

UGANDA / JUDGMENT

Byakika v Amotrust Construction Services Limited & Another (Civil Suit 951 of 2018)

[2024] UGCommC 156 (29 May 2024)

[2024] UGCommC 156

COURT

Commercial Court of Uganda

BEFORE

Ocaya, J

CASE / FILE NUMBER

Civil Suit 951 of 2018

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5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION] CIVIL SUIT NO. 951 OF 2018

10 ESEZA CATHERINE BYAKIKA] PLAINTIFF

VERSUS

1. AMOTRUST CONSTRUCTION SERVICES LIMITED

15 2. OLANZICON SERVICES LIMITED] DEFENDANTS

Before: Hon. Justice Ocaya Thomas O. R

JUDGMENT

Introduction:

- 20 The Plaintiff's claim against the Defendants jointly and severally arises out of breach of contract and for the recovery of UGX 83,945,080/= being monies due and payable under the contract; general damages, interest thereon, and costs of the suit. The suit was commenced against the two Defendants and a third one, Mr. Amos Mugisha but subsequently in the course of the hearing of the matter, Mr. Amos Mugisha who was the 2nd Defendant then was
- 25 dropped with leave of Court and the matter proceeded against the two Defendants herein.

The brief facts are that in 2018, the 2nd Defendant was awarded a contract by Welt Hunger Hilfe to excavate 2 (two) valley tanks in Moroto District Karamoja sub-region. On the 28th day of September 2018, the 2nd Defendant sub-contracted the 1st Defendant for the exaction

30 of the two valley tanks.

Pursuant to the aforesaid contract, the 1st Defendant was obligated to mobilize the following equipment; one excavator, one bulldozer, one supervision pick-up 4WD and two low beds for the construction of the valley tanks. On the 5th October 2018 the 1st Defendant introduced

- 5 the Plaintiff to the 2nd Defendant and contracted the Plaintiff as an independent contractor to perform the sub-contract by carrying out the construction works for the full consideration of UGX 180,000,000/= and all payments were to be made to the Plaintiff's bank account whose details were provided.
- 10 That by a variation deed dated 22nd October 2018, the 2nd Defendant and the 1st Defendant agreed that only 1 (one) dam would be excavated at a cost of UGX 90,000,000/= and all payments to be made to the Plaintiff.

That on the same date, the Plaintiff entered into a separate agreement with the 2nd Defendant 15 wherein they agreed to compute the costs related to the completion of the dam and share profits if any, from business transaction.

That premised on the undertakings of the Defendants and/or their agents, the Plaintiff solely financed and secured the equipment that was used in the entire project namely, One 20 Excavator number plate UAW, One Bulldozer number plate UAL 349L, One 4WD pickup truck number plate UAB 406N and Two low beds under registration number UBA 553Y and UAH 656K respectively. Whereupon the Plaintiff claims to have spent UGX 103,945,080/= and only received UGX 20,000,000/= despite fulfilment of her contractual obligations.

- 25 The Plaintiff particularized her claims of special damages as follows;
- a) Receipt from Total for 100litres of Diesel fuel for Pick up number plate UAB 406N of UGX 399,000/=.
- b) Delivery Note for supervising work at Rupa Dam for twenty-four days of UGX 2,400,000/=.
- 30 c) Receipt from Basalidi Transporters and Construction (U) Ltd being payment of hire of Excavator number plate UAW 635D for twenty-three days of UGX 25,300,000/=.
- d) Receipt from Basalidi for hire of a low bed UBA 553Y of UGX 10,000,000/=.
- e) Cash sale from Net Gas for 3500 liters of diesel of UGX 14,350,000/=
- f) Cash Sale from Net Gas for 280 liters of diesel of UGX 1,148,000/=.
- 35 g) Receipt from Sennan for food assortments of UGX 430,000/=.
- 5 h) Receipt from Teslat Engineering services for the hire of Pick up UAB 406N for 26 days for UGX 3,120,000/=.
- i) Receipt from Bullent Construction for hire of 4 tents and 8 pieces of 250-liter jerricans for UGX 1,200,000/=.

