs and interest. That while processing this payment, DW was surprised by the Plaintiffs' demand for UGX 120,000,000 plus interest. He rejected this demand but expressed willingness to pay UGX 88,573,000.
- 18. DW further testified that he paid UGX. 50,000,000 to the 2nd Plaintiff on 6th December 2017. Additionally, he paid Mr. Faisal Khan (via Linda Maria Lisa) UGX 38,530,000 in three installments.

Resolution:

Whether there was breach of contract by the Defendants *Issue 1:*

- 19. It is not in dispute that the parties entered into a memorandum of understanding in July 2014. memorandum was between Linda Maria Lisa and Azhar Malik The (the 2nd Plaintiff) on the one part and the Defendants on the other part. Under the memorandum, the parties agreed to enter into a joint venture to run a car bond on the Defendants land. It was also agreed that the parties would enter into a comprehensive agreement detailing the business relationship. In consideration of the parties entering into that relationship, the 2nd Plaintiff and Linda Maria Lisa were required to start advancing the Defendants UGX. 8,000,000 per month to enable the Defendants to take steps to remove the existing tenants from the property.
- 20. Under clause 6 it was agreed that upon obtaining vacant possession, the parties shall enter into a joint venture agreement where the Plaintiffs were to provide the capital and the Defendants to provide their land for the business.
- 21. It is also not in dispute that the Defendants received UGX. 88,573,000 from the 2nd Plaintiff. The Plaintiffs adduced in evidence a deed of acknowledgment of receipt of the said money dated 31st October 2015 and signed by the 1st Defendant (PE 2). It is also not in dispute that the 1st Defendant entered into a tenancy agreement for the same property with a 3rd party sometime in 2016. The agreement does not indicate the date and the month of execution (PE 3).

- 22. The Plaintiffs' claim is that the Defendants breached their contractual obligation by failing to avail the property to the Plaintiffs as agreed under the memorandum of understanding and entering into other agreements with other parties and receiving money from other parties for the same plots of land during the subsistence of the memorandum of understanding.

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- 23. The Defendants on their part stated that they could not fulfil their obligation under the contract because the Plaintiffs did not fulfil their end of the bargain under Clause 1 of the memorandum of understanding which would have enabled the Defendants to evict the tenants at the time thus making the contract voidable.
- 24. Section 32(1) of the Contracts Act, Cap 284 provides that the parties to a contract shall perform or offer to perform, their respective promises unless the performance is dispensed with or excused under this Act or any other law.
- 25. In the case of Kabaco (U) Ltd Versus Turyahikayo Bonny Civil Suit No. 014 of 2021 Justice Wagona held that where a contract sets out promises to be performed by either party to a contract, in the event that they are not performed as per the terms of the contract without any justification as provided for under the contract, a party at fault is said to have breached the contract.
- 26. According to Mckendrick E, in Contract Law, Text, Cases and Materials, 2022, 10th Edition, Oxford University Express, (Pg. 743) "a breach of contract consists of a failure, without a contractual obligation.". perform excuse, to lawful Mckendrick further states that "... not every failure to perform a contractual obligation amounts to a breach of contract. In some cases, the law provides the party who fails to perform his contractual obligation with an excuse for non-performance." (pg. 745)
- 27. The Plaintiffs were required to pay UGX. 8,000,000 per month to the defendants. Both parties acknowledge that a total of UGX. 88,573,000 was paid to the Defendants. The tenancy agreement with a 3rd party was entered into in 2016, however there is no date or month on the agreement. Assuming that it was entered into in January 2016, by that date the Plaintiffs

should have paid a total of at least UGX. 136,000,000. The Plaintiffs did not pay that amount of money.

- 28. Under section 44 of the Contracts Act, it is provided that "When a contract contains reciprocal promises and one party to the contract prevents the other party from performing his or her promise, the contract shall become voidable at the option of the party who is prevented from performing his or her promise.

