

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**CIVIL SUIT NO. 539 OF 2016**

**BAREBEREHO ROGERS** .....**PLAINTIFF**

**VERSUS**

**ZIBUCO CIVIL ENGINEERING & CONTRACTORS** ..... **DEFENDANT**

**BEFORE: LADY JUSTICE LYDIA MUGAMBE**

**JUDGMENT**

1. This is judgment in civil suit No. 539 of 2016 in which the Plaintiff seeks orders that the Defendant pays him Ug. shs: 54,377,000/= (Uganda Shillings fifty four million three hundred seventy seven thousand only), interest of 30% from the date of default till payment in full, general damages and costs of the suit.
2. The Plaintiff is represented by Ms. Zawedde Lubwama Lukwago of M/s. Zawedde Lubwama & Co. Advocates and the Defendant is represented by Ms. Faridah Ikyimana of M/s. Geoffrey Nangumya & Co. Advocates.
3. The Plaintiff testified as PW1 and failed to bring any other witnesses. During cross examination on his written statement tendered as PW1 Exhibit 1, the Plaintiff explained that the late Judith Kazairwe signed postdated cheques for him and gave him these cheques as proof that she was going to pay him back. In the first instance he explained that he had been lending the said Judith money for a long time. He also explained that he used to supply the late Judith cement and she would sign the said cheques. He gave

evidence of some cheques that Judith had signed and they were paid or where the money in the cheque would be paid and he would return the original cheque to Judith. He denied knowledge of the late Judith's mental sickness or having ever worked for the Taratibu family.

4. He explained that he met Judith and Mr. Taratibu at his shop/ business in Kamwokya in March 2007 where he sold cement. However PW1 said that his cement shop in Kamwokya was worth Ug. Shs. 40,000,000/= (Ug shs: forty million only) but had no name and was not registered. He adduced PW1 exhibit 2 collectively as proof of attachment and sale of the Defendant's property in 2008.
5. Although we adjourned so many times for the Plaintiff to bring his other witness who was his brother, a one Mr. Ngerejaho Geoffrey, the same did not appear and no satisfactory explanation was given. The Plaintiff said his brother needed witness summons which were issued but he still did not come. On another occasion the Plaintiff said his brother could not come because he was busy. At the request of the Plaintiff's counsel, his brother's statement was tendered as PW2 Exhibit 1 to be treated as unsworn and not cross examined. In earnest, there is no justifiable reason why the second Plaintiff's witness did not come to court. In the circumstances, I am reluctant to rely on his unsworn and uncross-examined witness statement at all.
6. The Defendant brought four witnesses who also proceeded by witness statement. During cross examination on his witness statement tendered as DW1 exhibit 1, DW1 Mr. Mabike Sande explained that he came to know the Plaintiff from his employment as a driver in the Defendant Company. As the driver of Mr. Taratibu the owner and Managing director of the Defendant Company, he often went to Mr. Taratibu's home in Bukoto and that is where he came to know the Plaintiff who worked as a shamba boy, cook and house boy. DW1 was a driver of one of Mr. Taratibu's lorries. The Plaintiff who was a worker at the home would open the gate for them and they used to talk because they used to work for the same master.

7. DW1 also explained that as a truck driver he would carry cement, bricks, sand and other building materials and only left this employment after an accident in 2008. DW1 explained that what he knew about the Plaintiff is that the late Judith would give him money to buy food stuffs for the children between 2008 and 2009. He categorically explained that he never carried any building materials from the Plaintiff's business in Kamwokya. Normally he bought the building materials from hardware world and would pay hardware world.
8. During cross examination on his witness statement tendered as DW2 exhibit 1, DW2 Mr. Mbazira Kenneth explained that he worked for the Defendant Company for 10 years and he knew the Plaintiff for the 10 years as a worker at the Taratibu home. As a worker his designation was cooking food. He found the Plaintiff working at the Taratibu home and left him working there when he left his employment. He said he knew the Plaintiff very well as a fellow worker, they used to have drinks in Kifumbira on weekends and off days and they both stayed in Kifumbira in Kamwokya. He categorically explained that he did not know of any business the Plaintiff had. All that the Plaintiff did was work at the Defendant director's home in Bukoto and he never witnessed any business between the Plaintiff and the late Judith Kazairwe.
9. The statement of Mr. Taratibu the Managing Director and owner of the Defendant company was tendered as DW3 exhibit 1. The defence explained that Mr. Taratibu could not attend court because he was suffering from kidney failure and hospitalized in the United States of America. They also brought satisfactory evidence to prove this. With such medical evidence the defence satisfactorily demonstrated justifiable cause for the said Taratibu's failure to attend court. His witness statement was therefore easily admissible and reliable. However, this court treated it with caution as it is unsworn and not cross examined.
10. Generally Mr. Taratibu as DW3 deponed that the Defendant company has never had business with the Plaintiff or authorized the said Kazairwe to deal with the Plaintiff in

any business association. The Plaintiff was simply a shamba boy/cook in his home in Bukoto for all the years he knew him and lived with him.

11. DW4 Mr. William Lwanga John whose statement was tendered as DW4 exhibit 1 explained that he worked for the Defendant company from 1992 to 2007 and came to know the Plaintiff in 1999 when they met at Mr. Taratibu's home in Bukoto. He explained that the Plaintiff came as a helper and casual worker at Mr. Taratibu's home and later worked as a cook for a very long time. DW4 was a fore man in the Defendant company. For all the time he knew the Plaintiff, he had no dealings between him and Judith Kazairwe. He categorically explained that he has never known the Plaintiff to be a businessman insisting that he was a cook and has always known him as such. He also categorically explained that he has never heard of the Plaintiff's hardware or cement business and that the Plaintiff has never been in business with any one. He explained that the Plaintiff was well known by everyone as just a cook. He even laughed at any suggestion that the Plaintiff had a cement business.

