

Watoto Limited v MarKmat Agro Processors Limited and Another (Civil Suit No. 526 of 2019) [2023] UGHCCD 99 (14 April 2023)
[2023] UGHCCD 99

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In December, 2016, the Plaintiff had a service Level Agreement with the Defendant where the defendants were to rear layer chicks for the Plaintiff for a period of three months. In December 2016, before the three months lapsed the 2nd Defendant offered to purchase the Plaintiff's chicken at 98,000,000/= to which the defendants made numerous commitments to make payments to the effect.

The Plaintiff further avers entered into an agreement with the defendants to supply them with maize/ corn at UGX. 15,000,000/= to which the defendants issued a Cheque which was banked and it bounced and that since then the defendants have never paid for the maize delivered.

On the 28th day of February 2019, the 2nd Defendant (the director of the 1st Defendant) executed a commitment to pay the Plaintiff an amount of UGX 113,000,000/=which comprises of the UGX. 98,000,000/= for the unpaid chicken purchase and UGX. 15,000,000/= for the maize payment whose Cheque bounced, and an addition UGX. 2,825,000/= being the legal fees for the recovery of the said principles sum.

Consequently the Plaintiff prays for judgment to be entered in his favor against the defendants jointly and severally for recovery of UGX 115,825,000/=:, general damages and interest on the thereof.

On the other hand the defendants contended that there existed a services level agreement where the Defendant had to raise for the Plaintiff 7,000 chicks by providing management services at their poultry farm at Mukono, for three months that the said agreement was frustrated by the pronouncement of outbreak of bird flu in Uganda by the Ministry of Agriculture on 15th January 2017.

The Defendants further avers that the frustration was brought to the attention of the Plaintiff instead the Plaintiff resorted to threatening the 2nd Defendant and that it was through duress that the he signed a commitment to pay Plaintiff a total of UGX 115,825,000/=:.

The 1st Defendant filed a counterclaim for breach of oral management agreement arising from the Counter Defendant s actions, general damages, compensatory damages, interests and costs. The said oral agreement suggests that the counterclaimant was to run the day to day management of the Counter Defendant's farm and that the Counter-Claimant was to receive 40% of the profits made after deductions while the Counter-Defendant was to get 60% of the same.

The Counter-Defendant further avers that she performed her duties well to required standards for the for the contracted period of three years running from 2017 to 2019, but the Counter-Defendant sold all poultry products and refused to pay the counterclaimant her 40% profit share.

During scheduling, the following issues were framed for determination by this court;

- *1. Whether the Plaintiff is entitled to UGX 115,825,000 in the Commitment to pay dated 28th February?*

- *2. Whether the 1st Agreement between the parties was frustrated by the outbreak of bird flu in Uganda?*
- *3. Whether the Counter Defendant breached the Management Agreement?*
- *4. What remedies are available to the parties?*

The plaintiff was represented by *Lastone Gulume* while the defendant was represented by *Ambrose Rukundo Tiishekwa*

The Plaintiff led evidence of two witnesses in support of her case while the Defendant also led also led evidence of two witnesses and proof of their counter claim.

DETERMINATION OF ISSUES

Issues 1 and 2 shall be resolved by this court together accordingly.

Whether the Plaintiff is entitled to UGX 115,825,000 in the Commitment to pay dated 28th February? AND

Whether the 1st Agreement between the parties was frustrated by the outbreak of bird flu in Uganda?

Counsel for the Plaintiff submitted that the debt of UGX 115,825,000 arises from two separate business arrangements between the parties, the first being an agreement to purchase the Plaintiff's chicks which were in the possession of the Defendant and the second related to the defendants' purchase of corn (maize) from the Plaintiff for poultry feeds.

Counsel for the Plaintiff submitted that the first arrangement with the Defendant was to retain the Plaintiffs' 8000 chicks in consideration that the Defendants would pay the Plaintiff in three equal instalments to total to UGX. 98,000,000/=. This was corroborated with email correspondences DEX-2 and DEX-3 and several Cheques issued by the Defendant to the Plaintiff which later on bounced see PEX-3.

