THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: KIRYABWIRE, JA; MUGENYI, JA AND KASULE, AG. JA

CIVIL APPEAL NO. 131 OF 2013

BETWEEN

REVOLUTIONARY ADS & DESIGNS LTD .... APPELLANT

AND

BOARD OF TRUSTEES
OF NAKIVUBO STADIUM .... RESPONDENT

(Appeal from the Judgment of the High Court of Uganda (Madrama, J) in Civil Suit No. 73 of 2009)

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. This is an Appeal by Revolutionary Ads & Designs ('the Appellant') against the Judgment and orders of the High Court ('the Trial Court') dated 2nd March 2012, whereby the Trial Court dismissed **Civil Suit No. 73 of 2009** and allowed a counter-claim by the Board of Trustees of Nakivubo Stadium ('the Respondent') for rental arrears. A brief factual background to the Appeal, as gleaned from the Record and Memorandum of Appeal, is pertinent.

2. On 7th December 2005, the Parties to this Appeal executed a contract whereby the Appellant would run advertisements in Nakivubo War Memorial Stadium for a period of three years and in return pay the Respondent an annual rent of Ushs.45,000,000/= (forty-five million). The rental payments to the Respondent would be drawn from advertising charges paid by clients sourced by the Appellant to run adverts in the stadium.

3. The contract *inter alia* enjoined the Respondent to pay to the Appellant 50% of the proceeds from pre-existing advertising arrangements, and deny access of the rented premises to any other advertiser without the Appellant's consent. The Respondent allegedly reneged on this contractual obligation. In addition, without securing the Appellant's consent, it permitted other companies to run adverts in the stadium thus interfering with the Appellant's advertising rights. It did also sanction advertisements in the stadium without payment of any advertising charges to the Appellant, causing it financial loss of Ushs. 140,500,000/= (one hundred and forty million five hundred thousand).

4. The Respondent subsequently terminated the contract on account of default on rental payments by the Appellant without either addressing the foregoing breach or according the Appellant a hearing.

B. Trial Court Proceedings

5. Aggrieved by the Respondent's actions, the Appellant instituted **Civil Suit No. 73 of 2009** in the Trial Court claiming relief for breach of contract and the resultant financial loss. It sought the following remedies:

i. Payment by the Respondent of Ushs. 140,500,000/=, being the money that accrued from the companies that were permitted to advertise in the stadium.

ii. General damages for breach of contract and wrongful termination of the contract by the Respondent.

iii. Interest on (I) and (II) at commercial rate of 30% from the date of breach until payment in full.

iv. Costs of the suit.

6. In its defence, the Respondent asserted that it did comply with the obligation to remit 50% of proceeds from pre-existing advertising contracts to the Appellant albeit after deducting monies owed in rent by the Appellant for the first year of the contract. It is the contention that not only did the Appellant fail in its contractual duty to attract advertisers for the rented premises, it was solely responsible for any financial loss it suffered and could not, either in law or equity, claim any contractual rights in respect of a contract that it had effectively repudiated. The Respondent did in turn raise a counter-claim against the Appellant for rental arrears in the sum of Ushs. 83,000,000/= (eighty-three million) as at 31st December 2008 when the contract had been formally terminated.

7. The Respondent thus sought the dismissal of the suit with costs, as well as the following orders as against the Appellant:

i. Payment by the Appellant of Ushs. 83,000,000/= in rental arrears.

ii. 25% interest thereon from the date of filing of the suit until payment in full.

iii. Costs of the counter-claim.

8. At trial, and pursuant to a scheduling conference held on 31st October 2011, the following issues were framed:

I. Whether the landlord permitted clients to advertise on the contract premises without the consent of the plaintiff and, if so, whether this was in breach of contract.

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II. Whether the plaintiff was liable to pay arrears of rent during the subsistence of the contract.

III. Remedies available to the parties.

9. The Trial Court found for a fact that the Appellant was unable to fulfill its contractual obligations, an eventuality that the said party had sought to attribute to frustration of the contract owing to a slump in advertising business. The Trial Court thus disallowed the Appellant's claim against the Respondent, dismissing the suit with costs. It did, however, uphold the counter-claim for outstanding rental arrears in the sum of Ushs. 83,000,000/=, awarding 14% interest thereon.

C. <u>**The Appeal**</u>

10. Dissatisfied with the Trial Court's decision, the Appellant lodged this Appeal before this Court, preferring the following grounds of appeal:

    i. The learned trial judge erred in law and in fact in holding that there was no breach of contract by the Respondent.

    ii. The learned trial judge erred in law and in fact by holding that the Respondent was not collecting rent in breach of the contract between the Appellant and Respondent.

    iii. The learned trial judge erred in law and in fact by holding that the Respondent did not frustrate the Appellant from collecting rent and that the Respondent did not become the Appellant's major competitor.

    iv. The learned trial judge erred in law and in fact when he held that the payment for the first year was not made in accordance with the terms of the contract by the Appellant. *(sic)*

    v. The learned trial judge erred in law and fact when he held that the Appellant was an agent of the Respondent, yet the latter was the former's landlord.

