THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 0754 OF 2014

DELIGHTS COMPANY LIMITED :::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

HAJJI MUHAMMAD KITAKA :::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

JUDGEMENT

Introduction

The Plaintiff brought this suit against the Defendant for recovery of the sum of UGX 58,000,000/=, general damages for breach of contract, interest and costs of the suit.

The brief facts of the Plaintiff's case were that the Plaintiff deals in importing and selling of motor vehicles. On diverse occasions in 2014, the Plaintiff through its agent, one Hussein Ssegujja, sold three motor vehicles to the Defendant. On the 29th May 2014, the Plaintiff sold to the Defendant a motor vehicle Toyota Kluger, Model L 2001, Reg. No. UAV 356G, Engine No. 2AZO340862, Chassis No. ACU250006876, silver in colour at UGX 30,400,000/=. The Defendant made part payment of UGX 15,400,000/= leaving a balance of UGX 15,000,000/=. On 6th June 2014, the Plaintiff sold to the Defendant another motor vehicle, Toyota Mark X, Model GRX125 2007, Reg. No. UAV 316F, Engine No. 4GR0418077, Chassis No. GRX1253005300, silver in colour at UGX 38,000,000/= payable on 30th June 2014. On 11th June 2014, the Plaintiff sold to the Defendant yet another motor vehicle, a Toyota Raum, Model NCZ20 2003, Reg. No. UAU 763Q, Engine No. 1NZA845504, Chassis No. NCZ200013482, Blue in colour, at UGX 17,000,000/=. The Defendant made part payment of UGX 12,000,000/= leaving a balance of UGX 5,000,000/=. The Defendant did not

pay all the outstanding balances as agreed, thus creating a total liability of UGX 58,000,000/=. The Plaintiff therefore brought this suit seeking the reliefs above stated.

The Defendant filed a Written Statement of Defence in which he denied the Plaintiff's claims and particularly stated that though it was true that he had bought the said motor vehicles from the Plaintiff, he was not indebted to the Plaintiff in the sums claimed in the plaint. The Defendant stated that he did not breach the contract since there was no date on which he should have paid the balances; the oral contracts executed between the two parties were open ended. The Defendant therefore denied ever executing the agreements annexed to the plaint and insisted that the parties only entered in oral contracts. The Defendant further stated that the date for payment of the balance indicated on the receipt marked as Annexture "C" to the plaint as 24/04/2014 was false as it was never inserted on the said receipt in the presence of the Defendant. The Defendant prayed for dismissal of the suit with costs.

Issues for determination by the Court

The following issues were framed for determination by the Court:

1. Whether the Defendant is indebted to the Plaintiff to a tune of UGX 58,000,000/=.
2. What remedies are available to the parties?

Evidence

The parties proceeded by way of witness statements. The Plaintiff filed two witness statements but only relied on one during the trial. The Defendant filed two witness statements which he relied on during the trial. There is a claim contained in the Defendant's written submissions that when the suit came up for cross examination of the two Defendant's witnesses, the Plaintiff's Counsel indicated that he did not intend to cross examine the said witnesses and "a consent to that effect admitting the said … witness

statement[s] respectively was made and put on record". Perusal of the record however has not revealed any indication or consent to that effect. I will therefore evaluate the evidence as it appears on record.

