

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.171 OF 2020
INFESTIOUS DISEASE INSTITUTE LIMITED:..... APPLICANT
VERSUS
MARPS NETWORK LIMITED:..... RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act and Order 41 rule 7 of the Civil Procedure Rules for the orders that;

1. The applicant be permitted to take physical possession of its Motor Vehicle Registration No. UBB 167B Toyota Land Cruiser from the respondent.
2. The respondent, or its officers, agents or servants, immediately avails to the applicant all and every record and document required for the accountability/audit of the expenditure of monies availed by the Applicant to the Respondent under two sub Award Agreements.
3. Any other relief which is just and equitable in the circumstances.
4. Costs of the application be provided for.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the application of Slyvan Kaboha-The Deputy Head of Strategic Planning & Business Development/ Sub-granting Team Leader of the Applicant but generally and briefly state that;

- 1) The applicant was awarded a grant by the Centre for Diseases Control under Grant No.1 NU2GGH002022-01-00 to fund the Kampala region HIV Project titled Accelerated Epidemic Control in Kampala region of Uganda under the President's Emergency Relief Plan for AIDS Relief Through Scale-up of Evidence Based and High Impact intervention Towards Achievement of UNAIDS 90:90:90: Targets (The Project).
- 2) The respondent a non-governmental Organisation registered and working in Uganda applied for sub-grant support from the applicant and was contracted to participate in the Project given its specialised focus on HIV related matters among a segment of key populations. To record the agreed terms and conditions the Applicant and Respondent executed two sub award agreements.
- 3) The respondent was a sub awardee under contracts with the applicant dated 11th October 2017 and 9th October 2018 and covering the period 1st July 2017 to 31st March 2018 and 1st April 2018 to 31st March 2019.
- 4) The applicant as per the contract availed to the respondent for use in executing deliverables required under sub Award Agreements a brand new motor vehicle registration number UBB 167Z Toyota Land

Cruiser, which was to be returned to the applicant upon termination of the Sub Award Agreements.

- 5) The respondent was required by the terms of the sub Award agreements to provide proper accountability for the funds advanced to it by the applicant. The respondent has refused to cooperate on the matters of special audit for the funds advanced.
- 6) That although the Sub Award Agreements terminated on 31st March 2019 the respondent has refused or neglected to render accountability or return the said vehicle to the applicant or permit the applicant to conduct a special audit of the funds disbursed to and utilized by the respondent.
- 7) That if the said motor vehicle is not immediately taken possession thereof by the applicant the same shall be alienated or deliberately wasted or used for purposes for which it was not intended to the detriment of the applicant, both in terms of its use as an expensive asset as well as in terms of the contractual obligation under the grant for the applicant to account for the funds and assets.

The respondent did not file any affidavit in reply or appear in court upon being served twice through the available modes of service. The applicant filed an affidavit of service.

Preliminary considerations

The applicant served the respondent by registered post and also by email to the known address on the following email addresses gmujisha@marps.net and info@marps.net. This court was

satisfied with the said service as being effective since the same is provided for under section 274 of the Companies Act which provides;

A document may be served on a company, by personally serving it on an officer of the company, sending it by registered post to the registered postal address of the company in Uganda or by sending an email to the known electronic address or by leaving it at the registered office of the company. See also page 213-214 Civil Procedure and Practice in Uganda 2nd Edition by Ssekaana M & S

The same is supported by new rules of court which provide for e-hearing in the judiciary under *The Constitution (Integration of ICT into Adjudication Processes for the Courts of Judicature)(Practice)Directions of 2019*

The said email addresses have been used throughout the contract communications and the same was duly sent and received. Therefore the service of court process was effective.

The applicant was represented by Mr Ernest Kalibbala and Mr Apollo Katumba who made oral submissions and the same have been considered in this ruling.

Analysis

The applicant contended and submitted that the respondent requested to be availed and provided with a number of equipment and accessories to facilitate the sub-award agreements and it was a term of the agreement that the same would be returned to the applicant at the end of the project contract period. The respondent would return the motor vehicle and any equipment and assets valued at amounts exceeding US \$ 5,000 at the end of of the sub-award term.

The two parties executed a contract and the same is binding on the parties and it is on this basis that the applicant seeks court's intervention to force the respondent perform her part of the contract.

Contract law is the vehicle by which we ensure efficient behaviour. The courts enforce the promise made between the parties not because there is normatively 'good' about the promise itself, but because the enforcement of such a promise would encourage future economically efficient behaviour of not renegeing on promises of this sort.

