THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

REMMY KASULE :: PLAINTIFF

VERSUS.

CHARLES HARRY TWAGIRA]
OIL SEEDS (U) LIMITED] :: DEFENDANTS

BEFORE: JUSTICE GEOFFREY KIRYABWIRE.

J U DG M E N T.

The brief facts of this case as were out lined in the written submissions of the plaintiff and were largely agreed to by counsel for the Defendant are as follows hereunder.

By an order of The High Court of Uganda at Kampala dated 3rd March 1999, the Plaintiff was appointed arbitrator to reconsider on remission, an award that had been made by Arbitrator Mr. J.N. Mulenga Esq. (as he then was) in a Commercial dispute between the second Defendant and the Uganda Development Bank.

The Plaintiff duly conducted the proceedings of the arbitration on remission and by 2nd May 1999, the award was ready and he accordingly delivered it inter parties.

A disagreement thereafter developed between the parties to the arbitration and the arbitrator as to the quantum of his fees, the Plaintiff claimed Shs. 204,734,530/= as his fees. The Plaintiff duly notified the two parties that he would exercise his lien as arbitrator by not filing the award in Court until his fees had been met. Both parties agreed that the Plaintiff prepares his bill and files the same in court for taxation. The Plaintiff duly prepared a Bill of Costs with a total claim of Shs. 1, 531,579,000/= which he filed in court on 7th Sep. 1999 for purposes of taxation, and served copies on both parties to the arbitration.

Before a date could be fixed for taxation of that Bill of Costs, the second Defendant approached the Plaintiff. An agreement was reached and signed on 26th Oct. 1999 by which the second Defendant undertook to pay Shs. 204,734,530/= to the Plaintiff as arbitrator's fees. A down payment of Shs. 12,000,000/= was made upon the signing of the agreement. The balance, Shs. 192,734,530/=, was to be paid by the second Defendant out of proceeds from the award, less any amount paid by the Uganda Development Bank as M/S Bitangaro & Co. Advocates, was to pay to the Plaintiff all his due fees out of any money that may be in their possession as a result of the award.

Following the Plaintiff's filing of the award in Court, the second defendant on 29th Oct. 1999 filed an objection to it vide H.C.C. Misc. Application. No.1355 of1999. Uganda Development Bank too filed a cross-objection to it. Whereas by its objection the second Defendant sought to challenge the Plaintiff's rejection of its claim for lost opportunity and have it remitted in part, Uganda Development Bank sought to challenge the quantum of the entire award made in favour of the second Defendant on remission.

Both the second Defendant and Uganda Development Bank eventually reached a negotiated settlement of the objection and cross-objection which they reduced to writing in an agreement dated 25th July 2000 and duly filed in court. The objection and cross-objection was a result not decided on merit.

By that agreement, Uganda Development Bank paid the second defendant Shs. 870,000,000/= in full and final settlement of its claim against the Bank. Out of that sum, Shs. 70,000,000/= was payment "in full and final settlement of fees and any expenses which may be due and owing to the Plaintiff as arbitrator." On payment of that sum, Uganda development Bank was to be absolved of any further liability for payment of any fees or expenses that may be due and owing for the Plaintiff. Uganda Development Bank paid the said Shs. 70,000,000/= to the second Defendant's Counsel M/S Bitangaro & Co. Advocates. The money

was then paid out to various people "in consideration of their respective roles in facilitating the settlement". There appears to be some disagreement between the parties as to whether this said payment was the direct act of the 2nd Defendant or that of its Managing Director the 1st Defendant. The Plaintiff has to-date not received any payment. He has sued seeking recovery of that sum from the Defendants jointly and/or severally.

Let me begin with a short history of this case. When this matter came before Me for trial it became clear that this case, which had originally been filed as HCCS 1488 of 2000 and began before another Judge had several competing causes of action involving different parties and counsel arising from the same facts. It became embarrassing to for me to try the matter. I used my discretion then to realign the dispute into two cases namely HCCS 1488 A of 2000 and HCCS 1488B of 2000 and continue with the hearing of the later. It is for the latter that the above brief facts relate.

