THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 382 of 2018

MUHEREZA YASON :: PLAINTIFF

VERSUS

1. **J AND J TRADING COMPANY LIMITED**
2. **MUGONA JOHN**
3. **RUTENTA JOSELYNE :: DEFENDANTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this suit seeking special damages of Ugx. 671,187,680/=, general and aggravated / exemplary/ punitive damages interest thereon and costs of the suit.

The plaintiff alleges that by agreement executed on the 22nd January, 2016, the 1st defendant acting through the 2nd and 3rd defendants; its shareholders/ directors sold to the plaintiff the land and property comprised in Kyadondo Block 243 Plot 1403 situate at Kitintale, Luzira in consideration of a sum of Ugx. 350,000,000/=. The property was sold as a going concern along with the hotel/ guest house business therein.

The plaintiff further alleged that a few days before the property and business therein were to be handed over to the plaintiff, the defendants informed her that that the building had caught fire and every piece of property therein was destroyed. Subsequently, the defendants persuaded the plaintiff to sign a

renovation agreement accepting that the sum of Ugx. 108,000,000/= be deposited with advocate Peter Busiku, out of which the defendants were to renovate the property before handing it over. Believing that they were acting in good faith and that they had genuinely suffered a fire accident, the plaintiff accepted the arrangement. Out of the agreed sum of Ugx. 108, 000,000/=, the defendants only raised Ugx. 100,000,000/=. The property was restored at a sum of Ugx. 354,675,000/= sum way above the contribution by the defendants, the balance being raised by the plaintiff by borrowing, notwithstanding that he had fully paid for the property which the defendant had undertaken to hand over in a state of repair.

The restoration of the property was completed and the plaintiff enabled to commence business nine months after the initially agreed date of the hand over which occasioned enormous loss unto the plaintiff. The plaintiff further stated that the entire good will had been lost and the premises were re-opened as a new business that for the first two months, there was scanty clientele and operations further occasioning loss unto the plaintiff.

The plaintiff discovered that in fact, the property had been under insurance cover with AIG Uganda Limited by the time of the sale and fire damage, a fact that defendants had not disclosed to the plaintiff and that after the fire, the 2nd and 3rd defendants secretly processed and received indemnity from the insurers in the sum of Ugx. 206, 574, 183/= out of the property they had already sold to the plaintiff and his expense. The plaintiff averred that the renovation agreement was therefore void on account of misrepresentation and fraud and his thus not bound by the waivers and commitments therein.

The defendants were served with summons to file their defence in respect of the suit but neither of them filed its written statement of defence denying any liability.

When this matter came up for hearing, the plaintiff informed court that the defendants were served with the summons and pleadings and an affidavit of service was on court record. Counsel thereby sought to have the matter heard and determined which prayer was allowed.

This court notes that the defendant were served twice with the summons to file a defence and before the trial, I ordered that they be served with a hearing notice and the 3rd defendant served and an affidavit of service was duly filed on court record.

The plaintiff was represented by Mr. Ssengendo Saad.

The plaintiff filed his scheduling notes wherein three issues were proposed for determination by this court.

1. ***Whether the renovation agreement between the plaintiff and the defendants by which he accepted to be paid the sum of Ugx. 108,000,000/= was void on account of fraud or misrepresentation.***
2. ***Whether the defendants acted wrongfully and/ or breached their contract with the plaintiff.***
3. ***Whether the plaintiff is entitled to the remedies sought in the plaint.***

The plaintiff was ordered to file written submissions; and accordingly filed the same. The same were considered by this court in determining the issues in the

suit. The defendants did not enter appearance at the hearing and did not file any written submissions.

Despite the fact that the defendants in this suit did not file their defense nor offer any evidence, the plaintiff still bears the burden of proving his case on the balance of probabilities

Determination of issues

Whether the renovation agreement between the plaintiff and defendants by which he accepted to be paid the sum of Ugx. 108,000,000/= was void on account of fraud or misrepresentation.

