

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-CS-0025-2015

BWAMBALE NICKSON.....PLAINTIFF

VS

SOLAR NOW SERVICES (U) LTD.....DEFENDANT

BEFORE: HON MR. JUSTICE OYUKO. ANTHONY OJOK

JUDGMENT

The plaintiff filed this suit against the defendant claiming that the defendant had unlawfully terminated the Franchise agreement he had made with the plaintiff. The plaintiff contends that the franchise contract he had with the defendant was for a period of 60 months and that the defendant had unlawfully terminated the same after 7 months without giving him notice of termination and following the laid down procedures in the agreement.

The defendant on the other hand, contended that it had given the plaintiff notice prior to the termination of the franchisee agreement and that therefore he had no legal claim against him.

The plaintiff sought the following relief;

- (a) Declaration that the termination of the agreement between the plaintiff and the defendant amounted to the breach of contract.
- (b) Special damages of Ushs 254,824,000/=.
- (c) General damages
- (d) Costs of the suit.
- (e) Any other with leave of Court.

Issues raised;

- 1. Whether the defendant lawfully terminated the contract.
- 2. Remedies available to the parties.

Counsel Victor Businge appeared for the plaintiff and Counsel Mujurizi appeared for the defendant. By consent both counsel filed written submissions.

Issue 1: Whether the defendant lawfully terminated the contract.

Counsel for the Plaintiff submitted that the on the 16th day of October 2014, the plaintiff entered into a franchise with the defendant for five years to wit; was to sell the solar panels of the Defendant and the Plaintiff was to earn a commission on sales.

The plaintiff sold effectively however the Defendant terminated the contract unlawfully and illegally without regard to the dictates of the franchise agreement. Hence the suit.

The Defendant denied ever breaching the contract and contended that she followed the provisions of the franchise agreement.

Evidence

The plaintiff testified in Court and never produced any witness and so did the Defendant.

The plaintiff in his witness statement clearly enumerated the facts stated that according to the terms and conditions of the contract agreement, he had served only seven months out of sixty months and that the contract was terminated before the expiry time and it was terminated without following the procedures as indicated in the contract.

During cross-examination the plaintiff re-insisted on this issue without any contradiction

The plaintiff clearly stated that he has never seen the termination notice and as a matter of fact, there is a provision for him to sign and he never signed.

The defendant's only witness (PW1) one Amanda Chrispa who is the Legal Compliance and Risk Officer of the Defendant did not know whether the Notice of termination was served or not. That yes. There is a provision for plaintiff to sign and that he never signed, that she (Miss Amanda) never saw any evidence of service of the Notice like an Affidavit of service.

It is clear that the notice of termination, See Annexure "D6" attached to Miss Amanda's witness statement, was concocted or and manufactured after the Notice of the intention to sue the Defendant was served on her (See Annexure "B1" attached to the plaint.)

According to the plaintiff he clearly stated that when the Defendant's official one Jeff sent him an e-mail (See Annexure "B" attached to the Plaintiff's witness Statement) he communicated and told him (Jeff) that he (the plaintiff) needs a formal communication. When he was asked in re-examination, he clearly stated that he never received this formal communication of termination. They prayed that since there is no evidence of formal communication of termination of the franchise this honourable Court believe the plaintiff.

When the Defendant's witness was asked whether the plaintiff breached any of the clauses of the franchise agreement (see Annexure B attached to the witness statement of the plaintiff) specifically on clause 8 which can lead to the termination of the franchise the witness (DW1) answered that she does not know whether the plaintiff breached any clauses and later added that she does not know the reason as to why the plaintiff's contract was terminated.

The PW1 tried to smuggle in the issue of the conversion of the franchise into a Branch mode (see Paragraph 7 of her witness statement) but when cross-examined she stated the change from the franchise to the branch mode was not provided for in the franchise agreement and so was a decision taken contrary to the provisions of the franchise agreement.