Counsel for the Plaintiff further submitted that the second arrangement related to the purchase of the corn maize for the Defendants' private use from the Plaintiff and in consideration the 2nd Defendant issued a Cheque No. 514872 for UGX. 15,000,000/= PEX-4 which on being banked the same bounced. Upon communicating the same to the Defendant, he confirmed that the Cheque bounced and he requested for time to sort the matter PEX-5.

That it is upon these two arrangements that the parties executed the commitment to pay dated 28th February 2019 in which the 2nd Defendant committed to pay the Plaintiffs UGX.113,000,000/= being UGX.98,000,000/= as consideration for the 8000 chicks, 15,000,000/= being consideration for the corn maize and an addition of 2,825,000/= for legal fees for the recovery of the principle sum.

Counsel for the Plaintiff submitted that the 2nd Defendant in his witness statement under paragraph 6 and in cross examination admitted to having signed the commitment to pay dated 28th February 2019 and that there was no evidence adduced for duress by the defendant.

The Defendants in their submissions aver that the poultry business was frustrated by the outbreak of Bird Flu in Uganda which was a natural happening that none had control over which made them lose market for the poultry products which frustration relieves both parties of their obligation. Counsel for the Defendants relied on the case of **TAYLOR V CALWELL (1863) 3B** at page 751 where court stated considerations for frustrate to be bound to has occurred, first being what was the foundation of the contract, secondly was the performance of the contract prevented and thirdly was the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? Where all questions are answered in the affirmative then both parties are discharged from further performance of the contract.

The Defendant further submitted that whereas the first and second arrangement arise from a frustrated contract being the UGX.98,000,000/= and UGX 15,000,000/= the balance being 2,825,000/= was not for the Plaintiff but for Advocates being a different transaction should be claimed by the Advocates and not the Plaintiff.

Counsel for the Plaintiff in rejoinder averred that the contract between Plaintiff and the Defendants was not contingent on the success of the poultry and the Defendants failed to discharge their legal burden of proving frustration of contract nevertheless during his cross examination, the 2nd Defendant confirmed to court that he didn't has sick birds and that the Plaintiff didn't place on him an obligation to sell poultry rather his obligation was to pay the debt owed.

Further still in their submission in rejoinder the Plaintiff further contends that UGX. 2,825,000/= was part of the commitment to pay which was signed by the 2nd Defendant thereby acknowledging a debt and by signing the commitment to pay, the Defendants acknowledged a debt of 113,000,000/=

Analysis

It is not the function of the court to make contracts between the parties, but it is the court's duty to construe the surrounding circumstances, including written and oral statements, so as to effectuate the intention of the parties. *See Omega Bank v O. B. C Ltd (2005) 8 NWLR (pt 928) 547*

The contracts Act under section 10 illustrates that a contract is an agreement made with the free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object with the intention to be legally bound. The Act under SEC 10(2) is clear that a contract may be oral or written or partly oral and partly written or contract may be implied from the conduct of the parties. In case of **Greenboat Entertainment Ltd-vs-City Council of Kampala H. C. C. S NO. 0580 OF 2003** court held that; *"In general, oral contracts are just as valid as written ones. An oral contract is a contract the terms of which have been agreed by spoken communication, in contrast

with a written one, where the contract is*

oral or written, it must have the essentials of a valid contract. The essentials of a valid contract were pointed out in the same case as; - "in law, when we talk of a, 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; consensus ad 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 than a contract."

In the instant case, from the evidence adduced by both parties, it is not in dispute that the Plaintiff and the defendants had two verbal arrangements (contracts) and they satisfied all elements of a valid contract. Oral agreements can be proved in a court of law, through several circumstantial evidence.

The claim made by the Plaintiff constituted of first, an agreement to purchase 8000 chicks at 98,000,000/= which was corroborated by email correspondence between the parties see DEX-2, DEX-3 and PEX2. From the said exhibits it is clear that the Plaintiff and the Defendant had reached to an understanding that the Defendant would retain the 8000 chicks and in consideration make immediate payment to the Plaintiff. Additionally, the 2nd Defendant issued six postdated cheques which were totaling to UGX.98, 000,000/= see PEX-3

As for the second agreement, the Defendant purchased corn for the Defendants' private use from the Plaintiff and in consideration the 2nd Defendant was to pay a sum of UGX. 15,000,000/=, the said contract was corroborated by Cheque No.514872 dated 7th June 2017 which was issued by the 2nd Defendant and upon being banked the same bounced see-PEX-5. Furthermore email correspondences dated 7th July 2017 between the parties clearly indicates the communication to the 2nd Defendant by the Plaintiff about the bounced Cheque which the 2nd Defendant responded by requesting for time to sort the matter see PEX-5.