Counsel for the plaintiff submitted that section 15 (1) (b) of the Contracts Act, 2010 stated that fraud is committed where there is the concealment of a fact by a person having knowledge or belief of the fact. He thereby defined fraud as discussed in the case of Fredrick J.K Zaabwe vs Orient Bank & Ors SCCA No. 4 of 2006 to mean an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

Counsel stated that the defendants persuaded that plaintiff to sign a renovation agreement and in the due course accepting a sum of Ugx. 108,000,000/= as the contribution from the defendants but they were only able to raise Ugx. 100,000,000/= and persuaded the plaintiff to accept it as their contribution on belief that they were acting out of good will.

Counsel cited the case of ***Betty Kizito vs David Kizito Kanonya & 7 Ors SCCA No. 8 of 2018,*** where it was held that fraudulent concealment in either event must be contemporaneous with the execution of the contract. He submitted that the concealment of the fact that the property enjoyed an insurance cover by the defendants from the plaintiff is an action that preceded the execution of the contract. He therefore prayed that this court declares the renovation agreement between him and the defendants void on account of fraud.

Analysis

It is important to note that ***section 10 (1) of the Contracts Act*** defines a contract as; -

> *"A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound".*

In the case of ***Greenboat Entertainment Ltd vs City Council of Kampala C.S No. 0580 of 2003*** a contract as was defined 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 led evidence to show that he entered into an agreement with the 1st defendant and its agents/ representatives these being the 2nd and 3rd defendant

for the purchase of the land comprised in Block 243 Plot 11403 situated at Kyadondo on the 22nd day of January 2016. He also led evidence by way of police report dated 11th March, 2016 to show that before he took over possession of the land and the property thereon, there was a fire outbreak that destroyed all the properties which were estimated to a value of Ugx. 800,000,000/=

It is upon this occurrence that the parties entered into an agreement to renovate that the plaintiff seeks to contend before this court on account of fraud and misrepresentation since the defendants benefited from the insurance policy cover under AIG Uganda Limited after having sold the suit property to the plaintiff who also later obtained a loan to cater for the complete renovation of the suit property. From the evidence of the plaintiff, it appears that the defendants double crossed the plaintiff upon to benefit from the insurance cover from AIG Uganda Limited as seen under Exh. F this thereby unjustly enriching themselves. This was therefore done in bad faith.

Section 16 of the Contracts Act provides that where consent to an agreement is obtained by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was obtained by coercion, undue influence, fraud or misrepresentation. It therefore suffices to say that fraud and misrepresentation vitiate a contract and make the contract voidable at the instance of the party who claims to have been affected by this. (See; ***Luzinda Marion Babirye vs Ssekamatte (Alias Mulwana Samuel) & 4 Ors Civil Suit No. 366 of 2017)***

Fraud was defined by the Supreme Court in ***Fredrick Zaabwe vs Orient & 5 Ors Civil Appeal No. 04/2006*** while relying on the Black's Law Dictionary 6th Edition page 660, as:

> *"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Fraud and misrepresentation vitiate a contract and make the contract voidable*

I find that the defendants were fraudulent in dealing with the plaintiff when they represented to him that they would renovate the guest house/ the property but did not fulfill the said agreement leading to the plaintiff acquiring a loan to see through the entire project. The defendants were therefore unjustly enriched without expending benefit to the plaintiff. The misrepresentation was material and indeed affected the plaintiff as a normal and reasonable person. It was indeed an inducement to enter the contract to renovate wit intentions of obtaining money under the insurance policy.

The principle of unjust enrichment requires; 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 qualifies restitution. (see: ***Mahabir Kishore & Madhya Paradesh 1990 AIR 313, Kensheka vs Uganda Development Bank Civil Suit 469 of 2011)***

I therefore find that the renovation agreement between the plaintiff and defendants by which he accepted to be paid the sum of Ugx. 108,000,000/= was void on account of fraud or misrepresentation as to the true status of the suit property upon the fire outbreak in order to receive the claim under the insurance policy with AIG Uganda Ltd.

