

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

CIVIL SUIT NO. 153 OF 2006

GGABA MARKET PROPERTY OWNERS LTD :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

KAMPALA CAPITAL CITY AUTHORITY :::::::::::::::::::::::::::::: DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff and the defendant executed a market management contract to run Ggaba Market in Makindye division for a period of 3 years commencing from 1st March 2004 and ending February 2007.

That sometime around February-March 2005 the defendant under the hand of the Town Clerk office terminated the contract and took over the market barring the plaintiff from running the market, occasioning substantial loss. The Plaintiff Company filed the instant suit among others claiming that the Defendant breached the said contract and that it has suffered damages.

The Plaintiff's case is that the Defendant breached the said contract by terminating it before it expired and that as a result, it has suffered damages and is seeking to recover Ugx.299,892,960 in special damages, ugx. 180,000,000 as general damages and costs of the suit.

On the other hand, it is the Defendant's case that the contract was not terminated but was frustrated thereby preventing either party from fulfilling their contractual obligations.

AGREED FACTS

1. That on the 19th October and 2004 the plaintiff and the defendant executed a market management contract to run Ggaba Market in Makindye division.
2. The management of the Market was taken over before the expiry of the contract between March 2005 and November 2008 by KCC.
3. The market is currently managed by 3rd party-Real Ggaba Market Property Owners Ltd who are the registered proprietors.
4. Real Ggaba Market Property Owners are the registered Owners of land having obtained a lease from ULC on 1st June 2004.
5. Between March 2005 and 17th/11/2008, KCC was managing the Market.

AGREED ISSUES.

(1) Whether or not there was a breach of contract by KCC?

(2) What remedies are available to the parties?

At the trial both parties agreed to file witness statements and the plaintiff lead evidence of three witnesses while the defence led only one witness in support of their case.

The plaintiff submitted that the agreement is not disputed and it is was also an agreed fact without any need to prove. In addition the agreement was admitted by both parties.

The management of the market was taken over by the defendant before the expiry of the contract. Since this was agreed fact between the parties, it is clear that contract ended before the due date.

The plaintiff's witnesses testified to that effect and this was also confirmed in the different documents exhibited in court-P3 which stated that;

That in the interim, KCC Makindye Division takes over the management of the Market with effect from 14th March 2005."

That for purposes of smooth hand over by the current market managers, there will be no collection of dues from Ggaba market..."

Similarly, exhibit P4 also reflected the same position of breach according to the plaintiff's counsel which stated inter alia; "Re-entry of Ggaba market by Makindye Division Council."

According to counsel for the Plaintiff they cited the case of **Asuman Mutekanga vs Equator Growers (U) Ltd SCCA No. 7 of 1995** where it was held that "There is no better evidence than an admission by a party"

The plaintiff led evidence through different exhibit documents confirming the breach of contract in exhibit p3, p4 and P5 and they speak for themselves. Section 94 provides that;

" When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show it was not meant to apply to these fact."

According to the said documents exhibited on court record and the fact they are not challenged leaves the plaintiff's case as clear a breach and the defendant is estopped from denying this breach. The law is settled on failure to challenge evidence on a material or essential point, then such evidence is deemed admitted as inherently credible and probably true. See **Uganda Revenue Authority vs Stephen Mabosi No. SCCA No. 26 of 1995**.

The defendant's counsel submitted that there is unchallenged evidence of **Joanita Ssonko, DWI** that the contract was frustrated when the market vendors carrying on business in Ggaba market formed a company and obtained a leasehold certificate of title for Ggaba market land from the Uganda Land Commission. They formed a Company called Real Ggaba Property Owners Ltd. At the material time

of executing the said contract, the Plaintiff and the Defendant were not aware of the said state of affairs.

There is also evidence on record to show that following the issuance of the said leasehold Certificate of Title to Real Ggaba Market Property Owners Ltd, serious land ownership disputes arose in the market.

This new land owner demanded for vacant possession of the market land which the Defendant and the Plaintiff Company resisted. Real Ggaba Market Property Owners Ltd thus filed a suit against the Plaintiff and Defendant among others challenging the legality of the said contract vide HCCS No. 325 of 2005 though, it later withdrew the suit from Court.