    vi. The learned trial judge erred in law and fact by holding that there was no proof on record that the Respondent collected a sum of Ushs. 140,500,000/= from existing and new tenants, companies that advertised on the Respondent's premises.

vii. The learned trial judge erred in law and in fact when he held that the Appellant failed to fulfill its obligation of collecting rent from existing and prospective clients.

viii. The learned trial judge erred in law and fact when he held that the Respondent did not acquiesce to the breach of contract by the Appellant on the part of the Respondent. *(sic)*

ix. The learned trial judge erred in law and in fact by holding that the Respondent was entitled to the sum of Ushs. 83,000,000/= in rent arrears, interest at 14% on the rent arrears from the date of filing the suit until the date of the judgment, and interest on the decretal sums at 8% per annum from the date of the judgment until payment in full.

x. The learned trial judge erred in law and in fact when he held that the Respondent had established that the Appellant failed to pay rent.

11. At the hearing of the Appeal, whereas the Appellant was unrepresented, Mr. Anthony Bazira for the Respondent did appear for the Respondent. The Parties had filed written submissions in which the foregoing grounds of appeal were narrowed down to three issues for determination (reproduced verbatim):

    i. **Whether the learned judge erred in law and in fact in holding that there was no breach of contract by the Respondent.**

    ii. **Whether the learned judge erred in law and fact in holding that the Respondent did not frustrate the Appellant from collecting rent.**

    iii. **Whether the learned trial judge erred in law and in fact in holding that** (the) **Appellant was an agent of the Respondent.**

12. Learned Counsel for the Appellant argued *Grounds 1, 2, 4, 6* and *8* under the first issue; *Grounds 3, 7* and *10* under the second issue, and concluded with *Ground 5* under the third issue. I propose to determine the Appeal on that basis, albeit considering Ground 9 as well for completion.

D. **Determination**

Breach of Contract

13. Grounds 1, 2, 4, 6 and 8 as framed fault the trial judge for his finding that there was no breach of the contract on the part of the Respondent. It is the Appellant's contention that the Trial Court misdirected itself on the rental collections by the Respondent; rental payments made in the first year of the contract; the unremitted payments (in the sum of Ushs. 140,500,000/=) that was collected by the Respondent from pre-existing and unauthorized third parties' adverts, as well as the Respondent's acquiescence of the Appellant's breach of contract.

14. However, in its written submissions, the Appellant restricted its contestations with regard to the alleged breach of contract to clause 5 bullet four of the contract, which forbade the Respondent from allowing any advertiser to erect advertising billboards in the stadium without the Appellant's consent. It was argued that, in contravention of that contractual provision, the Respondent allowed third-party entities to use the Appellant's advertising space yet all advertising charges were made to the Respondent. The Respondent was further faulted for collecting rent from the said third-party entities without the Appellant's consent. No attempt was made to address the question of rental payments in the first year of the contract or the Respondent's alleged acquiescence of the Appellant's breach of contract. Accordingly, this Appeal shall be determined on that basis.

15. Conversely, the Respondent contests the purported exclusivity of the Appellant's advertising rights, arguing that the contract concurrently allowed it twenty (20) advert spaces and mandated it to host banners and billboards on temporary basis, provided that they were not superimposed over the Appellant's adverts. It is the contention that no evidence was adduced by the Appellant as to whether or not the contested 'third-party' adverts were within the permitted 20 advert spaces permitted under clause 7(a) of the contract, or were in respect of pre-existing contracts that had been duly acknowledged in clause 3 thereof. With regard to the unremitted rent, whereas the Appellant sought to rely on Exhibit P5 in proof thereof, it is the Respondent's assertion that none of the companies listed therein were illegal advertisers. The Respondent further denied receipt of the Shs. 140,500,000/= that allegedly remained unpaid, supporting the Trial Court's finding that no evidence to that effect had been adduced by the Appellant.

16. I reproduce below the pertinent provisions of the contract for ease of reference.

I. ....

II. ....

*III. **Running Advertising Contracts***

The land lord and the advertiser do note that there are existing and running advertising contracts in the Stadium, and it is agreed that 50% of all money received by the landlord from the existing and running advertising contracts at the commencement of the contract, shall be deducted and retained from the contract sum by the Advertiser, in the course of remitting payments for the initial period.

IV. Use of Premises

The Advertiser covenants with the Landlord as follows:-

a. To use the premises owned by the Landlord for purposes of constructing, erecting, installing and maintenance of Advertising Billboards, save that the advertising shall not in any way defeat the landlord's use of its property for sports, games and other functions in its general business.

b. ....

c. ....

d. ....