The Plaintiff's evidence was adduced by **Hussein Sseguja (PW1)** who stated that he was a Sales Representative of the Plaintiff Company (hereinafter called "the Company"). The Company dealt in importation of new and used cars from Japan. He stated that he, on behalf of the Company, sold three motor vehicles to the Defendant. In May 2014, he sold to the Defendant a Toyota Kluger motor vehicle Reg. No. UAV 356G at a sum of UGX 30,400,000/=. A sales agreement was executed. The Defendant made part payment of UGX 15,400,000/= leaving a balance of UGX 15,000,000/= which the Defendant never paid. On 26th May 2014, the Defendant entered into another sales agreement with the Plaintiff for purchase of a Toyota Mark X motor vehicle Reg. No. UAV 316F at UGX 38,000,000/=. The Defendant did not make any payment but was to pay the full purchase price by 30th June 2014. The Defendant however did not pay. On 11th June 2014, PW1 sold another motor vehicle Toyota Raum UAU 763Q to the Defendant at UGX 17,000,000/=. The Defendant made part payment of UGX 12,000,000/= remaining with a balance of UGX 5,000,000/= which he did not pay. The unpaid monies by the Defendant amounted to UGX 58,000,000/= which is claimed by the Plaintiff in this suit.

The Defendant adduced evidence through himself, **Hajji Mohammad Kitaka (DW1)** and through **Wampamba Nehemiah (DW2).** The Defendant **(DW1)** stated that he purchased four motor vehicles from the Plaintiff namely Toyota Mark X Reg. No. UAV 316F, Toyota Kluger Reg. No. UAV 356G, Toyota Raum Reg. No. UAU 763Q and Isuzu Elf Bumper. DW1 stated that he fully paid for all the said motor vehicles and he does not owe the Plaintiff any monies at all. He stated that he paid UGX 38,000,000/= for the Toyota Mark X; UGX 30,400,000/= for the Toyota Kluger; UGX 17,000,000/= for the Toyota Raum; and UGX 35,000,000/= for the Isuzu Elf Bumper. DW1

stated that he later returned the Isuzu Elf Bumper to the Plaintiff. DW1 stated that in the course of the transactions, he dealt with Hussein Sseguja (PW1) who was the Plaintiff's Sales Manager. The Defendant prayed for dismissal of the suit with costs and with an order against the Plaintiff to hand over the log books to the Defendant and to URA Motor Vehicle Registration Department to register the three motor vehicles in the Defendant's names.

DW2 (Wampamba Nehemiah) confirmed that the Defendant purchased four motor vehicles from the Plaintiff which the Defendant fully paid for and does not owe the Plaintiff any money. DW2 also stated that the fourth motor vehicle, the Isuzu Elf Bumper was returned by the Defendant to the Plaintiff.

Submissions by Counsel

Both Counsel filed and relied on written submissions. I will refer to the submissions in the course of resolution of the issues.

Resolution of the issues

Issue 1: Whether the Defendant is indebted to the Plaintiff to the tune of UGX 58,000,000/=

There is no dispute as to whether a contract for purchase of motor vehicles existed between the Plaintiff and the Defendant. The Plaintiff led credible evidence on this fact and the Defendant both in his Written Statement of Defence (WSD) and in his evidence also admitted this fact. The dispute is as to whether or not the Defendant fully paid for the said motor vehicles. The claim by the Plaintiff is that the Defendant made part payment remaining with an outstanding balance of UGX 58,000,000/=. The Defendant on his part states that he fully paid up the entire sum and does not owe any money to the Plaintiff.

The Plaintiff showed in evidence that when the Defendant purchased the Toyota Kluger motor vehicle, the Defendant made part payment of UGX

15,400,000/= leaving a balance of UGX 15,000,000/=. The Plaintiff adduced evidence of acknowledgment receipts for the sum of UGX 15,400,000/= variously dated 20/05/2014 (Exhibit P3), 24/05/2014 (Exhibit P4) and 29/05/2014 (Exhibit P5). The last receipt (Exhibit P5) indicates the outstanding balance as UGX 15,000,000/=. The Defendant did not deny these receipts. He, on his part, claims he paid up the balance.

Regarding the second motor vehicle, the Toyota Mark X, the Plaintiff led evidence to show that the Defendant did not make any deposit on the purchase price but undertook to pay the full amount by 30th June 2014, the transaction having taken place on 26th May 2014. The Defendant claimed he fully paid for this motor vehicle.