Similarly, contract law is concerned with duties that contracting parties owe to each other rather than any broader efficiency goal on a societal level. Contract law gives legal force to such individual rights and ensuring that such rights are not breached. A promise gives rise to rights and obligations.

A contract is only discharged by performance where the contracting parties have precisely and exactly performed that which has been specified in the terms of the contract. Obviously, the determination as to whether that is indeed the case requires a comparison between what it is that has been performed, and what it is that the terms require as a matter of construction.

In the present case, the applicant entered into sub-grant contracts and advanced money for the project and a brand new vehicle for use during the project. The Motor vehicle was to be used in discharging the respondent's obligations. That it was a term of the sub-Award Agreement that project equipment and assets valued at amounts exceeding US \$ 5,000 would be recalled and returned to the applicant after the end of the Sub-Award term.

The respondent was also supposed to avail to the applicant all and every record and document required for the accountability/audit of the expenditure of monies availed by the applicant to the respondent under the two Sub Award Agreements.

It is clear the respondent is in breach of the contract since the contractual obligations have not been performed precisely by the promisor and this is the basis of seeking judicial remedies and force the respondent to return the motor vehicle and also avail all records to account for all the monies received under the sub award agreements.

In general a breach of contract will have occurred if a party to the contract without lawful excuse fails to perform his contractual obligations. Since performance of contractual obligations must be precise, any derogation from full and precise performance, if proved to be the case by the contractual promise, would amount to a breach.

The period for the expiry of the contract was supposed to be March 2019 and the respondent has refused to give accountability of the funds and also return the vehicle and equipment given or bought to discharge the obligations under the contract. This is a clear breach of contract and this court has a duty to enforce and give sanctions against the respondent in form of judicial remedies.

The applicant seeks to compel the respondent to do precisely what it is that she promised, but has failed or neglected to do. The order of specific performance operates *in personam*, addressing the specific respondent against whom the order is sought. Further, being a remedy in equity, specific performance is available as matter of *discretion*. That discretion is not, however, so broad as to present the presiding judge an unbridled freedom of decision: the discretion is not to be exercised at the whim and fancy of the court.

The discretion is the court's exercise: it not open to the contracting parties to fetter the court's exercise of its discretion. As Stocker LJ observed in the English Court of Appeal case of *Quadrant Visual Communications Ltd v Hutchinson Telephone (UK) Ltd* [1993] BCLC 442 at 451;

Once the court is asked for the equitable remedy of specific performance, its discretion cannot be fettered. Once the assistance of the court is involved by one of the parties in a discretionary matter, that party is bound by the general discretion of the court to grant or refuse the remedy sought. If [the] submission that the court is bound by the terms of contract and therefore has no discretion to exercise is correct, the function of the court would be reduced to that of a rubber stamp. In my opinion, this could not be and is not the situation.

The question as to whether the court ought to grant the remedy of specific performance presupposes or arises where there is a breach of contract.

This court under section 33 of the Judicature Act is empowered to give any remedies sought in a matter if properly brought before the court. It provides;

The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to the cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters are avoided.

The applicant is entitled to the remedies sought to take physical custody of its Motor Vehicle Registration No.UBB 167Z Toyota Land Cruiser from the respondent.

Secondly, the respondent or its officers, agents or servants must avail the applicant all and every record and document required for the accountability/audit of the expenditure of monies availed by the applicant to the respondent under the two Sub Award Agreements.

In the interest of justice and for completeness, this court would allow the applicant to lift the veil and hold the persons directly involved in the fraud using the corporate veil responsible. In the case of *Salim Jamal & 2 others vs Uganda Oxygen Ltd & 2 others* [1997] 11 KARL 38, the Supreme Court held *that corporate personality cannot be used as cloak or mask for fraud. Where this is shown to be the case, the veil of incorporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud.*

There is limited principle of law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's legal personality. See *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1

The privileges accorded to companies must operate in accordance with the terms upon which they are granted. The doctrine of corporate veil piercing is premised on the basis that such privileges should work hand in glove with responsibility in order to avoid the possibility of abuse or exploitation. When there is a fracture in the proper operating parameters, the court may ascertain the realities of the situation by removing the corporate shield or veil in order to make the controller behind the company personally liable as if the company were not present. See *Infrastructure Projects Ltd v Meja Projects Ltd* HCCS No. 2351 of 2016

The persons directly responsible should be made to account for the money or be prosecuted in order to meet the ends of justice.

The applicant is awarded costs of the application

I so Order

SSEKAANA MUSA

JUDGE
10th/08/2020