V. The Landlord covenants with the Advertiser as follows:-

- ....
- *That the Advertiser shall pay the rent hereby reserved and observing and performing the several covenants herein contained, and that it shall be afforded peaceful and quiet enjoyment of the demised premises during the subsistence of the contract.*
- ....
- *That the landlord shall keep secure the rented premises and shall NOT allow any other advertiser to erect advertising billboards in the landlord's property without the consent of the Advertiser, save as agreed herein.*

VI. ....

VII. <u>Landlord's Further Rights</u>

Reservation of Advert Spaces/ sites

a. *The Landlord shall retain 20 (twenty) advert spaces/ sites in the Pitch Perimeter and may place banners and billboards on a temporary basis for adhoc functions of concerts, galas, boxing tournaments and football matches so long as they are not placed or superimposed on the Advertiser's existing boards, provided they do not remain wherever they may be placed for a period of more than 36 (thirty-six) hours.*

b. *That if the rent hereby reserved or any part thereof shall remain unpaid for 60 (sixty) days after receipt of the Landlord's due invoice/ notice or if any covenant on the Advertiser's part implied or herein contained shall not be performed or observed, then in any of the said cases, it shall be lawful for the Landlord thereafter to re-enter upon the rented premises or any part thereof.*

17. As quite rightly argued by the Respondent, clause 3 of the contract does indeed make express provision for pre-existing and running advertising contracts in the stadium and how proceeds therefrom were to be handled by the contracting parties. Clause 7(a), on the other hand, did mandate the Respondent to retain 20 advert spaces in the Pitch Perimeter area of the demised premises. Furthermore, the same clause did authorize the Respondent to temporarily place banners and billboards in respect of adhoc concerts, galas, boxing tournaments and football matches on any part of the rented premises on temporary basis, provided that the said banners/ billboards were neither superimposed over the Appellant's billboards nor remained in place for longer than 36 hours.

18. The Appellant being the party aggrieved by the alleged interference with its exclusive advertising rights, it would bear the onus of proof of all the material facts that underpin this Appeal. *See section 101(1) of the Evidence Act.*[1] This duty is underscored by the fact that in the absence of any evidence whatsoever by either party, it is the Appellant's case that would fail hence the burden of proof upon it as espoused in section 102 of the

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[1] Section 101(1) provides that '**whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove those facts.**'

Evidence Act.[2] It is nonetheless appreciated that '**the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence.**'[3]

19. **Halsbury's Laws of England**[4] further clarifies the burden of proof applicable to civil proceedings by drawing a distinction between the legal and evidential burdens as follows:

> **The legal burden (or the burden of persuasion) is a burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case, or persuading the tribunal of the correctness of a party's allegations. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The incidence of this burden is usually clear from the statements of case, it usually being incumbent upon the claimant to prove what he contends.** *(emphasis mine)*

20. Indeed, in tandem with the import of sections 101(1) and 103 of the Evidence Act, it is proposed that '**the legal burden … of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation,** (however), **the burden lies upon that party for whom the substantiation of that particular allegation is an essential of his case.**[5] Accordingly, in the instant Appeal the Appellant would bear the legal burden of establishing the totality of its case as against the Respondent. This would entail proof to the required standard of all the allegations of law and fact that it imputes to the latter. However, each party would bear the onus of proof of the specific allegations made by it that, if not substantiated, would leave the gravamen of its complaint or defence (as the case may be) unproven.

21. In the same vein, and replicating the provisions of section 102 of the Evidence Act, the *evidential burden* (or the burden of adducing evidence) '**rests upon the party who would**

[2] Section 102 provides that '**the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**'
[3] See section 103 of the Evidence Act.
[4] Halsbury's Laws of England, Civil Procedure, Vol. 12 (2020), para. 697.
[5] Ibid. at para. 698.

fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side.'[6] It is espoused as follows:

> **The evidential burden ..... will rest initially upon the party bearing the legal burden. ... If the party bearing the legal burden fails to adduce evidence, he has failed to discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue and must then bear the burden of adducing evidence in respect of all material facts.**[7]

22. Against that background, it becomes abundantly clear that not only was the Appellant under a duty to prove the totality of his case as against the Respondent (as stated in section 101(1) of the Evidence Act), it bore a corresponding duty to prove each issue cascading therefrom as framed. Having invoked breach of clause 4 of the contract by the Respondent, the legal and evidential burden of proof of this allegation rests with the Appellant. To that extent, it was under a duty to establish for a fact that the impugned adverts neither arose from pre-existing or running advertising contracts that were allowed under clause 3 of the contract, nor violated the provision in clause 7(a) thereof that entitled the Respondent to 20 advert spaces in the Pitch Perimeter and mandated it to host temporary banners/ billboards for the designated adhoc functions.

23. Stated differently, as the party that bore the legal burden in this case, the Appellant bore the evidential burden to adduce evidence that in the absence of evidence to the contrary, would materially prove its allegations against the Respondent. Needless to say, this being a civil appeal, the applicable standard of proof would be on the balance of probabilities.

