**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA.**

**CIVIL APPEAL NO. 07 OF 2012**

1. **E-KRALL INVESTMENTS (U) LTD**
2. **THOMAS EGGENBURG**
3. **DRB MINING (U) LTD ========== APPELLANTS**

**VERSUS**

1. **GUNTER PIBER**
2. **BUWEMBE BREWERIES & DISTILLERS (U) LTD ========== RESPONDENTS**

**CORAM: HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA**

**HON. MR. JUSTICE ELDAD MWANGUSYA, JA.**

**HON. MR. JUSTICE KENNETH KAKURU, JA.**

**JUDGMENT OF THE COURT**

This appeal arises out of a judgment of Hon. Lady Justice Flavia Senoga Anglin delivered on 8th August, 2011 at the High Court of Uganda sitting at Jinja. The appellants were defendants and the respondents were plaintiffs in the High Court suit, in which the learned trial judge found for the plaintiff and also dismissed the defendants counter claim on 8th August 2011.

At the hearing of this appeal Mr. Andrew Bagayi Wavamunno appeared for the appellant while Mr. Rashid Semambo and Mr. Hamza Sewankambo appeared for the respondent.

At the commencement of the hearing Mr. Sewankambo raised a preliminary objection to the appeal. It was to the effect that the appellants have no capacity to bring this appeal. That as limited liability companies, they are required to have at least two Directors and they do not.

We dismissed this objection and allowed the appeal to proceed. The issues raised were mainly issues of fact that required proof by way of evidence. This not being a trial court the respondent was advised to raise those issues before a competent court. In any event one of the appellants is a natural person and the appeal would still have proceeded on that account alone. Suffice it to say we found no merit in the objection.

We note that the objections raised before us had also been set out in a separate application filed in this court by the respondents *vide* Court of Appeal Miscellaneous Application No. 36 of 2013.

For reasons stated above we find that there is no merit in both the application No. 36 of 2013 and in the preliminary objection and we dismiss both accordingly.

Although the appellants filed their conferencing notes in this appeal, the respondents did not. Mr. Bagayi learned counsel for the appellants adopted their conferencing notes in addition to his oral submission. We have indeed perused the said notes and the annextures thereto which we have considered together with his oral submissions. The respondents counsel only submitted orally in reply.

The back ground to this appeal is not well set out in the appellants conferencing notes and both parties made no effect to have it clearly set out in their submissions before us.

However, we have been able to reconstruct the history of this appeal upon perusal of the High Court record especially the pleadings, and the records submitted by both parties in this Court.

The brief background to this appeal as far as we could ascertain is as follows.

The respondents sued the appellants in the High Court seeking the following orders.

a) An order for the payment of Ug. Shs. **340,459,000**/= *(Uganda Shillings three hundred forty million, four hundred fifty nine thousand only).*
b) Interest on the above at 24% per annum from 16th July 2004 until payment in full.
c) A declaration that the Plaintiffs are the rightful owners of a Metallurgical plant *"Deconterra"* product of Lub Lurghi made out of steel and a mobile crane ATT 480 (HAZET)
d) General Damages.
e) Any other or better relief as this Honourable Court may deem fit.
f) Costs of this suit.

The appellants denied the claim and contended that the respondents had no cause of action against them as they had never entered into any agreement with them or breached one.

The appellants counter claimed for general damages for trespass.

It appears that prior to the filing of Civil Suit No. 57 of 2008 the subject of this appeal the respondents had filed HCCS No. 31 of 2008. This suit was apparently dismissed for failure to disclose any cause of action. Following the dismissal the appellants evicted the respondents from the suit premises and repossessed the plant and machinery. The respondents then filed HCCS No. 57 of 2008 and later filed Miscellaneous Application No. 157 of 2009 arising from that very suit. That application was also dismissed. The respondents appealed against the dismissal of that application to this Court, which appeal was also dismissed.