Issue 1 is resolved in the affirmative.

Issue 2: **Whether the defendants acted wrongfully and/ or breached their contract with the plaintiff.**

Counsel for the plaintiff defined a breach of a contract as was held in the case of Nakana Trading Co. Ltd vs Coffee Marketing Board Civil Suit No. 137 of 1991 as where one or both of the parties fails to fulfill the obligations imposed by the terms of a contract.

In reference to Clause 12 of the renovation agreement, it is spelled out that each party agrees and understands that any overt or covert action of the circumvention shall be a fraudulent act against the other party and will be subject to judicial action, recompense for damages, possible punitive damages and injunctive remedies, imposed by the legal process. Counsel further stated that as noted from paragraph 4 (h) of the plaint, the 2nd and 3rd defendants concealed from the plaintiff the fact that the building at the time of the fire was insured and that they had gone on to secretly process and receive the indemnity amounting to a tune of Ugx. 306,574,183/= from the insurers. That this clearly manifests the occurrence of a covert act by the defendants, which according to the renovation agreement is a ground that establishes breach of contract by the

defendants. the plaintiff therefore prayed that the court declares that the defendants the contract in issue.

Analysis

G.H. Treitel's The Law of Contracts 4th Edition at page 571 noted that breach of a 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 a renovation agreement wherein it was agreed that the 1st defendant would renovate the suit property to cater for the loss of business. However, the 1st defendant did not fulfill this obligation as seen from the evidence leading to the plaintiff's borrowing money to finish with the said renovation. Furthermore, the plaintiff discovered that the defendants fraudulently claimed money from the insurance cover over the property due to the fire outbreak having sold the property to the plaintiff thereby breaching Clause 12 of the agreement.

Since this court has found in issue 1 that the said contract is/ was void at the instance of the plaintiff for fraud and misrepresentation, I find this issue of no consequence.

Issue 3: **What remedies are available to the parties?**

The plaintiff in their pleadings prayed for: special damages, general damages, aggravated/ exemplary/ punitive damages against the defendants jointly and severally, interest at 26% per annum from the date of filing and costs.

Counsel defined damages as per Hon. Justice Bart M. Katureebe's Principles Governing the Award of Damages in Civil Cases as sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed is imposed by contract, by general law or legislation. He submitted that to effect clause 12 of the renovation agreement stated that each agrees and understands that any overt or covert act action of circumvention shall be a fraudulent act against another party and will be subject to judicial action, recompense for damages, possible punitive damages and injunctive reliefs imposed by legal process.

On costs, the plaintiff submitted that under section 26 (2) of the Civil Procedure Act, Cap. 17, costs follow the event. He therefore prayed that the plaintiff is granted the reliefs as sought in the plaint.

Special Damages

It is trite that special damages must not only be specifically pleaded but they must also be strictly proved but that strictly proving does not mean that proof

must always be documentary evidence. **(see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR.*** Special damages can also be proved by direct evidence; for example, by evidence of a person who received or paid or testimonies of experts conversant with the matters". (*See* ***Gapco (U) Ltd vs A.S. Transporters (U) Ltd CACA No. 18/2004, Haji Asuman Mutekanga vs Equator Growers (U) Ltd, SCCA No.7/1995)***

The plaintiff led evidence to show that he incurred expenses on the renovation of the suit property, borrowed a loan facility from the bank which all resulted from the damage caused by the fire outbreak.

I have perused all the records adduced by the plaintiff and I am satisfied that the plaintiff has proved the special damages. The plaintiff is awarded special damages to the tune of **UGX 671,187,680/=** as prayed for and proved.

General damages

The plaintiff testified that he suffered economic distress with the restoration of the property and the commencement of the business nine months after the initially agreed date of the hand over occasioned enormous loss unto the him. The plaintiff further stated that the entire good will had been lost and the premises were re-opened as a new business that for the first two months.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were

damages losses or injuries suffered as a result of the defendant's actions. General damages are unliquidated damages which arise from a court order for the payment of money and compensation by way of damages; "the award of a sum of money which, so far as money can be so, is equivalent to the claimant's loss". Compensatory damages seek to make good or make up for the aggrieved claimants loss resulting from the other party's breach of contract.

