THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

HIGH COURT CIVIL SUIT NO. 392 OF 2014

JASPAR PHAGUDA :: PLAINTIFF

VERSUS

JIMMY KWIZERA :: DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff brought this suit against the Defendant seeking for recovery of USD. 124, 143 (United States Dollars One Hundred Twenty Thousand One Hundred and Forty-Three.

The Plaintiff alleges that he entered into several transactions with the Defendant which included the purchase of the Plaintiff's equipment in Kapkwata Wood Works Limited, renting various premises of the Plaintiff and obtaining goods from third parties for which the Plaintiff paid for the same with the belief that the Defendant shall refund the money. The parties did not make any agreements in respect of most of the said transactions but made notes and reconciliations in some instances which were signed by the Defendant in acknowledgement.

Furthermore, the Plaintiff alleges that the Defendant promised to sell to him land at Nansana comprised in Block 263, Plot No. 1363 upon which the Plaintiff advanced money on this belief. The Defendant was given the title which he kept believing that he was purchasing the said land until the Defendant got the title

from him for transfer into the Plaintiff's name. Legal fees were paid by the Plaintiff to the Defendant's brother, John Barenzi but the same was never transferred and the property sold off by the Defendant.

The parties reconciled all the money owed by the Defendant being a total of Ugx. 840,000,000/= and the Defendant paid off Ugx. 480.000.000/= leaving a balance of Ugx. 360.000.000/= equivalent to USD$ 124, 143 for which the latter made an acknowledgement. He issued the Plaintiff with cheques of the said amount and interest which were dishonored thus prompting this suit for the recovery of money owed.

The Defendant in its written statement of defence denied being indebted to the Plaintiff and contended that he had paid the Plaintiff all sums due to him and was not indebted at all. In addition, the Defendant counterclaimed against the Plaintiff for the recovery of the sum of Ugx. 120,000,000/= as money had and received for no consideration.

The parties during scheduling raised several grounds for determination by this court which are that;

i) Whether the Plaintiff advanced the sum of USD$ 140,000 to the Defendant.

ii) Whether the Defendant is indebted to the Plaintiff in the sum of USD$ 124, 143 or at all.

iii) Whether the Defendant is entitled to a refund from the Plaintiff to the sum of UGX. 120,000,000/= or at all.

iv) What remedies are available to the parties.

The Plaintiff was represented by *Mr. Yiga Shafir* whereas the Respondent was represented by *Mr. Paul Kuteesa*.

Order 15, Rule 5 of the Civil Procedure Rules SI.71-1 gives this court the power to amend and strike out issues at any time before passing a decree as it thinks fit as may be necessary for determining the matters in controversy between the parties. In the interest of adequate discussion of the legal issues at hand and for the purposes of this decision, the court rephrases the issues for determination to reflect as;

1. ***Whether there was a contract between the plaintiff and the defendant.***
2. ***Whether the defendant is liable for breach of contract, when he issued false cheques to the plaintiff.***
3. ***Whether the defendant is entitled to the counter claim***
4. ***What remedies are available to the plaintiff?***

The parties were ordered to file written submissions; the parties accordingly filed the same. Both parties' submissions were considered by this court.

Court's Determination:

Whether there was a contract between the Plaintiff and the Defendant.

Counsel submitted that the Plaintiff's claim is embedded in an agreement marked PE3 that was authored by the Defendant and was admitted by the parties. The contents of the agreement are that the Defendant owes the Plaintiff Ugx. 360,000,000/= dated 20th September, 2013; the same day that the Defendant had paid off Ugx. 480,000,000/=.

The Plaintiff testified that this agreement was accompanied with cheques for the payment of the money after said amount was converted into USD. 140,000 and further reconciled other payments hence arriving at USD 124.143 the subject matter of this suit.

Counsel further submitted that the cheques which were issued by the Defendant and marked PE4 were presented in evidence and he admitted to having issued them and the same had been dishonoured when presented by the Plaintiff.

Counsel defined a contract under section 10 of the Contracts Act, 2010 as an agreement made with the free consent off parties with the capacity to contract for a lawful consideration and with a lawful object, with the intention to be legally bound. He submitted that the document PE3 is a contract within the ambits of this section and is proof that a debt exists; with the Defendant owing the Plaintiff money.

Counsel further submitted that the cheques issued by the Defendant establish that there is a debt owed to the Plaintiff by the Defendant. He referred to Section 72 of the Bills of Exchange Act, Cap. 68 to define a cheque as a bill of exchange drawn on a banker payable on demand. He stated that the cheques that were issued by the Defendant were bills of exchange issued with the intention to have them pay a debt that was an outstanding.

Counsel stated that both parties admitted to several transactions and dealings that were barely in writing between them for which the Defendant took advantage of and obtained money from the Plaintiff and also made sales of land which he would knew would not materialize as he later sold the land.