24. I carefully reviewed the material on record on this issue. The Appellant relied on the oral testimony of Ms. Agnes Kamya (PW1) and Exhibits P2 – P12 in proof of its allegations on breach of contract. First and foremost, although not canvassed by the Appellant in submissions, it was PW1's evidence that the issue of first year rental payments viz a viz non-payment of 50% of the monies realized from pre-existing advertising contracts, as

[6] Ibid. at para. 697.
[7] Ibid. at para. 699.

raised in *Ground 4* of this Appeal, was resolved by the parties. The trial judge arrived at the same conclusion when, at page 26 of his judgment, he observed that '***the plaintiff did not comply with clause 2(1) and (2) of the contract in terms of the period within which to make payments under the contract. The defendant compromised the terms of the above clause in that it did not treat it as a breach or repudiation of the contract and reduced the plaintiff's liability from 45,000,000 to 33,000,000/=. The proper inference is that the defendant collected part of the rent from existing tenants***.' I cannot fault the conclusion of the trial judge. Quite clearly the Respondent elected not to treat the Appellant's violation of clause 2 as a repudiation of the contract but, rather, to recover the outstanding rent from the monies that were due to the Appellant under clause 3 of the contract. *Ground 4* thus fails.

25. PW1 did, nonetheless, take issue with the Respondent's use of the stadium under clause 7(a), arguing that it had not been done as stipulated in the contract. She attested to the Respondent having wrongfully placed new adverts in the stadium after the execution of the contract without the Appellant's consent, and the Appellant was never paid for the said adverts. Ms. Kamya identified the supposedly illegal adverts in pictures that had been adduced in evidence as Exhibits P6 – P12. These are pictures of adverts, banners and billboards that were run without the consent of the Appellant but with the alleged acquiescence of the Respondent. PW1 took issue with unauthorized adverts by Barclays Bank in the background of the picture in Exhibit P6. She did also impute illegality to an advert by Warid Telecom in Exhibit P7; a Peacock Paint advert in Exhibit P10; a CBS anniversary advert in Exhibit P11, and a Michelin advert in Exhibit P12.

26. With regard to Exhibit P8, whereas PW1 sought to fault the Respondent for obstructing an advert by StaSofFro – the Appellant's client, I did not observe any such obstruction in the picture; the advert was very visible even to a cursory look. In any event, clause 7(a) prohibited the superimposition of adverts over the Appellant's billboards. This would denote concealment of the Appellant's billboards, which is certainly not the case in the exhibit in question.

27. The witness appeared to impute unduly lengthy periods of advertisements (7 – 14 days) to the adverts by Beat FM anniversary and Kumho Tires in Exhibit P9. However, no such conclusion can be drawn from that exhibit given that it does not depict the duration of the

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adverts displayed therein. In submissions in rejoinder in this Appeal, the Appellant imputed a time-frame of five (5) days to the advert in Exhibit P11 so as to infer breach of clause 7(a) of the contract. I am disinclined to accept this submission as it is not borne out by the evidence. The only date on the exhibit being 8th June 2008. There is nothing to suggest that the advert run from 3rd – 8th June, as proposed by learned Counsel for the Appellant.

28. The Appellant did also rely on a tax invoice dated 20th April 2007 that was issued by the Respondent to Arrow Centre (U) Ltd for payment of Ushs. 8,260,000/=. The tax invoice was adduced in evidence as Exhibit P2. It was PW1's evidence that the Appellant did not receive the monies sought in the invoice. Under Exhibit P4, receipts of payments to the Respondent were presented, PW1 affirming that the monies highlighted therein were not received by the Appellant. It will suffice to point out here that Exhibit P3 is a tax invoice that is materially similar to that in Exhibit P2 and was similarly issued by the Respondent. However, in so far as it pre-dated the contract under scrutiny presently, having been issued on 4th May 2005 yet the contract was executed on 7th December 2005, it is inapplicable to the present dispute. Perhaps more importantly, neither the tax invoice in Exhibit P2 nor the receipts in Exhibit P4 indicated that the monies depicted therein were rental collections so as to support the inference in *Ground 2* hereof that the Respondent collected rent in breach of contract.

29. Be that as it may, PW1 identified the companies that defaulted on payments to the Appellant, causing it financial loss of Ushs. 140,500,000/=, as Peacock Paints, Warid Telecom, Arrow Centre, Kakira, Michelin, Uganda Telecom and Wall Painting. It was her testimony (without any shade of supporting evidence) that the Appellant had demanded payment from them but they did not make good their obligation. However, Exhibit P5 depicts a slightly different picture. The companies delineated therein as having defaulted on payment were Crown Beverages Ltd, Arrow Centre, Peacock Paints, Wall Painting and Warid Telecom.

30. In Exhibit P5, the adverts of Crown Beverages, Peacock Paints and Wall Painting were clearly stated to have run in the *Kirussia*, *Pavilion* and *Main Gate*, and *Namirembe Road* areas of the stadium respectively. The said adverts thus fell outside the *Perimeter Pitch* area, part of which had been allotted to the Respondent under clause 7(a) of the contract.

