

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CIVIL DIVISION)

CIVIL SUIT NO. 326 OF 2014

MAGDALENE LAMWAKA-----PLAINTIFF

VERSUS

M/S MUKONO BOOKSHOP PRINTING AND PUBLISHING CO. LTD-----DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The facts of the plaintiff's case are that on 20th November 2009, she entered into a contract with the defendant who undertook to print and supply two Geography textbooks titled-(The concept of Map Reading) & (The Concept of Map Reading and Photographic Interpretation) authored and copyrighted by the plaintiff.

The plaintiff delivered the two books to the defendant in soft copies. The defendant according to the contract was to print and sell the two books and to remit to the plaintiff her entitlement from the quantities supplied within two weeks upon receipt of full payment from the Ministry of Education and Sports.

The defendant never disclosed to the plaintiff the quantities supplied, but the plaintiff later learnt from the ministry of education that the defendant supplied 183,741 books from which the plaintiff was entitled to 413,417,250/=.

The defendant was duly paid by the Ministry of Education and Sports in February 2014 but only remitted 15,000,000/= in total breach of the contract. The balance of 398,417,250/= has not been paid.

The plaintiff learnt from reliable sources that the defendant made reprints that were allegedly made to compensate for damaged and lost copies without notifying or informing the plaintiff.

The defendant also made unauthorised further printing of “The Concept of MAP READING for Ordinary Level” and continued to sell in its own bookshop and to other buyers and outlets, including schools.

The defendant made general denial in respect of some of the facts without giving any specific answers. The defendant contended that the book that was sold on retail was on the authorisation of the plaintiff because the same books were the excess published textbooks of those supplied to the ministry of Education and Sports.

The defendant further contended that it has always been ready to pay the plaintiff’s balance of what she is duly entitled but the latter’s dishonesty have delayed the payment.

The defendant further pleaded that the plaintiff has decided to use uncouth methods in accessing information relating to the suit books instead of approaching it directly to avail the same.

AGREED FACTS

According to the record of proceedings, and Joint Scheduling Memorandum the following are the agreed facts;

- The plaintiff and the defendant entered into a contract on the 20th day of November 2009 whereby two Geography Textbooks belonging to the plaintiff as the author namely (The Concept of Map Reading) and (The Concept of Map reading and Photographic Interpretation) were submitted for bidding under reference No. MOEZ/SUPPLS/09-10/3023.
- Geography textbook titled The Concept of Map Reading was the only successful bid and the defendant proceeded to print and supply the said titled textbook to the Ministry of Education and Sports.

- The defendant has since paid the plaintiff 15,000,000/= under the said contract.

AGREED ISSUES.

ISSUES

1. Whether the Plaintiff's suit is barred in law.
2. Whether the Defendant breached the contract as alleged.
3. How much is the Plaintiff entitled to under the suit contract from the defendant.
4. Whether the Defendant committed copyright infringement as alleged?
5. Whether the Plaintiff is entitled to the reliefs sought and if so, the quantum thereof.
6. What remedies are the parties entitled to?

At the trial the plaintiff led evidence of 4 witnesses in proof of her case while the defendant lead 3 witnesses and other evidence was by way of documentary evidence that were exhibited at trial. The plaintiff was represented by Mr Opwonya Dalton Charles and the defendant was represented by Ssebunya Paul.

Issue 1

Whether the Plaintiff's suit is barred in law.

The defendant's counsel submitted that the Plaintiff's suit is based on a claim under Exhibit PE 1 which is a contract between the Plaintiff and the defendant dated the 20th of November, 2009.

The stated contract in its current form contravenes sections 2, 42, and the 1st part of the schedule of the stamp duty Act Cap 342 as amended because the Plaintiff never paid stamp duty on the same hence the Plaintiff is precluded from relying on the same in evidence before this Honorable court because of the stated illegality.

In the case of **MAKULA INTERNATIONAL VERSUS HIS EMINENCE CARDINAL NSUBUGA & ANOR NO. 4 OF 1981 (CA)** Court held that a court of law can't sanction an illegality and that once an illegality is brought to the attention of court it overrides any claim in the pleadings.

Exhibit PE1 contravenes the law hence it can't be enforced against the defendant in its current form.

The Plaintiff can only lodge a claim against the defendant based on an agreement that meets the requirements of the law.

In view of the above, it is the defendant's submission that issue one is answered in the affirmative.

The plaintiff and the defendant have all admitted that there was a contract executed between them with both written and oral terms. This is not a disputed document and it was the duty of both parties to ensure that the agreement or contract is registered or is stamped or pays stamp duty.