The appellants set out 7 grounds of appeal in their Memorandum as follows:-

1. *The learned trial judge erred in law and fact when she reconsidered the matter of the ownership of the plant and crane, effectively sitting in appeal of a judgment of her own court.*
2. *The learned trial judge erred in law when she effectively shifted the burden of proof to the defendants.*
3. *The learned trial judge erred in law and fact when she held that an invoice and a receipt are one and the same thing.*
4. *The learned trial judge erred in law and fact when in her judgment, she d3eparted from the pleadings of the parties.*

5. *The learned trial judge erred in law and fact in her award of general damages based on a misinterpretation of the facts.*
6. *The learned trial judge erred in law and fact when she found that the defendants were indebted to the plaintiffs in the sum of $150,000/=, neither pleaded nor proved.*
7. *The findings of the trial judge go against the weight of evidence are based on conjecture, and misinterpretation of the facts and law.*

The respondent did rephrase or reframe the grounds set out in the memorandum of appeal in their conferencing notes and reduced the grounds from 7 to 5.

Ordinarily this Court would have proceeded to determine the appeal based only on the grounds as set out in the memorandum of appeal. However the grounds in the memorandum of appeal are too general and seem to offend the provisions of Rule 86 (1) of the Rules of this court. They are better reconstituted in the conferencing notes. Secondly the appellant's counsel argued the appeal following the grounds as set out in the conferencing notes and not as set out in the memorandum of appeal.

The respondents who did not file conferencing notes in reply raised no objection to the and their oral reply followed the arguments of appellants as set out in the conferencing notes.

Accordingly we shall also determine this appeal following the appellant's arguments as set out in their conferencing notes and not as set out in the memorandum of appeal.

**Ground 1:**

***The learned trial judge erred in law and in fact thereby arrived at a wrong decision when she failed to appreciate that the claim of the defendants for the plant and crane was barred by res judicata.***

It was argued for the appellant that HCCS No. 57 of 2008 was barred by *res judicata*, since the matter before the same partied over the same subject matter had been dismissed in HCCS No. 31 of 2008. It is not in dispute that HCCS No. 31 of 2008 was struck out or dismissed for non closure of the cause of action.

The trial judge's ruling in this case is at page 51 of the supplementary record of appeal filed by the respondent. At page 67 of the record and page 17 of the Ruling of Hon. Lady Justice Irene Mulyagonja Kakooza held as follows:-

> *"Order 6 rule 11(d) of the CPR provides that where the suit appears from the statement in the plaint to be barred by any law, the plaint may be rejected. The applicants' plaint is barred by S.176 of the RTA.*
>
> *It is accordingly rejected"*

The learned judge went on to strike out the defence and the counter claim.

Order 7 rule 13 of the Civil Procedure Act provides as follows:-

> ***13***. *"The rejection of the plaint on any of the grounds herein before mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action"*

Since the plaint was rejected order 7 rule 13 applies and as such the respondents were still at liberty to file a fresh suit subject to limitation of time. *Res judicata* would not apply in this case. We find this ground to be frivolous and devoid of any merit. It accordingly fails.

**Ground 2**:

***The learned judge erred in law and in fact when she reconsidered the matter of the ownership of the plant and crane effectively sitting in appeal if a judgment of her own court.***

Mr. Bagayi learned counsel for the appellant argued that Hon Justice Irene Mulyagonja who heard and determined the application for temporary injunction arising out of the suit from which this appeal arises determined the issue of ownership of the plant and the crane the ownership of which was in issue. That Hon. Justice Flavia Senoga Anglin who heard and determined the main suit should not have revisited the question of ownership of the property as it had already determined, by Justice Mulyagonja.

An application of temporary injunction is an interlocutory application arising from a substantive suit. By its very nature an interlocutory application it is restricted to the determination of whether or not a temporary injunction should issue. As Justice Anglin correctly observed a judge while determining an application for temporary injunction is only required to determine whether or not the main suit had a reasonable chance of success. The judge is not required to determine the issues upon which the

suit rests. Those are determined at the trial itself. That is exactly what happened in this case. The remarks made by Justice Mulyagonja in respect of the plant and crane were by way of observation and clearly obiter. The learned trial judge was right to determine the suit upon receiving evidence and to come to her own conclusion the way she did. This ground too has no merit and it fails.