Counsel stated that the Defendant issued the cheques knowing that they would not be honored considering that he knew that there was no money on the bank account. This was fraudulent as was defined in the case of Fredrick J.K. Zaabwe vs Orient Bank Limited and Others Civil Appeal No. 04/ 2006 to address and define fraud. He therefore submitted that the Defendant indeed owes the Plaintiff money being USD. 124,143 obtained through several transactions.

Counsel for the Defendant submitted that the Plaintiff did not advance to the Defendant the sum of USD 140,000 as claimed in the Plaint or at all and that this was not supported by any evidence adduced by the Plaintiff. He stated that the burden to prove that the Defendant was indebted to the Plaintiff and how that indebtedness arose lay squarely with the Plaintiff in accordance with the provisions of Section 101 of the Evidence Act and this was burden was not discharged.

Counsel stated that the basis of the Plaintiff's claim that he advanced to the Defendant the sum of USD $ 140,000 is premised on the contents of Exhibit PEX 3A and the allegations in his witness statement which panned out. He therefore submitted that the Plaintiff totally failed to substantiate that the Defendant borrowed any money and how much as no loan agreement or any document of disbursement of the loan was produced.

Counsel further submitted that whereas Exhibit PEX 3A is a purported acknowledgment of a debt, it does not constitute an enforceable agreement as it is an agreement to agree. He stated that the parties specifically stated that they would have a one Daniel Aiju to draw an agreement.

In rejoinder to the Defendant's submissions, the Plaintiff submitted that the Defendant testified about money he borrowed of USD. 140.000 from the Plaintiff and only paid USD. 15.000 and confirmed that he did not sign any agreement. Counsel stated that at no point did the Plaintiff in his pleadings or testimony allege that there was an agreement in this respect but stated that the claim arose from a series of transactions where the Defendant defaulted in payment and issued cheques that were later dishonoured. He further stated that the Plaintiff's burden in this case was to establish that these transactions actually lead to an advancement of USD. 140.000 which is an outstanding of a larger sum.

Counsel submitted that the Defendant admitted the agreement PEx. 3A which he attached to his witness statement and pleadings and also confirmed that he wrote the content that refers to the payment of Ugx. 360,000,000/= and signed the document. He submitted that the Defendant admitted that he issued cheques to the Plaintiff and at the hearing, he confirmed that indeed he issued the said cheques in PEX.4.

He submitted that prima facie, cheques are evidence that the defendant was paying or undertaking to pay the Plaintiff's money. Counsel stated that the cheques were issued by the Defendant to the Plaintiff for the advancement of the USD. 140.000.

The Plaintiff submitted that the Defendant admitted being indebted to a tune of USD. 140.000 and therefore prayed that court finds so.

Analysis

I have carefully considered the submissions of both counsel. Under **S. 2 of the Contract's Act**, a contract is *"An agreement enforceable by law made with free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound"*. (Also see Section 10)

In the case of ***Greenboat Entertainment Ltd –vs- City Council of Kampala H-C-C-S No. 0580 of 2003*** court defined a contract as;

> *"In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be: capacity to contract; intention to contract; consensus and idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract".*

The plaintiff alleged that due to several transactions between the parties, the Defendant owed him money to a tune of Ugx. 840,000,000/=. Both the Plaintiff and Defendant testified that upon reconciliation of amounts, the Defendant paid off a sum of Ugx. 480.000.000/= where upon the Defendant drafted an agreement in respect of the said payment.

The Defendant in his counterclaim under paragraph 17 (a) makes an admission to the said acknowledgement/ agreement stating that he was indeed indebted to the Counter Defendant/ Plaintiff to a tune of USD. 140.000/= and this being the basis of his counterclaim.

Counsel for the defendant submitted that Exhibit PEX 3A, a purported acknowledgment of a debt does not constitute an enforceable agreement and is an agreement to agree. Since the parties specifically stated that they would have a one Daniel Aiju to draw an agreement.

I am inclined to agree with the plaintiff that there was a contract duly between the parties in accordance with section 10 of the Contracts Act in all form and manner. The Plaintiff testified upon having done several transactions with the Defendant who purchased equipment and ceramics from the Plaintiff. From the reading of the pleadings, it is seen that there was consideration that was supposed to be met by the Defendant for all the transactions made upon which he made a payment of Ugx. 480,000,000/= to the Plaintiff.

The Defendant cannot therefore acknowledge the agreement he drafted as a basis upon which he paid out money to the Plaintiff and then turn around and claim that the said agreement was not an agreement in its legal sense but an agreement to agree. This is the same agreement that goes to the root of his counterclaim.

It is a well-known principle of equity that one cannot approbate and reprobate all at the same time. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage." (See: **Stephen Seruwagi Kavuma –vs- Barclays Bank (U) Ltd; Miscellaneous Application No. 0634 of 2010**, **Halsbury's Laws of England, 4th**

Ed. Vol. 16, para. 1055) After taking advantage of the agreement, the defendant is precluded from saying that it is not a contract but an agreement to agree

It is therefore my finding that there was a valid contract between the parties for which the Plaintiff provided several equipment to the Defendant.

Whether the defendant is liable for breach of contract, when he issued false cheques to the plaintiff.

The plaintiff alleged that the obligation of the defendant was to pay the sum of Ugx. 840,000,000/= upon reconciliation of his books. He testified that the Defendant accordingly paid Ugx. 480.000.000/= leaving an outstanding of Ugx. 360.000.000/= which the parties computed to be an equivalent of USD.140.000. the Defendant admitted having advanced the said sum to the Plaintiff in his pleadings and testimony.

The Plaintiff testified that upon payment, the Defendant signed an acknowledgement and further issued the Plaintiff with cheques for the outstanding amounts and interest. When the Plaintiff presented the first cheque to the bank, it was dishonoured and returned showing that the account was dormant. He informed the Defendant of the status but the latter became elusive. The Defendant submitted that all the moneys owed were paid in full as stated in Exhibit PEX 3A and as a consequence the Defendant is not indebted to the Plaintiff. In respect of the cheques, counsel submitted that these cannot stand-alone and cannot support such a claim as they were issued as part of Exhibit PEX 3A being security for the performance of obligations in the document exhibit. The defendant submitted that the efficacy and purpose of the cheques can only

be looked at on the basis of the purported agreement and its performance (see; ***Kasango Peter –vs- Voice of Toro HCCS No. 1147 of 2001)***

He further submitted that the amount of money for which the cheques were supposed to secure which is the amount stated in Exhibit PEX3A was paid in full by the Defendant to the Plaintiff in cash and therefore was not indebted to the Plaintiff in the sum of USD 124,143 or the sum of UGX 360 Million.

The Plaintiff in rejoinder submitted that the Defendant admitted having issued cheques to the Plaintiff upon which the latter bases the claim of USD.140.000. The Plaintiff submitted that the Defendant made another payment of Ugx. 44,000,000 an equivalent of USD.15.587 which was deducted from USD.140.000 hence the claim of USD. 124,143 in this suit.

Counsel for the plaintiff submitted that a cheque once issued, show the value of the amount due to the holder of the cheques as per section 7(1) and (2) of the Bills of Exchange Act and ***Dembe Trading Enterprises Limited –vs- Bidco Limited Misc. Applic. No. 0152 of 2008***.

He stated that primafacie, the defendant owes the plaintiff the value of the cheques and that the total number of cheques was 20 with each valued at USD.10.000 amounting to USD.200.000 to cover for the outstanding and the interest for which the issued.

Analysis

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 fail to fulfil the obligations imposed by the terms of contract

The defendant issued a total number of 20 Equity Bank cheques for USD 10, 000 each amounting to USD. 20,000 to which he admits. He stated that these were security for payment of the 480.000.000/= that had been made to the plaintiff.

However, the plaintiff alleged that the said postdated cheques were for payment of the outstanding balance of 124, 143 together with accruing interest for the transactions between the parties. The plaintiff testified that the same were presented to the bank but dishonored and he was informed that the account on which to draw was dormant. He informed the defendant that the cheques were dishonoured and were returned unpaid as the account had no money and was dormant.

This in my view shows that the defendant did not meet his side of the bargain. There was a contract between the defendant and the plaintiff for supply of several goods and ceramics at a consideration for which the plaintiff adduced evidence of several receipts and the acknowledgement from which the claim arose. It is unlikely that the defendant could issue the Plaintiff with postdated cheques as security for payment of monies he had already paid out in cash to the Plaintiff and further acknowledged.

A cheque is supposed to be as good as cash and even though its use is likely to diminish with the introduction and/or adoption of electronic modes of payment, the courts will fault any person who issues a cheque for presentment to a bank

by the holder thereof knowing or not caring whether it will be dishonoured. The situation is grave when, and as is often the case, the cheque is issued as payment for goods or services.

For the reasons stated above I find that the defendant was in breach of the contract and is liable to pay the plaintiff a sum of USD $124, 143.

Accordingly, this issue is answered in the affirmative.

Whether the defendant is entitled to the sum of Ugx. 120,000,000/= in the counter claim

The Defendant made a Counterclaim against the Plaintiff seeking the recovery of the sum of UGX 120,000,000/= being money had and received by the Plaintiff for no consideration. The Defendant/Counterclaimant stated that the Plaintiff received the sum of UGX 120, 000,000/= over and above, what he was fairly and justly entitled to and this being unjust enrichment.

