



failed or neglected to pay him the balance of Ugx. 191,500,000/=, although they received that entire decretal sum from the Attorney General in spite of the several demands that have been made.

The defendants filed a joint written statement of defence wherein they denied the claim and contended that they intended to raise a preliminary objection to the effect that the plaint does not disclose a cause of action and that the case is frivolous and vexatious and should be dismissed with costs. The defendants admitted to making the agreement but however contended that the plaintiff misrepresented to them that he was an official from the Ministry of Justice and Constitutional Affairs personally handling their payments whereas not.

The defendants further contended that the plaintiff failed to fulfill his obligations under the contract when they did not receive their payments by the 15<sup>th</sup> of September, 2012 which thereby nullified and voided the agreement. They further alleged that the Ugx. 2,000,000/= paid to the plaintiff was done under duress and coercion and that thus stopped dealing with him upon discovering that he was not an employee nor an official from the Ministry of Justice. The defendants therefore prayed that the plaintiff suit is dismissed with costs.

The plaintiff represented himself at trial after he had withdrawn instructions from his former counsel whereas the defendants were represented by Mr. Nuwagira Gerald.

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

- 1. Whether there was breach of the agreement by any of the parties.*

## ***2. What remedies are available to the parties?***

The parties were ordered to file written submissions. Both parties' submissions were considered by this court.

### ***PRELIMINARY CONSIDERATIONS***

This suit as noted earlier arises out of an agreement executed between the plaintiff and the defendants in this matter which is set out herein as follows;

NALWEYO NKOOKO AND KASIITA  
DISPLACED VETERANS FROM  
MPOKYA ASSOCIATION (NNAKDVMA)  
13/08/2012

KAINAMURA PATRICK  
P.O.BOX 45492  
KAMPALA  
TEL: 0772-325549/0701055915

**RE: HCCS 546/2003**

**LT. BEN KACHOPE & OTHERS  
VS**

**ATTORNEY GENERAL AND OTHERS**

1. We the undersigned write to inform you that we agreeable to paying you 10% of the total decretal amount received as payment in the aforementioned suit from Ministry of Justice and Constitutional Affairs as disbursements. This letter/agreement supersedes the position stated in the earlier cost sharing agreement in between the parties in this case and other stakeholders.
2. This is based on the undertaking that the decretal amount shall be obtained by 15<sup>th</sup> September 2012 hence every installment shall be paid for 10%.

3. We undertake not to lay any claim or interest on the 10% paid out in disbursement or even paid in installments, we acknowledge and clearly state that we have written this letter without duress or coercion and in full understanding of its contents.
4. We have further agreed that the 1<sup>st</sup> payment shall be made with effect from the date of this letter/agreement up to 15<sup>th</sup> September 2012, and if this payment is not effected within the agreed period, this agreement shall be declared NULL and VOID.

Anticipating your co-operation.

Yours faithfully,

Lt Ben Kachope,  
Musimenta T Godfrey  
Mabondo Begumisa  
Twinomugisha Augustine  
Rucerereza William

The main issue that should have arisen out of this agreement is *whether this agreement should be enforced by this court*. I have found it pertinent to address the propriety of such an agreement since there are similar matters pending in courts for enforcement of brokerage/commission agreements.

It is now common in Uganda for persons to execute such agreements for recovery of money from government arising out of civil court awards or any recovery of money from Government or Government agencies for services rendered. Such agreements when executed between counsel and the litigants are known as Champerty or maintenance agreements. See *Elizabeth Kobusingye v Annet Zimbiha CACA No. 69 of 2019 & Shell (U) Ltd and 9 Others v Muwema and Mugerwa Advocates SCCA No. 02 of 2013*

The sum effect of the above decisions is that such contracts are considered to be contrary to public policy then such contracts are illegal. An agreement which is opposed to “public policy” cannot be enforced by either party to it. Public policy is the “Policy of the Law”.

Therefore, the question as to whether an agreement is opposed to public policy or not is to be decided on general principles only and by considering the terms of any particular contract since public policy is not articulated in statutes or laws. An agreement is unlawful if the court regards it as opposed to public policy.

Public policy in its broadest sense means that sometime the courts will in considerations of public policy, refuse to enforce a contract. The normal function of the courts is to enforce contracts; but consideration of public interest may require the courts to depart from the primary function and refuse to enforce a contract. The laws, must in this regard, continue to keep pace with the inevitable changes in societal values as well as public policy.

Therefore, an act which is injurious to the interest of society is against the public policy. The doctrine of public policy is based on the maxim *ex turpi causa non oritur actio* which means, an agreement which opposes public policy would be void and of no effect.

The nature of the contract between the plaintiff and the defendants breeds and encourages corruption in public offices. A party who has won a case in a court of law should not look for brokers (like the plaintiff) to be paid by the government. What was the role of the plaintiff in effecting payments to the defendants? Or what did he do to ensure that the defendants are paid as he contends?

It is therefore, not surprising that the defendants seriously contended that their former counsel M/s Mugenyi & Co. Advocates are the ones who pursued their payment.

The court has a public duty to ensure that corruption does not undermine public confidence in the work carried out under the aegis of such offices like (AG chambers and Ministry of Finance) in their public administration.

The contract between the plaintiff and the defendants is liable to corrupt public offices and therefore contrary to public policy. For this reason, I would dismiss the suit with costs.

However, for completeness I would proceed to determine the merits of the suit.

### **DETERMINATION OF ISSUES**

#### **Whether there was breach of the agreement by any of the parties**

The plaintiff submitted that he accordingly performed his part of the agreement as per the averments and that the defendants made part payment to him. He also submitted that the refusal of paying the plaintiff constituted fundamental breach of the contract on the defendants' part.