The parties then agreed to the following issues for trial

1. Whether the 2nd Defendant is liable to the Plaintiff for breach of contract?
2. Whether the 1st Defendant is liable to the Plaintiff for inducing the 2nd Defendant to breach the contract.
3. Whether the 1st defendant is liable to the Plaintiff in conversion?

4. Whether the Defendants are liable to the Plaintiff for breach of trust?
5. Whether the Plaintiff is entitled to the remedies sought?

Issue No. 1 whether the 2nd Defendant is liable to the Plaintiff for the breach of contract

With regard this issue the contract in question appears to be an agreement entitled

"Agreement to pay the Arbitrator's (Remmy Kasule) fees" dated 26th October 1999 signed it would appear by Mr. Remmy Kasule as arbitrator of the one part and M/S Bitangaro & Co Advocates together with M/S Kirenga, Butagira Byaruhanga & Co. Advocates (referred to as guarantors whatever that means) for M/S Oil Seeds (U) Limited of the second part.

The terms of the agreement in exhibit P.2 to the Plaint were as follows: -

"1.0 We Messrs Oil Seeds Uganda Limited of P. O. Box 6432 Kampala hereby undertake to pay in full the arbitrators' (Remmy Kasule) fees of Ug shs. 204, 734, 530/= in consideration of his filing the award on Remission in the High Court.

2.0 The said sum of 204,739,530/= shall be paid as follows: -

2.1 A sum of 12,000,000/= shall be payable by bankers draft upon the filing of the award.

2.2 The balance of Ug. Shs 192,734,530/= shall be paid by M/S Oil Seeds Uganda Limited out of the proceeds from the award against Uganda development Bank through our Advocates, less any amount paid by Uganda Development Bank as their share of arbitration fees.

We hereby authorize our lawyers M/S Bitangaro & Co Advocates and/or M/S Kirenga, Butagira, Byaruhanga & Co Advocates as well as Uganda Development Bank to pay the Arbitrator Remmy Kasule, all his due fees out of any money that may be in their possession due to us as a result of this award in this Arbitration. This mode of payment has been accepted by Mr. Kasule."

It is the case for the Plaintiff that when by another subsequent agreement dated 25 July 2000 between Uganda Development Bank and The 2nd Defendant Exhibit P.3, the 2nd Defendant was paid Shs 870,000,000/= out of which it was stated that Shs 70,000,000/= was payable to the plaintiff that money should have been paid to Plaintiff.

This is because Exhibit P.3 in a way settled an compromised the agreement of the parties in Exhibit P.2. It is further submitted by the Plaintiff that Arbitrator's

fees become due and payable upon making his award except if there is an agreement to the contrary.

In this regard I was referred to the cases of **Re Coombs 1850** 4 Ex 839 and **Ponsford Vs. Swaine** (1861) 1 J & H 433 as authorities for that proposition; it is therefore contended by the Plaintiff that the said 70,000,000/= was payable immediately to the Arbitrator the Plaintiff himself. This is because Uganda Development Bank clearly specified the amount to be paid to the Plaintiff as their contribution of the fees in exhibit P.3 and that Uganda Development Bank was not necessarily bound by exhibit P.2.

It is further contended however by the Plaintiff that under exhibit P.2 any money due to the Plaintiff as his fees that came into the Defendant lawyers hands i.e. M/S Bitangaro & Co advocates" was to be paid over by the said advocates to the Plaintiff.

For the Defendants it is submitted there was no breach of contract. Counsel for the Respondents submits that the only obligation of the 2nd Respondent as far as the present dispute was concerned was to pay the balance of Shs 192,734,530/= out of the proceeds of the award through their advocates less any money paid by Uganda Development Bank as their share of arbitration fees. Counsel for the Respondents strongly argues that those "proceeds" have to date not

materialized. However in what appears to be an alternative argument, counsel for the Defendants submits that the 2nd Defendant was actually coerced or under duress/under influence when making/signing Exhibit P.2. This is because the Plaintiff had earlier billed the 2nd Defendant Shs. 1, 531,579,000/= as taxed fees if the 2nd Defendant did not accept its demand of Shs. 204,734,530/=.

Given that the arbitration award was ready and that the arbitration had lasted a very long time, the 2nd Defendant was left with no choice but to accept the Shs. 204,734,530/=. This in effect made Exhibit P.2 legally voidable.

