THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO. 960 OF 2018

LAKEVILLE INVESTMENTS LIMITED:::::::::::::::::::: PLAINTIFF

VERSUS

MAT & SPENCER LIMITED::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

JUDGMENT

The Plaintiff brought this suit against the Defendant by way of ordinary plaint for breach of contract, reputational damage and economic loss seeking for a declaration that the Defendant breached the contract with the Plaintiff, a declaration that the Defendant's breach caused the Plaintiff economic loss, general damages, exemplary damages, interest and costs of the suit.

The brief facts constituting the Plaintiff's case are that the Plaintiff undertook a project to develop land comprised in Block 562 Kyagwe Plots 23 and 24 totalling 100 acres. That from 2015 to date, the Plaintiff offered portions of the property to the general public for sale and that the Defendant sent quotations for the sub-division of the property and titling 185 plots of land. That the Defendant agreed to complete the work in 59 working days and the Plaintiff made an initial deposit of UGX 35,000,000/. The Plaintiff relied on those promises and offered more plots for sale to several purchasers and assured them on when to expect titles but the

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Defendant failed to complete the contracted work within the stipulated time frames.

That upon the Defendant's insistence and hope that more money would ensure the Defendant's performance, the Plaintiff advanced an additional UGX 10,000,000/ but they did not complete and as a result, the Plaintiff has suffered several complaints, demands and claims from purchasers of the plots, and has been forced to return some of the purchase money occasioning economic loss and reputational damage, hence this suit.

The Defendant filed their Written Statement of Defence in which they aver that there was never a binding agreement in which its Directors or employees committed to complete the work within 59 days as alleged in the quotation relied on, and that they were mere estimations which do not form a binding contract between the parties given that the quotation was delivered after an oral agreement between them. That with the delays in the Land Office, the Defendant could not make such a promise and that it might have been made by one of the Defendant's employees as a mere business puff.

They added that the Defendant duly and diligently performed its mandate within a reasonable period to ensure that deed prints were completed within reasonable time and that the Defendant kept the Plaintiff updated at all times. That the delays were caused by the backlog in Mukono Land Office and were therefore beyond the Defendant's control. That upon being served with the notice of intention to sue, the Defendant updated the Plaintiff on the progress made and delays. They prayed that the suit be dismissed with costs.

In reply to the Defendant's Written Statement of Defence, the Plaintiff reiterated its earlier prayers and added that the Defendant is estopped from denying the existence of contract whose terms are reflected in the quotation for which valuable consideration was made. That they are further estopped from claiming the timelines are impracticable given the Defendant's expertise and knowledge of the field. That the suit is rightly before the Court given the Defendant's neglect to inform the Plaintiff about the availability and readiness of the deed print plans attached to the Written Statement of Defence.

REPRESENTATION

The Plaintiff was represented by M/s Ivory Advocates (formerly Apio, Byabazaire, Musanase & Co. Advocates) whereas the Defendant was represented by M/s Imran Advocates & Solicitors.

JUDGMENT

I have carefully read the pleadings and considered the submissions of the parties as well as listened to the testimonies of the witnesses in this matter.

During the scheduling conference, the following issues were agreed upon in the Joint Scheduling Memorandum for determination by this Honourable Court:

1. **Whether there was a valid and binding contract between the parties for the delivery and completion of work as stipulated in a quotation within 59 working days.**
2. **Whether the Defendant breached the terms of that contract?**
3. **Whether the Defendant's actions occasioned loss of reputation and economic loss to the Plaintiff?**
4. **What remedies are available to the parties?**

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Issue 1

Whether there was a valid and binding contract between the parties for the delivery and completion of work as stipulated in a quotation within 59 working days.

It was submitted for the Plaintiff that since it was an agreed fact in the joint scheduling memorandum that the Plaintiff entered into a contract with the Defendant for the sub-division, plotting and titling of 185 plots of land comprised in Block 562 Kyaggwe Plots 23 and 24, and that the Plaintiff had paid UGX 45,000,000/ for the contract, the issue was already settled except for the completion within 59 days. Counsel added that the quotation formed part of the contract and according to the quotation, the contract was to be completed within 59 days. That the days provided in the quotation were not estimates but exact days, which were binding, and that payments made to the Defendant were based on the said quotation. That the Defendant cannot now turn around to dispute the binding effect of the quotation.

However, Counsel for the Defendant submitted that the oral contract entered into by the parties was not valid or binding as it contravened Section ***10 (5) of the Contracts Act*** which requires that contracts whose subject matter exceed twenty-five currency points be in writing. Therefore, that since the subject matter was UGX 123,306,000/, it ought to have been in writing. That since the Plaintiff only paid part of the money for the second phase of the project, the Defendant cannot be held liable as the Plaintiff's expectation of the Defendant's performance without due performance should fail. Counsel added that the Defendant does not challenge the validity of the quotation but asserts that it should not be referred to as a contract.

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I have carefully considered the evidence on record and submissions from both Counsel and find as follows. A ***'contract'*** was defined by Hon. Justice Yorokamu Bamwine in ***Greenboat Entertainment Ltd v City Council of Kampala HCCS No. 580 of 2003*** to mean:

"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."

In this instant case, the Defendant does not deny entering an oral contract with the Plaintiff and in fact, both parties went ahead with performing their obligations under the contract. Although not fully given, part consideration was given and the Defendant performed two stages of the contract, therefore, in the absence of any evidence to suggest that the contract was invalid, I find that there was a contract between the parties. As to whether or not it is valid for being oral, it is not disputed that under ***Section 10 (5) of the Contracts Act 2010***, which was cited by the Defendant's Counsel, a contract whose subject matter exceeds twenty-five currency points must be in writing, however, under ***sub-section 2*** of the same section, a contract may either be oral or written or partly oral and partly written.

In addition, even the Courts have found that oral contracts are valid as long as they fulfil the other requirements of a valid contract. In ***Greenboat Entertainment Ltd v City Council of Kampala*** *(supra)* it was held that:

"In general, oral contracts are just as valid as written ones. An oral contract is a contract the terms of which have been agreed by spoken communication, in contrast with a written one, where the contract is a written document. In my view,

whether a contract is oral or written, it must have the essentials of a valid contract, which I have already spelt above."

In the premises, in the absence of any other evidence to show that the contract was invalid, I find that it was valid and binding on the parties. Therefore, the first issue is settled in the affirmative.

Issue 2

Whether the Defendant breached the terms of that contract

Counsel for the Plaintiff defined *'breach of contract'* and relied on the timelines in the quotation to submit that the Defendant breached the contract by failing to comply with the said timelines. He added that by early 2018, the Plaintiff had not received feedback or progress update from the Defendant and that in March 2018, over 60 days into the contract, the Defendant requested for an advance of UGX 10,000,000/ which was paid. He also added that the Defendant only acted on the contract after the Plaintiff engaged lawyers.

In reply, Counsel for the Defendant still referred to ***Section 10 (5) of the Contracts Act 2010*** and submitted that the subject matter to wit UGX 123,306,000/ was not reduced into writing and therefore that the same cannot be binding. That in the event that Court finds that the contract is binding, DW1 stated that the Plaintiff's main obligation was to make timely payment for the smooth running of the project. That the 1st phase was executed in a shorter time because the money was paid. However, that the second phase was for UGX 59,810,500/ out of which only UGX 13,370,000/ was paid until March 2018 when the UGX 10,000,000/ was added. That the Defendant kept the Plaintiff up to date with the progress of the work and finished progress of the second phase despite the outstanding sum of UGX 36,440,500/ and submitted the deed prints which were acknowledged by the

Plaintiff's Counsel in DEX 6 followed by a letter written by the Plaintiff's Counsel in PEX 5.

Counsel concluded that Court should find the Plaintiff in breach as the Defendant had substantially performed her obligations as opposed to the Plaintiff who only paid UGX 45,000,000/ out of the UGX 123,600,000/.

I have carefully considered the evidence and submissions from both Counsel and note that whereas the Defendant now alleges breach on the part of the Plaintiff, the same was not pleaded in their defence and neither did they file a Counterclaim to that effect. Instead, despite the Defendant denying the existence of a binding contract between them, they averred that the suit was premature and requested for more time to complete the work under paragraph 8 of the Written Statement of Defence. That notwithstanding, the issue here is whether there was breach of the contract by the Defendant, so I will restrict myself to that.

Breach of contract was defined in ***Ronald Kasibante v Shell Uganda Limited HCCS No. 542 of 2006*** the Court defined breach of contract as:

"breach of a 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 its performance impossible or substantially fails to perform his promise. The victim is left with suing for damages, treating the contract as discharged or seeking a discretionary remedy."

Whereas it is true that the parties entered into an oral contract, PEX 1 the quotation is the only written document concerning the contract; and whereas it has the different stages with the amount due properly stipulated, it does not have anything on when the payments should have been made. In this case, the alleged breach is

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failure to complete the work within the 59 days. According to PEX 1, the entire work should have been completed in 59 working days and since part payment was made in on 8th December 2017, the 59 working days would run until on or about 7th March 2018. At the time of filing the suit in December 2018, neither the Deed prints nor Titles had been delivered to the Plaintiff. According to DEX 6, the Deed prints were acknowledged by the Plaintiff's Counsel on the 11th day of April 2019, a year after the 59 working days had expired. Therefore, it is clear that there was breach by the Defendant.

However, even when there is no Counterclaim filed by the Defendant, it would be unjust and unfair to ignore the fact that the Plaintiff has equally breached the contract by failing to make payments. It is not disputed that out of the UGX 123,600,000/ of the contract, the Plaintiff only paid UGX 45,000,000/ leaving an outstanding sum. Even if the Plaintiff were to argue that they paid someone else to complete the work, the Defendant completed the second phase, although it was concluded late. Therefore, up to the second phase, the Plaintiff still has an outstanding balance of UGX 36,440,500/.

I therefore, find that there was cross breach by either party. It is trite law that *'he who comes to equity must come with clean hands'*. The Plaintiff in this case had not fully executed its obligations under the said contract, therefore, just as DW1 stated, it could have contributed to the delay in completion of the work but since it was never raised in the beginning, the Defendant cannot rely on it to escape liability. They only asked for more time within which to complete the work. In answer to the question at hand, despite the failure to complete payment by the Plaintiff, there was breach of contract by the Defendant. Therefore, this issue is answered in the affirmative.

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Issue 3

Whether the Defendant's actions occasioned loss of reputation and economic loss to the Plaintiff?

The Plaintiff's Counsel relied on PW1's evidence of angry messages on their customers' WhatsApp group saying they were fraudsters for failing to provide their titles. He added that PW2 also said their reputation was tainted in the eyes of their clients, customers, development partners and that the project development was delayed causing them economic loss. He added that several customers terminated their purchase agreements and demanded for a refund as well as lost potential clients. He concluded that the Plaintiff suffered reputational damage.

In reply, Counsel for the Defendant relied on the evidence of DW1 who stated that the plots were offered to the public in 2015, before this project commenced and that he was not aware of the offer. He added that as a professional he would not have advised them to go on with the offer before the definitive plots had been finalised considering the huge chunk of land. That the said loss cannot be imputed on the Defendant except if the offers were made upon the advice of the Defendant. He relied on the case of ***Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 ALL ER*** where a duty of care arises where someone possessing special skill undertakes to apply that skill to assist another person who relies on that skill.

Counsel submitted that the Plaintiff undertook an investment decision before and without consulting the Defendant, and that they are looking for an escape route in the Defendant. He also added that the Plaintiff failed to substantiate the buyers whose money was refunded and how many had bought the land.

Upon careful consideration of the submissions and evidence on record, I find that for this issue to be proved, there must be a direct link between the defendant's

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actions and the loss suffered by the Plaintiff, in other words, causation. In law, for one to be liable for loss of reputation to another, malice should be established, and malice is presumed to exist when there is intention to bring disrepute or knowledge that the matter in question could bring disrepute to the person (See ***Angwee v Odongo & Another Civil Suit No. 65 of 2011***).

In this case, no evidence was produced to show that the Defendant acted maliciously in delaying to acquire the titles so as to bring disrepute to the Plaintiff or that they had intention to do so because from the evidence of DW1, it appears that the delay was from the Lands Office of Mukono. In fact, DW1 stated that they were not aware that the Plaintiff had made public offers for the said land, he added that had he known, he would never have advised them to do so considering the huge chunk of the land.