Secondly, the inadmissibility of the document for non-payment of Stamp duty does not render the document/contract illegal as the defendant's counsel has submitted. The provision cited is only intended to ensure that government revenue is collected and paid, and not to punish parties by rendering the contract illegal.

The defendant's counsel admitted the said document and court accordingly admitted the same as an Exhibit P1. Therefore, section 43 of the Stamps Act came into play and the admission of such document cannot be called into question under the circumstances presented by the defendant.

The filing of a suit by the plaintiff relying on contract that has not paid stamp duty does not render the suit barred in law. The provision only relates to admissibility of evidence and this does not affect the parties case. There could be alternative ways of proving the case without relying on such document that may not be admitted in evidence.

The plaintiff could still have proved her case even without the said agreement being admitted since it was indeed an agreed fact that the defendant entered into a contract with the plaintiff. It was not necessary to have the same admitted as an exhibit.

The plaintiff's suit was not barred in law.

Whether the Defendant breached the contract as alleged.

The plaintiff's counsel submitted that breach of contract is defined in ***Black's Law Dictionary 5th Edition pg 171*** as where one party to a contract fails to carry out a term. Further, in the case of ***Nakana Trading Co. Ltd Vs Coffee Marketing Board Civil Suit No. 137 of 1991*** court defined a breach of contract as where one or both parties fails to fulfill the obligations imposed by the terms of contract.

From the facts in this case, the defendant only part paid the Plaintiff **Shs.15,000,000/= (Fifteen Million Shillings only)** and failed to fulfill the undertaking of paying the plaintiff the balance of **Shs.398,417,250/= (Three Hundred Ninety Eight Million, Four Hundred Seventeen Thousand, Two Hundred Fifty Shillings only)**, which is over Fifty Eight (58) months overdue now.

Plaintiff's counsel noted that that it has been established by decided cases that ***"breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages to the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible or substantially fails to perform his promise"***. – See **Ronald Kasibante Vs Shell (U) Ltd, HCCS No. 542 of 2006; [2008] ULR 690.**

The Defendant's pleadings and the testimony of DWI only seek to lower the balance remaining to be paid through trying to force the Plaintiff to agree to a new term to remedy alleged loses that that are said to arise in ways that the Plaintiff has nothing to do with but that are clearly breaches of contract by the distributor separately contracted by the defendant through the Courier Agreement exhibited as defence Exhibit DE 3. Some of the alleged losses appear to arise from negligence of the defendant and they were not substantial.

It was an agreed fact that the defendant was fully paid by the Ministry of Education in early 2014 and early 2015 and the defendant was contractually obligated to promptly pay the Plaintiff within two (2) weeks as per paragraph 4 of the agreement, Exhibit PE I.

The contract was therefore breached by the defendant.

The defendant appears not to contest this issue and has not made any submissions in rebuttal. The defendant only paid 15,000,000/= of the amount they were supposed to pay.

The defendant failed to fulfill his obligations under the contract i.e he failed or refused to pay the plaintiff the sums agreed upon under the contract and the same remains due and owing.

In the case of *Azziz vs Bhatia Brothers Ltd [2001] EA 7*. Court noted that a party who has performed his part of the bargain may be assisted by the court to enforce the contract against a defaulting party.

The defendant therefore breached the contract.

ISSUE 3

How much is the Plaintiff entitled to under the suit contract from the defendant.

The plaintiff's counsel submitted that the defendant only part paid the Plaintiff **Shs.15,000,000/=** and failed to fulfill the undertaking of paying the plaintiff the balance of **Shs.398,417,250/=** which is over Fifty Eight (58) months overdue now.

This is a contractual matter calculated as per the evidence of the Plaintiff in the Written Witness Statement of PWI.

The Plaintiff in her Written Witness Statement pointed out the Costs of transport, allowances and telephone charges following and investigating the matter amounting to **Shs.7,800,000/= (Seven Million Eight Hundred Thousand Shillings only)**. This part of her testimony was neither challenged by affidavit or through cross-examination, so it has been openly proven.

The defendant's counsel submitted that the Plaintiff handed to the defendant two text books titled the concept of map reading and photographic interpretation and these would be published under the trade names of Printapex Uganda Ltd and Joibaso Publishers Ltd.

The text book that was successful during the bidding process was titled the Concept of map reading (Exhibit PE2) and the same was published under the trade name of Mukono Bookshop; this explains the fact that the Plaintiff and the defendant's transaction was outside the terms of exhibit PE1 hence this implies that the text book the basis of the Plaintiff's claim is not covered under the terms of exhibit PE1.

It is not in dispute that the Ministry of Education and Sports executed a supply contract with the defendant for the supply of the successful text book titled the Concept of Map reading. (Exhibit PE2).

It is the defendant's unchallenged evidence that the defendant had unfairly lost the bid to supply Exhibit PE2 to the Ministry of Education and Sports and it was after the intervention of the office of the President and that of the Ministry of Education and Sports (refer to exhibit DE1, DE8 and DE9) that the defendant's bid to supply exhibit PE2 was successful; the process of accepting the defendant's bid took two years in which period the cost of publishing the suit text book had gone up from what the parties had anticipated when negotiating clause 3 (three) of Exhibit PE1.

The Plaintiff as per exhibit PE10 never disputed the operational costs incurred by the defendant when implementing contract number MOES/09-10/Suppl/3023/C0530; as per exhibit PE10 the consideration was Ugx. 2,252,269,617/=, the operational costs/expenses were Ugx. 1,904,645,513 hence the profit from the stated contract was Ugx. 347,624,104. This figure is way below the suit claim by the Plaintiff of Ugx. 398,417,250 hence this implies that the defendant would be paying over and above the profit margin.

As per exhibit PE11 the Plaintiff being the author of the stated letter acknowledges the loss incurred by the defendant during the implementation of contract number MOES/09-10/Suppl/3023/C0530.

Section 67 of the Contract Act 7 of 2010 reads Variation of contracts.

Where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract.

The defendant's counsel submitted that the uncontested evidence of Mr. David Kubona Muwaya who has been working in the publishing industry for the last 16 years that as a trade practice, the cost of royalties once reflected in figures in the publishing agreement can be adjusted and this is dependant on the cost of publishing a particular text book which keep on changing.

In view of the above submission, it is the defendant prayer the cost to be paid to the Plaintiff under clause 3 of exhibit PE1 is adjusted to Ugx. 600 the same being the figure that the defendant had verbally agreed with the Plaintiff as the reasonable figure in view of the losses the defendant incurred during the bidding process and also in the course of implementing contract number MOES/09-10/Suppl/3023/C0530. It will be unfair for this honorable court to condemn the defendant to pay any figure that is way above the profit margin that was made from the stated contract putting into consideration that it is the defendant who made sure that the bid for the supply of Exhibit PE2 succeeds.

The plaintiff adduced evidence to show that the defendant under the said contract supplied 183,741copies under the said contract with the Government-Ministry of Education.

The volume of the books supplied is not in issue the defendants have not contested the supplied textbooks as per the contract. The main dispute is the amount the plaintiff is entitled to.

According to the Exh P1 the plaintiff was entitled to 2,250/= .

“ That upon shortlisting of the text books on the list of Approved textbooks of the Ministry of Education and Sports, the Author shall be entitled to two thousand two hundred Uganda Shillings 2,250/= of the proceeds per textbooks procured under the accruing contract under the aforementioned procurement reference.”

The defendant in its defence pleaded as follows;

- (c) “The defendant shall aver and contend that initially the parties had agreed that the plaintiff was entitled to UgX 2,250/= proceeds per textbook, the same was renegotiated by the parties by the parties to UGX 600 after it was realized that the total unit cost was \$3.449 yet the Ministry of Education and Sports purchase price for the same was \$4.845 per text book.
- (d) That it is indeed the plaintiff who proposed the Ugx 600 figure which the defendant agreed to.”

The plaintiff in her reply to defence which was titled “Answer to WSD” she denied the above pleading as hereunder;

3) “The plaintiff denies paragraph 5 clauses (c) and (d) of the WSD and shall aver that there was never any re-negotiation of the plaintiff’s entitlement per book to any lower figure than Shs. 2,250/=”

The defendant’s witness DW 1 stated in his witness statement that the contract was amended and pricing was changed from 2,250 to 600.

However, the witness does not state when the contract was re-negotiated and from where the negotiations were conducted.

The defendant’s counsel has cited the contracts Act in respect of variations to contracts;**Section 67 of the Contract Act 7 of 2010 reads Variation of contracts.**

Where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract.

The above provision cited by the defendant's counsel is not applicable to the facts of the present case.

A contract that is in writing cannot be varied verbally or orally.

Section 92 of the Evidence Act provides;

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved, according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or substituting from its terms;

Similarly in the case of ***Ruhemba vs Skanka Jensen (U) Ltd [2002] 1 EA 251***, The court of Appeal held that; *An Oral variation leaves the contract intact since a contract which is by law required to be in writing can only be varied by a subsequent written agreement.*

The defendant's alleged variation of the contract orally is disregarded and it would appear it was an afterthought. The variation from 2,250/= to 600/= was a significant variation that went to the root of the contract, such that its variation ought to have been reduced in writing under any circumstances.

The plaintiff is entitled to a payment of 2,250/= per text book multiplied by the number of copies supplied by the defendant under their supply contract under Procurement reference No. MOEZ/SUPPLS/09-10/3023.

$2,250 \times 183,741 = 413,417,250/=$. The plaintiff is entitled to the said sum as her margin on the entire consignment.

ISSUE 4

Whether the Defendant committed copyright infringement as alleged?

The Plaintiff in her Written Witness Statement adduced evidence stating instances of infringement of her copyright.

She also brought three witnesses who demonstrated and proved clear instances of further infringement of her copyright.

PW 2 Ms Mukite Annette as well as PW 3 Mr. Justine Ongei each exhibited a receipt and a book they bought from the Bookshop of the Defendant and the Defendant did not challenge or deny the fact that the books were sold at their bookshop. DWI only tried to justify such sale but in vain. PW4 also proved books were supplied in schools in Mbarara outside the contract, not through Ministry of Education.

DWI also testified that the defendant printed extra books to replace books that were lost and those that were eaten by termites. He contradicted himself and was not quite sure whether to say the extra books were printed in India or in Uganda. It was clear that the extra books were printed without the consent of the Plaintiff. The defendant did not even have the courtesy of informing the Plaintiff that more books were printed. The number of extra books printed were never proven nor clearly stated by the defendant.

The Plaintiff stated in paragraph 4 of her witness statement that she never gave the defendant the copyright to any of her books but on the inside cover page the defendant Mukono Bookshop Printing and Publishing Co. Ltd. unlawfully indicated in writing that the books are copyrighted to it.

The plaintiff's counsel cited the case of Angella Katatumba –V- The Anti-Corruption Coalition Of Uganda (ACCU) (H.C.C.S No. 307 Of 2011) in support of his submission.

The defendant's counsel cited; ***Section 101 of the evidence Act Cap 6 states that;***

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.

The Plaintiff under her pleadings and evidence alleged that the defendant infringed on her copyright for exhibits PE2 and PE3. This allegation is premised on

the claims by the Plaintiff that as per Exhibit PE2 the defendant reflected ownership of the copyright in the same whereas not.

The Plaintiff further alleged that the defendant made reprints of Exhibits PE3 and PE2.

The plaintiff relied on the evidence of among others SCP Odwong Odongpiny Denis who claimed that he recovered as police exhibits copies of the text titled the concept of mapping reading and photographic interpretation from Adit book shop and from St. Peters SS Katukuru and that this was done in course of his duty as a police officer after receiving a complaint from the Plaintiff to that effect.

During cross examination SCP Odwong Odongpiny Denis admitted that there was no police file number in respect to the stated Plaintiff's police complaint; he further stated that he was not the investigating officer in respect to the stated complaint; he confirmed that he never had a search warrant when he recovered the stated text books (if they were even any books recovered); he stated that he never had any evidence that the defendant supplied the recovered text books to Adit Book shop and St. Peters SS Katukuru . He stated that the annexures to his witness statement are noted part of the evidence on the police file.

In view of the above inconsistencies it is the defendant's submission that SCP Odwong Odongpiny Denis failed to avail any evidence that it is indeed the defendant that supplied the stated text books to Adit Bookshop and St. Peters SS Katukuru.

The Plaintiff in respect to her contention that the defendant reprinted the text book titled The Concept of Map Reading and sold the same in its bookshop relied on the evidence of Justice Ongei (PW3) and Mukite Annet PW2; the receipts they submitted don't reflect the fact that it is the stated witnesses that purchased the stated books from the defendant; the defendant never denied the sale on retail of the text books titled the concept of map reading and further stated through the evidence of DW1 and DW2 that the books sold were those that were in excess of those supplied under contract number MOES/09-10/Suppl/3023/C0530 and further stated that in publishing when implementing a contract especially those

with Government, excess books are printed for purposes of replacing those damaged and lost and at the completion of the contract implementation the unutilized ones are sold on retail so that they don't go to waste. Exhibit PE1 never had a cap on the number of books to be printed under the stated contract.

The Plaintiff never availed any evidence that the text book titled the concept of map reading and photographic interpretation had been sold by the defendant in the defendant's book shop hence the allegation to that effect by the Plaintiff lacks merit.

The other line of a claim by the Plaintiff for copyright infringement was based on the fact that the defendant misrepresented that the copy right in the text book titled the concept of map reading belonged to the defendant; she based her assertion on the contents of page ii and iii of exhibit PE 2; it is the defendant's submission that the cover page, the page next to the cover page, pages ii, iii, iv, vi, viii of exhibit PE2 clearly reflect that the Plaintiff's contribution to the Copyright in exhibit PE2 is clearly reflected as she is referred to as the Author and copyright owner.

The defendant through the evidence of Mr. David Kubona Muwaya contended that the contribution to the copyright in a text book is by Authors, Illustrators, photographers, book designers and cartographers and concluded by saying that a copyright in a book is not only the contribution of an author.

The Plaintiff never availed any evidence of the original manuscript to show that she solely contributed to the photography, the illustration or that she designed exhibit PE2 or that she provided the services of a cartographer in respect to the suit text book but nonetheless her works as an author were recognised on the suit text book and in fact it is her picture that appears at the last page of exhibit PE2 hence her claim in respect to copyright infringement lacks legal merit

In nutshell it is the defendant's submission that this issue is answered in the negative.

The plaintiff is an author of the book that was the subject of the dispute. An Author is defined under **Section 2** of the *Copyright and Neighbouring Rights Act* as follows;

“Author” means the physical person who created or creates work protected under section 5 and includes a person or authority commissioning work or employing a person making work in the course of employment.

Section 4 of the *Copyrights and Neighbouring Rights Act* also provides for Author entitlement to Copyright protection;

The author of any work specified in Section 5 shall have a right of protection of the work, where work is original and is reduced to material form in whatever method irrespective of quality of work or the purpose for which it is created.

The owner of copyright has economic rights over the protected works;

Section 9 provides;

The owner of a protected work shall have in relation to that work, the exclusive right to do or authorize other persons to do the following-

(a) To publish, produce or reproduce the work;

The plaintiff owns the copyright for her works and indeed she is registered as the owner. Therefore any person who wishes to produce copies of her book must do so with her express permission and authority.

The plaintiff lined up witnesses who stated that they bought copies of the same book from the defendant. The defendant’s defence for being possession of the books while on sale at its outlet was that these are the extra copies made during the contract.

It was wrong for the defendant to deal with the extra copies without the knowledge, consent and approval of the author.

The plaintiff also established that copies of her book were being sold at a bookshop at Mbarara-Adit Bookshop. The police raided the said bookshop and

they were informed that they had sold copies to St Peters Katukuru. PW 4 stated that the books were got from Mukono Bookshop.

Copyright shall be deemed to be infringed by any person who distributes either for purposes of trade or such an extent as to affect prejudicially the owner of the copyright. See ***Gasston and Harbour vs Bwavu Mpologoma Growers Co-operative Union Limited and others [1958] EA 549***

The defendant infringed on the plaintiff's copyright by printing and selling more copies outside the contract without her permission and or authority. This issue is resolved in the affirmative.

Whether the Plaintiff is entitled to the reliefs sought and if so, the quantum thereof.

a) Special damages

The plaintiff is awarded a sum of 398,417,250/= as the balance on the contract for the books supplied to Ministry of Education.

b) General damages.

The plaintiff has sought 1,200,000,000/= as general damages. I have not seen any basis of arriving at such a figure. How many books were sold for her to be entitled to such an award.

*Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it. See ***Benedicto Musisi vs Attorney General HCCS No. 622 of 1989 [1996] 1 KALR 164 & Rosemary Nalwadda vs Uganda Aids Commission HCCS No.67 of 2011****

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is

restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

In the present case, the plaintiff has sought general damages for the infringement of her copy right. Considering the circumstances of the case, the plaintiff is awarded a sum of 5,000,000/= as damages for infringement of her copyright by selling extra copies.

(c) Interest

Section 26 provides for an award of interest that is just and reasonable. In the case of ***Kakubhai Mohanlal vs Warid Telecom Uganda HCCS No. 224 of 2011,*** Court held that;

“ A just and reasonable interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A plaintiff ought to be entitled to such a 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 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”

Special damages shall attract an interest of 8% from the date of filing the suit-24th September 2014.

General damages shall attract interest of 8% from the date of this Judgment.

(d) Costs

The plaintiff is awarded costs of the suit.

It is so ordered.

**SSEKAANA MUSA
JUDGE
25th/02/2019**