

I find that this pleading is sufficient to cover a claim of money had and received by its very wording, which is a concise form of the material facts for purposes of order 6 rule 1 of the CPR.

The tests for a court to consider in determining whether or not there was created a quasi contract were out lined in Pieterseon Vs. Tuboku-Metzger 1966 (2) A.L.R Comm. 331 (Reproduced in The Law of East Africa by Hodgkin 1997 P 277-8) where **Luke Ag. J** held:

"To succeed in a quasi contract the money must have been received to another's use and as a general rule the Plaintiff must in all cases prove;

- (a) that the Defendant himself or his agent has actually received money which is sought to be recovered; and*
- (b) It is generally stated that it is necessary in order to maintain this action, that the money... should have been received by the Defendant in such circumstances as to create a privity between him and the Plaintiff".*

I find that the Plaintiffs have indeed led evidence along the 2 tests given in the Pieterseon case (supra) and so can maintain a claim for money had received based upon a quasi-contract with the Defendants.

As to the Plaintiff's claim for declarations based on the contract Exb. P 2 between the Defendants and KCC, order 2 rule 7 of the CPR provides

"No suit shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby and the court may

make binding declarations of right whether any consequential relief is or could be claimed or not”.

I find that there is nothing to stop this court from making declarations as to the effect of the contract exhibit P 2 on the Plaintiffs who in any event are the subject of the said contract. A declaration of this nature does not determine the rights of the contracts high contract parties but rather its effects on interested third parties.

In conclusion based on the pleadings before court I find that the Plaintiffs have a claim against the Defendants in an action for money had and received and also for the determination of certain declarations. However the Plaintiffs must still prove their case.

Issue No. 3 Whether there is a valid existing contract between Kampala City Council (KCC) and UTODA

It is contended by the Plaintiff that the contract between Kampala City Council (KCC) Utoda (herein after referred to as “the Contract”) has now expired and is not valid. It is further contended the that subsequent extension by the Town Clerk exhibit P 3 was contrary to the provisions of the Local Government Act 1997. Counsel for the Plaintiffs argues that it is only the District Tender Board, which is empowered under section 92 of the Local Government Act to handle all Tender/Contracts. The Secretary of the Tender Board and not The Town Clerk does its communication. It is therefore argued that the Town Clerk’s letter is illegal and the contract extension is invalid.

For the Defendants it is submitted that the Plaintiffs have no capacity to question the validity of the contract, as they are not parties to it. It is argued that only the Defendants and KCC can do this. However KCC was not made a party to the

case by the Plaintiffs. In what appears to be an alternative argument the Defendants submit;

"... That the Town Clerk properly acted in extending the contract for the reasons below: -

- *Under S 66 2(b) and (c) the Town Clerk is responsible for the implementation of Council decisions not the Tender Board.*
- *The Town Clerk is a signatory to exh. P-2, which was extended under Exb. D-7 (I think counsel meant Exb. P2).*
- *In Exh. P-3, the Town Clerk quoted minutes of the Council, therefore the action of extension was not by him. All he did was to communicate".*

In other words it can be said that no one should fault the actions of the Town Clerk because he was just following orders.

Finally counsel for the Defendant argues that it would be wrong of court to nullify a contract where KCC collects Shs. 260M/= a month as public revenue without giving it a hearing.

Having perused the submissions of both counsels to the parties it would appear to me that the dispute lies with the manner in which the current contract was extended. From the submission of both counsel it would appear that there is no dispute with exhibit P 3, a letter from the Town Clerk to the Chairman of UTODA dated 20th October 2003 which reads as follows: -

To determine whether the contract is valid or not one has to examine the whole process behind the extension. The Plaintiffs have strongly argued that this contract was not valid because the District Tender Board in accordance with the Local Government Act did not approve the extension. The Defendants argue that the Plaintiffs are not a party to the contract and therefore are not privy to its terms and conditions for purposes of enforcement. Only KCC, which has not been joined as party, can sue for the contracts enforcement and or validity.

I must agree with counsel for the Defendants that as a result of the legal principles surrounding privity of contract it would be unjust to determine the validity of the contract without KCC being a party to the case and being given an opportunity to be heard. It is for KCC to in this situation to raise the red flag as to validity. In the circumstances I will have to rely on the Latin/legal maxim

*"Omina praesumuntur legitime facta donec probetur in contrarium
(All things are presumed to have been legitimately done, until the
contrary is proved)"*

In the absence of the KCC as a party it is difficult to prove the contrary, the Plaintiffs as third parties to the contract instead of suing on it to contest its validity should have complained to those other organs of Government that supervise public bodies and Local Governments over such contracts.

In answer to the fourth issue therefore I find that unless the contrary be legally proved there is a valid existing contract between KCC and UTODA.

Issue No. 4 Who is entitled to determine the charges under the contract?

For the Plaintiffs it is submitted that under section 31 and regulation 6 of part II of the second schedule it is KCC to fix fees and charges. Furthermore under regulation 13 (e) of the same schedule KCC is empowered to manage public vehicle parking. In this regard, KCC in the year 2000 fixed the proper fees for PSV vehicles as Shs.20,000/= monthly fee and Shs.3,500/= as daily fees.

For the Defendants it is submitted that the power of KCC to fix fees and charges under regulation 6 have been under the authority of regulation 9 contracted out to private contractor. This is done by virtue of exhibit P 2 being the contract with UTODA and KCC. Counsel for the Defendant further argues that the contract, Exhibit P2 does not relate to regulation 13 (e) i.e. public vehicle parking but rather regulation 16 being any other service not specified in the schedule. Counsel for the Defendants therefore submits that to determine this issue one must solely look at the contract exhibit P2.

Counsel for the Defendant further relies on Section 91 of the Evidence Act for the proposition that when the terms of a contract have been reduced into a document no other evidence shall be given in proof of the terms of such a document except the document itself.

Having perused the submissions of counsel for both parties I find that this issue is closely related to next issue No. 5 namely

"What charges are the Defendants entitled to collect under the contract"

To avoid duplication in my decision I shall tackle this issue in the next issue No. 5. Suffice it to find at this stage that KCC outsourced the Taxi Operation in Kampala District (whether pursuant to regulation 13(e) or 16 of second schedule of the Local Government Act as the case may be since this not a pleaded matter/issue in this case) to the Defendants under a contract exhibit P2 which was then extended under Exhibit P 3. One must therefore look to these contractual documents to determine the extent of delegation regarding the charges and fees

Issue No. 5. What charges are the Defendants supposed to collect under the contract?

For the Plaintiffs it is contended that the Defendants are mandated to collect daily sticker fees of Shs.3,500/= and month fees of 20,000/=. However the Plaintiff's argue that the Defendants have illegally increased the daily sticker fee from Shs.3,500- to Shs. 4,000 (and now Shs.4,500). Furthermore the UTODA through its employees are illegally charging further fees like loading fees which varies from stage to stage (from shs. 1000 to 20,000) and penalties.

Counsel for the Plaintiff submitted that it is KCC, which fixed the rates at Shs. 3,500/= daily sticker fee and 20,000/= monthly and this was not to be changed. This is on the strength of minutes of the Kampala District Tender Board held on 23rd November 2000 (part of exb P 1) where at P 3 it was stated that UTODA must not increase those charges.

He further submitted that under the Local Government Act Schedule 2 Reg. 13(e) KCC is empowered to fix and manage public vehicle parking and it is that

which the delegated to the Defendants. There is no provision for loading fees and penalties.

For the Defendants it is submitted that based on Exb P.1 the charges collectable are;

- (a) Special hire 6,000/= monthly
- (b) Pick up hire 9,000/= monthly
- (c) PSV(s) 20,000/= monthly
- (d) " 3,500 or 4,500 daily (currently)

Save for the amount levied for daily fees, counsel for the defendants states that the parties do not have a difference as to the above type of fees. The problem lies with the so-called loading fee. It is the case for the Defendants that UTODA does not collect loading fee. It is further the case for the Defendants that this so called loading fee is actually a welfare fund operated by the taxi drivers themselves. It is operated at each stage independently and the collected money is taken by the drivers. Indeed they point to evidence that the 3rd Plaintiff Muwanika Zubairi according to DW 4 Alex Mugabe actually operated a loading fee system as Vice Chairman of Kibuye stage in 1994 and collected this loading/welfare fee and so it is strange for him to sue against it.

With regard to fines counsel for the Defendant says that there is nothing wrong with UTODA collecting them. Counsel for the Defendant argues that Reg. 13 (a) of the 5th Schedule Part IV of the Local Government Act names fines as one of the revenues of the Local Governments and this function is delegated to UTODA.

I have perused the submissions of Counsel on this issue as well as the evidence. Exhibit P 2 which is the contract has the following recital

"WHEREAS

The council is required to provide the service of Managing Tax (i) [sic] operations and maintaining taxi parks in the City (hereinafter called the "service") and

WHEREAS

The contactor has been providing the said service and

WHEREAS

The council wishes to extend and is hereby extending the contract for the provision of the service, together with the other services and works related thereto as set out in the contract...

NOW IT IS THERE FOR AGREED between the council and contractor as follows:

- 1. The contactor shall provide the service of managing and maintaining the taxi operations and taxi parks respectively in the City of Kampala...*
- 2. The contractor shall pay to the council a monthly contract fee of shs. 260,000,000/= (shillings Two hundred and sixty million) payable as follows:-*
 - i) Two cheques for Shs. 55,000,000/= (fifty five million shillings only) each in favour of Kampala City Council.*
 - ii) Two cheques for shillings 75,000,000/= (seventy five million shillings) each in favour of the Local Government Development Fund.*

All payments to be made in advance and in any case not later than the 7th day of the month...

4) *The contactor shall pay arrears due and owing to council as follows:-*

i) *Shillings 520,000,000/= (Shillings five hundred and twenty million) shall be paid within 2 months from the date of signing the agreement*

iii) *[sic] Not less than 52,000,000/= (Shillings fifty two million) shall be deposited on the council's DFCU account every month.*

5. *The contractor shall provide the taxi service in accordance with the provisions of the contract and to the satisfaction of the council.*

6. *The contract constitutes the sole contract between the council and the contractor for the performance by the contractor of the service."*

The schedule to the contract largely reflects the above recital. Paragraph 1.14 of the contract defines the service as

'means the management of the Taxi Operation's at the Benedicto Kiwanuka Taxi Park, Namirembe Road Taxi Park, Special Hire Taxi Operation in Kampala District. This does not include any other business on or about the Taxi Parks."

Exhibit P.3, which is said to, extended the life of Exhibit P.2, though by letter this time (already reproduced in this judgment) only has this to say about money

"... the New Contract sum is shs. 280,000,000/= (two hundred and eighty million shillings) per month VAT excluded..."

It is clear from the contract and the letter that extended it that a contract lump sum as opposed to charges is provided for. Indeed, if one is to inquire into any charges one has to examine a different document altogether which is exhibit P.1 the report of the Kampala District Tender Board for the period September 2000 to February 2001. Paragraph 6 of the contract creates further legal complications by stating that the contract constitutes the sole contract between the council and the contractor for the performance of the service by the contractor. However both parties to the dispute seem to be clear in their minds about charges whether they are daily, monthly or otherwise which flow from the same contract and yet the same contract itself is silent about the said charges. I find this reference only to a contract fee/sum based on evidence given to court as poor reflection of the intention of the parties regarding the charges there under.

In the case of **JINABHAI AND CO VS. EUSTACE SISAL ESTATES [1967] EA (TZ) DUFFUS J.A** held:-

"The basic principle is that this (a) contract must be interpreted according to the intention of the parties and that this intention must first be ascertained from the document itself and that the words must be construed in their ordinary sense. This is subject to certain exceptions and in this case evidence of the surrounding circumstances was led by both parties to show the true meaning of the language used in cl. 7" (emphasis mine).

Such circumstances in the above case appear to have been fraudulent misrepresentation. **Sir Charles Newbold, P.** went on the further hold in the same case:-

"... but in no case is evidence of prior negotiations admissible and evidence of a prior draft which has been rejected, of a contract is ipso facto nothing other than evidence of prior negotiation."

From the above an analogy can be made with the present case and especially so in light of para 6 of the contract, Exhibit P2, that the contract does not provide for the separate charges/fees to be paid under the contract. Further more from the words in the contract it is impossible to construe from their ordinary meaning that separate charges/fees were contemplated.

This, as I have said before from the evidence of the parties on record including the Defendant, who is a party to the said contract, does not fully reflect the intention of the parties on the ground. In this sense the contract can be said to be defective and or poorly drafted.

Section 93 of the Evidence Act (Cap 6) provides

"When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects".

This means that evidence may not be brought to enrich the contract notwithstanding that it stands defective on the point in question. That is the legal position i.e. de Jure. However the position the ground de facto is different and to leave the issue as such will not resolve the matters in controversy.

Section 33 of the Judicature Act provides

“The High Court shall in the exercise of the Jurisdiction vested in it by the constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.”

Since the issue of charges/fees is at the heart of this dispute, based on the evidence before court certain findings can be made without unduly affecting the de Jure position of the contract.

First both parties accept that arising from the contract de facto the Defendants levy certain charges/fees. These are Monthly charges for special hire, pick-ups and PSV(s). The other levy that the defendant can charge and has been the basis of this case is daily fee for PSV(s) the amount of which is disputed. However since the contract is silent as to how these charges are to be levied I find that the increase of daily fee from Shs 3,500/= to Shs 4,000/= and consequently now to Shs 4,500/= cannot be said to be illegal.

Secondly on the issue of loading fee both parties also accept that the de facto that this fee is also being levied at the PSV taxi stages. According to PW1 Mr. Emmanuel Sserunjogi and PW2 Mayambala Mustapha this loading fee is paid to UTODA staff with UTODA identity cards who wear gowns and are called UTODA guides. Unlike the monthly and daily charge fee no receipt is given for the loading fee collected. Further according to PW2 Mayambala, if a PSV does not pay this fee it is not allowed to load passengers at the stage and indeed the PSV

taxi may be attacked by those at the stage if it is found loading passengers. According to the defence witnesses DW1 Eddie Namugera, DW2 Salongo Kawalya, DW3 Badru Mulumba and DW5 Rev Atwine the loading fee is actually a contribution to a welfare fund and its collection is voluntary.

A review of the evidence of how this so called loading fee is collected is slightly varied. However a look at the books used to record this loading fee i.e. exhibit P 9(a) and (b) and the bank saving card exhibit P10 where the money is kept shows that the collection, deposit and payment of this loading fee is very untransparent. It is however clear that this loading fee is not paid to UTODA company offices but is kept at the various stages. To that extent fee is not collected by UTODA and therefore does not derive its authority from the contract. However that notwithstanding I find that the said fee is collected in the name and authority of UTODA. The collectors of these loading fees like DW1 Eddie Namugera, hold Identity Cards with the name of UTODA and while others wear UTODA gowns. Indeed DW5 Rev. Atwine the Executive Secretary of UTODA clarified that UTODA have not refused the collection of this fee at the stages. Even though the payment of these loading fees is said to be voluntary, I am persuaded by the evidence of PW2 Mayambala who struck me as truthful witness that if a PSV does pay the loading fee it will not be allowed to load passengers at that stage.

I therefore find that loading fee is not a fee collectable under the contract, it is a voluntary fee collected at the stages and any attempt by anybody to force its collection at the stage or refuse the loading of a PSV vehicle that has not paid it to be illegal.

Thirdly as regards fines DW5 Rev Atwine testified that UTODA does not collect fines but rather penalties. It is not clear to me how the witness sought to

differentiate the two. He says it is collected under para 22 of the contract which provides.

"The council will be responsible for the maintenance of law and order at the taxi park hand in hand with the contractor (i.e. UTODA)."

DW5 Rev. Atwine testified that in furtherance of this provision that the Defendants UTODA jointly arrest with KCC defaulting vehicles. However according to the evidence tendered in Court in particular Exhibit P7 a receipt printed as "monthly sticker General receipt" No. 7973 of the 21st February 2004 the position is not that clear. The said receipt has on top of it the words written in ink "Fine". It is for the sum of 10,000/= received from motor vehicle UAD 834D in respect of

"penalty for late January sticker payment".

It is signed for UTODA Kampala District and has the stamp of "UTODA KLA DISTRICT Approved by Chief Cashier taxi park."

It is not clear how a monthly sticker general receipt can at the same time be used to collect penalties/fines? it is also not clear how a fine for the late payment for a January monthly sticker is or can be viewed as maintenance of law and order at the taxi park. By maintenance laws and order and one understands this to mean the maintaining Civic peace and the avoidance of criminal activities. Council for the defendant submits that there is nothing wrong about collection of fines by the defendant on behalf of the KCC as regulation 13 (a) of the 5th schedule of part iv. of The Local Government Act names fines as a source of revenue for local governments. He submits that it is only the collection of the same that it delegated to UTODA.

Whereas I do agree that the fines are a source of revenue to the local governments I am unable to see at what point that express delegation was made to Utoda by KCC. Certainly para. 22 is not a delegation of the power to collect fines. The contract is silent on the issue of fines and paragraph 21 of the contract provides.

"Following the formation of a binding agreement no delegation from, addition to or variation of the conditions shall be valid or of any affect unless agree to in writing and signed by the parties"

No evidence of an addition or variation to the contract in writing relating to the collection of fines has been presented to Court.

I therefore find that the defendants have no power to collect fines under the contract on behalf of KCC.

Issue No 6

Remedies

1. Refund of Shs.500/= illegally levied against 4,500. Motor vehicles daily for the past 3 years.

The plaintiff calculates that as a result of the alleged illegal levy of an extra Shs 500/= against the plaintiff's 4,500 vehicles for 3 years a refund of Shs 2,700,000,000/= should be awarded by Court. As Court has found that on the basis of the contract the increase of daily fees by the Defendant Utoda cannot be said to be illegal it means that no refund can be made. However even if Court had found the said increase to be illegal this refund would have to be treated at law as a special damage to be specifically and strictly proved. However the generality with which this claim was made (simply applying a mathematical

formula) would still have made it impossible for Court to make a meaningful award under this head.

2. A declaration that loading fees per stage and the extra Shs.500- as daily fee are illegal.

i. The Extra Shs.500- as daily fee

The Court on the basis of the contract signed declines to make the declaration sought.

ii. Loading fee

The Court finds that the loading fees levied per stage is not a fee collectable under the contract between KCC and the Defendant. It is a voluntary fee collected by drivers at the stage. The Court however declares that any attempt to force its collection and or to refuse the loading of a PSV vehicle that has not paid the said loading fee, is illegal.

3. Permanent Injunction

The Court declines to grant a permanent injunction against the Defendants Utoda from levying the extra Shs.500/= as daily fee and loading fee (as they don't levy it).

4. General damages

I agree with counsel for the Defendant that a case for general damages was not made well made out by Plaintiffs. A prayer was made that each of the Plaintiffs be awarded Shs.2,000,000/= for loss of useful income and emotional suffering. None of the Plaintiffs recognized by Court in this case lead evidence of this loss and emotional suffering. The Court therefore does not award general damages.

5. Interest of 20% on general damages

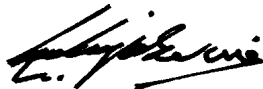
Following my findings on general damages no interest is awarded.

6. Costs

Court will exercise its discretion to award the Defendants 50% of their costs as this case raises issues of public concern about the running of the taxi business in Kampala city.

7. Any other relief

Since the parties addressed Court at length on the matter of fines and charges I make an additional declaration that in the absence of an addition or variation of the contract in writing signed by KCC and the Defendants, the Defendants have no contractual power to collect fines on behalf of KCC.



Justice Geoffrey Kiryabwire

Date 14th April, 2005