- j) Receipt from Home land guest house for accommodation of two people in one room 10 for UGX 30,000/=.
- k) Accommodation for Alex in secret Inn for UGX 20,000/=
- l) Receipt from City Friends Hotel Moroto for accommodation for UGX 1,580,000/=.
- m) Receipt from Kiteelore for 3M pipe for UGX 9000/=
- n) Receipt from Kiteelore for supplies for the project for UGX 125,000/=.
- 15 o) Receipt from Hass Petroleum (U) Ltd Soroti station for UGX 6,934,080/=.
- p) All phase receipt for hire of low bed UGX 10,000,000/=.
- q) All phase receipt for bull dozer rental for 2 nights UGX 2,000,000/=.
- r) All phase receipt for bull dozer rental for 2 nights for UGX 2,000,000/=.
- s) All phase receipt for excavation services for 25 working days for UGX 25,000,000/=.

| 20 | SUB TOTALING | UGX 103,945,080 |

|---|-----|-----|

| | Subtract 30% receipt by the Plaintiff | UGX 20,000,000 |

| | TOTAL | UGX 83,945,080/= . |

The total amount is what the Plaintiff is claiming in this suit as money owed.

The 1st Defendant filed a Written statement of Defense. The 1st Defendant denied ever appointing the Plaintiff as an independent contractor to perform the sub-contract by carrying out the construction works. That it never appointed or authorized its Managing Director Amos Mugisha to appoint the Plaintiff to carry out any construction works as alleged

30 in the amended plaint.

The 2nd Defendant contends in defense that the Plaintiff never executed any works under the subcontract and that for the duration of the subcontract, it was the 1st Defendant and its workmen who executed the part of the subcontract, for which they were paid through the

5 Plaintiff to cover 30% of the contract sum for mobilization and commencement of the works under the subcontract in the plaintiff's capacity as the 1st Defendant's collecting agent.

Further 2nd Defendant contends that they were not a party to any contract with the Plaintiff and they are therefore incapable of breaching any contract with the plaintiff.

The parties filed a joint scheduling memorandum on the 10th February, 2023 and agreed on the facts that in 2018 the 2nd Defendant was awarded a contract by Welt Hunger Hilfe to excavate 2 valley tanks in Moroto District. On the 28th September, 2018 the 1st Defendant was subcontracted by the 2nd Defendant to excavate the 2 valley tanks. The subcontract 15 obligated the 1st Defendant to mobilize an excavator, a bulldozer, a 4-wheel drive pickup truck and 2 low bed carrier trucks for construction of the 2 valley tanks.

The rest of the facts were in dispute.

20 Representation:

The Plaintiff was represented by the law firm of MMAKS Advocates; the 1st Defendant was represented by the law firm of M/s Ruhindi & Co. Advocates who subsequently didn't appear in court and, the 2nd Defendant was represented by M/s Kania & Alli Advocates & Solicitors.

25 Issues:

The following issues were arrived at for Court's determination.

- 1. Whether there was a contract between the Plaintiff and each of the Defendants?
- 2. If issue 1 is answered in the affirmative, whether there was a breach of contract and by whom?
- 3. Whether the Plaintiff executed any works under the subcontract between the 1st 30 and 2nd Defendants?
- 4. What remedies are available to the parties?

Evidence:

35 The Plaintiff adduced one witness, herself. She led his evidence in chief by witness statement which was admitted in court record PW1 and was cross examined on the same. The 2nd

5 Defendant lead evidence through its Managing Director, Noah Olam Okecho and Manager, Peter Agaba who all led their evidence by way of Witness statements which as admitted in court as DW1 and DW 2 respectively then they were cross examined on the same.

The parties filed a joint trial bundle of 5 documents on the 19th January, 2023 which was accepted in court namely, A copy of the Memorandum of Understanding dated 28th 10 September 2018 (EX P1), A copy of the 1st Defendant's letter dated 5th October 2018 (EX P2), Agreement dated 22nd October 2018 to have a meeting with Amos Mugisha after completion (EX P3), A copy of the minutes from the meeting dated 22nd October 2010 (EXP P4) and A copy of the receipt dated 22nd October 2018 for UGX 20,000,000/= (EXP P5).