Your Lordship, copies of the pleadings (plaint and written statement of defence) in the said HCCS N.325 of 2005 are on court record as the ***defendant's exhibit DE1.***

According to paragraph 5(iii) of the plaint (exhibit DE1), Real Ggaba Market Property Owners Ltd contended that in October 2004, the Defendant and the Plaintiff Company signed a formal contract in respect of the tender that had began six months ago, irrespective of the fact that the ownership status of the land changed in the interval, in paragraph 5(iv) and (v) of the said plaint, it is stated for Real Ggaba Market Property Owners Ltd that by a letter dated march 10,2005, the then Town Clerk effectively suspended the Plaintiff's contract to pave way for a re-assessment of the market revenue potential which was done with the officials of Real Ggaba Market Property Owners Ltd but that before the findings of this assessment were established, the then Deputy Town Clerk re-instated the Plaintiff's contract, an action that resulted in a violent fight between

Officers of Real Ggaba Market Property Owners Ltd and the Plaintiff Company in the instant suit.

It was the defendant's case that the moment the Defendant ceased to own land on which the market sits, it thus legally speaking lost its right under the contract to claim the monthly rent from the Plaintiff stipulated under the contract. Likewise, the Plaintiff Company was prevented from carrying on its obligation of paying to the Defendant the said monthly rent of ugx.1,000,000.

After realizing that they were responsible for causing trouble in Ggaba market, Real Ggaba Market Property Owners Ltd and Ggaba Market Property Owners Ltd entered into a Memorandum of Understanding with a view of making peace and reconciliation with each other on 12/3/2008 but this did not help the violent and chaotic situation.

Land dispute persisted in the market leading to chaos in some cases and consequently, Central Government officials including the Resident District Commissioner, Kampala intervened as well as the Ministry of Local Government forcing the Defendant to surrender the market to the new owners of the market land. The Defendant accordingly surrendered the market to Real Ggaba Market Property Owners Ltd.

The Minister of Local Government by a letter dated 28th June 2007 addressed to the Ag. Town Clerk of the Defendant directed that the management of the market in issue be in the hands of Real Ggaba market property owners Ltd and the Defendant's role be limited to the collection of the monthly market dues but not in the daily management of Ggaba market. The above evidence is on record as ***the defendant's exhibit DE2.***

The defendant's also contended that the Plaintiff's suit is an abuse of judicial process and a contrivance designed by the low cunning in conspiring with Real Ggaba market property owners Ltd, the Plaintiff's sister Company to defraud the Defendant.

This is evidenced by the fact among others that stakeholders in the Plaintiff Company are the same in Real Ggaba Market Property Owners Ltd. Mr. Kyagaba Charles, PW2 in the instant case is the shareholder number 22 in Real Ggaba Property Owners Ltd's Articles and memorandum of understanding on court record as the **defendant's exhibit DE3**.

According to the search report dated 9th August, 2016 from Uganda Registration Services Bureau, which was admitted on court record **forms part of the defendant's exhibit DE3** shows that Mr. Kyagaba Charles is one of the Directors and is the Company Secretary of Ggaba Market Property Owners Ltd, the Plaintiff Company in this case. In any case, the fact of having the same or related key players in Real Ggaba market property owners Ltd which frustrated is stated in the memorandum of understanding dated 12th March, 2008 clause 1 which states as follows;

'That since all the members were stakeholders in the Second Party, then it is reasonable that they work under the umbrella of the second party which owns the land title'

The said memorandum of understanding is on court record as **the defendant's exhibit DE3**. PW2 Charles Kyagaba signed the said memorandum of understanding on behalf of Ggaba Market Property Owners Ltd. The said Charles Kyagaba also signed on the resolution of Real Ggaba Market Property Owners Ltd

as its Director / Secretary. The Company resolution is part of **the defendant's exhibit DE3** and it is dated 8th September 2009.

The issue of Real Ggaba market property owners ltd and Ggaba market property owners ltd being sister companies was stated in the letter addressed to His Excellence, the Vice President of the Republic of Uganda dated 10th January 2005 authored by Gabriel Musisi and Ali Sekalo, the Managing Director and Secretary respectively in paragraph 4 of the said letter which states as follows;

It is also true that Kampala City Council does not own a single building on the property (land) but all is solely owned by the two companies i.e Real Ggaba Market Property Owners Ltd and Ggaba market property owners ltd (which companies are run by the same people). The said letter was not objected to by the plaintiff and was admitted on record as **the defendant's exhibit DE5**.

In light of the above facts and evidence, it is clear that the plaintiff company and Real Ggaba market property owners ltd are sister companies having the same people that went and obtained a lease but now are claiming under the Plaintiff company for breach of contract. This fact was also brought to the attention of Court on 21st June 2010 by the defendant's counsel as per the record of proceedings.

Indeed, **Joanita Ssonko, DWI** testified in cross examination that she has never come across any document specifically rescinding or terminating the contract in issue.

In view of the defendant's evidence as **per exhibits marked DE1 to DE5**, the said contract was not breached as alleged by the Plaintiff but it was frustrated.

According to Osborn's Concise Law Dictionary, Sweet & Maxwell, 12th Edition on Page 199, under the doctrine of frustration, a contract may be discharged if, after its formation, events occur making its performance impossible, illegal or radically different from that which was contemplated at the time it was entered into.

As earlier submitted, the contract in issue was frustrated when a faction of the Market vendors under Real Ggaba Market Property Owners Ltd, obtained a leasehold certificate of title to Ggaba market from Uganda Land Commission, a fact which was not within the knowledge of the Plaintiff and the Defendant.

The Minister of Local Government by a letter dated 28th June, 2007 addressed to the Ag. Town Clerk of the Defendant directed that the management of the market in issue be in the hands of Real Ggaba market property owners Ltd and the Defendant's role be limited to the collection of the monthly market dues but not in the daily management of Ggaba market. The said letter from the Minister of Local Government is on record as **the defendant's exhibit DE2**.

The Plaintiff's counsel during cross examination referred the Defendant's witness, Joanita Ssonko to the letter from the Mayor, Kampala City addressed to the Resident District Commissioner dated 29th March, 2005 specifically to paragraph 3. The said letter forms part of **the plaintiff's exhibit PE8**.

The Mayor of the Defendant's predecessor was against interference by the Central Government officials in this case, the Resident District Commissioner from interfering with the contract of the Plaintiff Company. This letter was actually protecting the interests of the Plaintiff Company. This letter is also evidence to the defendant's position that due to the interference of the central government officials, the defendant was forced to surrender the market to the Real Ggaba

Market property owners Ltd. The spirit of the said letter was against giving management of the market to the land owners as stated in paragraph 5 of the same letter in issue.

There is evidence that consequently, the Central Government officials including the Resident District Commissioner, Kampala intervened as well as the Ministry of Local Government forcing the Defendant to surrender the market to the new owners of the market land. Letter dated 31st March 2005 from the Resident District Commissioner, Kampala forming part of Plaintiff's exhibit PE8 was directing the defendant's predecessor to let Real Ggaba Market Property Owners Ltd to re-enter and manage the market, is clear evidence to support the Defendant's case.

According to the letter dated 5th January, 2004 from the Vice President of the Republic of Uganda **which forms part of the Plaintiff's exhibit PE8**, the Defendant's predecessor directed to urgently handover Ggaba Market back to Real Ggaba Market Property Owners Ltd.

The letter dated 18th march 2005 forming part of **part of the Plaintiff's exhibit PE8**, does not in any way terminate the contract in issue. It is an explanation to the Minister of Local Government from the Mayor, Kampala City on the legal regime pertaining management of a market in a district.

The letter dated 5th April 2005 from the Mayor, Kampala City to the Resident District Commissioner, Kampala also forming part of the **Plaintiff's exhibit PE8** is a request for guidance on the legal provisions the said Resident District Commissioner, Kampala convened, directed and made decisions and resolutions directing the re-entry of Ggaba Market by the land owners, Real Ggaba Market

property owners Ltd and notifying the said Resident District Commissioner ,Kampala of the disruption his action has caused to the ongoing discussions between the plaintiff company, the contractors and Real Ggaba Market property owners ltd, the land owners and warning that since the contractors are suing the defendant's predecessor, he will foot the bill.

The letter dated 23rd March 2006 is from the Plaintiff's witness, Charles Kyagaba, PW2, to the Defendant's predecessor's city advocate.

By a letter dated March 17, 2005, the Minister of Local Government was stopping the Mayor, Kampala City from evicting Real Ggaba market property owners Ltd from managing the market since it is the land owner of the market land. There is no evidence on court record to show that the defendant breached the contract. To the contrary, there is sufficient evidence to show that the said contract was frustrated. Stakeholders in the Plaintiff Company are the same people in Real Ggaba Market property owners Ltd. At one time, Real Ggaba Market Property Owners Ltd represented by Mr. Kyagaba Charles as its general secretary sued the defendant **vide Civil suit No.248 of 2008: Real Ggaba market property owners Ltd v Kampala City Council Makindye Division** and obtained a temporary injunction restraining the defendant from among others taking over management and control of and revenue collection from Ggaba Market vide **Miscellaneous application No.580 of 2008 arising from civil suit No.248 of 2008.**

According to the defendant, the said contract was not breached as alleged by the Plaintiff but it was frustrated.

The doctrine of frustration

Under the doctrine of frustration, a contract may be discharged if, after its formation, events occur making its performance impossible, illegal or radically different from that which was contemplated at the time it was entered into. See **Osborn's Concise Law Dictionary, Sweet & Maxwell, 12th Edition on Page 199.**

According to **Hodgin on law of contract in Africa pages 183-184** adopted the position settled in **Howard & Co.(Africa) Ltd. v. Burton 23 EACA 366** in the following words: -

'After the formation of a contract, certain sets of circumstances arise which, owing to the fault of neither party, render fulfillment of the contract by one or both of the parties impossible in any sense or mode contemplated by them...the question which the judge has to solve is this, would any reasonable third party consider the effect of such circumstances as altering the obligation of one or both of the parties to such an extent as to make the contract no longer capable of being enforced ? the reasonable third party is the court itself.'

In light of the above facts, the defendant's submitted that the contract was frustrated. The defendant did not breach the said contract.

The defendant pleaded in their amended written statement of defence that the contract was frustrated when the vendors carrying on business in Ggaba formed a company and obtained a leasehold certificate of title for the market land from Uganda Land Commission.

Therefore according to the pleadings, the contract was frustrated when new registered owners demanded vacant possession of the market land from Kampala City Council. That due to great insecurity in and around the market, the central government officials including the RDC forced the defendant to surrender the market to the new owners.

The said frustration of the contract was denied since the different letters written by the different offices from the defendant speak to the contrary. The defendant caused a temporary re-entry or interim take over.

The actions of the defendant's agents are what they allege to have frustrated the contract. PW2 testified that the regardless of the Mayors directive against the illegality, the defendants through its agents went ahead to deploy city law enforcement officers who stopped and barred the plaintiffs agents from entering the market. See Exh P2 and P3.

According to Exhibit P2;

Mayors Parlour

City Hall, Kampala

10th March ,2005

Twon Clerk

Kampala City Council

MANAGEMENT OF GABA MARKET

I received information that you have stopped Gaba Market Property Owners Ltd from managing Gaba Market. I further understand that these people have a running contract for managing the market. Therefore, interfering with that contract may cause dire consequences to KCC.

Furthermore, I understand that many decisions on this particular issue have been taken without the knowledge of the Chairman, Makindye Division. I consider this irregular.

Therefore, before executing the stoppage of the contract of Ggaba Market Property Owners Ltd. I would like to have a thorough explanation of the events. In the meantime the status quo continue.

Thank You

J. Ssebaana Kizito

Mayor, Kampala City.

Similarly, in another letter DATED 11th May 2005 it equally stated that;

“DIRECT MANAGEMENT OF GGABA MARKET BY KAMPALA CITY COUNCIL

I wish to inform you the Kampala City Council has finalised all the necessary arrangements to directly take over and manage Ggaba Market as by law provided.

The takeover exercise is scheduled to start effective from Monday 16th May 2005.....

We hope that this arrangement of Kampala City Council directly managing Ggaba Market will now ease the tension and wrangles that have surrounded the management of this market, while also ensuring KCC receives the statutory revenue from this market.

James K Ssegane

Town Clerk”

In addition in another letter from the Town Clerk Exh P3 also provides as follows;

“TEMPORARY RE-ENTRY OF GGABA MARKET BY KAMPALA CITY COUNCIL

- (i) That the KCC Revenue Task Team in liaison with the Landlords conducts a seven-day exercise with effect from Monday 14th March 2005 to establish the actual market potential of Ggaba Market.*
- (ii) That after the said census, a meeting will be convened between the landlords and KCC to chat out a way forward regarding the market management and revenue sharing arrangements.*
- (iii) That in the interim, KCC Makindye Division takes over the management of the Market with effect from Monday 14th March 2005*

(iv) That for purposes of smooth handover by the current managers, there will be no collection of dues from Ggaba Market for the days of Friday 11th March, Saturday 12th March and Sunday 13th March 2005

James K N Ssegane

Town Clerk”

Another letter of Exhibit P4 also confirms Re-entry of Ggaba Market by Makindye division.

Under Exhibit P8 it is a collective bundle of documents and some of them indicate as follows;

Prof Gilbert Bukenya as a Vice President wrote a letter dated 5th January 2004 directing that the tender be given to Real Gaba Market Property Owners Limited.

“therefore , it is obvious that the Real Gaba Market Property Owners Lts are the owners of the land, structures/lockers, and the landing site.

Consequently, Kampala City Council no longer has the mandate/legal authority to tender out the management of the above market.

I wish very urgently to see the Gaba Market Situate on the above property is given back to real Gaba Property Owners limited so that they can ran their establishment”

In a letter dated 5th April 2005, The then Mayor Ssebaana Kizito wrote a letter warning the then RDC about his interference with the market and consequences for his actions to KCC.

“Although there are problems of management of this market, we have been in discussions with the contractors and the owners. Your action has disrupted these discussions with the result that the contractors are suing the City Council for breach of contract. I hope you will foot the bill since you are the one who has caused this breach”

Similarly, in another letter dated 29th March 2005, The then Mayor John Ssebaana Kizito also wrote a letter to Resident District Commissioner and inter alia noted as follows;

“However, the current law governing markets obliges KCC to manage all markets in the City. Because of this, KCC contracted a company whose contract runs up to 2007 to manage this market. Since the Contract is current it is not possible to frustrate it without KCC paying heavy damages. We cannot afford the damages.....

Deciding as you seem bent to do, to give management of the market to the land owners will create very costly consequences because many markets in Kampala are on people’s land and are managed in accordance with the law cited above. Gaba market is not an isolated case”

In a letter dated February 16th 2005, the Twon Clerk clarified on the **Contract Agreement to Manage Ggaba Market.**

Whereas I did not dispute the claimed ownership and their land title, I made it clear to them that the management of markets in the City is the responsibility of Kampala City Council or as in this specific instance, by a firm contracted by Kampala City Council.

The management of markets, therefore, which is the responsibility of local authorities, should not be confused with ownership of land where such markets are located.....

As things stand now, I do not see any cause for any wrangles and the disruption of the operations of the market, since the law is very clear and this matter will definitely be handled accordingly and put to rest”

In a letter dated 31st March 2005, written by Resident District Commissioner he ordered a **RE-ENTRY OF GGABA MARKET BY THE LAND OWNERS**

After the meeting of shareholders of the market which took place today the 31st/3/2005 in Kampala City Hall and after hearing the great concern of the public about mismanagement of the market and embezzlement of revenue collected from the market by KCC and their tenderers, and after KCC failed to re-enter despite several calls from the Government and public, it has been decided today that the Real Ggaba Market Property Owners Limited temporarily re-enter and manage the market until KCC sorts out its problems with their current managers”

The sum effect of all these letters under exhibit P8 is that there was never any frustration of the contract since the ownership of land does not in any way affect the management of the market and this was statutory duty given to KCC which it had contracted to the plaintiff to manage.

It is clear there was a lot of interference in the management of the market by several government personalities including the Vice President, Minister of Local Government, Resident District Commissioner who exerted pressure in order to breach the contract.

The defendant's staff either succumbed to this pressure or they were part of the syndicate that led to the breach of the contract. It could be seen from the different communication that the then Mayor John Ssebaana Kizito was very mindful of the consequences of the breach of contract and persistently warned those concerned but they failed to heed his professional advice.

Therefore the defence of frustration is an afterthought by a technocrats after failure to stand against the political pressure or acting or abusing their authority without any explanations.

The management of the market is vested in the district administration as provided under section 1 of the Markets Act. The management of market and moreso the contract between the plaintiff and the defendant could not be frustrated as the defendant would wish this court to believe. This is a statutory duty and all the letter show that the defendant took over management of the market and later it was handed over to another person to manage.

The defendant's argument that the two companies are the same is baseless and legally devoid of any merit since the principle of corporate personality and entities being separate from each other is quite clear.

This cannot be the reason why they breached the contract or decided to hand over the contract to another entity. It is obvious this was a business which they had won and expected to get profits as a company.

Therefore the defendant breached the contract between themselves and the plaintiff company.

What remedies are available to the parties?

Special damages

The plaintiff witness testified that the company suffered loss of income which was pleaded in the plaint as loss or damage as 120,188,504/= and they presented their audited books of accounts and this evidence was not controverted. This court awards the plaintiff special damages of 120,188,504/=

General damages

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 business inconvenience suffered when the contract was terminated since it was a business it is clear they were affected by the actions of the defendant.

The court awards the plaintiff a sum of 100,000,000/= for the quantum of general damages for suffering arising out of the breach of contract.

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 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 rate of 22.5% from the date the contract would have expired in 29th February 2007 until payment in full.

General damages attract an interest of 15% from the date of judgment until payment in full.

Costs

The plaintiff is awarded costs of the suit.

**SSEKAANA MUSA
JUDGE
7th /12/2018**