I find that the plaintiff has discharged his duty to prove damages and injuries as a result of the defendants' actions.

The plaintiffs are awarded a sum of **UGX 30,000,000/=** as general damages against the defendants.

Punitive/Exemplary damages

The rationale behind the award of punitive/exemplary damages: exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct.

Though it seems punitive damages are available as a judicial remedy for certain wrongs, it would appear that so far as breaches of contract are concerned, no punitive damages may be ordered since damages for breach of contract are in the nature of compensation and not punishment. Therefore, non-compensatory damages is an exception for a breach of contract

The plaintiff is awarded interest at a rate of 20% from the date of filing the suit until payment in full on the refund of 671,187,680/= and interest shall be 8% on the rest of the awards of general and exemplary damages.

It is important to note that the 2nd and 3rd defendants are directors of the 1st defendant who is an artificial person that can sue or be sued in its own capacity thereby exempting them from individual liability.

Section 20 of the Company Act 2012 provides that;

> *"The High Court may, where a company or its Directors are involved in acts including tax evasion, fraud or where, save for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil".*

It is therefore clear that for the court to lift the veil, the applicant must prove fraud. This was upheld in the case ***Stanbic Bank Uganda Ltd vs Ducat Lubricants (U) Ltd & 3 Others Misc. Appl No. 845 of 2013,*** where court noted that;

> *"The provision does not indicate at which stage the High Court may lift the corporate veil. However, by using the term "involvement in fraud" it is apparent that it should be established to the satisfaction of the court".*

Accordingly, in my view fraud should just not be alleged, but it must be proved to the satisfaction of court to which I am satisfied the plaintiff has done in the instant case.

In **Gower's Principles of Company Law 6th Edition (page 173),** three instances were listed under which court can pierce the veil of incorporation which are; -

1. When court is construing a statement, contract or other documents.

2. When the court is satisfied that a company is a mere facade concealing the true facts.

3. When it can be established that the company is an authorized agent of its controllers or its members corporate or human.

Court in the case of ***Stanbic Bank Uganda Ltd vs. Ducat Lubricants (U) Ltd & 3 Others Misc. Appl No. 845 of 2013*** stated;

> *"It is a basic common law principle that the mind of a company where guilty intent or responsibility is being considered cannot meaningfully be separated from the minds of the Directors where the will of the company is to be discerned".*

In the case of ***HL Bolton Co vs TJ Graham and Sons [1956] 3 All ER 624, Lord Denning held at page 630;***

> *"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.... That is made clear in Lord Haldane's speech in Lennard's Carrying Co Ltd Vs Asiatic Petroleum Co Ltd ([1915) AC 705 at pp 713, 714. So also in the criminal law, in cases where the law*

requires a guilty mind as a condition of a criminal offence, the guilty mind of the Directors or the managers will render the company themselves guilty.

Therefore, a suit can be filed against a director/individual who is a member of the company in their own individual capacity and it would be a matter of evidence to prove that the use of the company name was merely a front or vehicle to perpetrate the alleged fraud by the individual. In other words, it is up to the plaintiff to prove that the company was a mere conduit of the individual.

In the instant case, it is clear that the 2nd and 3rd directors were involved in the acts of fraud which thereby necessitates this court to lift the veil of the company and hold them personally liable for their actions when dealing with the plaintiff for their personal benefit.

The plaintiff is therefore awarded special damages to the tune of **UGX 671,187,680/=** as prayed for and proved and a sum of **UGX 30,000,000/=** as general damages to be claimed jointly and severally from the 1st, 2nd and 3rd defendants.

Costs to the plaintiff.

I so order.

SSEKAANA MUSA
JUDGE
14th December 2022