

ANTHONY NSIBIRWA SSERUWAGI PLAINTIFF

VERSUS

3. HERMION UGANDA LIMITED
DEFENDANTS

JUDGMENT

The plaintiff alleges that sometime in or around June 2017, the 1st defendant who was acting on his behalf and on behalf of the 2nd defendant, entered into an oral agreement with the plaintiff instructing him to find a buyer for the suit property and it was agreed that the plaintiff would be paid a commission of 10% of the sale

price of the property. In December 2017 the plaintiff acting as an agent and broker of the 1st and 2nd defendants, introduced the 3rd defendant's agent to the 1st defendant, as a result of which the 3rd defendant purchased the 1st and 2nd defendant's property at a consideration of USD 800,000 (United states dollars Eight hundred thousand only). That despite several demands, the 1st and 2nd defendants have refused to pay the plaintiff's 10% commission. The plaintiff thus filed this suit seeking the above stated declarations and an order for payment of the 10% commission, plus general damages for breach of contract and costs of the suit.

The 1st and 2nd Defendants' case

The 1st and 2nd defendants contend that they have never approached the plaintiff or employed him to act as their agent in respect to their sale of the suit property to the 3rd defendant. They further denied that they had ever entered into an oral contract to pay the plaintiff 10% of the property's purchase price. They averred that the plaintiff like many other people inquired from the 1st defendant as to whether the suit property was on sale and the 1st defendant confirmed to him as such and informed him of their offer for the sale of the same which at the time was USD\$ 1,000,000 (United States dollars one million only). That the suit property was always available to the public for viewing and the 1st defendant personally informed Ms. Rukhasana Karmali the 3rd defendant's Managing Director and many other potential buyers about its availability on the market for sale. After the 1st defendant approached the 3rd defendant directly through Ms. Rukhsana Karmali to buy the suit property, he negotiated the terms of sale with her and thereafter the suit property was sold to the 3rd defendant for a purchase consideration of USD 750,000; all of which was done without the involvement of the plaintiff. They contended that the suit is barred by statute and the plaintiff has no cause of action against them and that he is thus not entitled to the prayers sought for in his pleadings.

The 3rd defendant's case

The 3rd defendant admitted that the plaintiff acting as an agent and broker of the 1st and 2nd defendants, took the 3rd defendant's agent to view the suit property and introduced her to the 1st defendant for a transaction of sale. As a result of the said

introduction the 3rd defendant entered into a purchase agreement with the 1st and 2nd defendants in which it bought the suit land.

It was an agreed fact by all the parties that the 3rd defendant does not owe the plaintiff any commission for the said land transaction. That the 3rd defendant paid the 1st and 2nd defendants the full purchase consideration for the property, and this is inclusive of the payment which the 3rd defendant deposited in court in compliance with a court order issued *vide* **Misc. Application No. 261 of 2021** which arose from the present suit. It was also an agreed fact that the suit property has since been transferred into the 3rd defendant's names as the Registered Proprietor and the 3rd defendant is in possession of the same.

Representation and hearing

The plaintiff was represented by Ms. Ita Kasaija, while the 1st and 2nd defendants were represented by Mr. Paul Sebunya and Mrs. Rola Barungi. Mr. Simon Tendo Kabenge represented the 3rd defendant. The parties filed witness statements which were further confirmed on oath and the witnesses were subjected to cross examination on the same. The parties filed written submissions which I have duly considered together with the pleadings and evidence on record.

Issues

The following issues were framed for determination by court;

1. Whether the plaintiff has a cause of action against the 1st and 2nd defendants premised on an oral contract for the payment of USD\$ 80,000 purportedly executed sometime in 2017 between the Plaintiff on one hand and the 1st and 2nd defendants on the other?
2. Whether the 1st and 2nd defendants are indebted to the Plaintiff?
3. Whether the parties are entitled to the remedies sought for in their pleadings?

Resolution of Issues

Issue No. 1: Whether the Plaintiff has a cause of action against the 1st and 2nd defendants premised on an oral contract for the payment of USD\$ 80,000

purportedly executed sometime in 2017 between the Plaintiff on one hand and the 1st and 2nd defendants on the other?

This issue was raised by counsel for the 1st and 2nd defendants as a preliminary issue under Order 6 Rule 28 and 29 of the Civil Procedure Rules SI 71-1 as amended.

Plaintiff submissions

Counsel for the plaintiff submitted that the plaintiff has a cause of action against the 1st and 2nd defendants and that whereas **Section 10(5) of the Contracts Act No. 7 of 2010** provides that a contract the subject of which exceeds twenty-five currency points shall be in writing, and while the plaintiff and 1st and 2nd Defendants did not execute a “Written Commissions Agreement”, the oral agreement plus written emails and telephone whatsapp messages exchanged between the 1st and 2nd and 3rd Defendants confirms that there was a legally binding contract for supply of services.

It was submitted that failure of a contract to comply with the provisions of Section 10(5) of the Contracts Act does not make oral contracts illegal or unenforceable. She cited the case of **JK Patel Vs Spear Motors Ltd SCCA No. 4 of 1991** where it was held “... *an oral agreement must satisfy the requirements of a contract such as offer, acceptance, consideration, capacity to contract etc....*” Counsel prayed that court finds that there was a contract for supply of services between the plaintiff and the 1st and 2nd defendants which was breached by the defendants’ when they deliberately refused to pay the plaintiff’s commission of 10% of the purchase price for the suit property.

Defendants submissions

Counsel for the defendants submitted that whereas the suit was premised on an oral contract between the plaintiff and the 1st and 2nd defendants, **Section 10(5) of the Contracts Act, No. 7 of 2010** provides that a contract the subject of which exceeds twenty-five currency points shall be in writing. That Section 10 (5) of the Contracts Act has been interpreted by the courts in various decided cases which have held that the requirement for a contract which exceeds twenty-five currency points to be in writing, is mandatory. He cited the cases of **John Kagwa Vs Kolin**

Insaat Turizm, Sanayi Ve Ticaret A.S and Nassur Bruhan HCT-00-CC-CS-0318 of 2012; and also the decision of Justice Christopher Madrama Izama in **Willy HC. Commercial Division Civil Appeal No. 03 of 2016**. Counsel also cited the case of **HJK Trading Company Limited HC. Land Division Civil Suit No. 415 of 2018** where court dismissed the suit because it offended the express provisions of Section 10(5) of the Contracts Act 7 of 2010.

He further submitted that plaintiff had misapplied the **Sale of Goods and Supply of Services Act 10 of 2018**. That the Act which commenced on the 17th of August 2018 could not apply retrospectively to an oral contract alleged to have been entered in 2017. In conclusion counsel submitted that the plaintiff's cause of action is statute barred and he prayed that this issue be answered in the negative.

Plaintiff arguments in rejoinder

In rejoinder counsel for the plaintiff argued that the cases cited by the defence counsel were distinguishable as they did not address **Section 5 of the Sale of Goods and Supply of Services Act 10 of 2018** which provides for contracts for the supply of goods and services to be made orally. Further that the argument that Act 10 of 2018 could not apply retrospectively to an oral contract entered in 2017 was misconceived because section 5 of Act 10 of 2018 was *in pari materia* with section 5 of the repealed Sale of Goods Act Cap. 82, which was adopted word for word in Section 5 of the Sale of Goods and Supply of Services Act of 2018.

Determination of Issue

This suit is premised on an oral contract between the plaintiff and the 1st and 2nd defendants, as asserted in paragraph 4(e) of the plaint. Whereas the plaintiff also adduced evidence of emails and telephone whatsapp messages to prove the alleged contract, he is bound by paragraph 4(e) of the plaint which states that the contract which is the subject of his claim was not in writing. **PW1** also testified that he and the 1st and 2nd defendants entered into an oral agreement based on the fact that the 1st Defendant was well known to him as a friend to his son PW2.

Counsel for the 1st and 2nd defendant argued that the suit which is seeking to enforce an oral agreement for USD 800,000 is barred by Section 10 (5) of the

Contracts Act 2010. **Section 10 (5)** of the Contracts Act No. 7 of 2010 provides that;

“A contract the subject of which exceeds twenty five currency points shall be in writing.”

Section 5 of The Sale of Goods and Supply of Services Act 10 of 2018 provides exceptions to the above requirement in respect of contracts for sale of goods and the supply of services. The section provides that;

*(1) “A contract of sale or supply of services may be made in writing, **or by word of mouth, or partly in writing and partly by word of mouth**, or in the form of a data message, or may be implied from the conduct of the parties. ”*

(2) “This section shall not affect a contract entered into under any other law requiring a contract to be made in a specific manner.”

The plaintiff argued that the oral agreement which is subject of this suit amounted to a legally binding contract for services which falls with the provisions of Section 5 of the above Act.

However it was pleaded in paragraph 4(b) of the plaint that the said oral agreement was entered into in 2017, which was prior to the enactment of **The Sale of Goods and Supply of Services Act 2018**. It is trite law that an Act of Parliament cannot be applied retrospectively. Accordingly the provisions of the Sale of Goods and Supply of Services Act 2018 (which law commenced on 17th August 2018) are not applicable to an agreement which was allegedly entered in 2017.

Counsel for the plaintiff also argued that the issue of retrospective application of Act 10 of 2018 was misconceived because **Section 5** of the repealed **Sale of Goods Act (Cap 82)** was in *pari materia* word for word adopted in Section 5 of The Sale of Goods and Supply of Services Act 2018. However section 5 of The Sale of Goods Act Cap 82 which is in respect of ‘*Contract of sale for goods with a value of 200 shillings or more*’ has no reference to contracts being made orally or in writing. In any event Cap 82 did not provide for contracts for the supply of services.

Plaintiff counsel also relied on the case of **JK Patel Vs Spear Motors Ltd SCCA No. 4 of 1991** wherein it was held that an oral agreement would be proved if a plaintiff established the existence of offer, acceptance, consideration, and capacity to contract. It was submitted that the plaintiff had adduced evidence to prove the said ingredients of an agreement. However I note that the above decision was made before the coming into force of the Contracts Act 2010 and thus cannot be relied on in the instant case where an agreement is alleged to have been entered in 2017. However even if this decision was applicable, it is notable that during the plaintiff's cross examination he conceded that he and the 1st defendant had never agreed on payment of a 10% commission and that he came up with the figure after being frustrated by the 1st defendant's refusal to discuss his payment. This would therefore mean that there was no consideration agreed to between the parties.

I therefore find that **Section 5 of The Sale of Goods and Supply of Services Act 2018** is not applicable to the agreement which is the subject of this suit. I further find that the agreement which is said to have been entered in 2017 is subject to the requirements of **Section 10 (5) of the Contracts Act**. Since the suit seeks to enforce an oral agreement for payment of a commission of USD 800,000, which exceeds twenty-five currency points as prescribed in section 10 (5) of the Contracts Act 2010, the said agreement was legally required to be in writing.

Plaintiff counsel cited various decisions where courts have held that the use of the word 'shall' in section 10 (5) of the Contracts Act is mandatory and dismissed suits which offend Section 10(5) of the Contracts Act. (See **John Kagwa Vs Kolin Insaat Turizm, Sanayi Ve Ticaret A.S and Nassur Bruhan HCT-00-CC-CS-0318 of 2012** and also the case of **HJK Trading Company Limited HC. Land Division Civil Suit No. 415 of 2018.**) In the case of **John Kagwa Vs Kolin Insaat Turizm (supra)** court when interpreting section 10(5) of the Contracts Act No. 7 of 2010 held that;

" And in conformity with the above highly persuasive decision, I hold that the word "shall" under S. 10(4) of the Contracts Act is mandatory. The provisions that such a contract shall be in writing is in plain English which can be understood by anyone who has gone to school. There is therefore no need for this court to bring in any other interpretations to suit the circumstances of the

plaintiff's case. And the rationale behind that legislation under S. 10(4) of the contracts Act was to prevent or groups of persons from conspiring to claim huge sums of money from others under dubious deals. So, in cases like the present one where hundreds of millions of Uganda Shillings (after converting US\$ 500,000,000) is being claimed this court cannot admit nothing less than a written contract.


*And as was held in the case of **David May Vs Busitema Mining CIE Ltd. HCT-00-CV-CS-0086-2008** quoted by counsel for the Defendants noncompliance with the law rendered the contract invalid and unenforceable."*

I agree with the above persuasive decision and hold that the use of the word 'shall' in **Section 10 (5) of the Contracts Act** means that the requirement for contracts exceeding twenty five currency points to be in writing is mandatory. Furthermore it has also been established that courts will not enforce a contract which is expressly or impliedly forbidden by statute. (See **Mariam Naigaga Vs Orient Bank Ltd HCCS No. 464 of 2013** which cited the case of **Stone & Rolls Vs B. Moore Stephens [2008] EWCA CIV 713, [2009] 2 WLR 351**. See also **Makula International Vs His Eminence Cardinal Nsubuga & Anor No. 4 of 1981 (CA)**).

Accordingly I find that this suit in which the plaintiff is seeking to enforce an oral contract of US\$ 800,000,00 (an equivalent to over Two Billion Uganda Shillings) cannot be sustained, as the said contract was entered in contravention of section 5 of the Contracts Act 2010.

I accordingly dismiss the plaintiff's suit with costs under Order 6 rule 29 of the Civil Procedure Rules, SI 71-1 as amended.

Delivered via E-mail this 30th day of March 2023


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Patricia Mutesi

JUDGE

30.03.2023