On the issue of that , the plaintiff never met the expectations of the Defendant, DW1 clearly stated that the expectations were not stated in the franchise agreement and she had no evidence at hand on the expectations.

On the issue of Defendant only leaving the plaintiff's wife in the branch, court put it to the witness DW1 whether franchise stopped the plaintiff from hiring the wife and she answered no. It was clearly brought out by PW1 (plaintiff) that the wife Jane Masika was his worker who could be paid by the plaintiff from the commissions earned as any other worker of the franchise. So the issue of the wife working better than the plaintiff is an utter fallacy.

DW1 also contended that the plaintiff did not contribute anything to the franchise. The plaintiff indicated that he contributed human resource and the agreement never provided that he (the plaintiff) should contribute electricity, water, rent, capital etc which is true in view of the provisions of the franchise agreement.

In reply counsel for the Defendant submitted that according to the evidence of the plaintiff on court record, PW1 stated that he entered into a franchise agreement with the Defendant agreement with the Defendant for a period of 5 years. And this was confirmed by DW1 and this franchise agreement was tendered into court. That under term 7, either party could terminate the agreement before the expiration of the 5 years if it gave a 14 day's written notice to the other party. PW1 in his witness statement adduced evidence that he only received an e-mail from Jefferson Bwambale informing him that his contract was terminated and during cross-examination, PW1 stated that he stopped working for the defendant on 29th May, 2015.

However, Annexure A which is the print out of the e-mail between the plaintiff and the representative of the defendant shows that the plaintiff replied to Jefferson Bwambale's email who was e-mailing him on behalf of the defendant on may 3rd 2015 seeking what he called formal communication for him to leave the company. However in his evidence, the plaintiff (PW1) stated that after reading the e-mail he packed his things left the company which was contradicting evidence with the email he sent on 3rd May, 2015 where he refused an informal communication and yet he claims that he left the company on 29th April,2015.

Further evidence that was not challenged is annexure DD to the witness statement indicating the commission earned for the months he worked. The statement shows that in may 2015, the plaintiff earned 880,000/= as commission. If he did not work for the month of May, 2015 why was he paid commission? He equally admitted that he received commission only upon sales.

He further submitted that the plaintiff did not leave solar now until his notice period expired and he was served with a notice of termination of the franchise in annexure DB to the witness statement after he had complained in the email as explained above

According to the Electronic Transactions Act No. 8 of 2011, S.5(1) provides that information shall not be denied legal effect solely because it was partly or wholly in form of data message. S.2 of the Electronic Transactions Act No. 08 of 2011, defines data message to mean data generated, sent, received or stored by computer means.

S. 5(3) of the Electronic Transaction Act No. 8 of 2011 provides that where an act, a document or information is required to be in writing, it may be written in electronic form.

He further submitted that considering the above provisions therefore, it is clear that the email the plaintiff sent to the defendant was a protest and indeed the Defendant's officers gave him official notice to leave by 1st June 2015 which was in fact more than 14 days notice. The plaintiff claimed that there was a provision on the notice for him to sign but did not sign and therefore that evidence that he was not served with the notice. This argument is without merit because there was no provision in the franchise agreement to the effect that the notice for him to sign but did not sign and therefore that evidence that he was not served with the notice.

This argument is without merit because there was no provision in the franchise agreement to the effect that the notice would only be effective upon acknowledgment of receipt by the other party.

A mere fact that a party was not acknowledged receipt of a document does not mean that he is unaware of it if other circumstances indicate otherwise. In this case he earned commission for May, 2015 but claims he did not work.

Further DW1 adduced evidence during cross-examination that the plaintiff received written notice of termination and she stated further during Re-examination that the plaintiff was not required to acknowledge receipt of the termination notice in the franchise agreement.

PW1 stated during cross-examination that he was not sure if he was required to acknowledge receipt of notice of termination.