Counsel for the defendants submitted that the plaintiff misrepresented himself to the defendants as an official from the Ministry of Justice and Constitutional Affairs and the one personally handling their file and that he would ensure the payment is effected by the 15<sup>th</sup> of September, 2021 which made the contract between the plaintiff and defendants voidable.

Counsel further relied on section 16 of the Contracts Act, 2010 which states that fraud and misrepresentation as factors that vitiate a contract and make the same voidable. He further cited the case of Access Financial Services PLC Ltd vs Khayongo Patricia HCT-00-CS061 of 2007 to define a misrepresentation as a representation that is untrue.

Counsel submitted that it was the defendant's unchallenged testimony in paragraph 3 and 4 of the witness statement that the plaintiff misrepresented himself to them and made them believe that he would ensure their payment by the 15<sup>th</sup> September, 2013. Furthermore. The plaintiff during cross examination clearly confirmed that he was never an employee of the Ministry of Justice and Constitutional affairs and yet it was on the premise of the plaintiff's misrepresentation that the defendants entered into an agreement with him.

Counsel submitted that a breach of contract occurs when one party fails to perform a material term of the contract and the Black's Law dictionary defines a material term as a contractual provision dealing with a significant issue such as subject matter, price, payment, quantity, quality, duration or the work to be done. He further relied on the case of United Building Services Ltd vs Yafesi Muzira t/a Quickest Builders & Co. HCCS No 154/ 2005 where court noted that a breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms of the contract.

Counsel also stated that in the instant case, it was agreed that the plaintiff was to ensure that the payment of the decretal sum was not later than 15<sup>th</sup> September, 2012 failure of which would render the agreement null and void. The plaintiff in

his cross examination testified that the payment was not made by the 15<sup>th</sup> September, 2021 as per ExPE1.

DW1 testified that the first payment was made on the 2<sup>nd</sup> November, 2012 which was after the agreed date of 15<sup>th</sup> September, 2012 and this was unchallenged by the Plaintiff. He further testified that their payment was followed up by their lawyers M/s Mugenyi & Co. Advocates. This evidence was unchallenged by the plaintiff which proved that the plaintiff failed to perform part of his obligation under the contract. The defendants therefore prayed that this court finds that the plaintiff breached the agreement.

### **Analysis**

I have read and considered the pleadings, evidence and submissions of the parties in respect of this matter. It is an agreed fact that the parties entered into an agreement wherein the plaintiff was obligated to process the defendants' decretal award from the Ministry of Justice and Constitutional Affairs and the defendants to pay him ascertain percentage thereof.

*G.H. Treitel in his book, the Law of Contract, 4<sup>th</sup> Edition at page 571* notes that breach of contract is committed when a party without lawful excuse refuses or fails to perform, performs defectively or incapacitates himself from performing the contract. This court in the case of *Dada Cycles Ltd vs Sofitra S.P.R.L. Ltd HCCS No. 656 of 2005* defined breach of contract as:

*"Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to*



*treat the contract as discharged if the other Party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy."*

In the present case, the parties entered into an agreement wherein obligations were created for both parties. The plaintiff on one hand had the obligation of processing the defendants' award from the Ministry of Justice and Constitutional Affairs by the 15<sup>th</sup> September, 2012 while on the defendants agreed to pay him a percentage of 10% off the money upon receipt. However, the defendants did not receive their first payment until the 2<sup>nd</sup> November, 2012, later than agreed in the agreement.

It is important to note that the parties agreed that where the payment was not affected by the 15<sup>th</sup> day of September, 2012, the agreement would become null and void. No evidence was adduced to prove that the plaintiff's failure to perform his obligation as per the terms of the agreement was due to any forbearing on the side of the defendants.

During cross examination, the plaintiff, PW1 testified that the 1<sup>st</sup> payment was not made by the 15<sup>th</sup> September, 2012. He further testified that he entered into the agreement as an employee of government.

DW1, the 3<sup>rd</sup> defendant testified that the Attorney General informed the defendants that the plaintiff was unknown to him and there was no work done by him. The defendants further testified that the money was obtained on the 2<sup>nd</sup> November, 2012 as per the EFT payment voucher.

It is therefore very clear from the evidence on the court record that there was breach of contract by the plaintiff thereby nullifying and voiding the agreement as agreed. He failed to effect the said payment by September as he had promised and this could definitely have affected the entire agreement as set out in paragraph 4 of the agreement.

The effect of failure to effect any payment by 15<sup>th</sup> September 2012 rendered the contract NULL and VOID. This clause was self-executing and the plaintiff would not recover anything outside the set timeline. Since time was of the essence to the said contract.

The defendants also testified that the Plaintiff misrepresented himself as an employee of Ministry of Justice and Constitutional Affairs whereas not. It is important to note that under *section 16 of the Contracts Act*, fraud and misrepresentation vitiate a contract and make the contract voidable. In order for a statement to amount to a representation, such as found an action in misrepresentation, it is often said it must be a statement which relates to a matter of fact, whether present or past (*See: Luzinda vs Ssekamatte & 3 Ors; Civil Suit 366 of 2017*).

I therefore find that there was a misrepresentation made by the plaintiff and this would have avoided this contract in any event since the plaintiff was never an employee of Ministry of Justice and Constitutional Affairs. The defendants as representees have established actionable misrepresentation and would therefore be entitled to rescission of the contract.

There was no breach of contract by the defendants as contended by the plaintiff.  
The suit would have been dismissed with costs as well.

I so order.

***SSEKAANA MUSA***

***JUDGE***

***14<sup>th</sup> December 2022***