Both the first and second transactions were equally corroborated by a commitment to pay signed by the Plaintiff and the 2nd Defendant where the 2nd Defendant guaranteed to pay a total of 113,000,000 which is the total amount of the money due from the two agreements and an addition of 2,825,000 being legal fees for the recovery of the principle sum and there is no evidence as to the existence of duress, intimidation and undue pressure as claimed by the Defendant See PEX-1. Indeed I agree with the authority relied upon by the plaintiff **KYARIMPA v NASSOZI (Civil Suit 794 of 2016) (2017) UGHCLD 91** where it was held that when one party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy. It is very clear from the above authority as to what amounts to breach of contract, the Defendant doesn't dispute the fact that the Plaintiff performed her obligations in both the transactions.

From the evidence on record, it is clear that there existed two binding contracts between the Plaintiff and defendant, the gist of the case remains to whether the said contracts were frustrated by unforeseen events. Section 66 of the Contract Act provides for discharge by frustration, in the case of **CPC FREIGHT SERVICES LTD V UGANDA PROPERTY HOLDINGS LTD MA 10 OF 2012** while referring to the case of **HIRJI MULJI AND OTHERS VS CHEONG YUE STEAMSHIP COMPANY LIMITED (1926) AC 497**, Justice Madrama quoted Lord Wright at page 352-353 "..... The dispute in all such cases where frustration is alleged is whether there

has been frustration at all, and such a dispute would seem logically to arise "under the contract" and fall within the submission just as such as if the words had been arising out of it."

The underlying principle from the above authority is that the unforeseen event should have stopped one of the parties from performing her obligation an implication that the occurrences should be interwoven with the contract between the parties, in the instant case I agree with the Plaintiffs' submissions, that the contract between the Plaintiff and Defendant was not depending on the success of the poultry. Frustration depends at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.

The court is to determine and decide disputes brought before it in accordance with evidence, both oral and documentary only, in particular as agreed by the parties. The court is not to draft or make a different agreement for parties. It will amount to injustice or miscarriage of justice to do so. *BFI Group Corp v BPE (2012) 18 NWLR (pt 1332) p. 209(SC)*

Therefore, the uncontroverted evidence on court is that there were binding contracts between the Plaintiff and the Defendants making the Defendants liable of a sum totaling to **UGX 115,825,000** to the Plaintiff, as for the defence raised by the Defendant, they failed to prove that the contract between Plaintiff and Defendant was contingent on the success of the poultry. The cardinal principle of interpretation of contracts is that the agreement between the parties should be

construed in a manner which is consistent with the object of the entire agreement.

In order to conclude that a contract has been frustrated by the circumstances that the parties find themselves in, the courts first have to construe the terms of the contract to determine their ambit. This is then compared with the circumstances of the case as have transpired to determine whether the contractual promisor's non-performance in light of the supervening events is truly something which is beyond the ambit of the contract.

There was no frustration of the sale of the Mukono Chicken to the defendants and indeed the defendant never alluded to the same when he breached the contract. He duly executed an agreement and agreed to make good the breach by paying the entire contract sum inclusive of legal costs. There was never any impossibility of performance as the defendant would wish this court to believe. They retained the chicken, reared them, sold its eggs and later sold off the

offlayer birds and retained all the proceeds without payment of any sum. This was a clear breach of contract and the plea of frustration by the defendant is an afterthought that is intended to enrich the defendant. The present case is for payment of 115,825,000/= as agreed upon by the defendant to be paid and this agreement to pay this sum has never been frustrated.

Issue 3

Whether the Counter Defendant breached the Management Agreement?