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Therefore, they could indeed have fallen under the Appellant's exclusive domain, owing it in payments for advertisements, but for the reasons I shall revert to shortly. By contrast, there is nothing in that exhibit that proves that the Arrow Centre and Warid Telecom adverts did not fall within the Perimeter Pitch area, 20 spaces of which had been allotted to the Respondent. The onus lay with the Appellant to demonstrate which part of the stadium their adverts occupied but it fell short on this duty. In any event, even if it were presumed that all the companies listed in Exhibit P5 did in fact run adverts during the contract period and within areas designated to the Appellant under the contract, all at the Respondent's behest; the total financial loss accruing from them would amount to Ushs. 111,000,000/= and not Ushs. 140,500,000/= as claimed by the Appellant.

31. I find the totality of the Appellant's evidence insufficient for proof of breach of contract by the Respondent as alleged. It is abundantly clear that the obligations upon the Respondent in clause 5 bullet 4 of the contract were subject to the provisions of clause 7(a) thereof. That would be the import of the phrase '*save as agreed herein*' at the end of clause 5 bullet 4. Consequently, although the invoice and payments made under Exhibits P2 and P4 were effected during the pendency of the contract, that would not in itself be sufficient proof of breach of contract in this case. Similarly, the mere existence of the adverts in Exhibits P6, P7, P10, P11 and P12 in the stadium would not necessarily prove breach of contract by the Respondent in the absence of supporting evidence, which was not forthcoming in this case.

32. A reading of clause 7(a) together with the recital to the contract would suggest that the Respondent reserved to itself 20 of the 30 sites and spaces of the Perimeter Pitch area of the stadium. This would have left the residual areas outlined in the recital to the Appellant. In proof of the Respondent's breach of contract, it was imperative that the Appellant demonstrates that the impugned adverts were in fact run on the residual sites and spaces that had by contract been allotted to it. Over and above the mere production of the pictures of adverts contained in Exhibits P6, P7, P10, P11 and P12, it was incumbent upon the Appellant to demonstrate the nexus between their location and the part of the stadium that was under its (Appellant's) exclusive use or that the said adverts were not in respect of temporary, adhoc events, which were also permissible under clause 7(a) of the contract. As it is, the insufficiency of the Appellant's evidence notwithstanding, Ms. Afisa Nabukeera (DW1) countered the Appellant's misgivings about the Barclays

adverts in Exhibit P6 with the assertion that they were in respect of a day event. Being a temporary, adhoc function, this advert was permissible under clause 7(a) of the contract.

33. In the same vein, in the absence of factual evidence that the companies whose adverts were displayed in the exhibits had been introduced to the stadium by the Appellant, making it the party entitled to the advertising charges arising therefrom; the Appellant fell short on proof of his claims in unpaid dues as against the Respondent. DW1 flatly denied the Respondent having received payment from any of the companies listed in Exhibit P5. She testified that the tax invoice in Exhibit P2 had been issued to Arrow Centre (U) Ltd as a reminder for payment but none was forthcoming. It was her testimony that, the Appellant having reneged on its contractual obligation to attract adverts to the stadium and pay rent from the proceeds therefrom, the Respondent sought to recover outstanding payments due to it from the Appellant by directly receiving payments from advertising companies, as depicted in Exhibit P4.

34. The inference to be drawn from this evidence is that the Respondent sought the payment of advertising charges from advertising companies in order to salvage a situation where the Appellant was neither attracting advertising business, collecting proceeds from the existing advertising companies nor paying its rental obligations to the Respondent. With the acquiescence of the Appellant, the Respondent had adopted the same approach in the first year of the contract term with regard to the then outstanding rent due from the Appellant. Nonetheless, as observed earlier herein, there was nothing on the face of Exhibits P2 or P4 to suggest that the payments sought or reflected therein were in respect of rent. It seems to me that they were in respect of advertising charges for the billboards cited therein.

35. In the result, weighing the Respondent's case against the evidence adduced by the Appellant, I am satisfied that the allegation of breach of contract by the Appellant remains unproven. I would therefore answer *Issue No. 1* hereof (*Grounds 1, 2, 4 and 6*) in the negative.

Frustration of Contract

36. The issue of frustration of contract was argued under *Grounds 3, 7* and *10*. In a nutshell, the Appellant questions the trial judge's conclusion that the Respondent neither frustrated

the Appellant from collecting rent nor became its competitor under the contract; rather, the Appellant reneged on its obligation to collect rent from existing and prospective clients and thus defaulted on its rental obligations to the Respondent. It was the Appellant's contention vide its written submissions that a contract may be discharged by frustration, such frustration arising where there exists a change in circumstances that render the contract either impossible to perform or negates its commercial purpose. Learned Counsel for the Appellant cited the following decision in **Davis Contractors Ltd vs. Hare Urban District Council (1956) 1 All ER 145 at 166** in support of his case:

> **Frustration occurs whenever the law recognizes that without default on either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract.**

37. Against that background, it was the contention that the Respondent's interest in advertising space in the stadium had transformed it into the Appellant's competitor and frustrated the latter's performance of the contract. Specifically advanced was the Appellant's inability to raise income from the business or collect rent from the adverts, the argument being that in allowing other companies to advertise on the same premises and collecting rent from them, the Respondent denied the Appellant the exclusive right of advertisement in the stadium as provided by the contract.