The termination notice was issued on the 4th day of May, 2015 informing the plaintiff that his contract was to be terminated effective 1st June, 2015 and this amounted to sufficient notice as the agreement required at least a 14 day's notice which this notice fulfilled.

Although the plaintiff in his witness statement states that he immediately left the company after receipt of the email, his reply to this email was made on 3rd May 2015, shows clearly that he was still in office at that point as he was expressing his resistance to leave until he received formal communication which was subsequently issued to him on 4th May, 2015.

If the plaintiff had left office immediately as he wants this court to believe, he would have stated so in that email which he never did. We submit that he did not leave and that claim is an afterthought.

The plaintiff claimed that he was terminated for no reason but the defendant sufficiently told court that he was terminated for failure to meet the targets of the Defendant.

While the plaintiff told court that he had no target to achieve, he did not tell Court how clause 8(d) of the franchise agreement would be measured. i.e failure to meet the minimum turnover benchmarks as stipulated in the franchise manual.

Clear and undisputed evidence was led to show that the plaintiff underperformed and never met the targets of the Defendant for all the months he worked. That evidence is found in Annexure DC to the witness statement which indicates that his target was UGX 36,000,000/= which he never met. The plaintiff never denied the contents of that annexure.

He further submitted that the Defendant gave sufficient termination notice to the plaintiff and therefore there was no unlawful termination of the franchise agreement.

It is my considered opinion that;

Clause 7 of the franchisee Agreement states that;

this agreement is effective from the date of signing by both parties and ends 5 years later, unless sooner terminated as provided herein. Either party may terminate upon 14 days written notice.

In case of termination of this agreement, the franchised location including all assets belonging to the franchisor shall be handed over to the franchisor in good order on or before the date of termination. Any outstanding balances must be settled before the date of termination. Essence of clause 7 is to the effect that the agreement is for 5 years effective upon signing by both parties. However for whatever reason either party may terminate upon 14 days written notice. The franchisor reserves the right to re-assign the franchised location from the date of termination. Indeed the defendant calculated Ushs 2, 544,000/= to pay off the plaintiff who refused to acknowledge.

Clause 8 of the Agreement states that;

The Franchisor may, at its option, terminate this agreement and all rights granted the Franchisee hereunder upon the occurrence of any of the following events;

- a. Abandonment – if the Franchisee ceases to operate the Solornow franchise for a period of 14 consecutive days, unless the full operation of the Solornow franchise is suspended due to fire, flood or similar causes beyond the franchisee’s control.
- b. Franchisee is convicted of any crime or has demonstrated behaviours that, in the sole opinion of the Franchisor, can materially and unfavourably effect the licensed methods, marks and reputation of the franchisor.
- c. Failure to comply with the terms and conditions of this Agreement, including, the policies and procedures stipulated in the franchise manual. Examples include failure to adhere to the Franchisor’s quality standards, failure to provide after sales services as stipulated in the franchisee manual.
- d. Structural failure to meet the minimum turnover benchmarks as stipulated in the franchise manual.

This clause gives option to the franchisor to terminate without notice if any of the above occurrence is proved. This implies that the franchisor does not need to give notice.

In the instant case the franchisor terminated the Agreement and gave 14 days written notice. He was not bound to give any reason (s) but in this case he even gave reasons that because of

the shift change from franchisee model to a branch model (see copy of the Termination Agreement dated 4th May 2015).

Secondly, as alleged by counsel of the Plaintiff, the plaintiff did not need to sign the termination agreement. Even in labour law, the employee does not need to sign his/her termination letter as long as the process of a fair hearing was conducted fairly by the employer.

The agreement is silent on the communication mode, meaning any mode of communication would work.

The Governing Law in the agreement is to be interpreted under the laws of Uganda. The Electronic Transaction Act is one of the laws of Uganda which the parties chose to use S.2 of the Interpretation section defines electronic communication as “It means Communication by means of data messages” .

Data message means data generated, sent, received or stored by computer means.