The Plaintiff filed a supplementary trial bundle namely, Photos of the Excavation Site at Rupa sub-county (EXP 9 Collectively), Letter from the 2nd Defendant dated 29th October 2018(EXP 10), Letter from the 2nd Defendant dated 1st November 2018(EXP 11), One paged letter from the 1st Defendant dated 2nd November 2018(EXP 12), Two paged letter from the 1st Defendant dated 2nd November 2018(EXP 13), Letter from the 2nd Defendant dated 6th 20 November 2018(EXP 14), Letter from the 1st Defendant dated 7th November 2018(EXP 15) and Certificate of Completion (EXP 16).

On the 4th April, 2023 counsel for the Plaintiff brought to court's attention that after several 25 attempts to serve the 1st Defendant to enter appearance in court, they were served through the New Vision Newspaper of 2nd March 2023 at page 39 and an affidavit of service was filed in Court on the 9th March 2023 and filled on ECCMIS on the 3rd April 2023. That despite the service and several other services before, the 1st Defendant refused to enter appearance and prayed to proceed exparte.

The court having examined the evidence on service, granted the order to proceed exparte against the 1st Defendant.

5 *Decision:*

Issue One: Whether there was a contract between the Plaintiff and each of the Defendants?

In civil proceedings, the burden of proof lies upon he who alleges and must prove his case on a balance of probabilities if he is to obtain the remedies sought. see *Lord Denning in Miller versus Minister of Pensions (1947)2 ALL ER 372 at page 373*.

Section 101 of the Evidence Act, Cap 6 provides that;

(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 103 of the Evidence Act provides that "the burden of proof as to any particular fact* 10 *lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person". When a Plaintiff has led evidence establishing his or her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

15 For a contract to exist, a party who asserts that it does must demonstrate that there was an agreement (there was an offer and acceptance), made with the free consent of parties with capacity to contract, for a lawful object and consideration, with the intention that such agreement shall be legally binding. See Section 10(1) of the Contracts Act, 2010, **Mathias Kabagambe v Kahiire Nobert HCCS 389/2016, Vivo Energy Uganda Limited & Anor v 20 Samuel Black & Anor HCCS 37/2019.**

The Plaintiff as PW 1 testified that the 1st Defendant wrote a letter to the 2nd Defendant introducing her as "its business partner" whom it assigned the role of carrying out the works. Further that the letter stated that it has been agreed between the Plaintiff and the 1st 25 Defendant that contract sum be paid directly in her accounts and that on 22nd October 2010 the Defendants agreed all payments be made to her and she was supposed to excavate 1 5 valley tank instead of 2 at fee of UGX 90,000,000/=. To this effect, the Plaintiff adduced EX P2 and EX P4.

Counsel for the Plaintiff submitted that the assertion that there was agreement between her and the 1st Defendant was never disputed throughout the trial and that 1st Defendant at

10 paragraphs 10 and 11 of the written statement of defense confirmed that the Plaintiff was sub-contracted to carry out the works and that, in EXP 3 the Plaintiff was introduced to the 2nd Defendant as a financier.

Further that DW 1 confirmed in cross examination that they set off to the construction site 15 with her, together with the 1st Defendant's Managing Director, Amos Mugisha and they confirmed that all the machinery and equipment needed for execution of the works was indeed mobilized and was used to execute the works.

Counsel further submitted that in the alternative without prejudice to the claim of a contract 20 between the Plaintiff and the two defendants equally, then at the very least, there existed, in law, a contract for the benefit of a third party which the Plaintiff is entitled to enforce.

Counsel cited section 65(b) of the Contracts Act which permits a third party to whom a contract confers a benefit, to enforce the terms of the contract which this suit seeks to 25 enforce all the payments due to the plaintiff.

Counsel also cited the case of **Asante Aviation Ltd v Star of Africa Charters Ltd and 3 others H. C. C. S No. 431 of 2014** where Justice David Wangutusi held at page 9 that a third party not privy to a contract can sue on it where that third party is a beneficiary under the

30 contract. That he further stated that the test lies in the question of whether the two contracting parties intended the third party to derive benefits from their contract.