The Counter-Claimant submitted that the Management Agreement between Plaintiff and 1st Defendant dated 12th April 2017 where under clause 1 the Plaintiff company appointed 1st Defendant company manager to run the day today management of her poultry farm at Buloba and that the Plaintiff was to provide facilities for establishment of poultry farm and cover expenses for the chicks and all that was necessary for smooth management of the farm and in the end they were to share the profits by 40% to Counter-Claimant and 60% to Counter Defendant . That the Counter claimant performed all her duties under the management agreement but the counter-Defendant (Plaintiff) breached the management agreement by concealing all financial records and sales from Counter-Claimant to fail her from ascertaining her 40% profit share from the total sales.

The Counter Claimant further relied on the case of **Kyarimpa Aarah vs Harriet Nassozi Hewett H. C. C. S NO. 0794 of 2016** where court held inter alia that when one party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party in a way that does not correspond with the agreement, the guilty party is said to be in breach of contract and the innocent party is entitled to a remedy.

The Counter-Defendant submits that the Buloba Agreement required the Counter-Claimant to provide Management services for a period of 2 years of the Agreement and the remuneration was to be by profit share at the end of the 2 years upon performance of the contract. He further submits that Counter Defendant did not fully perform the obligations in the said Agreement.

The Counter-Defendant further relied on the case of **Emmanuel Kyoyeta vs Emmanuel Mutebi Civil Suit No. 781** where court relied on the case of **Nakana Trading Co. Ltd vs Coffee Marketing Board Civil Suit No. 1137 of 1991** where court defined a breach of contract as where one or both parties fails to fulfill the obligations imposed by the terms of contract.

Analysis

The court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract on their own terms so long as the same is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document or orally agreed upon which constitute the contract are invariably the guide to its interpretation.

When parties enter into a contract, they are bound by the terms of the contract as set out by them. It is not the business of the court to rewrite a contract for the parties. The court, however, has a duty to construe the surrounding circumstances including written or oral statement so as to discover the intention of the parties.

The Counter-Claimant's case is that the Counter-Defendant's breached the contract of Management services by not effecting the payment of 40% of the total sales as agreed upon in the contract. As I held earlier that it is a principle of the law that for any person seeking to enforce his right under a contractual agreement must show that he has fulfilled all the conditions precedent and that he has performed all those terms that ought to have been performed by him.

From the Management Service agreement DEX-5 it clear that the profit sharing would arise from the sales of the poultry and poultry products or any other income generated in connection to the poultry farm, directly arising from the

undertakings of the first Party at the farm, after deduction of all expenses from the gross sales and secondly the performance of the Agreement has a duration of two years.

The evidence on record clearly indicates that the Counter-Defendant didn't not perform his obligations as per the agreement which was for a period of two years and secondly the Counter-Claimant was in full control of the poultry farm and the making of profits and could not claim that they could not access the sales records so as to assess the profits.

I therefore rely on the authority cited by the Counter Defendant **EMMANUEL KYOYETA vs EMMANUEL MUTEBI CIVIL SUIT NO. 781** where court noted that for any person seeking to enforce his right under a contractual agreement must show that he has fulfilled all the conditions precedent and that he has performed all those terms that ought to have been performed by him.

See BFI Group Corp v BPE

(2012) 18 NWLR (pt 1332) p. 209(SC)

I therefore find the Counter-Claimant not in the position to make any claim having not satisfied his obligation in the contract.

ISSUE 4

****What remedies are available to the parties?****

It is with no doubt that there subsisted a contract between the two parties, which contract was for the sale of Chicks by the Plaintiff to the Defendant to which the Defendant signed a binding commitment to pay worth UGX 115,825,000. According to the facts and evidence on record the Plaintiff is entitled to total sum of UGX 115,825,000.

General Damages.

General Damages are usually awarded at the discretion of court. In case of Uganda Commercial BANK vs KIGOZI [2002] 1EA 305 court held that in assessment of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered.

The plaintiff is entitled to general damages of a tune of 17,000,000/= for loss suffered ever since the Defendant withheld the plaintiffs money and the plaintiff is awarded interest of 20% on the decretal sum of 115,825,000/= from the date of the cause of action and interest of 15% on general damages from the date of this judgment and costs for the suit.

I so order.

Ssekaana Musa Judge 14th April 2023

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