First email was sent on 29/4/2015 at 03:39pm and it reads;

Dear Neckson,

Kasese is going to turn into a branch as of 1st May 2015 and below is the outlook of the branch. Management and have decided that Masika Jane takes over the Branch as the Branch team leader and will be joined by two other staff on the same date because the policy cannot allow to have you and Jane work in the same company and having made all due considerations, at this point, you will not be employed by Solornow in any capacity, we want to take this time to thank you for the time you spent with Solornow and wish you the best in your career path.

2nd mail on 3rd May 2015 at 12:45pm and it reads;

Hi Jeff

I can assure you that I have no problem with leaving solornow. However, for now I am taking this informal notice from you as possible conflict of interest. I can only be sure that I should leave or have been asked to leave if I received a formal communication addressed to me. I believe Ronal or HR and may be you know what I mean by formal notification. When I receive this I will leave peacefully because I have no problem with that and i know that at one time X I may find myself back in solornow possibly in a different capacity and so there is no need of pulling ropes. Please take this as a matter of urgency because the whole thing is impacting negatively to my performance at the branch.

On 4th May 2015 they terminated his agreement that;

We would like to thank you for the co-operation we have had with you as a Franchise since 16th October 2014. You have been a useful resource in our organisation and we appreciate your effort and hard work during the time we have worked together.

However, we have taken the decision to terminate your contract effective 1st June 2015 because of the shift from Franchise to Branch Model.

We wish you all the best in your future endeavours.

So considering the above provisions therefore the electronic transaction Act applies and as such the email communication was good enough. The issue therefore is was there the 14 days written notice? Whereas I agree that the first communication was on the 29/4/2015 by email, the second communication was on the 3rd May 2015 and the 3rd communication was on the 4th May 2015 terminating the agreement and clearly stating that the termination of the contract is effective 1st June 2015 this was enough notice as per the franchise agreement clause 7. Therefore the issue No. 1 miserably fails.

Issue 2: What remedies are available to the parties?

When Court asked him (The plaintiff) about how he arrived at the figure he is claiming (See Paragraph 3 (b) of the plaint), the plaintiff indicated that at some point he earned more than 4,700,000/= (Four million seven hundred thousand only) as a commission, therefore computed the highest earning times the 53 months was supposed to work and make similar commission hence arriving at the figure.

He submitted that this Honourable court finds for the plaintiff or and enters a judgment for the plaintiff, grants all the prayers as indicated in paragraph 3 of the plaint and also specifically in addition to granting number (b) in its entirety awards general damages of Ug Shs 10,000,000/=(Ten Million Shilling).

In reply counsel for the Defendant submitted that issue No. 2 follows directly from issue No.1. the remedies prayed for in the plaint will not suffice having found that there was no unlawful termination of the franchise agreement.

The plaintiff prayed for special damages. The law on special damages is that well settled.

In the case of **HCT-00-CC-CA-10-2011; DAIRY DEVELOPMENT AUTHORITY versus DAVID NGARAMBE (copy attached) THE HON. JUSTICE GEOFFREY KIRYABWIRE held that;** The principle of law in awarding special damages is well settled. Such a claim in special damages must be specifically pleaded and strictly proved – see the Judgment of Berko J (as he then was) in the case of **Benedito Musisi (supra)** that case referred a decision of **Lord Goddard CJ in Borham –Carter Vs Hyde Park Hotel [1948] 64 TLR** where he stated

“.....[the] plaintiff must understand that is they bring action for damages it is for them to prove their damages it is not enough to write down the particulars and so to speak, throw them at the head of the court saying This is what I lost; I ask you to give me these damages”, they have to prove it.....”

I fully agree with that position because many times that is what happens in court in that a list of losses is thrown at Court with the expectation that is enough to award special damages. It is not.