Counsel for the Defendants distinguishes the payment made under Exhibit P.3 from that anticipated in Exhibit P.2. Counsel for the Defendants argues that exhibit P.3 catered for a settlement between Uganda Development Bank and the 2nd Defendant in Mis. Application No. 1355 of 1999. This Mis. Application No. 1355 of 1999 arose out of an objection by 2nd Defendant and cross objection by Uganda Development Bank when the Plaintiff filed his arbitral award in court. However the arbitral award itself was filed under a different Misc. Application No. 9 of 1999 so the monies settled in Exhibit P.3 do not relate to the award per se' but rather to the objection and cross objection.

Counsel for the defendant rejects the notion that Exhibit P.3 in any way compromised or settled Exhibit P.2. If this were so then according to counsel for the Defendants

> *"By legal effect, this would according to the Plaintiff mean that his award was effectively set aside. By legal consequence, an arbitrator whose award has been set aside is not entitled to any fees and must in fact refund anything he has received"*

Before I make my findings on this issue let me set out what Exhibit P.3 states

"THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NOS. 1355 OF 1999

(ARISING FROM MISC. APPLICATION NO. 4 OF 1993)

IN THE MATTER OF AN ARBITRATION

BETWEEN

OIL SEEDS (U) LIMITED ..... APPLICANT/OBJECTOR

AND

UGANDA DEVELOPMENT BANK ..... RESPONDENT/CROSS OBJECTOR

SETTLEMENT

WHEREAS the parties hereto were dissatisfied with the award made in the arbitration proceedings before MR. REMMY KASULE and accordingly filed the

above application objecting and cross objecting to the said award and have agreed to settle their dispute.

WHEREFORE by consent of both parties, the said dispute is settled on the following terms namely: -

1. THAT the respondent/Cross Objection pays to the Applicant/Objector a total sum of Ug. Shs. 870,000,000/= (Shillings Eight Hundred Seventy Million Only) in full and final settlement of the Applicant/Objector's claim against the Respondent/Cross Objector, the said amount being itemised as follows: -

    (i) Amount to be paid to the Applicant/Objector in full and final settlement of its claim against the Respondent/Cross Objector Shs.700, 000,000/=

    (ii) Amount to be paid to the Applicant/Objector's Advocates in full and final settlement of costs incurred in all proceedings between the parties Shs. 100, 000, 000/=.

    (iii) Amount payable to the Applicant/Objector's advocates in full and final settlement of fees and any expenses, which may be due and owing to the arbitrator Mr. Remmy K. Kasule –

    Shs. 70,000,000/=

    TOTAL **Shs. 870,000,000/=**

2. THAT the Respondent/Cross Objector be absolved from liability to pay any fees and or expenses that may be due and owing to the said arbitrator.
3. THAT the Respondent/Cross Objector bears its own costs.

Dated this 25th day of July 2000.

BITANGARO & CO. ADVOCATES
COUNSEL FOR THE APPLICANT/OBJECTOR

NANGWALA & CO. ADVOCATES
COUNSEL FOR THE RESPONDENT/CROSS OBJECTOR

Given under my hand and the Seal of this Court this 25th day of July 2000.

JUDGE/REGISTRAR "

As to the existence of the contract/agreement in question I think both parties are agreed that court should address itself to exhibit P.2. in particular. Exhibit P.2 presents 2 legal challenges based on the submission to court. First whether it is voidable by reason of coercion, duress and or undue influence. Secondly as to its true interpretation.

A contract arrived at through coercion, duress and or undue influence is void able (see the learned author **HODGIN**: **Law of contract in East Africa** P.130) at the instance of the party who is the victim of the coercion, duress or undue influence.

I agree with the learned author that the test to be applied is where it can be shown that one party is in a position to dominate or influence the mind of another party and the contract appears to be against the interests of the dominated/weaker party then it is for the dominant person to prove that he did not unduly influence the other party.

There is an oscillating burden of proof here. First the person who alleges domination must prove that indeed he/she was in a position to be dominated by a second party. When that is done the onus then shifts to the dominant party to prove that it did not actually exercise or unduly influence the other party.