38. Conversely, the Respondent maintained that there was no evidence that it had been in competition with the Appellant during the contract term or otherwise frustrated the contract. On the contrary, Exhibits D15, D16 and D18 had communicated the real reasons behind the delayed rental payments between 2nd March 2006 and 14th June 2007, but made no reference whatsoever to the Respondent having introduced other advertisers to the stadium in contravention of the contractual terms. It was opined that the Appellant's failure to collect advertising charges could not be visited upon the Respondent as it had made every effort to ease the Appellant's performance of the contract. Reference in that regard was made to Exhibits D1 – D14, letters of introduction of the Appellant to all pre-existing advertising companies.

39. On its part, the Trial Court rendered itself as follows:

The last letter of the plaintiff exhibited D18 which is addressed to the Corporation Sole (sic) namely the defendant, clearly absolves the defendant of wrongdoing or frustration. ... The letter of the plaintiff dated 14th June 2007 exhibit D18 clearly and unequivocally shows that the plaintiff had failed to meet its obligations under the contract and was seeking a review of the terms of the contract. Most importantly, the plaintiff failed to pay rent, a fundamental term of the contract.[8]

40. A review of the doctrine of frustration is pertinent. I do agree with the dictum in **Davis Contractors Ltd vs. Hare Urban District Council** (supra) that frustration occurs when, without default by either party, a contractual obligation becomes incapable of performance. However, the debilitating circumstances giving rise to frustration of a contract must be established. For avoidance of doubt, the doctrine of frustration is subject to the important limitation that '**the frustrating circumstances must arise without fault of either party; that is, the event which a party relies upon as frustrating his contract must not be self-induced.**'[9] Proof of fault would therefore defeat the defence of frustration, the burden of proof thereof lying with the party alleging the fault.[10] Thus in the case of **Monday Eliab vs. The Attorney General, Civil Appeal No. 16 of 2010** (Supreme Court), the following observation in **Howard & Co. (Afrca) Ltd vs. Burton (1964) EA 540** was cited with approval (per Sir Daniel Crawshaw, JA):

> **The onus of proving frustration is on the party alleging it and, if that is proved the onus is on the other party to prove that it was self-induced.**

41. Similarly, in **J. K. Patel vs. Spear Motors Ltd, Civil Appeal No. 4 of 1991** (Supreme Court), citing with approval **Constantine Steamline Ship vs. Imperial Smelting Corp. (1945) All ER 165** (House of Lords), it was observed that '**it was the party denying the frustration to prove negligence or default on the party**.'

42. *Halsbury's Laws of England* succinctly negate the discharge of a contract for frustration simply on account of it being onerous to perform. It is proposed as follows:

[8] See pp. 32, 33 of the Trial Court's judgment.
[9] Halsbury's Laws of England/ Contract, Volume 22, 2019, para. 261.
[10] Ibid.

A contract is not discharged under the doctrine of frustration merely because it turns out to be difficult to perform or onerous. Thus the parties will not generally be released from their bargain on account of ordinary risks of business, such as rises or falls in process, depreciations of currency or unexpected obstacles to the execution of the contract.[11]

43. It follows then that the doctrine must not be lightly invoked but must be kept within very narrow limits.

44. Turning to the matter before me, having invoked the defence of frustration, the Appellant bore the burden of proving it. The onus of proof would only shift to the Respondent to prove self-induced circumstances by the Appellant after the establishment by the Appellant of the material elements of frustration. In this case, the Appellant initially attributed its default on rental payments to unforeseen financial constraints and short-term business constraints. *See Exhibits D15 and D16.* A year later in June 2007, it sought to attribute its dismal performance of the contract to frustrations typified by corporate entities' loss of interest in advertising owing to bland local soccer, as well as failure by pre-existing clients to honour their payments to it. However, the Respondent faulted the Appellant for its inability to perform the contract, it (the Respondent) having taken the trouble to enable a seamless entry into the stadium's advertising business for the Appellant by writing letters of introduction to pre-existing clients. *See Exhibits D1 – D14.* The trial judge did also lay the blame for the non-performance of the contract squarely at the feet of the Appellant in the following terms:

It was upon the plaintiff to do everything possible including filing actions for recovery of advertisements money from the companies which had advertised on the premises. It was also incumbent upon the plaintiff to source for new clients to advertise on the premises in the face of clients who had refused to pay.

45. It seems to me that prospective clients' loss of interest in a business entity's product, more so when the product in question hinges on the buoyance of a country's local soccer, represents ordinary business risks that would not discharge contracting parties from

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[11] Ibid at para. 266.

performance of a contract. The foregoing circumstances depict the difficulties faced by the Appellant in performance of the contract, but do not necessarily establish circumstances that rendered the contract impossible to perform. It would appear that financial and short-term business constraints were the reason for the failure by the Appellant to honour its contractual obligations. Unfortunately, however, although those difficulties rendered the contract onerous to perform, they did not fall within the ambit of frustration of contract. I would, therefore, disallow the notion that the Respondent frustrated the Appellant from collecting rent, either as a competitor or otherwise. *Ground 3* of the Appeal thus fails.