In this case the plaintiff pleaded for Ug Shs 254,824,000/= and Ug Shs 2,544,000/= and did not lead any scintilla of evidence to prove it yet the law requires strict proof. We agree with the decision above that it is not enough to write down the particulars and so to speak, throw them at the head of the court saying “This is what I have lost; I ask you to give me these damages.”

This is unacceptable and this court must reject it. In the plaintiff’s evidence in chief he did not at all state how he came to a figure of UG 254,824,000/= claimed in the plaint and when asked by Court how he came to it he only blamed his previous Advocate. They submitted that this is his case and it required strict proof of his claims but not to speculate.

As regard general damages, it is an established principle of law that general damages are such damage as the law presumes to be the direct natural or probable consequence of an act complained of.

In **Civil Suit No. 342 of 2014, Sentongo Jimmy Vs Kabugo Ltd & 2 Others Justice Flavia Senoga Anglin** at page 5 of the Judgment (copy attached) stated that where the plaintiff claims general damages, while he does not have to prove the specific amount lost, never the less if he does not lead some evidence which would assist the court, he has no one but himself to blame if the amount actually awarded by the Court is not sufficient to compensate him for any loss which he actually suffered.

The difference between special and general damages is that special damage you must specifically plead and strictly prove it by use of receipts or bills, while general damages you must prove it by leading evidence. The purpose of general damages is to restore you back to your previous position but not to enrich you.

In this case, the plaintiff did not lead any evidence to prove any loss suffered or the amounts claimed. No wonder in the submissions of the plaintiff, a lump-sum of Ug Shs 10,000,000/= is proposed without any basis at all.

He further submitted that the plaintiff is not entitled to any of the above claims as the contract was lawfully terminated.

The Plaintiff as he explained to court in cross-examination, he was not require to contribute anything to this franchise but only to make sales and earn a commission. He did not contribute capital or even pay rent for the premises for him to claim to have suffered any loss.

He is not entitled to any damages as he suffered none and indeed proved none.

They therefore submitted that the plaintiff is not entitled to any remedies and that the suit be dismissed with costs to the defendant.

In my considered opinion special damages must be specifically pleaded and strictly proved. In **HCT-00-CC-CA-10 of 2011 Diary Development Authority Versus David Ngarambe Hon. Justice Geoffrey Kiryabwire** held that; The principle of law in awarding special damages is well settled. Such a claim in special damages must be specifically pleaded and strictly proved. This was pleaded but not proved how Ushs 254,824,000/= came about.

Secondly, damages must also be proved. What the party suffered that he must be restored back to his/her previous position if the act had not happened. I agree with the decision of **Lord Goddard CJ in Borham –Carter Vs Hyde Park Hotel [1948] 64 TLR** where he stated

“.....[the] plaintiff must understand that is they bring action for damages it is for them to prove their damages it is not enough to write down the particulars and so to speak, throw them at the head of the court saying This is what I lost; I ask you to give me these damages”, they have to prove it.....”

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In this case the plaintiff pleaded Ushs 254,824,000/= but was able to prove only 2,544,000/= which I shall order the defendant to pay plus interest of 6% till full payment.

Regarding costs, S. 27 Civil Procedure Act is very clear that costs follow events unless otherwise. Where as it is true that the defendant succeeded in ground 1 and the plaintiff partially succeeded in proving general damages of Ushs 2,544,000/=, in the spirit of harmony and brotherhood I see no reason as to award costs, Let each party bear its own costs. This principle was illustrated in the case of **Prince J. D. C Mpuga Rukidi versus Prince Solomon Kioro and Others, Civil Appeal No. 15 of 1994 (S.C)**, it was held that;

“That however, where Court is of the view that owing to the nature of the suit, the promotion of harmony and reconciliation is necessary, it may order each party to bear his/her own costs.”

Right of appeal explained.

Further Orders: Refund of Ush 2,544,000/= as general damages together with 6% interest till payment in full.

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OYUKO. ANTHONY OJOK
JUDGE
20/04/2017