Counsel relied on the case of ***Dr. James Kashugyera Tumwine & Anor. -vs- Sr. Willie Magara & Anor. HCCS No. 576 of 2004***, where court held that a claim for money had and received is an equitable action that may be maintained to prevent unjust enrichment by the Defendant when it obtained money, which in equity and good conscience belongs to the Plaintiff.

He further defined unjust enrichment as per the Black's Law Dictionary 9th Edition at Page 1678 as *"A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary may make restitution or recompense.* He submits that the only sum of money that the Plaintiff was fairly and legally

entitled to was the sum of Ugx. 360,000,000/= and for the Plaintiff to keep the said sum of Ugx. 120,000,000/= would amount to unjust enrichment.

The Plaintiff in its rejoinder submitted that the defendant is reprobating and approbating and that he was not indebted to the defendant at all. Counsel submitted that the defendant denied in his defence having any transactions with the plaintiff or owing him a sum of Ugx. 360.000.000/=. He questioned the enforceability of the document PEx.3A and yet he makes a claim basing on the same document.

The Plaintiff further submitted that there is no proof that the defendant paid to the plaintiff Ugx. 480.000.000 and only seeks to rely on the admission of the plaintiff. He submitted that the defendant under para. 16 (a) of the counterclaim admits that he owed USD. $140,000, the equivalent of this being Ugx. 360,000,000/=. The defendant claims to have paid Ugx. 480,000,000/= and paid an excess of Ugx. 120,000,000/=. Counsel stated that the defendant in his defence denied all the transactions leading to the payment of Ugx. 360,000,000/=. He noted that the defendant was still indebted to the plaintiff to a tune of USD 124,143 and could therefore not have paid an excess of what he owed the plaintiff.

Analysis

The defendant's counterclaim is premised on the principles on unjust enrichment. As set out in the India case of ***Mahabir Kishore & Madhya Paradesh 1990 AIR 313,*** the requirements are:-

"First that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the plaintiff and thirdly that the retention of the enrichment is unjust"

This principle has long been adopted and accepted in Uganda and was well expounded upon for in the case of **Shenol & Another v Maximov [2005] EA 280** where the court was of the view that;

*"… **the principle is that where one person has received money from another under circumstances such as in this case he is regarded in law as having received it to the use of that other. The law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled. In default the right full owner may maintain an action for money had and received to his use."***

Relying on this very principle, His Lordship Kainamura while considering such similar situation in the case of **Kensheka v Uganda Development Bank HCCS No. 469 of 2011** was of the view that where it was proven that money was received for no services delivered then it was obligatory that the person who received it to refund it. I would concur completely with this view as it would be daylight theft for a person who purports to render a service to another but does not do so yet the outward presentation is such that such a person makes the other party to believe that the fulfillment of certain conditions would guarantee certain results.

In the instant case, the defendant alleged that the plaintiff was indebted to a tune of Ugx. 120,000,000/= which had paid in excess of the money he ought to have received. However, the defendant in his pleadings and submissions to this court

denied having had any transactions with the plaintiff or owing him a sum of Ugx. 360.000.000/=. He submitted that the agreement/ acknowledgement he had made in respect of the said total sum of Ugx. 480,000,000/= was not enforceable as an agreement but be treated an agreement to agree.

It is unbelievable that the same defendant seeks to rely on the same agreement to make this claim. As earlier noted, the defendant cannot approbate and reprobate. Furthermore, the defendant did not adduce any evidence to show that indeed he had made payment over and above what he owed the plaintiff that was not justified. As a matter of fact, he issued out several cheques from which the plaintiff was to obtain an outstanding sum of USD$20,000 upon presentation to court.

The defendant did not adduce evidence to show his claim. The court is therefore not satisfied with the allegations of the counter claim and finds that he is not entitled to the counter claim. Accordingly issue three is answered in the negative.

In the result the counterclaim is dismissed with costs.

What remedies are available to the parties?

Since the plaintiff proved his entitlement to the payment of the consideration for the goods and equipment provided where upon the defendant had issued cheques which were eventually dishonoured, he is entitled to USD 124,143.

Further, I am persuaded that the defendant's acts/omission in refusing to pay the agreed consideration was in breach of the obligation which a contract imposes which confers a right of action for damages on the injured party. (see ***Ronald***

Kasibante vs Shell Uganda Ltd HCCS No. 542 of 2006). I will accordingly award the plaintiff general damages of UGX 20,000,000/=.

Based on the above circumstances of the case, I award an interest of 7% on the contract sum of USD $124,143 from date of filling the suit till payment in full, and interest of 10% p.a on general damages from date of judgment till payment in full.

The plaintiff is awarded costs of the suit and counter-claim.

I so order.

SSEKAANA MUSA
JUDGE
7th July 2021