46. On the other hand, not only did DW1 testify in cross examination that the Appellant defaulted on rental payments, that fact is established by the Appellant's own admission in Exhibit D18. In that letter, the Appellant initially suggests that the cited frustrations disabled it from paying rentals to the stadium on time but, later on in the same letter, concludes that it has found itself without money to pay the Respondent. In the absence of any other evidence to the contrary, which I have not come across, I find no reason to fault the trial judge's conclusion that this letter amounted to an admission of rental default. I would, therefore, disallow Grounds 7 and 10 of the Appeal. In the result, Issue No. 2 hereof is resolved in the negative.

Agency

47. *Issue No. 3* as framed, reflecting *Ground 5* of the Appeal, criticizes the Trial Court's decision that the Appellant was an agent of the Respondent, yet the latter was the former's landlord. The Appellant relied upon the definition of an agent in the Contracts Act, 2010 and *Black's Law Dictionary*, 8th Edition, to argue that its contractual relationship with the Respondent entailed the use of the latter's premises for advertisements, the rental payment in respect thereof being drawn from advertising proceeds. It denied having contracted to act on behalf of the Respondent in a principal/ agent relationship. Conversely, the Respondent supported the Trial Court's finding, arguing that in so far as the Appellant was under a duty to get companies to advertise in the stadium and in turn pay rent to the Respondent, the appellant did act on behalf of the Respondent. Citing section 122 of the Contracts Act, it would appear to be the Respondent's proposition that an agency relationship could be implied from these circumstances.

48. For ease of reference, sections 118 and 122 of the Contracts Act are reproduced below:

Section 118

In this Part, unless the context otherwise requires—

"agent" means a person employed by a principal to do any act for that principal or to represent the principal in dealing with a third person;

"principal" means a person who employs an agent to do any act for him or her or to represent him or her in dealing with a third person;

Section 122

(1) **The authority of an agent may be express or implied.**
(2) **Authority is express where it is given by spoken or written words and implied where it is to be inferred from the circumstances of a case.**
(3) **Any words, spoken or written, in the ordinary course of a dealing, may be taken into account, depending on the circumstances of the case.**

49. On the other hand, *Black's Law Dictionary* defines an agent as '**a person who acts on behalf of a principal in particular business transactions with third parties pursuant to the agency relationship**.'

50. I carefully considered the parties' rival submissions on this issue. As quite rightly argued by learned Counsel for the Appellant, the agency relationship envisaged under Part X of the Contracts Act lays due emphasis on an agent 'acting for' a principal. The same emphasis is re-echoed in the definition of an agent propounded by Black's Law Dictionary.

51. In the instant case, the Trial Court relied on the identical wording of Exhibits D1 – D14, particularly the reference therein to a *Sole Advertising Agent*, to impute an agency on the parties. A sample letter is reproduced below:

RE: APPOINTMENT OF REVOLUTION ADS & DESIGN LTD

The Board of Trustees of Nakivubo Stadium, sitting on 4th October 05, appointed Revolution Ad & Design Ltd as the Sole Advertising Agent for Billboards at the Stadium.

The appointment takes effect on 1st January 2006.

In doing so, the Board hopes to re-organize and redesign the Billboards to suit the new era. It also aims at adding a professional touch to the business and enhance revenue collection. Furthermore the new company is expected to discover new clients and motivate existing ones to improve on their advertising business and to explore new areas, mode and sites of Billboards available to clients.

This is therefore to introduce to you Mrs Agnes Kamya the Marketing Director of the Company who shall be handling the Billboards business.

All payments, correspondences, negotiations and deals regarding Billboard advertising are taken over by Revolution Ads & Design Ltd.

We wish you successful operations with this Company.

Yours faithfully,

Afisa Nabukeera

CHAIRPERSON MANAGEMENT COMMITTEE

52. With the greatest respect, I take a contrary view. In my judgment, mere reference to a contracting party as an agent is not sufficient in itself to impute agency on the underlying contractual relationship. Given the emphasis in section 118 of the Contracts Act on an agent acting for a principal in relation to a third party, I would defer to the proposition in **Halsbury's Laws of England** that '**if an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen**.'[12] Therefore, an agent is essentially only an intermediary between two other parties.

53. Turning to the present case, a review of the contract in issue presently is instructive. The appellant's obligations under the contract are encapsulated in clauses 4(a) and 5 bullet 2 thereof. In essence, it was expected to construct, erect, install and/ or maintain its clients' advertising billboards on the demised premises and, from the proceeds realized

[12] Halsbury's Laws of England, Vol. 1, 2017, para. 1.

therefrom, pay rent to the Respondent in the terms spelt out in the contract. It certainly was not either stated or contemplated in the contract that the Appellant would collect the advertising charges it imposed on its clients on behalf of the Respondent. This position is unambiguously reflected in the last paragraph of the letter from the Respondent to pre-existing clients (Exhibits D1 – D2) as follows:

> *All payments, correspondences, negotiations and deals regarding Billboard advertising are taken over by Revolution Ads & Designs Ltd.*

54. Considering the foregoing paragraph against the express terms of the contract, I read nothing therein to suggest that the functions in reference were to be undertaken on behalf of the Respondent. That being so, I am satisfied that the learned trial judge erred in law and in fact in holding that the Appellant was an agent of the Respondent. I would therefore answer *Issue No. 3* in the affirmative.

