

UGANDA / JUDGMENT

# Bukuli v Bigirwenkya (Civil Suit 10 of 2021)

## [2025] UGCommC 28 (18 March 2025)

[2025] UGCommC 28

## COURT

Commercial Court of Uganda

## BEFORE

Stephen Mubiru, J

## CASE / FILE NUMBER

Civil Suit 10 of 2021

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.



**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA COMMERCIAL DIVISION**

Reportable Civil Suit No. 0010 of 2021

In the matter between

**BUKULI EMMANUEL MUSOKE PLAINTIFF****And****BIGIRWENKYA ROBIHAH NAMULONDO DEFENDANT****Heard: 6th April, 2022. Delivered: 18th March, 2025.**

\*Law of contract - waiver of breach of contract - the intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed - unconditional acceptance of partial, deficient or non-conforming performance from beyond the due date without protest or reservation constitutes a waiver of the breach - Duress - The courts may also consider whether the impugned conduct, although legitimate, amounted to economic duress - two elements of duress are required; compulsion of the will i.e. absence of choice and illegitimacy of the pressure - The illegitimate pressure must have been such as actually caused the making of the agreement - the burden of proof rests on the party claiming duress to demonstrate that they were forced to enter the agreement under pressure sufficient to deprive them of the ability to exercise their independent free will, or leaving them no reasonable alternative.\*

\*Civil Procedure - award of general damages for breach of contract - at common law, where the only injury suffered is mental anguish, a recovery of damages for such suffering is not allowed unless they proceed from physical inconvenience caused by the breach, or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation - exemplary/punitive damages are generally not awarded in breach of contract cases unless an independent tort is also involved - damages recoverable for breach of contract are restricted to compensation for pecuniary harm. This harm may be in the form of\* \*gains prevented by the breach or in the form of losses suffered. i.e. income prevented or expenses caused.\*

\*Land transactions - resale of land before rescission of the earlier contract of sale and without the consent of the earlier buyer, constitutes anticipatory repudiation or breach which serves to discharge the other party's contractual obligations.\*

## JUDGMENT

STEPHEN MUBIRU, J.

## The background;

[1] By an agreement dated 21st November, 2015 the plaintiff purchased seven acres of land from the defendant comprised in Bulemeezi Block 19 Plot 322 at Degeya, Luwero District at the price of shs. 70,000,000/= The plaintiff made a part payment of shs. 20,000,000/= and subsequent instalments of shs. 20,000.000/= on 5th December, 2015; shs. 5,000.000/= on 6th February, 2016; and shs. 5,000.000/= on 10th April, 2016. On or about 29th October, 2016 the parties executed a variation of that agreement, by which the defendant acknowledged having received shs. 50,000,000/= that far, and undertook to refund it with interest at the rate to 24% per annum by the end of April, 2017 on ground that, since the execution of the agreement he had transferred the land to another person. The defendant failed to honour that undertaking, hence the suit.

**The counterclaim and defence to the claim.**

[2] In her defence, the defendant denied liability for the claim. Her case is that the agreement of 21st November, 2015 was never varied but was rather terminated and replaced by another following the plaintiff's default. She continues that by an agreement dated 5th December, 2015 the plaintiff undertook to pay the balance of the agreed purchase price, being shs. 30,000,000/= in a lump sum not later than March, 2016, but instead the plaintiff had proceeded to pay only two instalments of shs. 5,000,000/= each on 6th February, 2016 and 10th April, 2016 respectively, leaving an outstanding balance of shs. 20,000,000/= which the

plaintiff has never paid to-date. The defendant being desirous of raising money urgently to meet her husband's medical bills and expecting payment to be forthcoming from the plaintiff soon, borrowed a sum of shs. 20,000,000/= from a money lending company at a monthly interest of 5% repayable within one month. The plaintiff did not pay as promised resulting in the defendant's consequential default on the loan which as a result accumulated to shs. 66,000,000/= which she was only able to clear on 5th March, 2020. The defendant was forced to sign the agreement of 29th October, 2016 under duress while she was ill at her home in Komamboga. The plaintiff is not entitled to any refund considering that it is his breach that occasioned her liability to repay shs. 66,000,000/= to the money lender.

- [3] In her counterclaim, the defendant contends that her liability to repay shs. 66,000,000/= to the money lender was a direct consequence of the plaintiff's breach of the agreement of sale of land dated 21st November, 2015. The plaintiff having failed to raise the balance of shs. 20,000,000/= tacitly agreed to the defendant's decision to borrow in order to meet her pressing financial needs as she awaited the balance. The defendant relied on the plaintiff's representation that he was to pay the balance soon, and she borrowed shs. 20,000,000/= from a money lender. The plaintiff's failure to pay led to the amount borrowed from the money lender to accumulate to shs. 66,000,000/= which the defendant counterclaims as special damages. The plaintiff's default caused her a lot of anxiety and inconvenience for which she claims general damages.

### **The reply and defence to the counterclaim;**

- [4] In his defence to the counterclaim, the plaintiff contends that whereas he was obliged to pay a total of shs. 70,000,000/= by 6th February, 2016 he had by that date paid shs. 45,000,000/= leaving a balance of shs. 25,000,000/= The plaintiff testified that the parties had agreed that the plaintiff would pay the balance after the defendant had removed the squatters; there was one permanent structure, a mud and wattle house while the rest were tilling the land. The defendant was to

ensure that the land was vacant but she failed to do so. In February, 2016 she asked for shs. 5,000,000/= to begin the process of eviction. The plaintiff subsequently paid shs. 5,000,000/= on 10th April, 2016. No deadline was set for payment of the outstanding balance of shs. 20,000,000/= By mutual agreement entered into on 21st October, 2016 the defendant willingly undertook to refund the shs. 50,000,000/= that had been paid by the plaintiff. The claims of coercion in signing the undertaking to refund and the forced borrowing to bridge the funding gaps are false an afterthought.

### **The questions for determination;**

- [5] At the scheduling conference conducted by Court on 17th November, 2021 the following issues were agreed upon by the parties for determination, namely'
- 1. Whether the contract dated 29th October, 2016 is vitiated by duress.

- 2. If not, whether it was breached by the defendant.
- 3. Whether the plaintiff breached the agreement dated 21st November, 2015.
- 4. What remedies are available to the parties?

### **The submissions of counsel for the plaintiff;**

- [6] Counsel for the plaintiff submitted that the defendant sold the land to the plaintiff on 21st November, 2015 but subsequently resold it to an undisclosed third party after the plaintiff had paid the bigger part of the purchase price. On 29th October, 2016 the defendant voluntarily undertook to make a full refund the plaintiff's part payment by April, 2017 failure of which she would pay interest on the outstanding sum. The defendant has since failed to honour her obligations. The defendant's assertion of coercion in her undertaking to refund the part payment is not supported by any evidence. The plaintiff claimed special damages which were specifically pleaded and proved. As a result of the defendant's breach, the plaintiff suffered mental anguish and inconvenience for which he is entitled to general damages. The plaintiff never made any representations to the defendant and is not privy to her contract of borrowing. The plaintiff therefore is not liable on the counterclaim. In any event, by 29th October, 2016 the defendant had already resold the land to a third party and therefore her borrowing of funds during the year 2017 had nothing to do with the plaintiff's non-payment of the balance.

### **The submissions of counsel for the defendant;**

- [7] Counsel for the defendant submitted that the plaintiff admitted having breached the agreement of 21st November, 2015. The plaintiff subsequently threatened and coerced the defendant into signing the agreement of 29th October, 2016. The defendant's assertion of coercion is corroborated by the fact that the agreement in issue is not witnessed, in contrast with all previous agreements between the parties. The provision regarding interest is placed in brackets. The plaintiff threatened her with violence and in light of her then prevailing precarious medical condition, she signed in order to save her life. She did not report the incident anywhere since she was of the view that she would not be believed. The free consent to an agreement can only be ascertained by the presence of a neutral third party. The contract was procured under threat, intimidation, duress and coercion and is therefore void.

### **The decision;**

- [8] In all civil litigation, the burden of proof requires the plaintiff, who is the claimant, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of his or her claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant is liable for the relief claimed. Generally, the plaintiff in the instant suit must

show: (i) the existence of a contract and its essential terms; (ii) a breach of an obligation imposed by the contract; and (iii) resultant damages. As regards the counterclaim, the defendant bears the burden of proving the same elements in order to succeed.

**First issue; whether the plaintiff breached the agreement dated 21st November, 2015.**

- [9] It is trite that where the parties agree the period within which the full purchase price must be paid, the purchaser must comply; if no period is fixed by the parties, the balance of the purchase price must be paid within a reasonable time. By virtue of the agreement dated 21st November, 2015 the plaintiff paid shs. 20,000,000/= out of the agreed total purchase price of shs. 70,000,000/= He was obliged to pay the next instalment of shs. 20,000,000/= "by December, 2015." He paid shs. 20,000,000/= on 5th December, 2015. It was agreed that the balance of shs. 30,000,000/= would be paid in March, 2016. On 6th February, 2016 he paid an additional shs. 5,000,000/= to bring his total payment to shs. 45,000,000/= The last payment he made was on 10th April, 2016 to bring his total payment to shs. 50,000,000/= In his own admission, he owed the defendant shs. 20,000,000/= which he never paid.
- [10] A breach of contract occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, express or implied, written or oral, without a legitimate legal excuse, resulting in damage or loss to the other party (see \*Waga B. Francis v. The Chief Administrative Officer Maracha and another, H. C. Civil Suit No. 0005 of 2016\*). The various excuses that a party to a contract can rely on to justifiably avoid performance include; failure of a condition, supervening events, impossibility, impracticability, frustration of purpose, anticipatory repudiation, and later agreements between the parties (including modifications, waivers, rescissions, and accord and satisfactions).
- [11] Waiver is the intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. It denotes the granting of a concession by one party to a contract, whereby it does

not insist on the precise performance by the other party of a duty under the contract, whether before or after any breach of the term being waived. Waiver may be express or implied from conduct. An express waiver occurs when a person explicitly states that they are giving up a right, while an implied waiver is inferred from a person's conduct or the circumstances of a situation. In either case it must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession, with knowledge of all the material circumstances. It must be deliberate in the sense that the party waiving the right should after applying its mind to the matter decide to abandon the right. When it occurs, it compulsorily releases a promisor from his obligation to strict performance. It constitutes an affirmation of the contract which destroys any rights to rescind the contract and sue for damages (see \*McLachlan v. Ryan (1987) 4 BCL 155\*).

- [12] In the instant case, the plaintiff failed to perform his obligation to pay the outstanding balance of the agreed purchase price in March, 2016. Despite this failure, the defendant accepted an additional instalment of shs. 50,000,000/= on 10th April, 2016 which was paid past the agreed due date, without specifying a date when the outstanding balance was to be paid, implying a waiver of the payment terms initially agreed upon. The defendant was aware of the breach by the plaintiff. She nevertheless intentionally and voluntarily waived her right to suspend her own performance and declare a breach of contract by the plaintiff.
- [13] Notwithstanding the plaintiff's breach, the defendant went ahead to receive some of the consideration for which she had bargained. She accepted partial, deficient or non-conforming performance from the plaintiff without protest or reservation. This is an unequivocal act or conduct evincing an intent to waive. When a party acts in a way that is inconsistent with the terms of a contract, the Court can reasonably conclude that a party waived those contractual provisions. When one party makes a late payment to the other, and the late payment is accepted unconditionally, this constitutes waiver of breach of contract through conduct.

Since no time frame was thereafter agreed upon, the implication is that the balance of the purchase price thereafter had to be paid within a reasonable time.

- [14] It is trite that a contract for the sale of land, which is capable of specific performance, operates in equity so as to confer a trust on the purchaser pending completion of the sale. It is well established that, upon exchange of contracts, equity will "treat that as done which ought to be done" (see *\*Walsh v. Lonsdale* (1882) 21 Ch D 9\*) with the consequence that the purchaser acquires equitable ownership even though full (legal) title to the land will not pass until completion (and registration). It is well established that, during the interim period between exchange of contracts and completion, the rights and duties of vendor and purchaser are defined in terms of a trust; the vendor holds the legal estate upon trust for the purchaser and the purchaser becomes a beneficial owner of the land (see *\*Lysaght v. Edwards* (1876) 2 Ch D 499\*; *\*Chang v. Registrar of Titles* (1976) 137 CLR 177; *Ismail Jaffer Akkubhai and others v. Nandakak Harjivan Karia and another*, S. C. Civil Appeal No. 53 of 1995\* and *\*Rayner v. 10 Preston* (1881) 18 Ch D 1\*). The purchaser acquires an equitable interest in the land and retains that interest for as long as the contract remains enforceable, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.
- [15] Neither the seller nor the buyer has unqualified beneficial ownership (see *\*Jerome v. Kelly* (Her Majesty's Inspector of Taxes) [2004] 2 All ER 835; [2004] 1 WLR 1409\*). Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the Court ordering specific performance. The buyer holds equitable title once the contract is executed. The seller holds the legal title in trust for the

buyer and the buyer holds the purchase money in trust for the seller. Once the contract is satisfied, the seller

gives the buyer a deed, which vests legal title in the buyer from the date the contract was signed. In order to re-sale, the defendant had to seek the prior consent of the plaintiff or an order of rescission by the Court when mutual rescission cannot be negotiated.

- [16] Whereas rescission of a contract may be effected by mutual consent of all parties to the contract, instead, sometime before 29th October, 2016, without the plaintiff's prior consent nor an order of rescission by a Court, the defendant resold the land to an undisclosed third party. In effect the re-sale was done without first seeking a rescission of the agreement of 21st November, 2015, which act constituted anticipatory repudiation on her part. Anticipatory repudiation, sometimes referred to as anticipatory breach, is premised on the fact that one party's performance is a "constructive condition" of the other party's performance. It occurs when one party to an agreement makes a statement or takes an action that indicates to the other party that it will not or may not fulfil its contractual obligations on or before the time performance is due.
- [17] Anticipatory repudiation requires a party to an agreement to have said or done something that substantially impairs the value of the contract to the other party, and either (1) demonstrates that it will not perform as required pursuant to the terms of the agreement, or (2) renders its performance not reasonably possible under the circumstances. Since a party's anticipatory repudiation can serve to discharge the other party's contractual obligations, it is on that basis that the agreement of 29th October, 2016 was signed, effectively terminating the plaintiff's obligation to pay the balance of the purchase price. The issue is accordingly answered in the negative; the plaintiff's breach of the agreement dated 21st November, 2015 was waived by the defendant and later the contract was rescinded and replaced by that dated 29th October, 2016.

### **Second issue; whether the contract dated 29th October, 2016 is vitiated by duress.**

- [18] Once a repudiation has taken place, an aggrieved party may either: (i) await performance by the repudiating party (for a commercially reasonable time), in which case it may have an implied duty to mitigate damages; or (ii) avail itself of any of the remedies for breach of contract offered, even if it has already notified the repudiating party that it would await performance and has urged retraction. A repudiating party may retract its repudiation prior to the time that such party's next obligation is due, unless the aggrieved party has either; (a) communicated to the repudiating party that it is treating the agreement as cancelled or the repudiation as final (best practices would include providing this communication in writing), or (b) materially changed its position in reasonable reliance on the repudiation.

- [19] In the instant case, the it is the plaintiff's case that when he learnt of the defendant's having resold the land, he accepted that as a repudiatory breach or anticipatory repudiation, whereupon he required the defendant to sign the agreement of 29th October, 2016 wherein the defendant undertook to refund the entire shs. 50,000,000/= part payment, by the end of April, 2017 failure of which it was to attract interest at a commercial rate for the period of beach. The defendant challenges the validity of that agreement. It is her testimony that she was forced to sign the agreement under duress while she was ill at her home in Komamboga. In effect the defendant pleads the defence of duress as vitiating that contract.
- [20] Duress in the law of contract relates to situations where a person enters into an agreement as a result of threats. Where a party enters into a contract because of duress, he or she may have the contract set aside. Originally, the common law only recognised threats of unlawful physical violence, however, in more recent times the courts have recognised economic duress as giving rise to a valid claim. The basis of the duress as a vitiating factor in the law of contract is that there is an absence of free consent. Pressure not amounting to duress may give rise to an action for undue influence in equity. The effect of a finding of duress and undue

influence is that the contract is voidable. Otherwise, a document signed without compulsion implies that the person who subscribes his or her signature thereto, intends his or her signature to authenticate his or her full agreement to its contents.

- [21] Where a person enters into a contract as a result of threats of physical violence, the contract may be set aside provided the threat was a cause of entering the contract. There is no need to establish that they would not have entered the contract but for the threat. For example, in *\*Barton v. Armstrong* [1976] AC 104\*, the appellant was the managing director of a company, whose main business was in property development. The appellant made a deed by which the company agreed to pay \ \$140,000 to Alexander Armstrong, a state politician and former Chairman of the company's Board of Directors, and buy his shares for \ \$180,000. Evidence was led to show that Armstrong had threatened to have the appellant killed. The Privy Council decided that the appellant could avoid the contract for being under duress, and it did not matter that he may have agreed to the deal any way. Lord Cross, Lord Kilbrandon and Sir Garfield Barwick held that physical duress does not need to be the main reason, it must merely be one reason for entering an agreement.
- [22] Where the form of duress alleged is of a physical nature, three requirements must be met, namely; (i) it must be shown that some illegitimate means of persuasion was used, (ii) that the illegitimate means used was a reason (not the reason, nor the predominant reason nor the clinching reason), and (iii) third that his evidence is honest and accepted. Although a threat to commit a lawful act can sometimes amount to unlawful duress, that is determined after court applies the following tests; - whether the victim protested; whether there was an alternative route available to the victim; whether the victim independently advised; and whether the victim took steps to avoid the agreement after entering in to it.

- [23] The courts may also consider whether the impugned conduct, although legitimate, amounted to economic duress. In *\*Occidental Worldwide Investment Corporation\**

*\*v. Skibs (The Sibeon & The Sibotre)* [1976] 1 Lloyd's Rep 293\* it was held that commercial pressure was not enough. It must be shown that there existed a state of affairs constituting coercion of the will so as to vitiate consent. "The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him" (*\*The Universe Sentinel* [1983] 1AC 366\*). Accordingly, two elements of duress are required; compulsion of the will, i.e. absence of choice and illegitimacy of the pressure.

- [24] In deciding whether or not the transaction was procured by duress, the fundamental question always is whether the pressure crossed the line from that which must be accepted in normal robust commercial bargaining. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining (see *\*DSND Subsea Ltd v. Petroleum Geo-Services ASA* [2000] EWHC 185\*). The minimum basic test of subjective causation in economic duress is a "but for" test. The illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching (see *\*Huyton SA v. Peter Cremer GmbH* [1999] 1 Lloyd's Rep 620\*). The classic case of duress is not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no practical choice open to him or her. The absence of choice can be proved in various ways, e.g. by protest, by the absence of independent advice, or by a declaration of intention to go to law to recover the money paid or the property transferred.
- [25] There is a fine line between tough negotiations and actual economic duress. It must be shown that the claimant was put in a position where no other practical solution was available. It is important for the party claiming signing under duress to prove that there was indeed no other alternative, but to accept the conditions given under illegitimate (excessive) pressure, in which case, the claimant must

also prove that he or she protested against such proposal and took all possible and necessary steps to avoid the deal (see *\*Pao On v. Lau Yiu Long* [1980] AC 614\*). It follows from the above decisions that the necessary ingredients for a successful economic duress claim are: (a) Pressure which is illegitimate; (b) that the pressure was a significant cause that induced the claimant to enter into the contract; (c) that the practical effect of the pressure is that there is compulsion on, or a lack of practical choice for, the victim.

- [26] As regards whether or not there was application of pressure that was illegitimate, this is decided by considering whether the person allegedly exerting pressure acted in good or bad faith. In establishing whether pressure is illegitimate, consideration should be paid to the nature of the demands being made and whether they can be justified. It entails pressure, the practical effect of which is compulsion or the absence of choice. "Outside the field of

protected relationships, and in a purely commercial context, it might be a relatively rare case in which lawful acts duress can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid" (see dictum of Lord Steyn in *\*CTN Cash & Carry Ltd v. Gallaher Ltd* [1993] EWCA Civ 19; [1994] 4 All ER 714\*). While a threat of an unlawful consequence would be considered an illegitimate pressure that could amount to duress, the concept of illegitimate pressure does not extend to the use of lawful pressure to achieve a result to which the coercer believes in good faith it is entitled (see *\*Nilecom Limited v. Kodjo Enterprises Limited*, H. C. Civil Suit No. 0018 of 2014\*).

- [27] The legitimacy of the pressure must be examined from two qualities: primarily, the nature of the pressure and secondly, the nature of the request which the pressure is applied to support: the danger of any form of unlawful act will be deemed as illegitimate where it is a significant cause inducing the claimant to enter into the contract, such that the practical result of the threat is that there is force on, or an absence of choice for, the victim. The threatening party must have used reprehensible means of applying pressure beyond mere commercial self-interest.

The recipient of the threat or pressure must have had no reasonable alternative but to accede to the threat. The Court must consider the overall context and whether the threatening party deliberately manoeuvred the threatened party into a position of increased vulnerability.

- [28] In a case alleging contractual duress, the burden of proof rests on the party claiming duress to demonstrate that they were coerced into the contract; that they were forced to enter the agreement under pressure sufficient to deprive them of the ability to exercise their independent free will, or leaving them no reasonable alternative. Where the threat was of a physical nature, the party alleging it must prove that he or she was; - under an immediate threat of serious bodily harm or death. The threat must be believable, immediate, and unavoidable, i.e. belief that the perpetrator of the act will carry out the threat. The fear of the threat is justifiable if a reasonable person would likely experience the same level of fear when faced with the same threat; and there was no opportunity to escape safely, except by signing the contract. Accordingly, two elements of duress are required; compulsion of the will - absence of choice and illegitimacy of the pressure. The Court will consider whether the victim protested; whether there was an alternative route available to the victim; whether the victim was independently advised; and whether the victim took steps to avoid the agreement after entering in to it.
- [29] In the instant case, the pressure that the defendant testified to have been subjected to, was of a physical nature. She stated in paragraph 15 of her witness statement that she was coerced into signing the agreement "and due to sickness and fear of my escalating high blood pressure and violence from the plaintiff, I ended up signing the same." In her oral testimony while under cross-examination, she said the signing occurred at her home, where the plaintiff met her alone. She did not specify what the plaintiff actually did or said that constituted her perceived "coercion" or "violence." The evidence does not disclose whether

the violence alleged was actual or threatened, and of what nature. Apart from her sweeping conclusory statements, there is no evidence to show that she was subjected to any

illegitimate pressure leave alone of a nature that amounts to compulsion of the will. There is no evidence to show that the plaintiff subjected the defendant to pressure that was illegitimate, not motivated by good faith. The plaintiff's mere insistence on the timely payment of a debt he genuinely considered to be due from the defendant, does not constitute duress. The agreement was signed in the defendant's home where she had the authority to eject the plaintiff from, in the event of inappropriate conduct.

[30] Furthermore, there is no evidence to show that either before, during or after the signing of the agreement, the defendant protested against duress or made a declaration of intention to go to the law to revoke the document. Indeed, the allegation of duress was only raised or first emerged after the current proceedings had been commenced by the plaintiff. There is acquiescence if the victim fails to take any steps to set aside the transaction within a reasonable time after he is freed from the duress (see \*DSND Subsea Ltd v. Petroleum Geo-Services Asa, [2000] EWHC 185 (TCC), [2001] BLR 23, [2000] BLR 530\*). As a result, there is no evidence that there was any coercion or violence that constituted a significant cause in inducing the defendant into the contract. This suggests that the agreement was not entered into under the influence of illegitimate pressure or, alternatively, that the plaintiff's conduct was not a significant cause in the defendant's decision to sign. This issue is accordingly answered in the negative; the contract dated 29th October, 2016 is not vitiated by duress.

### **Third issue; if not, whether it was breached by the defendant.**

[31] While material breach of a contract allows the aggrieved party to suspend performance, only a "total breach" allows the party to terminate the contract, which discharges its duty. Courts are often willing to allow the breaching party some period of time to cure its breach. A total breach occurs when the material breach cannot be cured, or non-performance is accompanied by repudiation or there is a substantial impairment of the value of the contract at the time of the breach. A "total" breach is one that is sufficiently material and important to justify the aggrieved party to declare the contract is at an end. By contrast, a "partial" breach provides the aggrieved party with a right to sue for provable damages, but it is not sufficiently material or important to end the contract.

- [32] A breach is material when it goes to the "essence" or "heart" of the contract. Factors considered in determining whether a breach is material include: (i) the extent to which the injured party will be deprived of the benefit it reasonably expected; (ii) the extent to which the injured party can be adequately compensated for the benefit of which he will be deprived; (iii) the extent to which the party failing to perform will suffer forfeiture; (iv) the likelihood that the party failing to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (v) the extent to which the behaviour of the party failing to perform comports with standards of good faith and fair dealing. It is irrelevant whether the injury suffered by the other party was foreseeable to the

breaching party as a consequence of the breach. The time for determining materiality is the time of the breach and not the time that the contract was made.

- [33] The plaintiff claims recovery of shs. 86,000,000/= constituted by the principal sum of shs. 50,000,000/= and accrued interest thereon as at 29th October, 2016. Being a claim for special damages, the law is that not only must they be specifically pleaded but they must also be strictly proved (see *\*Borham-Carter v. Hyde Park Hotel [1948] 64 TLR\**; *\*Masaka Municipal Council v. Semogerere [1998-2000] HCB 23\** and *\*Musoke David v. Departed Asians Property Custodian Board [1990-1994] E. A. 219\**). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. It is trite law though that strict proof does not necessarily always require documentary evidence (see *\*Kyambadde v. Mpigi District Administration, [1983] HCB 44*; *Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S. C. Civil Appeal No.7 of 1995\** and *\*Gapco (U) Ltd v. A. S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004\**).
- [34] As proof of the claim, the plaintiff relies on the agreement dated 29th October, 2016 (exhibit P. Ex.5) by which the defendant undertook to pay that sum in full, "by April, 2017." By that documentary evidence, the plaintiff has established the basis of his claim, yet the defendant has failed in her attempt to controvert it on grounds of duress. There being no proof of payment of the that sum or any part of it furnished by the defendant, I find that the plaintiff has proved, on the balance of probabilities, that he is entitled to the recovery of shs. 86,000,000/= from the defendant.

#### **Fourth issue; whether any of the defendant is entitled to the recovery of the damages sought.**

- [35] The defendant pleaded in her counterclaim that due to the plaintiff's delay in honouring the contract of 21st November, 2015 and she being desirous in the meantime of raising money urgently to meet her husband's medical bills, while expecting payment to be forthcoming soon from the plaintiff, she borrowed a sum of shs. 20,000,000/= from a money lending company at a monthly interest of 5% repayable within one month. The plaintiff did not pay as promised resulting in the defendant's consequential default on the loan which as a result accumulated to shs. 66,000,000/= which she was only able to clear on 5th March, 2020. She therefore seeks recovery of that sum from the plaintiff, together with general damages for misrepresentation of the fact that he was to pay soon whereas not, causing her immense stress, mental anguish, and psychological torture. Furthermore, she seeks exemplary and punitive damages.

##### **i. The claim for recovery of shs. 66,000,000/=**

- [36] Being a claim for special damages, the law is that not only must the claim be specifically pleaded but it must also be strictly proved. Although it is trite that strict proof does not necessarily always require documentary evidence, a borrowing of the nature claimed by the

defendant would invite documentary proof. The defendant pleaded her claim and also adduced in evidence, exhibit D. Ex.4 as proof of that borrowing. The defendant claims the sum as an expense she incurred on account of the plaintiff's breach of the agreement dated 21st November, 2015. When resolving the first issue, this Court came to the determination that the plaintiff's breach was waived upon the defendant's unconditional receipt of instalments paid past the due date. Accepting late payments unconditionally evidences an intention to be less than stringent in requiring timely payment.

- [37] That aside, an innocent party is only entitled to recover the kind or type of loss which was reasonably foreseeable to result from the breach. In order to be recoverable as a loss or expense consequent to breach of a contract, it must have been reasonably foreseeable, meaning it either arises naturally from the breach; or was in the contemplation of both parties at the time the contract was made; or arises from particular (unusual) circumstances that the parties knew or should have known about at the time the contract was entered into. To be reasonably foreseeable, a type of loss or damage must be within the contemplation of the parties at the time when the contract was made, and arise within "the usual course of things," or as result of special knowledge known to the parties. Loss is too remote (and not reasonably foreseeable) if it was highly unlikely to happen in the circumstances of the case, or the parties never foresaw it as a consequence of the breach.
- [38] In order to be reasonably foreseeable, the kind or type of loss is likely to be reasonably foreseeable when it is within the knowledge of the party in breach. That a seller of land will resort to borrowing from a money lending company in order to finance the medical needs of her husband, nearly two years after the signing of the agreement, if payment of the purchase price is late, cannot be stated as having been reasonably foreseeable; it neither arises naturally from the breach nor is there evidence to suggest that it was in the contemplation of both parties at the time the contract was made, or that the parties knew or should have known about it the time the contract was entered into. Whereas the contract was signed on dated 21st November, 2015 the borrowing took place nearly two years later, i.e. sometime

after 23rd March, 2017. There is no evidence to show that the medical condition which necessitated that borrowing existed at the time of the contract, and that it was brought to the attention of the plaintiff. In any event, by 29th October, 2016 the defendant had already resold the land to a third party and therefore her borrowing of funds during the year 2017 had nothing to do with the plaintiff's nonpayment of the balance. Therefore, the defendant is not entitled to the recovery of the sum claimed.