Counsel then submitted that from the foregoing, the intention for the Plaintiff to benefit from the contract between the 1st and 2nd Defendant is plain to see from the wording of the

35 minutes marked EXP 4 which stated as follows- "..... the payment for the above referenced project should be made to Madam Eseza Catherine....". that the intention was made clear.

5 *Diversion of the benefit due to the Plaintiff.*

Counsel submitted that having established that the Plaintiff was entitled to the benefit of the contract between the two Defendants, it was discovered during cross-examination of DW 1 that the 2nd Defendant paid a sum of UGX 27,330,000/= to the 1st Defendant after being instructed to do so by a letter dated 2nd November 2018 EXP 12 for the percentage of the

10 works which was completed before the site was allegedly abandoned by the either the Plaintiff or the 1st Defendant.

Counsel quoted Chitty on Contracts, 27th Edition Vol. 1 and I reproduce the same as cited "A contract for the benefit of a third party creates a trust for the third party's benefit and a

15 party who holds or receives that benefit under the contract hold or receives it in trust for the benefit of the third-party."

Counsel further cited paragraph 18-048 which reads

"Irrevocability of intention to benefit a third party. As a general rule, the intention to benefit

- 20 the third party must be irrevocable; so that a contract will not normally give rise to a trust in favor of the third party if, under the terms of the contract, the promise is entitled to deprive the third party of the benefit by diverting it to himself or to other beneficiaries not mentioned in the contract".
- 25 Counsel also cited Halsbury's Laws of England, Fourth Edition, Volume 9, para 341 which reads;

"Among the factors which appear to influence the courts in deciding whether to imply a trust are the following:

- 1) There must be an intention on the part of A that B's promise should benefit C and not
- 30 A.
- 2) That intention to benefit C must be irrevocable; a power in A to divert the benefit of the promise to himself is fatal; but a mere power in A to redistribute the benefit between other third parties will not necessarily negative or trust, whether the alleged trust is created by contract or statutes.
- 5 3) Such an irrevocable intention to benefit C is not necessarily conclusive in favor of a trust, for it may merely show an intention to make a gift; but it seems that an intention to create a trust of a promise will readily be found where the promise by B to A was made in pursuance of some pre-existing contractual or fiduciary obligation owed by B to C"
- 10

Counsel the further submitted, drawing from the above analogy, that in this case A is the 2nd Defendant to whom B (the 1st Defendant) made a promise to execute the Works. A (2nd Defendant) undertook to pay the monies due thereunder to C (the plaintiff). A trust is therefore created in favor of C (the plaintiff) and is according to the evidence presented, it is 15 irrevocable because there exists a "pre-existing contractual or fiduciary obligation owed by B (the 1st Defendant) to C (the Plaintiff). The 1st Defendant owed the Plaintiff a refund and possibly a profit for financing the execution of the works, the 2nd Defendant was aware of this arrangement and agreed to it.

- 20 On the execution of the work and its completion, counsel submitted that the 1st Defendant in paragraphs 10 and 11 of its Written Statement of Defense contended that the Plaintiff commenced the works but did not complete them and that the 1st Defendant did not lead any evidence to support its assertion that the Plaintiff failed to complete the works and neither did it contradict the plaintiff's evidence to the contrary.
- 25

Counsel submitted that DW 1 contradicted himself during cross-examination on the percentage of the work from 30% to 50% and 80% and that the 2nd Defendant's allegation of having to complete the work themselves after the site was abandoned by the Plaintiff or 2nd Defendant had no documentary evidence whereas the Plaintiff was consistent with the

30 claim of completion of the work vide EXP 7(i) to 7(xiii) on the plaintiff's trial bundle, in her evidence in chief and during cross-examination too. That the lack of proof of remobilization of the machinery by the 2nd Defendant suggests that no such expense or effort was made by the 2nd Defendant.

5 Counsel concluded that the above submission proves that the Plaintiff had a contract with each of the Defendants, the 1st and 2nd Defendants each breached the said contract and the Plaintiff executed the works.

Counsel for the Defendant submitted that in the letter EXP 2 the 1st Defendant through its 10 Managing Director did not appoint the Plaintiff as an independent contractor but rather the letter was a communication to the 2nd Defendant that the Plaintiff is the 1st Defendant's business associate/partner and that no point did the 2nd Defendant have knowledge or give its consent to the 1st Defendant's appointment of the Plaintiff as an independent contractor as alleged.

Counsel further submitted that in paragraphs 7(f) and (g) of the amended plaint, the Plaintiff pleaded that her and the 1st Defendant entered into a separate agreement on the costs related to the completion of the work which is contained in EXP 3.

- 20 Further that in the last paragraph of EXP 4 the parties intended and agreed as between the 2nd and 1st Defendants that the excavation works of the 1 Valley dam were to be executed by the 1st Defendant, but not the plaintiff. The plaintiff's role was limited to financing the works on the 1st Defendant's part and of receiving the payments for the project for and on behalf of the 1st Defendant as was contained in EXP 3 being the 2nd Defendant's representative. From
- 25 the foregoing evidence, that there was a contract between the Plaintiff and the 1st Defendant.

On the contract for the benefit of the Plaintiff as a third-party beneficiary, counsel submitted that whereas they agree with section 65(1) and the law on third party beneficiaries to contracts as an exception to the doctrine of privity of contract they strongly disagree that the

30 Plaintiff was a beneficiary under the contract between the Defendants.

Counsel further submitted that the Plaintiff was a conduit through which the 1st Defendant was to be paid for works duly executed under the subcontract. That if at all the Plaintiff financed the project to the extent she allegedly did, but the 1st Defendant failed to execute

35 the works under the contract and therefore payments under the subcontract weren't paid to

5 her, her remedy would lie in taking legal action for recompense from the 1st Defendant under their subcontract.

Counsel further submitted that the circumstances in Asante Aviation Limited V Star of Africa Charters Limited and 3 others(supra) as cited by the Plaintiff are distinguishable from those

- 10 of the instant case. That in that case, the sale and purchase agreement itself provided that the 2nd Counter-Defendant would finance the purchase of the aircraft and in the present case the subcontract for excavation of the 2 valley tanks does not name the Plaintiff as the financier of the 1st Defendant's obligations under the subcontract.
- 15 That in the Asante Aviation case, the 2nd Counter-Defendant actually paid USD 770,000 at the purchase price of the aircraft to the Counter-claimant and undertook to pay a further USD 200,000. The counter-claimant received these sums directly from the 2nd Counter-Defendant, while in the instant case, the amount of financing allegedly agreed upon and provided by the Plaintiff to the 1st Defendant for the execution of the subcontract was
- 20 shrouded in mystery and it was never communicated to the 2nd Defendant during the subsistence of the subcontract. It wasn't until the subcontract was terminated that the Plaintiff came up with figures that allegedly represented the extent to her financing of the subcontract.
- 25 Counsel then cited section 10(1) of the contracts act on the essential elements of a contract which he said does not exist between the Plaintiff and the Defendant.

Counsel further submitted that the 2nd Defendant who wasn't party to the terms of the plaintiff's financing arrangement with the 1st Defendant should not belatedly be dragged into

30 it by the Plaintiff on the ground that she is a third-party beneficiary and the 2nd Defendant did not breach a contract they were not a party to.

On the issue of whether the Plaintiff executed any works under the subcontract, counsel submitted that the Plaintiff never pleaded in her plaint that she executed any works under the subcontract between the 1st 35 and 2nd Defendant. That she alleged to have completed the 5 works on the 4th of November, 2018 and handed over the site to the Defendants. Counsel cited *Acaa Bilentina V Okello Micheal C. A No. 0053 of 2015* on departure from pleadings.

Further that the Plaintiff did not adduce any evidence in form of interim certificates of works, a completion certificate or a site handover report to substantiate her allegations that she did

10 work under the subcontract. That all she relied on during the hearing to prove that she executed works under the subcontract were photographs in EXP 9(a) – (j).

From the foregoing submissions of the parties, what stands clear is that there was a contract between the Plaintiff and the 1st Defendant who by their actions put themselves out of the 15 trial for the matter to proceed *ex parte* against them.

It is important to note that whether a case proceeds *ex parte* or not the burden of the Plaintiff to prove his or her case on a balance of probabilities still remains. See *Kityo v Erias Kaddu* [1982] HCB 58.

The Plaintiff testified that her and the 1st Defendant entered into a subcontract and DW 1 testified that the 1st Defendant introduced the Plaintiff as their partner. There was no direct evidence to disprove the assertion by the Plaintiff that it entered into a sub-contract with the 1st Defendant. Moreover, the admission of the introduction by DW1 corroborated the 25 evidence of the Plaintiff that such sub contract agreement existed.

Section 10(1) of the contracts Act which defines a contract as; -

"A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound".*

In the case of *Greenboat Entertainment Ltd Vs City Council of Kampala C. S No. 0580 of 2003* a contract as was defined as; -

"*In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable there must be: capacity to contract; intention to contract;*

35 *consensus and idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other*

5 *than a contract".*

It is trite that a contract does not necessarily need to be in writing and can be inferred from the conduct and the intention of the parties. See **Ebbzworld Ltd & Anor v Rutakirwa HCCS 398/2013**

In the case of the Plaintiff and the 2nd Defendant, it is all agreed that there was no direct contract between them and the Plaintiff was not privy to the contract between the Defendants thus the Plaintiff's claim of a contractual relationship is based on a principle of being a third-party beneficiary to the Contract between the Defendants.

As a general rule, a person who is not a party to a contract cannot claim a benefit out of it. See **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd [1999] 3 SCR 108**

20 There are a number of exceptions to the doctrine of privity. These include claims resulting from trusts (such as by beneficiaries against trustees), claims arising from estates, claims under collateral contracts, claims on behalf of another, claims on the basis of assignment or agency or succession in title, claims under negotiable instruments, third party claims and so on. See **Les Affréteurs v Walford [1919] AC 801, Re Schebsman [1944] Ch 83, Beswick v 25 Beswick [1968] AC 58, Jackson v Horizon Holidays Ltd [1975] 1 WLR 1468, Shanklin Pier Ltd v Detel Products Ltd [1951] 2 KB 854, Nisshin Shipping Co Ltd v Cleaves & Co Ltd [2003] EWHC 2602**

A third-party beneficiary in the law of contracts is a person who may have the right to sue on 30 a contract, despite not having originally been a party to the contract. This right arises when the third party is the intended beneficiary of the contract and not an incidental beneficiary.

In the determination of such a scenario, one has to look into the contractual documents and the nature of the third-party engagement to discern if he or she is an intended beneficiary or

35 an incidental one.

5 Honorable Justice Dr. Peter Henry Adonyo in **Guangdong Hao He Engineering & Construction Company (U) Ltd and another Miscellaneous Cause No. 37 od 2020** observed that –

"Looking at the attachments to the application, I would fully agree that.....in regard to the position of the parties before me for the insurance company is clearly provided for in the*

10 *construction works contract making three parties which are Britam Insurance Company (U) Limited (the guarantor), Capital Shoppers Limited (the beneficiary) and Guangdong Hao He Engineering & Construction Company (U) Ltd (the contractor)".*

..... the subject matter of this application relates unquestionably to the advance payment bond and performance bond which are intertwined with the contract for construction works

between the application and the 2nd 15 *respondent, leaving (it) out of the contracts would completely mutilate the main contract."*

The import of the Honorable Justice's observation is that a court considering the matter ought to analyze the third party's contract alongside the main contract to determine if the

20 third party was an intended beneficiary.

Section 65(1) of the Contracts Act, 2010 provides thus

"Subject to this Act, a person who is not a party to a contract may in his or her own right enforce a term of the contract where—

25 (a) the contract expressly provides that he or she may do so; or (b) subject to subsection (2), a term of the contract confers a benefit on that person."