On the third motor vehicle, the Toyota Raum, the Plaintiff showed in evidence that the Defendant made a part payment of UGX 12,000,000/= remaining with a balance of UGX 5,000,000/=. The Plaintiff adduced evidence of an acknowledgment receipt which was admitted in evidence as Exhibit P1. The receipt shows the outstanding balance as UGX 5,000,000/=. The Defendant did not deny the said receipt. He claimed he paid the balance of UGX 5,000,000/=.

It was submitted by Counsel for the Plaintiff that the Plaintiff had led sufficient evidence to prove sale of the motor vehicles by the Plaintiff to the Defendant and that the Defendant had not paid the outstanding balances. Counsel submitted that the Plaintiff had adduced evidence of receipts issued by the Plaintiff to the Defendant in acknowledgment of the part payments. The Plaintiff had also retained the logbooks of the said motor vehicles, a sign that full payment had not been effected.

In reply, Counsel for the Defendant submitted that the evidence of Hussein Sseguja (PW1) upon being cross examined corroborated the Defendant's defence and evidence that the latter paid off all the monies for the motor

vehicles and does not owe the Plaintiff any monies at all. Counsel relied on **Section 15 of the Evidence Act** and the case of **Abubaker Seruwagi vs Jaffery Forex Bureau Ltd HCCS No. 830 of 2003** to submit that when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact and the Court is enjoined to look at the same in order to establish what the true facts are. Counsel invited the Court to visit the course of dealings in the present case and find that the Plaintiff had failed to prove to the Court that the Defendant owes him the sum of UGX 58,000,000/= and that the Plaintiff's written testimony was incoherent, inconsistent and incredible.

In civil proceedings, the burden of proof lies upon he who alleges. **Section 101 of the Evidence Act, Cap 6** provides –

> *(1) Whoever desires any court to give judgment 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 -

> *The burden of proof as to any particular fact 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.*

The burden of proof in civil proceedings, therefore, normally lies upon the Plaintiff. The standard of proof is on a balance of probabilities. The law however goes further to classify between a legal burden and an evidential burden. When a Plaintiff has led evidence establishing his/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.

It is also the case under the law that the burden of proof in any particular case depends on circumstances in which the claim arises. Considering the aspect of payment, where one party alleges payment and the other is denying, the burden of proof in such a case lies upon the party alleging payment. In ***J.K. Patel v. Spear Motors Ltd SCCA No. 4 of 1991 [1991] UGSC 9 (11 October 1991)***, the Supreme Court, quoting from **Odgers on Pleading and Practice 21st ED., at pp. 186 -187** stated as follows:

> ***"Payment before action is a matter of defence which must be pleaded and proved by the defendant. A plea of payment should state that the payment relied on was made before the issue of the writ, giving dates and amounts and also any facts showing an appropriation of such payments to the debt sued for in the action. But there is no need for the defendant to plead he has paid any sums for which he is expressly given credit in the statement of claim. The plaintiff is taken to be suing for the balance due after crediting payments he admits."***

The Supreme Court (in the above quoted case) concluded that the burden of proof in the sense of adducing evidence was upon the defendant to prove payment.

In the instant case, the Defendant claimed in evidence that he fully paid the monies claimed by the Plaintiff. He however adduced no proof of such payment. Incidentally in the WSD, the Defendant was not that emphatic on payment. His defence was that he was *"not indebted to the Plaintiff in the sum claimed in the plaint"* and that he *"did not breach the contract since there was no date on which he should have paid the balances. The oral contracts executed between the two parties were open ended"*.

Given the evidence adduced by the plaintiff as above highlighted, whether the Court takes the version in the WSD or in the Defendant's evidence, the burden of proof shifted to the Defendant to prove any of those assertions.