55. Before taking leave of this Appeal, in the interests of justice, I am constrained under Rule 2(2) of the Judicature (Court of Appeal) Rules to address *Ground 9* of this Appeal. It is evident from Exhibits D19 – D24, as well as the oral testimony of PW1, that rental dues for 2006 were resolved by the parties leaving no rent in arrears. According to Exhibit D19, however, only Ushs. 7,000,000/= was paid to the Respondent by the Appellant in 2007. It was also DW1's uncontroverted evidence that the last rental payment made by the Appellant was in October 2007, which would suggest that no other payments had been made by December 2008 when the contract was terminated. Consequently, I cannot fault the Trial Court's finding that the outstanding rental arrears amounted to Ushs. 83,000,000/=.

56. With regard to the interest awarded by the Trial Court, it is now well established law that an appellate court may only interfere with the discretion exercised by a court of original jurisdiction in the following instances:

    i. **Where the judge misdirects himself with regard to the principles governing the exercise of discretion;**
    ii. **Where the judge takes into account matters that he ought not to consider; or fails to take into account matters that he ought to consider;**

Muh

iii. **Where the exercise of discretion is plainly wrong.**[13]

57. In the instant case, the trial court awarded 14% interest on the rental arrears from the date of filing the suit until the date of the judgment, and interest on the decretal sum at 8% per annum from the date of the judgment until payment in full. Given that the rental arrears arose from the Respondent's counterclaim, and not the suit, I would substitute the 14% interest awarded from the date of filing the suit with 14% interest per annum from the date of filing the counterclaim. I find no reason to interfere with the 8% interest per annum that was awarded on the decretal sum from the date of the judgment till payment in full, neither was any improper exercise of the trial judge's discretion brought to the Court's attention.

E. Conclusion

58. The substratum of this Appeal lay in breach of contract and the Parties' competing interests in respect thereof. The question of the contested agency relationship between the Parties does not go to the root of the dispute. Therefore, Grounds 1, 2, 3, 4, 6, 7, 9 and 10 having failed, the Appeal substantially fails. The upshot of my consideration of the Appeal is that:

I. The Appeal fails in Grounds 1, 2, 3, 4, 6, 7, 9 and 10, but succeeds in Ground 5.

II. The Appellant be, and is hereby, condemned to the costs in this and the Trial Court.

It is so ordered.

Dated at Kampala this 31st day of March, 2021.

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL

[13] See American Express International Banking Ltd vs. Atul (1990 – 94) EA 10 (Supreme Court of Uganda).

5 THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OD UGANDA
AT KAMPALA

CIVIL APPEAL 131 OF 2013

10 **Revolutionary Ads & Designs Limited :::::::::::::::: Appellant**

Versus

Board of Trustees of Nakivubo Stadium ::::::::::::: Respondent

15

Coram: **Hon. Mr. Justice Geoffrey Kiryabwire, JA**
Hon. Lady Justice Monica Mugenyi, JA
Hon. Mr. Justice Remmy Kasule, Ag JA

20 **Judgment of Hon. Justice Remmy Kasule, Ag. JA**

I have had the privilege of reading through the draft Judgment of my learned sister, Hon. Lady Justice Monica Mugenyi, JA.

I agree with the reasoning, analysis of issues and conclusions she
25 reaches. I have nothing useful to add.

Accordingly, the appeal fails as regards grounds 1,2,3,4,6,7,9 and 10 but succeeds in ground 5.

30 The appellant is condemned to the costs in the trial Court. Costs of the appeal are awarded to the respondent.

Dated at Kampala this...31st...**day of**...March...**2021.**

35

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Remmy Kasule
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 131 OF 2013

REVOLUTIONARY ADS & DESIGNS LIMITED===============APPELLANT

VERSUS

BOARD OF TRUSTEES OF NAKIVUBO STADIUM==========RESPONDENT

CORAM HON. MR. JUSTICE GEOFREY KIRYABWIRE, JA

HON. LADY JUSTICE MONICA MUGENYI, JA

HON. MR. JUSTICE REMMY KASULE, JA

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

I have had the benefit of reading in draft the Judgment of my learned sister, Hon. Lady Justice Monica Mugenyi, JA. I agree with her reasons and conclusions. Since Hon. Mr. Justice Remmy Kasule Ag. JA, also agrees, accordingly, this Appeal stands dismissed with costs here and the trial court to the Respondent.

Dated at Kampala this 31st day of March 2021.

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA