

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 267 OF 2004

MBALE UNITED TRANSPORTERS LTD ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

- | | | | |
|----|--|---|--|
| 1. | TOWN CLERK, MBALE MUNICIPAL LOCAL GOVERNMENT COUNCIL | } | ::::::::::::::::::::: DEFENDANT |
| 2. | RICHARD MASABA WOMALIA alias KANINDO, THE CHAIRMAN LC IV/MAYOR MBALE MUNICIPAL LOCAL GOVERNMENT COUNCIL | | |
| 3. | MBALE MUNICIPAL LOCAL GOVERNMENT COUNCIL | | |

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The brief facts of this case are as follows. The Plaintiffs Mbale United Transporters Ltd (herein after referred to as "MUT") on the 1st July 2003 entered into a contract with The Mbale Municipal Local Government Council (herein after referred to as "MMC"), to

manage, supervise, register (sic) and collect revenue of the Main Tax Park within the Municipality of MMC for a period of 3 years running from 1st July 2003 to 30th June 2006. From the evidence there appears to have been two contracts, signed one for the Main Taxi Park and the other for Kumi Road Park. However only the contract for the Main Taxi Park (Exh. P3) was exhibited in Court.

According to Para 2 of the said contract MUT was to pay MMC monthly in advance the sum of Shs.25,000,000/= (inclusive of VAT) for this service and was to pay a performance bond of one month's rental fee. MUT began to manage the two parks namely Mbale Main Taxi Park and the Kumi Road Taxi Park. However, on or about the 13th April 2004, MMC through their lawyers M/S Owori and Co. Advocates wrote 2 letters (Exh. D6 and D7) to the Managing Director of MUT with essentially the same wording as in Exh. D6 stating;

"Mbale Municipal Main Taxi Park.

In accordance with clause 14 of the Agreement between the parties dated 1st July 2003 Mbale Municipal Local Government Council intimates that one month after this notice, on 13th May 2004 it will re-enter Mbale Municipal Main Taxi Park.

This is to require you peaceably render vacant possession on 13th May 2004.

Owori and company."

What followed was a barrage of litigation in pursuit of a temporary injunction which even led to civil unrest in Mbale. Ultimately under the guidance of this Court, a consent order was arrived at whereby MUT was allowed to run the taxi park until the 30th June 2004 and then hand over the parks back to MMC. The parties then agreed to amend their pleadings which led to the hearing of this case.

MUT then sued as Plaintiffs, the 3 defendants claiming according to Para 5 of the amended plaint.

- a) A declaration that the contract it entered into with the 3rd Defendant has been unlawfully interfered with by all the defendants.*
- b) A declaration that the said contract was unlawfully terminated in as far as the termination was not considered and ratified by the relevant committee of the Public Procurement and disposal of Public Assets Authority.*
- c) And injunction restraining, the 1st, 2nd and 3rd Defendants from unlawfully interfering with the said contract during its life time and/or pendency.*
- d) An order of specific performance*
- e) In the alternative and without prejudice to the foregoing an order to compel all Defendants to pay loss of earnings on the unexpired term of the contract."*

Under Para 12(b) and (c) the plaintiffs also claim the costs they incurred in renovation and civil works at both parks (this was later dropped during the hearing as an issue) and the reimbursement of Shs.10,000,000/= said to have been advanced by them to the MMC.

In their statement of defence to the amended plaint the defendants generally deny the claims against them. They state that the plaintiffs are estopped from raising the termination of the contract by reason of the consent order dated 19th May 2004 as amended by that of the 7th June 2004. The defendants deny awarding the plaintiff's a tender to renovate the parks. They also deny in Para 5 of the defence anything to do with an advance of Shs.10,000,000/= to them.

The following issues were agreed upon for trial.

1. Whether the 3rd defendants were entitled to terminate the contract
2. Whether there was unlawful interference with the contract?
3. Whether the plaintiff is entitled to the alleged lost earnings of Shs.360,000,000/= resulting from the termination of the contract.
4. Whether the plaintiff is entitled to the advance payment of Shs.10,000,000/= it effected to the 3rd defendant.
5. Remedies.

Mr. S. Mungoma appeared for the plaintiff (at various times he appeared with Mr. D. Ogalo) while Mr. A. A. Owori, Mr. J. Nangwala and Mr. A. Rezida appeared for the defendants.

Issue No. 1. Whether the 3rd defendant was entitled to terminate the contract:

It is the contention of the defendants that the issue as framed seeks a finding on whether the 3rd defendant had a right to terminate the contract and not whether that right was wrongly exercised.

Counsel for the defendants referred me to a number of authorities on the issue of contract termination.

I was referred to the learned author **Chitty on Contracts** No. 1, 27th Edition Published by London Sweet and Maxwell in Para 22-043 at Pg. 1090 which reads;

“The parties may expressly provide in their contract that either of them or one of them is to have an option to terminate the contract. The right of termination may be exercisable... simply at the will of the party upon which the right is centered. In principle since the parties are free to incorporate whatever terms they wish for the termination of their agreement, no question arises at common law whether the provision is reasonable or whether it is reasonable for a party to enforce it.”

Furthermore at Para 22-046 at Pg. 1092 on notice it is further written;

“ Where the terms of the contract expressly or impliedly provide that the right of termination is to be exercised only upon notice given to the other party, it is clear that notice must be given for the contract to be terminated pursuant to that provision. Any notice must be sufficiently clear and unambiguous in its terms to constitute a valid notice”

Counsel for the defendants also referred to the cases of **Manual Investments Co. Ltd –Vs- Eagle Star Life Assurance Co. Ltd** [1993] 3 All E.R. 352.

and

H. Mc Govern –Vs- Maize Marketing Board [1966] EA 40. On how fixed term contracts can be terminated by giving notice pursuant to break clauses in a contract.

In this particular case the relevant break clause in the contract Exh. P3 was clause 14 which provided.

“ 14. This agreement shall be terminated by either party giving the other one month’s notice in writing.”

It is submitted for the defendants that this clause is clear and unambiguous in its wording. It is further submitted that the break clause was effected by notice in 2 letters (Exh. D6 and D7) written by M/S Owori & Co. Advocates on the 13th April 2004 that the 3rd defendant MMC would re-enter the 2 taxi parks on the 13th May 2004.

It is the case for the defendants that all that was required to terminate this contract under the break clause was notice and nothing else. In their view;

“ The claim that a resolution of Council was required before such a termination was erroneous and devoid of legal substance...”

It was therefore submitted that a Local Council under the Local Government Act (cap 243) is a body corporate and therefore likened to a company;

“ A Council may be equated to a board of directors and the town clerk is equated to either the Managing Director or the Company Secretary. A Town Clerk has ostensible authority to take decisions and implement what Council has expressly or by implication authorized.”

Counsel for the defendants submitted that under S. 65 of the Local Government Act a Town Clerk is a head of the Administration of the Council and among his functions would fall the implementation of the lawful decisions taken by Council. He was said not to be *“... a clerk and rubber stamp. He takes decisions in the course of heading administration...”*

Lastly, it was submitted by Counsel for the defendants that the provisions of the Public Procurement and Disposal of Public Assets Act are irrelevant to the issue of termination.

For the plaintiffs on the other hand it is conceded that it was the 1st defendant, the Acting Town Clerk, who authorized the termination of the contract. The plaintiffs however challenge the evidence of DW1 Wonyema Masaba that as the Acting Town

Clerk he could implement the contract and did not require further authorization by way of a Council resolution.

It submitted for the plaintiff that the only time termination of the contract without reason could occur was for non payment of dues under clause 14 (sic). I think Counsel was referring me to clause 11 which reads;

“ 11. The Local Government shall rescind the contract without notice in case the manager defaults in payment.”

Here it was submitted by Counsel for the plaintiffs that automatic termination may occur. However if there was a dispute over anything else then clause 15 of the agreement provides that the dispute would be referred to arbitration.

“ 15. Any dispute between the parties hereto touching on the construction of this agreement shall be referred to arbitrators one appointed by each party who in turn shall appoint the third and decision shall be binding.”

It is submitted that the defendants were in error not to evoke clause 15 for arbitration instead of clause 14. it is submitted for the plaintiff that if one evoked clause 14 of the agreement then that party *“... had to compensate the other for the unexpired period of the contract, unless if there was a fundamental breach/condition that goes to the root of the matter as provided in clause 11 of the contract...”*

It was argued for the plaintiffs that clause 14 was not automatic and that the 1st and 3rd defendants had to follow the right procedure which they did not; thus rendering

the termination unlawful. In the view of the plaintiff's, that the correct procedure would have been to follow the provisions of the Public Procurement and Disposal of Public Assets Act (hereinafter referred as "The PPDA" Act) as provided for under S. 55, which provides

" 55. All Public Procurement and Disposal shall be carried out in accordance with the rules set out in this part of the Act, any regulations and guidelines made under this Act."

Counsel for the plaintiff submits that disposal includes "termination".

I have had the opportunity to read the written submissions of both Counsel and peruse the evidence and find as follows:- The issue here seeks to determine whether the 3rd defendant MMC had the power to terminate the contract. Of course a power would have to be exercised by an officer of MMC as it is a body corporate in law.

From the hearing and the written submissions there appears to be some contest as to where the power to terminate should be drawn from. On the one hand the defendants state that the power to terminate should only be derived from agreements signed between the plaintiff and the 3rd defendant. On the other hand the plaintiffs argue that the power to terminate is not only a factor of the agreement but also the PPDA Act which sets out the procedure to be undertaken in order to arrive at the decision to terminate.

These arguments raise apparently subtle but important points of law in relation to contracts of these nature. In other words to what extent should public bodies not only exercise powers given to them in a contract but also disclose the source of authority for them to exercise those powers in the contract when so acting?

It is not difficult to see why such subtle distinctions arise. In a document agreed to by both the parties during the scheduling of this case but not used as an exhibit (but which I shall exercise my discretion to use as an agreed document and hereinafter call it the "Tender Award" granting the contract to the Plaintiff's) it is written...

***" MBALE MUNICIPAL
LOCAL GOVERNMENT COUNCIL***

Our Ref: CR 214/7

Your Ref:

M/S Mbale United Transporters Ltd

P.O. Box 2628

Mbale.

Contract period for the main and Kumi Road Taxi Parks

I am pleased to notify you that the Urban Tender Board at its sitting held on 18th July, 2003 considered... considered council's resolution under Minute C16/2003 session held on 27th March 2003, concerning the above period.

Under Minute UTB 222/2003 the Board granted you a period of three years effective from 1st July 2003 on the following conditions:-

- 1. The contract sum for the Main Taxi park shall be Shs.25,000,000/= inclusive of VAT.*

- 2. The contract sum for the Kumi Taxi park shall be Shs.4,768,000- inclusive of VAT.*

3. *The contract shall be subject to quarterly surveys and annual budget revisions of council.*

4. *You sign contracts with the respective local Government Divisions councils of industrial and Northern under whose jurisdiction the said taxi parks are located.*

Paul Soddo
Secretary
Urban Tender Board "
(emphasis mine)

It can be seen from the above letter that the source of authority and power to enter into the contracts was extensively quoted and referred to. The mirror argument would be that a similar letter or authority to quote from, would have been given to terminate the same contract.

The value of procedure from a governance point of view cannot be down played and more so in public bodies and where they interact with private bodies. Such procedures ensure transparency, public accountability and best practices. Courts should take cognisance and Judicial notice of these principles whenever evaluating evidence. That notwithstanding the courts should apply the law as established when reaching a decision; but also note where lapses in corporate governance, occur. Fundamental lapses in corporate governance procedures could amount and lead to illegality.

In this particular case however the tender award was made on condition that a contract be signed. This made the tender award legally "subject to contract". The law on awards made subject to contract are well settled. In the case of **Karmale Tarmohamed –Vs- Lakhani and Co.** [1958] E.A 567, is instructive on this point.

In that case it was held that where a contract was conditional and subject to a formal contract and that was not done it would relieve either party from liability under it. Since the tender award in this case was conditional upon signing a contract then that means the Agreement Exh. P3 was the main contractual document. That means one would have to look to the Agreement to discern the actual terms of the contract. This is also the import of the evidential rule under Section 91 of the Evidence Act (cap 2).

In this regard I agree with counsel for the Defendant that a review of Agreement shows that it had a clear break clause No. 14 where the agreement could be terminated by either party giving the other one months notice in writing. Where a contract expressly provides that termination is to be exercised by giving notice to the other party and a sufficiently clear and unambiguous notice is given then that would terminate the contract. At common law the provision need not be reasonable nor does a question arise whether it has reasonably been applied.

With due respect to Counsel for the plaintiff I do not agree that clause 14 could only be evoked if there was a fundamental breach/condition that went to the root of the contract like non payment of fees under clause 11. Secondly there is nothing in the contract to support the assertion that before evoking the break clause No. 14 one

would have to first submit to arbitration under clause 15 of the agreement. That is position of this contract at common law.

However as I pointed out earlier in a case such as this it would be skirting the underlying dispute if one did not look at how this contract was terminated from a corporate governance point of view as well.

It has been submitted for the defendants that the Town Clerk had the ostensible authority to instruct external lawyers to issue the requisite notice to terminate the agreements. This is because a Town Clerk under the Local Government Act Section 65 is head of administration of the Council. It was further submitted that he should be able to make binding decisions in the course of his duties and should not be viewed as a Clerk or rubber stamp of the Council. Indeed it was further submitted by Counsel for the defendants that a Town Clerk should be equated to a Managing Director or Company Secretary in a company.

I think that the analysis of the role of a Town Clerk by Counsel for the defendants cannot really be faulted too much. A Town Clerk is indeed a very senior officer in a District and Section 65 (2) of the Local Government Act (cap)243) provides that he/she shall;

- “ a) be responsible for the expending of the Council's funds and shall be the accounting officer of the relevant council;*
- b) advise the Council on legal and administrative matters;*

c) be responsible for the implementation of lawful decisions of the Council...etc. "

However, a Town Clerk as Head Administrator or Manager of a District Council has a duty to work with integrity, transparency, accountability and apply best practices.

In other words the Town Clerk has to exercise good corporate governance in the same way a Managing Director or Company Secretary is a company would; there is no escaping this.

The Town Clerk must therefore operate within the laws governing his office in the same way that a corporate executive would under a company Memorandum and Articles of Association. Such laws in my view include the Local Government Act (cap 243) and The PPDA Act 2003.

In this regard I must disagree with Counsel for the defendants that the PPDA Act has completely nothing to do with the termination of this contract. It can be used to evaluate the actions of the Town Clerk in effecting the termination.

The PPDA Act provides as follows:-

" 2. (i) This Act shall apply to all Public Procurement and Disposal activities and in particular shall apply to –

(c) Procurement or disposal of works, services, supplies or any combination however classified by –

(ii) entities, not of government, but which benefit from... public funds.

3. *“procuring and disposal entity” means a statutory body, department of the Central Government, Local Government... “*

The governance aspects around this contract are indeed spectacular. It all appears to begin with the interdiction of the then Town Clerk of Mbale Mr. Fred Bukeni Byasi PW1 some time at the end of July 2003 and the appointment of Mr. James Wonyema Masaba DW1 then the Assistant Town Clerk Northern Division Mbale as Acting Town Clerk on 2nd August 2003. The method of Mr. Fred Bukeni’s interdiction (apparently on the instructions of the Mayor Mr. Richard Masaba) has its own issues but that is not the subject of this case. The now Ag. Town Clerk Mr. James Wonyama Masaba was to become the Central figure in the termination of the contract with the plaintiff. Interestingly Mr. Wonyema Masaba in terminating the agreement testified that he was exercising his powers under S.26 of the PPDA Act, and so is some what at variance with the submissions of his Counsel as to the relevance of the said Act. Section 26 (j) of The PPDA Act provides that an accounting officer shall be responsible for;

“...ensuring that the implementation of the awarded contract is in accordance with the terms and conditions of the award...”

in the thinking of DW1 Wonyama Masaba Section 26 of the PPDA Act empowered him to terminate the agreement without reference to anybody inclusive the Municipal Council or its Tender Board. It also gave him authority to appoint M/S Owor & Co. Advocates, who according to the Council Speaker PW2 Mr. Davis Wanyera Mwaule was not the lawyer of the Council, to terminate the agreement.

Though the agreement did not require reasons to be given for issuing notice to terminate the agreement Mr. Wonyema Masaba gave the Court the reasons for the termination. According to the testimony of Mr. Wonyema Masaba the reasons for the termination were that contrary to the agreement, MUT were determining their own rates and overcharging, issuing their own receipts and causing insecurity. That the plaintiffs' MUT were called to discuss these matters but refused and denied MMC access to the park. Perhaps what is most interesting is that Mr. Wonyema Masaba testifies that the decision to terminate the agreement was made in March 2004 in the office of the Resident District Commissioner (RDC) Mbale as security matters were involved (sic). It is interesting to note that Mr. Wonyema Masaba was more willing to work with the office of the RDC than his own Council which employed him and to which he was answerable. Indeed Mr. Davis Mwaule the District Speaker testified that when a Council meeting was requested by way of petition (Exh. P7) by Councilors to inquire into the termination of the contract, the Council hall was locked to avoid the holding of meeting.

According to the testimony of the speaker Mr. Mwaule the meeting by letter from the office of the Town Clerk (Exh. P8) was postponed to a date "... to be communicated to you in due course...".

Mr. Mwaule said he did not authorize the postponement of the meeting but this was allegedly done under the instructions of the Mayor Mr. Richard Masaba (2nd defendant) and Mr. Wonyema Masaba. Indeed Mr. Wonyema Masaba in his testimony wondered

why the Councilors wanted the agreement put before Council for review when it had already been cancelled.

From the above, I find that whereas the 1st defendant (DW1) Mr. Wonyema Masaba as Town Clerk could ostensibly terminate the contract with the plaintiff MUT on behalf of the 3rd defendant MMC under the provisions of the contract itself, he did not from a corporate governance point of view do it transparently.

In doing what he did Mr. Wonyema Masaba did not act in a transparent and accountable manner. He did not exercise the best practices expected of a Town Clerk under the Local Government or PPDA Acts. Indeed Mr. Wonyema Masaba went further to refuse to account for his actions before the Council when a special session of Council was petitioned. He therefore as a public servant abused his office. The consequences of this are self evident the Municipal Council became divided with some members actually testifying against the Council before this Court and there was civil unrest in Mbale leading to unnecessary loss of life.

I therefore answer the first issue as follows that the 3rd defendant were entitled to terminate the contract but in doing so the 1st defendant did not act in a regular and transparent manner.

Issue No. 2: Whether there was unlawful interference with the contract?

This issue as framed is largely declaratory. In light of my findings in issue No. 1 with regard to how the contract was terminated there is not much to add.

The manner in which the termination was done shows poor corporate governance at the time at the Mbale Municipal Local Government Council (MMC).

The failure to follow the proper procedure in this case is so deep rooted that even after the termination was made the Inspector General of Government (IGG) found in his report (Exh. P4) that the Ag. Town Clerk Mr. Wonyema Masaba and his Deputy Mr. J. J. Mabonga flouted the provisions of the PPDA Act by awarding the contract of running the parks to M/S S. S. Invent and workshop without passing through the tendering process. Indeed the IGG recommends that both officers be “seriously warned” for their actions.

The IGG’s report declined (at Pgs 3-4) to make a finding as to whether or not the contract with the plaintiffs was irregularly terminated or not because the matter was in Court.

The IGG’s office was correct in not making a finding on a matter before Court. Court can now assist under this issue to complete this finding.

I accordingly find and declare that the termination of the contract was procedurally irregular but did not amount to unlawful interference with the contract.

Issue No. 3: Whether the plaintiff is entitled to the alleged lost earnings of Shs.360,000,000/= resulting from the termination of the contract.

According to Para 12 of the amended plaint the plaintiff's allege that defendants unlawfully interfered with the management contract as a result of which the plaintiff suffered both loss and damage. Para 12 (a) in particular alleges "loss of earnings from the management contract at a rate of Ug.Shs.15,000,000/= (fifteen million shillings) per month for a period of 24 months.....Shs.360,000,000/=."

This claim as pleaded is a special damages claim which according to law has to be pleaded and specifically proved. It is not a general damage as Counsel for the defendants submitted it to be.

It was also submitted by Counsel for the plaintiff that his clients;

" ...on top of their capital investments had borrowed money from financial institutions and individuals to be able to properly manage the park facilities..."

As proof of this loss the plaintiffs called Mr. Michael Waga Angualia PW5 a certified Public Accountant with 8 years working experience. MR. Angualia led Court through Exh. P12 which is a report dated 3rd September 2004 and styled;

" ...Audited Financial Management and Investigation Report for 4 months ended 30th April 2004."

Unfortunately as a special investigative audit the specific terms of reference were not reproduced therein. However at Para 2 of the report it is written.

“...we (therefore), interpreted our tasks broadly, to include, gathering, analyzing and interpreting the views and opinions of each party about the problems and issues described in our report from various correspondences.”

This is the nearest to the terms of reference that one can get to. I must say from the outset that if this is a term of reference then it is too general to answer the claim of the plaintiff in Para 12 (a) of the plaint which refers to a loss of Shs.360,000,000/=.

Indeed apart from 2 tables, one showing the “income analysis for a period of four months – 2004” (i.e. January to April 2004) and “Expenditure for a period of four months.” (i.e. January to April 2004) there is no actual analysis of loss which is shown. What follows are “tentative budgeted projected income statements” for the fiscal years ended 30th June 2005 and 30th June 2006. These are also followed by “tentative budgeted projected expenditure statements” for the same periods. Para 9 (6) and (7) of the report on Audited findings then reads;

“ 6. M/S Mbale United Transporters Ltd has lost revenue from May 2004 up to June 30th 2006 (sic) as per the contract agreement signed, which has been computed as follows:-

| Details | Notes | Per month - Shs. | Costs - Shs. |
|---|-------|------------------|---------------------|
| From May to June 2004 | 1 | 1,500,000= | 30,000,000= |
| From July 1 st to June 30 th 2005 | 2 | 1,500,000= | 180,000,000= |
| From July 1 st to June 30 th 2006 | 3 | 1,500,000= | 180,000,000= |
| Cost of renovation & civil works | 4 | - | 50,000,000= |
| Advance payment | 5 | - | 10,000,000= |
| Grand Total | | | 450,000,000= |

7. *All the documentary evidence for payment to date can be availed as evidence if requested by anybody to justify this claims and anomalies that arose between the two parties for verification and decision thereto."*

Of course one can discern that the Shs.360,000,000/= claimed is a factor of the items listed as "From July 1st to June 30th June 2005" (Shs.180,000,000/=) and from July 1st to June 30th 2006" (another Shs.180,000,000/=).

From an objective point of view it is difficult how in a report dated 3rd September 2004 one can project an actual loss of Shs.15,000,000/= per month up to 30th June 2006 (giving a total of Shs.360,000,000/=)? It is not surprising that base material used to arrive at these figures were "tentative" and "projected" budgets.

At best these figures can be but speculative and therefore of no value to Court. The Audited, Financial Management and Investigation Report Exh. P12 was therefore of no value to the plaintiff in dealing with this issue. The auditor Mr. Angualia (PW5) also

admitted during cross examination that he did not interview officials from the municipality yet he signed a report in which he wrote that he understood his task to include;

"...gathering, analyzing and interpreting the views and opinions of each party (sic)...".

This alone, if nothing else, greatly affects the credibility of the report, I accordingly find that I cannot even rely on it.

Special damages must be specifically proved and the plaintiffs have on this issue failed to discharge this burden. I accordingly disallow this claim.

Issue No. 4: Whether the plaintiff is entitled to Shs.10,000,000/= advance payment.

The facts surrounding the alleged advance of Shs.10,000,000/= do not appear to be in dispute.

It is the case for the defendants that the amount was informally received by the 3rd defendants MMC and informally paid back through one Yunus Yusuf (DW3) on the instructions of late Managing Director of the plaintiff company one Taibu Magoola (RIP). It is the case for the defendant that the late Magoola was the Managing Director of both the plaintiff company and another company called Targo Construction Ltd. The late Magoola allegedly instructed Yunus Yusuf to collect the money from

MMC and take it to his other company Targo Construction Ltd and that ends the matter of money. Mr. Stephen Khaukha (DW2) the Chief Finance Officer is alleged to have refunded the money to Yusuf.

For the plaintiffs Mr. Hussein Ishag PW4 a director denies that the company was paid back the money. Indeed he further denies that Yunus Yusuf works for or is an agent of the plaintiff company. On the contrary he viewed Yunus Yusuf as a competitor who runs a company called M/S S.S. Invent and Workshop which took over the running of the parks when the plaintiff's contract to manage the taxi park was terminated.

The evidence adduced at the trial shows that there was further lapse of corporate governance on the part of the officers of MMC. Mr. J. J. Mabonga the Deputy Town Clerk wrote to the Managing Director of the plaintiff company requesting for an advance of Shs. 10,000,000/= by a letter dated 27th June 2003. The money was due to be "...reimburse(d) in the course of our transactions." The money was received by MMC's Chief Finance Officer Khaukha Stephen by a handwritten minute on the very same letter. Another handwritten minute on the same letter by the Mayor Mr. Richard Masaba then authorizes the Town Clerk to sign 3 year agreements with the plaintiffs to run the Mbale and Kumi road taxi parks.

Furthermore the minute of the Mayor further directed that the money advanced be deducted from the monthly payments made by plaintiffs at Shs.1,000,000/= per month. The Speaker Mr. Davis Mwaule PW2, signed as a witness.

This matter was also investigated by the IGG who wrote a report Exh. P4. The findings of the IGG's report are consistent with most of the evidence I heard during this trial by Mr. Davis Mwaule (PW2) the speaker; Mr. Hussein Ishag (PW4) a director of the plaintiff, Mr. Stephen Khaukha (DW2) the Chief Finance Officer and Yunus Yusuf (DW3).

Based on the evidence I heard the conclusions of the IGG's report are persuasive to a large extent. Para 7.2 reads;

"...it was concluded that ten million was requisitioned for by the Deputy Town Clerk Mr. Mabonga J. J. through the Mayor, Mr. Masaba Richard. The money was received in cash by CFO, MMC Mr. Khaukha. S. He however never gave a receipt or even put it in books of accounts as advance or revenue to Council contrary to the Local Government Finance Accounting Regulations Section 32. There is no proof that Mbale United received it, although they also never deducted it from their monthly remittances as indicated on the advance chit. Hence, Mr. Khaukha be held responsible for not putting Council money on charge and paying it back the money to a person without any acknowledgement from Mbale United a company that advanced the money. (emphasis mine)."

However, based on the evidence, I would agree with Counsel for the plaintiff that the testimony of Yunus Yusuf (DW3) that he received a refund of the money from Mr. Stephen Khaukha cannot be believed. His demeanour while giving this testimony as a

witness was not credible. He was nervous and evasive while answering questions. Mr. Yunus Yusuf was also through his company M/S Invent and Workshop the main beneficiary of the termination of the plaintiff's contract. The IGG's report also points out that this company M/S Invent and Workshop was awarded a contract to run the Mbale and Kumi Road Taxi Parks by the Ag. Town Clerk, Mr. Wonyema J. Masaba and his Deputy Mr. Mabonga J. J. contrary to Section 46 of the PPDA Act and should be warned for doing so. Mr. Yunus Yusuf cannot be regarded as an impartial and truthful witness. His evidence cannot even be authenticated by Mr. Taibu Magoola who is dead.

I accordingly disregard Mr. Yusuf's evidence. In answer to the fourth issue therefore I find that the plaintiff is entitled to the advance payment of Shs.10,000,000/= it effected to the third defendant as there is no evidence that it was refunded to the plaintiff company.

Issue No. 5: Remedies.

The plaintiff sought Judicial declarations, a permanent injunction, specific performance, general and special damages and costs of the suit.

I shall now address the remedies starting with the declarations.

1. I decline to find and declare that the said contract was unlawfully and wrongly terminated by the 1st and 3rd defendants.

2. I decline to find and declare that the contract was unlawfully interfered with by the 1st and 2nd defendants.
3. I decline to grant a permanent injunction restraining the 1st and 2nd defendants from interfering with the said contract during its tenure as the contract is at an end anyway.
4. I also decline to grant an order of specific performance of the contract. I however make an auxiliary order under the head of any other relief directing, as recommended by the IGG, the immediate tender and advertisement of the management of taxi parks in MMC in accordance with public procurement laws.
5. I decline to grant special damages of Shs.360,000,000/= as they were not legally proved. In the same way there are no general damages awardable for unlawful interference and termination of the contract.
6. I grant the plaintiff an order for refund of Shs.10,000,000/= advanced to the 3rd defendant.
7. I grant the defendant 2/3 of the costs of the suit and allow 1/3 of the costs of the plaintiff. I also grant a certificate of two Counsel for the parties.

Geoffrey Kiryabwire

JUDGE

Date: 30/09/05