The Defendant was only exonerated from proving that which the Plaintiff acknowledged having received. The Defendant had the duty to lead evidence to prove that he paid monies beyond that acknowledged by the Plaintiff. The Plaintiff produced documentary evidence of the sums received and acknowledged by them. If the Defendant desired to be believed that he paid more than what is contained in the exhibited receipts, he had to adduce evidence to that effect. The Defendant did not do so. The Defendant did not therefore execute the evidential burden that lay upon him under the law. I have not found any incoherence, inconsistence or incredulity in the Plaintiff's evidence as claimed by the Defence Counsel in their submissions. I have found the Plaintiff's evidence adduced by PW1 consistent within itself and with the Plaintiff's pleadings.

The Defendant further claimed in evidence that he purchased four motor vehicles from the Plaintiff including an Isuzu Elf Bumper which he paid for but later returned to the Plaintiff. This claim however does not appear in the Defendant's WSD. It constitutes a departure from the Defendant's pleadings which is unacceptable under Order 6 rule 7 of the CPR. That claim therefore cannot form part of the Defendant's defence. This also explains why the Plaintiff made no response to this claim. The same is therefore disregarded by the Court.

In all therefore on the first issue, the Plaintiff led ample evidence to prove on a balance of probabilities that the Defendant is indebted to the Plaintiff in the sum of UGX 15,000,000/= in respect of the Toyota Kluger motor vehicle; UGX 38,000,000/= in respect of the Mark X motor vehicle and UGX 5,000,000/= in respect of the Toyota Raum motor vehicle; totalling to UGX 58,000,000/= as claimed by the Plaintiff. The first issue is therefore answered in the affirmative.

Issue 2: What remedies are available to the parties?

In the plaint, the Plaintiff claimed for recovery of the sum of UGX 58,000,000/=, for UGX 20,000,000/= as loss of profits, for general damages, interest and costs of the suit. The Defendant prayed for dismissal of the suit with costs.

Given my finding on issue one above, the Plaintiff is entitled to recovery of the principal sum of UGX 58,000,000/= as claimed.

On the claim of UGX 20,000,000/= claimed as **loss of profits**, the Plaintiff neither pleaded nor adduced evidence on this claim in a substantial manner. The law is that loss of profits, just like loss of income, is claimed as special damages, which have to be specifically pleaded and proved in evidence. See ***AZK Services Ltd vs Crane Bank Ltd HCCS No. 334 of 2016 [2018] UGCOMM 63 (7 August 2018)*** and ***AV Flexologic bv v. Monarch Paper Convertors Ltd [1998] Lexis Citation 1824 (U.K Court of Appeal)***.

In the instant case, the Plaintiff neither specifically pleaded nor proved the claim for loss of profits. The Plaintiff simply included it among their prayers at the bottom of the plaint. The same cannot therefore be considered and/or awarded by the Court.

The Plaintiff claimed for **general damages** for breach of contract. In evidence PW1 stated that as a result of non-payment by the Defendant, the Plaintiff had continued suffering financial loss.

Counsel for the Plaintiff submitted that **Section 61(1) of the Contracts Act** empowers the court to award compensation for any loss or damage caused to one party due to another's breach of contract. **Section 61(4)** thereof further provides that in estimating loss, the court has to consider the means of remedying the inconvenience caused by non-performance of the contract that exists at the time. Counsel for the Plaintiff further relied on the case of

Stanbic Bank (U) Ltd vs. Sekalega HCCS No. 185 of 2009 to submit that in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter and the economic inconvenience the other party may have gone through. Counsel submitted that in the instant case, the Plaintiff is a Company that deals in importation and sale of cars for profit. The Plaintiff had shown that they had suffered business loss due to non-payment of the balance on the purchase price. Counsel further submitted that in the case of ***Kampala District Land Board & Anor vs Venansio Babweyaka SCCA No. 2 of 2007***, it was held that damages are the direct probable consequence of the act complained of and such consequence may be loss of profit, physical inconvenience, mental distress, pain or suffering. Counsel invited the Court to exercise its discretion and award the sum of UGX 10,000,000/= to the Plaintiff as general damages.