In this case the "dominant" party would be the Plaintiff Mr. Remmy Kasule the arbitrator while the "dominated" party would be the 2nd Defendant M/S Oil Seeds (U) Limited.

The factor of dominance or the nexus between the two would be the in filed arbitral award. As an example of this power are 2 bills of arbitrator fees "placed" before the 2nd Respondent to pay one up to 7 times the other. The 2nd Respondent was to choose which one he would rather pay if he wanted his award filed in court. I find that this is really an exercise of payment levering by the Plaintiff as an unpaid Arbitrator in a situation where the fee structure for his fees had not been agreed to in advance. In such a situation I am persuaded by counsel for the Plaintiff when he states that this was commercial pressure and not economic duress. In this respect I agree with the cases cited namely **The semeon and the siborre** [1976] 1 Lioyds Rep 293 and **Pao on Vs. Lau Yiu Long** [1980] AC 614 on the effect of commercial pressure. I particularly agree with the extract of the Judgment of Lord scarman in the Pao on case where he held

> " *In a contractual situation, commercial pressure is not enough. There must be present some factor which could be regarded as coercion of his will so as to vitiate the consent"*

I am unable to see these other factors in this case; certainly it cannot be the desperate desire to have the arbitration award filed in court. This clearly required the prior settlement of fees. I therefore find that exhibit P.2 is not voidable by reason of coercion, duress and or undue influence.

As to the true interpretation of Exhibit P.2 especially para 2.2 it is really a mechanism of payment. The balance of Ug. Shs. 192, 734, 550/= is said shall be payable out of the proceeds from the award against Uganda Development Bank through the Advocates (of the 2nd Defendant) less any amount paid by Uganda Development Bank as their share of Arbitration fees. It is significant to note that this agreement was dated on the 26th October 1999 that is 5 years ago. This payment still remains outstanding to date. It is argued for the Defendants that this amount is outstanding because the proceeds have not materialized. Counsel for the Defendants further argues that the 2nd Defendant is still seeking the enforcement of the award through Exhibits D 20 (a letter dated 6th May 1999 from the Plaintiff to counsel for the parties in the arbitration) and D 14 (a letter dated 16th October 2000 by then counsel for the 2nd Defendant to the Registrar (Civil) for the High Court of Uganda requesting the matter be placed before a Judge for remission to the arbitrator). However these letters are 4 – 5 years old and therefore show a general lack of vigilance to conclude the matter.

It is not clear why it is taking so long for the award in the words of counsel for the Defendants to "Materialise". One argument is that by counsel for the Plaintiff that the Agreement in Exhibit P.2 was compromised by Exhibit P.3 Even without going that far it clear that the 2nd Defendant is in breach of Exhibit P.2

for the sum therein to date remains due and owing. Five years is a longtime to settle fees even when the award has been duly filed in court.

I therefore find in answer to issue No. 1 that the 2nd Defendant is liable to the Plaintiff for breach of contract (i.e. exhibit P.2),

Issue No.2 whether the 1st defendant is liable to the Plaintiff for inducing the 2nd Defendant to breach the contract.

It is argued for the Plaintiffs that the 1st Defendant runs the 2nd defendant alone as its Managing Director. As a result he used to negotiate and transact on behalf of the 2nd Defendant. In this regard it is alleged that the 1st Defendant had all the powers of The Board even though there were other directors in the company. It is alleged that the 1st Defendant used his position to induce the 2nd defendant not to pay him the Shs. 70,000,000/= mentioned in Exhibit P. 3 which was stated therein to be "in full and final settlement of fees and any expenses which may be due and owing to the Arbitrator Mr. Remmy Kasule (the Plaintiff)."

It is further argued by counsel for the Plaintiff that the inducement of breach of contract by the 1st Defendant was a tort. Court was shown various authorities for this proposition which included **Wah Tat Bank & Ancr Vs. Chan Cheng Kum** [1975] 2 All 257 **Performing Rights Society Vs. Cyril Theatrical**

Syuheate [1924] 1 KB 1 and **International Factors Vs. Rodigues** [1979] 1 QB 351 for the Defendants it is argued that the actions of the 1st Defendant were actually the actions of the 2nd Defendant and there can be no question of inducing a breach. The Defendants further argue that the authorities cited are irrelevant as they relate to a tortuous actions and not a claim of breach of agreement.

In his evidence in chief the 1st Defendant in his written statement states that he never received the said 70,000,000/= but rather the money was passed over to M/S Bitangaro & Co. Advocates who expended the money. The 70,000,000/= DW 1 Mr. Twagira stated was to be expended on persons who played various roles in the procurement of the settlement. These people were the following.

1. 32,900,000/= to C. Twagira
2. 10,000,000/= " B. Kansango an Advocate with Bitangaro & Co Advocates.
3. 3,500,000/= "Jean Rwakakoko an Advocate with Bitangaro & Co Advocates.
4. 3,500,000/= " Alfred Nkwale an Advocate in Bitangaro & Co. Advocates
5. 10,000,000/= " Nangwala & Co. Advocates.
6. 300,000/= " A Clerk in Bitangaro & Co. Advocates.
7. 300,000/= " A secretary in Bitangaro & Co Advocates.
8. 300,000/= to A Clerk at Bitangaro & Co. Advocates
9. 300,000/= " An Office Manager with Bitangaro & Co. Advocates.
10. 300,000/= " A driver at Bitangaro & Co. Advocates.

DW 1 Mr. Twagira in his evidence while being cross examined acknowledged that by signing Exhibit P.3 the payment voucher M/S Bitangaro & Co Advocates could pay the above 10 named persons.

I shall now address my mind to the issue. This issue I find to be at the heart of the dispute between the parties. As referred to earlier in this Judgment Exhibit P.3 stated that the 70,000,000/= was to pay the Applicant/Objector's Advocates in full and final settlement of fees and any expenses which may be due to the Arbitrator Mr. Remmy K. Kasule (the present Plaintiff). Exhibit P.3 was drawn by M/S Nangwala & Co. Advocates. Mr. Nangwala PW 2 in his witness statement stated

"that in the year 2000 my firm received instructions from the Uganda Development Bank to represent the Bank in objection proceedings against an award on remission delivered by the Plaintiff as arbitrator, and to prosecute the Bank proceedings. The said objection and cross-objection were filed as High Court Misc. Application No. 355 of 1999.

Before the objection could be disposed of by Court, my firm received instructions from the Bank (UDB) to explore a possibility of settling the long standing dispute between the parties...several meetings were held between the parties... attend

by myself counsel for the Bank with Mr. Peter Nkuruziza as counsel for oil seeds...in attendance was the 1st Defendant.

Those meetings were aimed at a final and comprehensive resolution of the entire dispute between the two corporations that was the subject of the initial arbitration, the subsequent arbitration on remission and the objection and cross objection ..."

In cross-examination he said " Mr. Kasule was the object of the 70,000,000/=... which maybe due and owing... if there was no money owing it should have been refunded".

Mr. Peter Nkurunziza PW 3 who was the counsel of the 2nd Defendant but Limited in how far he could testify because of client/lawyer privilege rules confirmed to court that a settlement had been reached and that his firm paid the 70,000,000/= as directed by Mr. Charles Twagira the 1st Defendant as Managing Director of the 2nd Defendant. Mr. Nkkurunziza also confirmed that Exhibit P.4 the payment voucher from his firm was signed by the 1st Defendant. Exhibit P.4 was made out to the 2nd Defendant in the sum of 70,000,000/= for *"Being payment towards Arbitration costs in the case of M/S Oil Seeds Vs. UDB".*

I find from the evidence before court that the 70,000,000/= was indeed for payment to the Plaintiff. I am persuaded by the testimony of PW2 Mr. Nagwala which was very firm that the 70,000,000/= was part of a " *final and comprehensive resolution of the entire dispute between the parties". I take further comfort in this conclusion when one reads para 1(11) of Exhibit P3 which is a payment to the Applicant/objector's Advocate said to be in "full and final settlement of costs incurred in all proceedings between the parties (emphasis mine)." I don't see why the Plaintiff as arbitrator would be treated differently.*

The only reason then why the Plaintiff was not paid is that the 2nd Defendant ordered the 70,000,000/= to be distributed to other persons who had helped procure the settlement including himself. I must say that looking at the distribution list where the bulk of the money was paid to various persons at Bitangaro & Co. Advocates one cannot avoid the feeling that the whole payment of the 70,000,000/= was not transparent and was dishonest.

Having found as above it is now easier to address the matter of the alleged inducement of the 2nd Defendant. This issue has a component of lifting the corporate veil to attribute liability to 1st Defendant for his actions as Managing Director.

It is trite law that the veil of incorporation may be lifted where corporate personality is used as a mask for improper conduct, fraud or illegality.
See **Gilford Motor Co** Vs. **Home** [1933] CA 935.

In this era when Corporate Governance is being given renewed importance Company Officers are under a duty to conduct them selves honestly and in the best interest of the company or risk personal liability.

It is for this reason that I am further persuaded by the authorities cited by counsel for the Plaintiff and in particular Performing Rights Society Vs. Cyril Theatrical Syndicate [19245] KB 1 at P 14 – 15 where At Kin L. J. stated

> " *Primia facie, a Managing Director is not liable for tortuous acts done by servants of the Company unless he himself is privy to the acts, that is to say, unless he ordered or procured the acts to be done... if a company is formed for the express purpose of doing a wrongful act if, when formed, those in control expressly directed that a wrongful thing be done, the individuals as well as the company are responsible for the consequences... if the Directors themselves directed or procured the commission of the act, they would be liable in whatever sense they did it, whether expressly or impliedly".*

I accordingly in answer to the second issue find the 1st Defendant liable for inducing the 2nd Defendant to breach the contract.

Issue No. 3 whether the 1st Defendant is liable to the Plaintiff in conversion

The Plaintiff's counsel has conceded this issue that an action in conversion of money cannot lie once it has passed into currency. This is a true position of the common law.

Counsel for the Plaintiff however in the alternative argues that an action lie for money had and received. For this proposition he relies on the case of **Liphin Gorman** Vs. **Karprale Limited** [1992] 2 All E. R 512.

In that case it was held that where an action in conversion is barred because what the Defendant handled was money that had passed into currency, the Plaintiff never-the-less had a valid action for money had and received in so far as he could trace the money into the Defendant's hands and the latter did not take it in good faith for value.

Counsel for the Defendant largely argues on the grounds that a claim based on the tracing of money had and received is a departure in the pleadings and

offends 06r 6 of the CPR. He further argues that this claim of money had and received is unsubstantiated as even PW 2 Mr. Peter Nkurunziza testified that the 70,000,000/= was never paid out to the 1st Defendant.

In light of my findings in issue No. 1 I find this issue No 3 superfluous. However the argument that the 1st Defendant did not receive the 70,000,000/= is very technical and superficial. This is because the 1st Defendant himself admitted to taking 32,900,000/= of the 70,000,000/=.

I find that my answer to issue No. 1 substantially covers whatever outstanding dispute is covered in issue No. 3 and in light of the concession by counsel for the Plaintiff on the issue as framed I am making no further finding on the issue.

Issue No. 4 whehter the defendants are liable to the Plaintiff for breach of trust.

I find that light of my findings in issue No. 1 this area of the claim has also substantially been dealt with. I therefore make no further finding as to this issue.

Issue No. 5 whether the Plaintiff is entitled to the remedies sought.

The amended plaint sought the following orders. That judgment be entered for the Plaintiff against the Defendants jointly and or severally for

(a) Shs. 70,000,000/= and a tracing order

(b) Interest on the sum at 35% p.a from August (the year was not pleased), until payment in full

(c) In order that the Defendants pay for V.A.T on the sum above

(d) Costs of the suit.

I find that the Plaintiff entitled to the following remedies against the Defendants jointly and severally

(i) Shs. 70,000,000/=

(ii) Interest though not at 35% p.a which I find inordinately high. I would award 24% p.a from date of Judgment.

(iii) Costs of this suit.

I would make no order for the Defendants V.A.T on the above sum, as taxation is a matter for the Uganda Revenue Authority to assess. Judgment is accordingly, so entered.

Sgd.
Geoffrey Kiryabwire
JUDGE

Date 23/02/2005