In relation to the economic loss, whereas the Plaintiff contends that they relied on the duration of time of 59 working days cited by the Defendant in the Quotation, it is also true that the WhatsApp group according to PW1 was created in 2016, way before this project came into existence. Also from the different termination of contract between the Plaintiff and its customers in Tab W of the PTB pages 8-19, it is evident that the Plaintiff had sold to them the land between 2015 and 2016 way before they entered this contract with the Defendant, therefore, the Defendant's failure to deliver the said titles within 59 working days cannot be the cause of the said economic loss and reputation damage.

Even though one argued that there is a possibility that the delay further escalated the problem, the Plaintiff's own failure to fully pay for the services cannot be ignored therefore, the Defendant cannot be entirely liable for the economic loss. In the premises, this issue is answered in the negative.

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Issue 4

What remedies are available to the parties?

On the remedies available to the parties, the Plaintiff had prayed for the following remedies;

a. A declaration that the Defendant breached the contract, which was answered in the affirmative. Therefore, a declaration is hereby issued that the Defendant was in breach of its contract with the Plaintiff.

b. The Plaintiff also prayed for a declaration that the as a result of the Defendant's breach, the Plaintiff suffered reputation damage and economic loss which was answered in the negative, therefore no declaration is made to this effect.

c. General damages.

It is trite law that the award of the general damages is a discretion of Court, arising from the direct, natural and probable consequence of the defendant's act or omission in breach of the contract (See ***Uganda Commercial Bank v Deo Kigozi [2002] E.A 293***, and ***James Fredrick Nsubuga v Attorney General, High Court Civil Suit No. 13 of 1993***).

The Defendant in this case failed to deliver the titles within 59 days as projected. Whereas the delay may have been beyond their control, the Defendant did not follow up swiftly as the letter that was written to the Principle Land Management Officer to expedite the process was written on 10th August 2018, several months after the 59 working days had expired in March. But then again, the Plaintiff has also not completed payment towards completion of the second phase which would probably have enabled the Defendant to expedite completion of the said work.

In the circumstances, I find this is an appropriate case for the award of nominal damages of UGX 1,000,000/= to the Plaintiff because while its rights may have been infringed, it has not sustained any actual damage and, if at all, the same also arises from the Plaintiff's conduct in delaying to make the requisite payments to the Defendant and actually owes them a balance of Ugx 36,400,000/=, a submission that has not been disputed. The Defendant also appears to have faced challenges at the Ministry of Lands/ Mukono Land office that were out of its control and resulted in further delays in completing the assignment, but it would have been prudent for them to inform the Plaintiff of the same and request for more time.

d. Exemplary damages

In ***Fredrick Zaabwe v Orient Bank & 5 Others [2007] HCB Vol. 29,*** it was held that punitive damages are awarded to punish the Defendant and deter him from repeating the wrongful act. Further, in the case of ***Kanji Naran Patel v Noor Essa and another [1965] 1 EA 484***, the Court elaborately laid out the two circumstances under which exemplary damages are awarded and these include: cases in which the wrong complained of was an oppressive, arbitrary or unconstitutional action by a servant of the government, and cases in which the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation made to the defendant.

In this instant case, it is apparent that the Defendant is not a servant of the government therefore it does not fall within the first category and also the Plaintiff has not adduced evidence to show that the Defendant's conduct was calculated for self-enrichment. In the premises, this prayer for exemplary damages fails.

e. Interest on general damages at commercial rate of 30% per annum from the date of judgment till payment in full.

The award of interest is provided for under ***Section 26 of the Civil Procedure Act Cap 71***. Having awarded nominal damages as above, I decline to award interest as prayed by the Plaintiff.

f. Costs of the suit

The law on costs is in ***S.27 (2) of the Civil Procedure Act*** which provides:

"...costs of any action, cause or matter shall follow the event unless court for good reason orders otherwise".

Given the circumstances of this case, each party will bear their costs of the suit.

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HON. LADY JUSTICE ANNA B. MUGENYI

DATED: 15/12/2023