Counsel for the Defendant did not make a specific reply to the Plaintiff's submissions on damages. He only prayed that the Plaintiff's suit be dismissed.

The law on general damages has been aptly set out by Counsel for the Plaintiff in his submissions. I will only add that in the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered (See ***Uganda Commercial bank v. Kigozi [2002] 1 EA 305***). Furthermore that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in if he or she had not suffered the wrong (See **Hadley v. Baxendale (1894) 9 Exch 341; Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993 and Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992**). The damages available for breach of contract are measured in a similar way as loss due to personal injury. The court should look into the future so as to forecast what would have been likely to happen if the contract had not been entered into or breached. (See **Bank of**

Uganda Vs Fred William Masaba & 5 Others SCCA No. 3/98 and **Esso Petroleum Co. Ltd Vs Mardon (1976) 2 ALL ER**).

I have already come to the conclusion that the Defendant breached the contract through non-payment of the balance of the purchase price. The Plaintiff has shown that they are a company dealing in importation and sale of cars for profit. As such, by having their money held beyond the agreed period, the Defendant clearly occasioned the Plaintiff loss, inconvenience and an interruption of their business operations. I have therefore found that the Plaintiff is entitled to an award of general damages. From the evidence and circumstances, and taking into consideration the principles set out in the decided cases, set out above, I find the sum proposed by Counsel for the Plaintiff, of UGX 10,000,000/=, reasonable and appropriate compensation to the Plaintiff in the form of general damages for breach of contract. I award the same to the Plaintiff.

On **interest**, the Plaintiff sought interest at the rate of 30% per annum on the principal sum of UGX 58,000,000/= from February 2014 till payment in full.

Under **Section 26(2) of the Civil Procedure Act**, where the decree is for payment of money, the court may, in the decree, award interest at such a rate as the court deems reasonable to be paid on the principal sum. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and ought to compensate the plaintiff accordingly. (See **Premchandra Shenoi and Anor Vs Maximov Oleg Petrovich SCCA No. 9 of 2003** and **Harbutt's 'placticine' Ltd V Wayne tank & pump Co. Ltd [1970] QB 447**).

In determining a just and reasonable rate, courts take into account the ever rising inflation and 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 falls due. **(**See **Kinyera Vs the Management Committee of Laroo Building Primary School HCCS 099/2013**).

I have taken into consideration that the Defendant has kept the Plaintiff out of use of their money and the Defendant has held on it for over five years now. The Plaintiff is a commercial entity who does business for profit. The Plaintiff is therefore entitled to interest at a commercial rate on the principal sum. The rate of 30% per annum claimed by the Plaintiff is on the high side. The prayer by the Plaintiff that the interest should run from February 2014 also has no basis. The contracts herein had different dates of performance. The dates were between May and July 2014. In my view, the definite date of default is the date when a notice of demand was served onto the Defendant, which was on the 19th August 2014, according to paragraph 4(k) of the plaint. I will therefore award interest to the Plaintiff on the principal sum at the rate of 24% per annum from the 19th August 2014 till payment in full. I further award interest on general damages at the rate of 6% per annum from the date of judgment till full payment.

As the successful party, the Plaintiff is also entitled to the costs of the suit. The same are awarded to the Plaintiff.

In the result, judgment is entered for the Plaintiff against the Defendant for:

1. Payment of the principal sum of UGX 58,000,000/= being the outstanding balance on the purchase price.
2. Payment of the sum of UGX 10,000,000/= as general damages for breach of contract.
3. Payment of interest on (1) above at the rate of 24% p.a. from the 19th August 2014 till payment in full; and on (2) above at the rate of 6% p.a. from the date of judgment till payment in full.

4. Payment of the taxed costs of this suit.

It is so ordered.

Signed, dated and delivered by email this 28th day of May 2020.

Boniface Wamala

JUDGE