## **ii. The claim for recovery of general damages for misrepresentation.**

- [39] It is the defendant's claim that the plaintiff encouraged her to borrow funds on the undertaking that the plaintiff was to pay the outstanding balance of the purchase price within a short time. Relying on that false assurance, the defendant borrowed funds to her detriment, hence the claim for general damages. The defendant denied having given any

such assurances. The burden was on the defendant to prove that the plaintiff gave such assurances, that they concerned facts peculiarly within the plaintiff's knowledge, and that he did so dishonestly.

- [40] A misrepresentation is a false statement of fact or law which induces the other party to enter into the agreement. Generally, such statements have to be made before the contract is entered into. The statement must purport to be statement of fact or law, it must have been a false statement and it must have induced the other party to enter the contract. Damages are awarded to the party who entered the contract due to the misrepresentation, aiming to put that party in the position they would have been in had the contract not been entered.
- [41] A key component of misrepresentation, as a claim is that it will not be actionable if the statement made was merely an opinion or a suggestion. Similarly, the misrepresentation must be one of fact, not future intention. A misrepresentation as to future intention is usually not actionable as a misrepresentation, since it does not amount to a statement of fact. The statement of future intent will not be held to

be a fact even if the defendant intentionally changes their mind as to their intentions (see *\*Inntrepreneur Pub Co v. Sweeney* [2002] EWHC 1060\* and *\*Beattie v. Lord Ebury* (1872) 7 Ch. App. 777\*). However, a statement of future intention made with absolutely no intention at the time of the statement, will amount to a misrepresentation (see *\*Edgington v. Fitzmaurice* (1885) 24 Ch D 459\*). A statement of an act to be undertaken in the future will be a statement of presently existing fact, if there is no coexistent intention to do that which the representor states is his or her future intention.

- [42] One party to the contract must have made a false statement knowingly, or without belief in its truth or recklessly as to its truth. The intent involved is intent to mislead, to deceive; and it requires something in the way of knowledge or belief that what is misrepresented is in fact false. The representor must have known the statement to be false or must have been reckless as to whether it was true or false, or had no reasonable grounds to believe it to be true, or a failed to exercise reasonable care to make sure that the representation is true, even where he or she honestly believed it to be true. Mere failure to honour a promise is not proof of a lack of intention to honour it at the time it was made.
- [43] While failing to fulfil a promise can certainly lead to disappointment or even legal consequences, it does not automatically prove that the person making the promise lacked the intention to honour it at the time it was made. Many factors can prevent someone from fulfilling a promise, even if they genuinely intended to do so at the time. The evidence in the instant case shows that the plaintiff struggled to pay the instalments, albeit outside the agreed time frames. That on its own does not show deliberate intention not to pay at all, at the time promises to pay the balances were made. Therefore, the defendant is not entitled to the recovery of the damages sought.

### iii. The claim for general damages for causing immense stress, mental anguish, and psychological torture.

- [44] The award of general damages in contract is premised on proof of breach of contract. A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract, including when an obligation that is stated in the contract is not completed on time. However, the defendants have not proved the assertion that it was a term of their contract that delivery was to be made within any specified time, let alone the said ten days after discharge of the cargo at the port of Mombasa. In any event, general damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *\*Storms v. Hutchinson* [1905] AC 515; *Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd* [1981-1982] HCB 74\* and *\*Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government H. C. Civil Suit No. 186 of 2006\**). As a general rule, a person who has suffered loss as a result of another's breach of contract is entitled to be restored to the position that the person would have occupied had the breach not occurred. In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *\*Hungerfords v. Walker* (1989) 171 CLR 125\*). The defendant's claim suggests that she suffered mental perturbations that were more than ordinary regret or annoyance as a necessary and natural result of the breach of contract.
- [45] Any breach of contract usually results in mental vexation and feelings of disappointment. However, at common law, where the only injury suffered is mental anguish, a recovery of damages for such suffering is not allowed unless they proceed from physical inconvenience caused by the breach, or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation (see *\*Hamlin v. Great Northern Railway Company* [1856] 1 H&N 408, *Addis v. Gramophone Ltd.* [1909] AC 488\* and *\*Watts v. Morrow* [1991] 1 WLR\*

\*1421\*). The damages recoverable for breach of contract are restricted to compensation for pecuniary harm. This harm may be in the form of gains prevented by the breach or in the form of losses suffered. i.e. income prevented or expenses caused.

- [46] The courts following this doctrine base their decisions mainly upon the ground that damage for mental anguish is too remote, that it is easily simulated and that there is no adequate means of determining the damage suffered. In contrast, common law allows recovery for mental suffering in tort actions, although limiting it to cases where the mental suffering is the natural and proximate result of a physical injury sustained by the plaintiff through the negligent act of the defendant and to cases where the mental suffering is the result of a wilful wrong committed by the defendant. Thus damages are not recoverable for distress or disappointment arising from a breach of contract unless the distress or disappointment arises from breach of an express or implied term that the promisor will provide the promisee with pleasure, enjoyment or personal protection or unless the distress

or disappointment is consequent upon the suffering of physical injury or physical inconvenience (see \*Hayes v. James & Charles Dodd [1990] 2 All ER 815\*).

- [47] There is no evidence in the instant case to show that the agreement between the parties contained an express or implied term that the plaintiff was to provide the defendant with pleasure, enjoyment, peace of mind or freedom from distress, or personal protection. Equally, the evidence does not show that the distress or disappointment complained of by the defendant was consequent upon the suffering of physical injury or physical inconvenience. Therefore, the defendant is not entitled to the recovery of the general damages sought.

#### iv. The claim for exemplary and punitive damages.

- [48] Punitive damages are also commonly called exemplary damages, and occasionally called vindictive, or retributory damages. The terms punitive and exemplary are legally synonymous and are often used together. An award of exemplary or punitive damages is intended to punish the wrongdoer for conduct showing a conscious and contumelious disregard for the claimant's rights and to deter him or her from committing like conduct again. Generally speaking, although an award of exemplary damages is not wholly in the nature of punishment, however, the purpose of such damages is to mark the disapprobation of the court for the conduct and intended to set an example, to deter others from like conduct or committing similar acts.
- [49] It is a well-established principle of law that exemplary/punitive damages may be awarded, where there is oppressive, arbitrary or unconstitutional action by the servants of the government, or where there is a wanton or intentional act, i.e. an act which intended the result or, where the motive of making a profit is a factor, i.e. where the defendant's conduct was calculated to procure him or her some benefit, not necessarily financial, at the expense of the plaintiff which would outweigh any compensatory damages (see \*Rookes v. Barnard [1964] A. C. 1129; [1964] 1 All E. R. 367\*). They can be awarded whenever it is necessary to teach the wrongdoer that tort does not pay (\*see Dorothy Tuma v. Muller Elizabeth and another, H. C. Civil Suit No. 229 of 2011\*). They are preventative or deterrent in character and are over and above compensation.
  - [50] However, exemplary/punitive damages are generally not awarded in breach of contract cases unless an independent tort is also involved (see \*Obong v. Kisumu Council [1971] E. A. 91\*; \*Esso Standard (U) Limited v. Semu Amanu Opio, S. C. Civil Appeal No. 3 of 1993; Bank of Uganda v. Betty Tinkamanyire S. C. Civil Appeal No. 12 of 2007\* ; \*M/s Dembe Enterprises Limited v. M/s Transami (U) Limited and another, H. C. Civil Suit No. 375 of 1993\* and \*Uganda Revenue Authority v. Wanume David Kitamirike CA Civil Appeal No. 43 of 2010\*). The breach alleged against the plaintiff did not involve any tort. In any event, exemplary/punitive damages are only awarded in addition to any other claim for compensatory damages. This is unlike the instant case as no damages have been ordered

against the plaintiff. In conclusion therefore, this issue is answered in the negative; the defendant is entitled to the recovery of the reliefs sought in the counterclaim and it is hereby dismissed with costs to the plaintiff.

#### **Fourth issue; what remedies are available to the parties.**

- [51] The Court has found that the plaintiff has proved, on the balance of probabilities, that he is entitled to the recovery of 86,000,000/= from the defendant. By virtue of section 26 (2) of \*The Civil Procedure Act,\* where and insofar as a decree is for the payment of money, this court is empowered, in the decree, to order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, with further interest at such rate as the court deems reasonable from the date of the decree to the date of payment or to such earlier date as the court thinks fit. It is on account of the fact that this litigation has taken such a prolonged time that I consider the award of interest at the rate of 20% per annum from 1st April, 2017 until payment in full as adequate compensation for the plaintiff's having been deprived of the use of this money for the duration of this litigation, and it is accordingly awarded.
- [52] According to section 27 (2) of \*The Civil Procedure Act,\* costs of any action, cause or matter follow the event unless Court for good cause orders otherwise. The plaintiff being the successful party in this case is therefore entitled to costs of the suit and of the counterclaim.

#### **The final orders;**

- [53] For the foregoing reasons, Judgment is entered for the plaintiff against the defendant, in the following terms;
- a) The sum of shs. 86,000,000/=.
- b) Interest on the award in (a) above at the rate of 20% p.a. from 1st April, 2017 until payment in full.
- c) The costs of the suit and of the counterclaim.

Delivered electronically this 18th day of March, 2025 ...Stephen Mubiru.....

Stephen Mubiru Judge, 18th March, 2025

Appearances;

For the plaintiff : M/s Jingo, Ssempijja & Company Advocates. For the defendant : M/s Muhagara Associated Advocates & Legal Consultants.

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://ulii.org/akn/ug/judgment/ugcommc/2025/28/eng@2025-03-18>

**CASE PAGE**              <https://chat.esheria.ai/case-law/uganda/bukuli-v-bigirwenkya-civil-suit-10-of-2021-2025-ugcommc-28-18-march-2025-unknown-topic-unknown-court-2025--6a3ea4da3b1caa91297e745f>

Prepared on 14 October 2026 · Esheria