For a claimant to properly maintain a claim as a third party they must show

(a) The contract either provides that they can do so or the contract confers a benefit on

30 them

- (b) A proper construction of the contract shows that the provision was intended to be binding
- (c) The contract clearly identifies the third party
- (d) The term conferring the benefit is subject to and in accordance with the contract

5 The contents of EXP 4 which is referred to as the meeting between the Defendants whose minutes body with the heading **"EXCAVATION OF 15.000m VALLEY DAM IN RIYA SUB-COUNTY MOROTO DISTRICT"** quoted verbatim states that-

"We have agreed between Olanzicon Services Ltd and Amos Mugisha of Amotrust Construction Services Ltd with Madam Eseza Catherine [Financier] that the payments for the above-

10 *referenced project should be made to Madam Esezi Catherine. We have agreed that as per clause 5(a), that Amotrust Ltd shall only excavate one valley Dam at Rupa sub-county at a cost of UGX 90,000,000. ACC No. 0101515041900."*

- 15 A review of the minutes [EXP4] and the other materials on the record show, at the very least an agreement between the parties for the plaintiff to provide financing for the project to be undertaken by the 1st Defendant as a sub-grantee of the 2nd Defendant. As a means of repayment, the 2nd Defendant undertook to make payment to the plaintiff vide EXP4.
- 20 It follows from a review of the above that there was an agreement between the parties in which the plaintiff financed the undertaking of the project (we will shortly consider who did the actual work) on the condition that the 2nd Defendant would make some payments to her. What this means is that there were two unique relationships under the same contract; (a) an obligation to provide an investment for the 1st Defendant use, or at least benefit and (b) an

- 25 obligation by the 2nd Defendant to make certain payments to the plaintiff. In my view, the above is a contract binding the defendants and the plaintiff, except that the party liable for the relief sought depends on the nature of the breach alleged and proved.
- In the instant case, it is the 2nd Defendant and not the 1st Defendant that would be obligated 30 to make payment, if at all any was due. It therefore follows that there was a contract between the parties.

In any event, even if my decision on the existence of a contract above was overturned on appeal, I would still have found that EXP4 was a contract conferring a third party benefit to 5 the plaintiff which she was entitled to sue on, for the basis of securing or recovering in accordance with Section 65(1) of the Contracts Act, 2010.

Issue 3: Whether the Plaintiff executed any works under the contract.

Issue 2 is raised on breach of contract, resolving issue 2 before issue 3 would be jumping the

- 10 gun as such, I will resolve issue 3 before looking into whether there was a breach of contract. This issue raised as it only seeks to find out if the Plaintiff executed any works under the subcontract between the 1st and 2nd Defendants however, it does not seek to find out if the Plaintiff in some way completed the execution of the work under her agreement with the 1st Defendant.
- 15

The DW 2 the Managing Director of the 2nd Defendant in his evidence in chief stated that the Plaintiff never executed any works under the contract and is not aware under what terms the 1st Defendant decided that all payments under their contract be made to the Plaintiff.

- 20 The Plaintiff's proof of having executed the work is the fact that UGX 20,000,000 was paid to her as payment for 30% of the work done and EXP 11 which is a letter from the 2nd Defendant to the 1st Defendant complaining that the works should have been completed by the 1st November 2011 and they were behind schedule by 20%.
- 25 The Plaintiff's evidence and arguments adduced in proof of having done work under the contract are at all times tied to the 1st Defendant. There is no independent evidence of the Plaintiff supporting her claim of having done work under the subcontract.
- I note that the Plaintiff did not adduce an interim certificate of works as evidence of the 30 completion of works or a specific project milestone. In my view, the evidence on the record must be considered as a whole. The purpose of certificates is to certify that works described have been completed. These certificates are usually issued by a person designated to certify progress or completion of works on a project such as an architect or a contract manager. The evidence on record show a payment of 20% paid and received by the Plaintiff. Such a

- 35 payment has not been described as an advance payment to ensure that the works started. The payment was also not in discharge of other contractual relations between the parties

5 and neither were they described as a gift or charitable donation. In my view, the payment of the sums above is evidence that works were undertaken as there is no other reasonable explanation of the payment of these monies.

Therefore, I find that the Plaintiff did work or financed the work done thus far under the 10 subcontract.

I find issue 3 in the affirmative.

Issue 2: whether there was a breach of contract and by whom?

15 Breach of contract is defined in **Black's Law Dictionary 11th Edition pg. 232** as Violation of a contractual obligation by failing to perform one's own promise, by repudiating it or by interfering with another party's performance. In **Nakawa Trading Co. Ltd V Coffee Marketing Board Civil Suit No. 137 of 1991** court defined a breach of contract as where one or both parties fail to fulfil the obligations imposed by the terms of the contract.

The Plaintiff claims in paragraph (g) of her pleadings that Amos Mugisha, the 1st Defendant's representative and her agreed to compute the costs related to the completion of the dam and share profits, if any, from the business transaction as exhibited in EXP 3 and in paragraph (I) the Plaintiff stated that despite fulfilling her contractual obligation, the Plaintiff only received

- 25 UGX 20,000,000/= and is owed UGX 83,945,080/=. Plaintiff adduced EXP 12, a letter from the 1st Defendant to the 2nd Defendant instructing them to stop making payments to the Plaintiff contrary to the earlier instructions thereby interfering the Plaintiff's role an entitled third party.
- 30 As noted earlier, the 1st Defendant by failing to come for hearings despite being served with numerous hearing notices and the matter proceeding exparte did put itself out of court therefore leaving the Plaintiff's claims uncontested.

Be that as it may, I found compelling evidence that the Plaintiff provided financing for the 35 project as noted above, and was entitled to obtain payment in respect of the works done. As 5 indicated above, the Plaintiff only received UGX 20,000,000 out of UGX 103,845,080 owed leaving a sum due of UGX 83,845,080.

Issue 4: What are the remedies available to the parties?

10 The Plaintiff prayed for payment of the total money owed to her of UGX 83,945,080/=. General damages of UGX 20,000,000/=. Interest on the amount owed and the general damages plus costs of the suit.

General damages:

Black's Law Dictionary 11th Edition page 489 defines damages as damages that the law presumes follow from a type of wrong complained of; compensatory damages for the harm that are so frequent the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong.

15 Lord Greene MR, in **Hall Brothers SS Co. Ltd V. Young** [1939] 1 KB748, at 756 (CA) defined the term damages thus:

"'Damages' to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law, or legislation." Also see **Storms versus Hutchinson* (1905) AC 515.*

In **Haji Asuman Mutekanga versus Equator Growers (U) Ltd. SCCA NO. 7 of 1995, Oder JSC, held that;**

'With regard to proof, general damages in a breach of contract are what a Court (or jury) may award when the Court cannot point out any measure by which they are to be assessed, except in the opinion and judgment of a reasonable man'.

The Plaintiff stated that under the agreement she was entitled to receive a total of UGX 90,000,000/= and she was only paid UGX 20,000,000/= yet she incurred costs in the course of financing the project and suffered great inconvenience due to the actions of the 1st Defendant.

I am inclined to award the Plaintiff general damages of UGX 20,000,000/= as she prayed for which is a fair amount.

Interest:

5 Section 26(2) of the Civil Procedure Act gives the court the discretion to grant interest that is fair and reasonable.

Justice Stephen Mubiru in **Waiglobe (U) Limited V Sai Beverages Limited Civil Suit No. 0016 of 2017**, stated that:

- 10 "In determining a just and reasonable rate, the court takes into account the ever-rising inflation and the drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it*
- 15 *falls due"*

Costs:

25 *Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873.*

In Conclusion:

- 5 a) There exists a contract between the Plaintiff and Defendants.
- b) That the Plaintiff financed and or did work under the subcontract with the 1st Plaintiff company.
- c) The 1st Defendant breached the contract with the Plaintiff by failing to make payment of UGX 83,945,080 which is the sum outstanding and owing.
- 10 d) The 2nd Defendant did not breach the contract with the Plaintiff and is therefore not liable to the plaintiff for any sum.
- e) The Plaintiff is entitled to the outstanding sum of UGX 83,945,080/= owed to it by the 1st Defendant.
- f) The Plaintiff is awarded General Damages of UGX 20,000,000/= against the 1st Defendant.
- 15 g) Interest of 12% per annum on (e) above from the date of filing this suit until payment in full and further interest of 9% per annum on (f) above from the date of this judgment until payment in full.
- h) The 1st Defendant shall bear the Plaintiff and 2nd Defendant's costs of this suit.
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[illegible]

Ocaya Thomas O. R Judge

29th May 2024

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