- 29. Under section 1 of the Contracts Act reciprocal promises are defined as "promises that form the consideration or part of the consideration for each other."
- 30. According to The Black's Law Dictionary 8th Edition at page 973, a reciprocal contract is also termed a bilateral contract. The Dictionary defines a bilateral contract as a "contract in which each party promises a performance, so that each party is an obligor on that party's own promise and an obligee on the other's promise; a contract in which the parties obligate themselves reciprocally, so that the obligation of one party is correlative to the obligation of the other."
- 31. In the present case, the Plaintiffs promised to give the defendant and monthly fee of UGX. 8,000,000 "to enable the second parties [the Defendants] to take all the lawful steps to remove the existing tenants from the said land and make it available for the joint business..." (Clause 1 of the memorandum of understanding)
- 32. The Defendant testified that he requested the Plaintiffs to pay him the UGX. 8,000,000 as had been agreed and the Plaintiffs declined to make the payment. The Plaintiffs demanded for the money that they had paid which prompted him to enter into a contract with a third party who was willing to refund the Plaintiffs' money.
- 33. In the case of Lombard North Central plc Vs. Butterworth [1987] QB 527, the Court of Appeal held that "where a breach goes to the root of the contract, the injured party may elect to put an end to the contract. Thereupon both sides are relived from those obligations which remain unperformed."
- 34. In the present case, the failure by the Plaintiffs to make the monthly contribution of UGX. 8,000,000 goes to the root of the agreement. The Defendants' obligation to make the premises available to the Plaintiffs was dependent on the Plaintiffs being able to evict the tenants. In order for that eviction to happen the Plaintiffs had undertaken to pay the Defendants UGX. 8,000,000 per month to facilitate the process.
- 35. I find that in this case, the Defendants had a lawful excuse under section 44 of the Contracts Act cited above and therefore they did not breach the contract. This issue is answered in the negative.

Issue II: Whether the Plaintiffs are entitled to a refund of the monies paid to the Defendant

- 36. In the case of Dr. James Kashugyera Tumwine & Anor. Versus Sr. Willie Magara & Anor. HCCS No. 576 of 2004, court held that in an action for money had and received liability is based on unjust benefit or enrichment and that the action is applicable whenever the Defendant has received money which, in justice and equity, belongs to the Plaintiff.

- 37. Unjust enrichment is defined in the Black's Law Dictionary 9th Edition at Page 1678 to mean "A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary may make restitution or recompense."
- 38. It is not in issue that the Defendants received UGX. 88,573,000 from the Plaintiffs and therefore the Plaintiffs are entitled to a refund. What is in dispute is how much of that money was refunded to the Plaintiffs. PW admitted during cross-examination that he received UGX. 50,000,000 from the Defendants.
- 39. The DW testified that he paid a further UGX. 38,530,000 to a one Faisal Khan a representative of Linda Maria Lisa who was party to the memorandum of understanding. However, he did not submit evidence to prove this. Section 103 of the Evidence Act, Cap 8 is to the effect that the burden of proof as to the existence of a particular fact lies on the person that wants Court to believe in the existence of that particular fact.
- 40. The Plaintiffs having been paid UGX. 50,000,000, the amount due to them is UGX. 38,573,000. The issue is therefore answered in the affirmative.
- *Issue III: What remedies are available to the parties?*
- 41. The Plaintiffs prayed for general and punitive damages, interest, and costs of the suit.
- 42. In the case of Maruri Venkata Bhaskar Reddy Versus Bank of India (Uganda) Ltd [Civil Suit No. 804 of 2014] Justice Wamala held that "In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through, and the nature and extent of the injury suffered."
- 43. In this case while as found above the Plaintiffs are entitled to the money owed to them, I have also found that the Plaintiffs did not meet their end of the bargain under the memorandum of understanding. In the circumstances, I decline to grant general damages.
- 44. With respect to punitive damages, according to the Black's Law Dictionary, 8th Edition on page 1177 punitive damages are "awarded in addition to actual damages when the

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defendant acted with recklessness, malice, or deceit; damages assessed by way of penalizing the wrongdoer or making an example to others. Punitive damages, which are intended to punish and thereby deter blameworthy conduct, are generally not recoverable for breach of contract."

- 45. In the case of **Uganda Revenue Authority Vs Wanume David** Kitamirike Civil Appeal No. 43 of 2010, the court held as follows:

Punitive or exemplary damages are an exception to the rule, that damages generally are to compensate the injured person. These are awardable to punish, deter, and express outrage of court at the defendant's egregious, highhanded, malicious, vindictive, oppressive, and/or malicious conduct. They are also awardable for the improper interference by public officials with the rights of ordinary subjects.

Unlike general and aggravated damages, punitive damages focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are in the nature of a fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society's and also the court's sense of decency. They may also be awarded to prevent unjust enrichment. They are awardable with restraint and in exceptional cases, because punishment, ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract. (Emphasis added)

- 46. In view of the above authorities, I find that exemplary/punitive damages do not apply in this case.
- 47. In conclusion judgment is entered for the Plaintiffs on the following terms:
 - a) The Defendants pay the Plaintiffs at UGX. 38,573,000 as money due and owed to them;
 - b) Interest on a) above at the rate of 21% from the date of this judgment until payment in full; and
- c) The Defendants pay costs of the Plaintiffs.

Dated this 3rd day of September 2024.

\$\n *Alp*\n\$ Patricia Kahigi Asimwe Judge Delivered on ECCMIS

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