12. All in all after hearing both sides one of the parties is clearly peddling lies and determining who it is, is central to the determination of this suit. The Plaintiff claims to have had business dealings with the Defendant from which the bounced cheques amounts arose. In circumstances where the Defendant disputes any such business dealings, the Plaintiff needs to demonstrate that these dealings actually took place to my satisfaction. However the Plaintiff claims he had a cement business for which he supplied only the Defendant. His business shop in Kamwokya had no name and he supplied only the Defendant. He has no record of these or any transaction. This together with his demeanor of looking ambushed and with no straight answer to the questions asked in cross examination by defence counsel and clarification by court point to an untruthful witness.

13. On the other hand, the consistent defence testimony is that the Plaintiff was a simple laborer and cook at the home of Mr. Taratibu, he has never had any business dealings with the Defendant company or Ms. Kazairwe and has never been a business man. It is no wonder that the Plaintiff's alleged cement business had no name as he testified. I find this

consistent and well corroborated defence testimony more truthful, of probative value and reliable. Because of this I am convinced that the Defendant's version of the events is the truthful one. In the same way, I believe the other defence evidence which corroborates the theory that the Plaintiff has never been a business man or had business dealings to warrant the cheque versions that he claims in this suit.

14. The other reliable and corroborative Defence evidence is that the late Kazairwe has never at any material time been a director of the Defendant company, she only became an account signatory/office manager after Mr. Taratibu was taken ill and ceased being so on 14<sup>th</sup> February 2008 when she got a severe stroke leading to memory loss and paralysis and left for her home in Rwanda in October 2008.
15. More believable inferable evidence is that the Plaintiff attended to the late Kazairwe at Kadic hospital and at home when she suffered stroke and by virtue of this association, he had access to vital company documents like cheque books from which he stole various cheque leafs and later attempted to cash them. Having failed to cash the cheques the Plaintiff and his brother Geoffrey Ngerejaho filed civil suits Nos. 1774 and 1775 of 2008 in the Chief Magistrates court in Nakawa and orchestrated a mission to illegally attach the Defendant's property without the knowledge of the Defendant's directors who at all material times were out of the country.
16. In one of the suits the Plaintiffs illegally attached and sold the Defendant's property including office furniture, computers and a complete carpentry machinery set all valued at Ug. Shs. 200,000,000/= (Ug shs: two hundred million only) and the same was allegedly sold at Ug. Shs. 6,000,000/= (Ug shs: six million only). The Defendant denies ever having received any notice of dishonor for the bounced cheques in issue. The Plaintiff did not adduce any evidence to my satisfaction to demonstrate that he notified that Defendant of the bounced cheques. There is also no evidence that the Defendant was served with summons in Misc. Application 1051 of 2008.

17. In its counter claim the Defendant contends that the Plaintiff through his actions of stealing the cheque leafs, attaching and selling the Defendant's property committed breach of trust against the Defendant company whose Director employed and lived with him for so many years. For this breach of trust they seek general damages, special damages and costs of the counter claim. They seek damages also for the unjustified enrichment and theft and the resultant illegal execution which resulted in great loss and damage to the Defendant.
18. From the defence evidence, I am satisfied that indeed the Plaintiff acted in breach of trust when he took advantage of Ms. Kazairwe's illness and incapacity, stole the Defendant's cheques in issue, without authorization tried to cash them and later unfairly and improperly used the process of court to attach and sell the property of the Defendant.
19. In **Kibuuka Nelson & Anor v. Yusuf Zziwa HCCS No. 81 of 2007** court set aside an *ex parte* judgment on the well settled reason that the Applicants had not been duly served. It then allowed an investigation into whether a sale following an execution was done legally. The court was of the view that where an execution by attachment has been regularly carried out but the resultant sale found to be riddled with fraud or illegality, the court is empowered to make an order of restoration.
20. Similarly in this case although the execution was through a process of court I find that the resultant sale by the Plaintiff without proper notice to the Defendant at a ridiculous under value of Ug. Shs. 6,000,000/= for property worth Ug. Shs. 200,000,000/=, a sale embedded in the fraudulent acquisition of the cheques in issue, the said sale was riddled in fraud and illegality. Moreover, even the Plaintiff going to court on the cheques in issue in the first place was a fraudulent scheme. Therefore the courts were misused. A restoration order of the property in issue that was sold or its value for the Defendant is proper in the circumstances of this case and is accordingly issued.
21. Based on all the above the Plaintiff's suit is dismissed and the Defendant's counter claim is allowed with the following orders.

- i. Special damages for the Defendant property sold through a fraudulent court process of Ug. Shs. 100,000,000/= (Uganda shillings one hundred million).
- ii. General damages for the inconvenience and pain suffered by the Defendant Directors and beneficiaries through the fraudulent actions of the Plaintiff, breach of trust and abuse of court process of Ug. Shs. 100,000,000 (Uganda shillings one hundred million).
- iii. All the cheque payments that the Plaintiff claims to have been paid by the Defendant should be extensively investigated by the police with a view to his prosecution if he is implicated in fraud regarding them.
- iv. Costs of the Defendant to be paid by the Plaintiff.

I so order.

**Lydia Mugambe.**  
**Judge.**  
**31/05/2018.**