**Ground 3**:

***The learned trial judge erred in law and fact when she held that an invoice and a receipt are one and the same thing.***

One of the issues before the trial court was whether or not the respondents had purchased the plant and crane from the appellants. The respondents presented an invoice as proof of payment, which was accepted by the trial judge. The appellants contend that an invoice is not a receipt and therefore the trial judge erred in holding that the invoice presented was proof of payment. On this issue the learned trial judge at pages 8 and 9 of her judgment finds as follows:-

*Between 25/05/05 and 30/05/05 the 1st defendant issued invoice No. PF1/001/225 for the Mobile Crane and the plant to plaintiff for a consideration of Shs. 8,000,000/=. The invoice was signed by Micheal Krall and the 3rd Defendant.*

*This was good consideration considering the various obligations in money and expertise the company owed to the 1st Plaintiff.*

*Again on 30/05/05 by Licence signed by 3rd Defendant and Micheal Krall. 1st Defendant allowed 1st Plaintiff to use all equipments and other assets of the 1st Defendant at Jinja. The Plant was not to be relocated after purchase. It is on land belonging to Kilembe Mine.*

*The receipt of Shs. 8,000,000/= was acknowledged by Micheal Krall on behalf of 1st Defendant as Director and Manager. The acknowledgement required the 1st Plaintiff to forego all claims against 1st Defendant up to that date.*

*The claims included all the expenditures the plaintiff had incurred on behalf of 1st Defendant and the outstanding salary amounting to Euro 650,000/=.*

We have perused the supplementary record and ascertained that indeed an invoice was issued by the 1st appellant to the 1st respondent on 25th May 2005 it indicates the following:-

*"(1) A Mobile Crane ATT 480 (HAZET).*

*(2) Metallurgial plant "Deconterra) product of LL Lub Lurghi as described in the attachment at 8,000,000/= (eight Million shillings) excluding VAT"*

This amount was acknowledged in writing by the 1st appellant on 3rd June 2005.

Without going in to the detailed definition of what a receipt and an invoice are, suffice it to say that an invoice signifies an offer. What was required to be proved was just acceptance. All the facts in this case show that the appellant made an offer and it was accepted by the respondents. Consideration takes many forms

including forbearance. In any event the appellants clearly acknowledged receipt of the said Shs. 8,000,000/= in writing. This is what the trial judge also found, when she held at page 18 of her Judgment

> *"Without evidence to the contrary, I am constrained to agree with counsel for the Plaintiffs that there was an offer made to the 1st Plaintiff and the contract was concluded when he paid the consideration above stated and also agreed to forego all the funds owed to him by the Defendants as of 30th May 2005".*

We find no reason to faulter the learned trial judges' finding. Accordingly this ground must also fail.

**Ground 4:**

> ***The learned trial judge erred when she found that the appellants were indebted to the respondent in the suit of Euro 150,000/= neither pleaded nor proved***.

We have found nothing to suggest that the learned trial judge found in her judgment that the appellant was indebted to the respondent in the sum of Euro 150,000/=.

The decree of court at P.113 of the record makes no mention of such a sum of money at all. The judgment of court does not mention it either. The plaintiff filed an action for recovery of Shs 340,459,000/= as special damages in paragraph 7 of the plaint.

At page 24 of her judgment the learned trial judge found that only Shs. 96,759,000/= had been proved as special damages and went on to award the same to the respondents.

She also awarded the respondents US 125,000/= as general damages and states in her judgment at page 25 the reasons way. We find this ground misconceived and without any merit. It also fails.

**Ground 5:**

***The findings of the learned trial judge go against the weight of the evidence and are based on conjecture and misrepresentation of the facts and the law.***

The submissions of counsel for the respondent in support of this ground are set out in the conferencing notes as follows:-

a) *The learned trial judge misinterpreted the facts of the case and thereby arrived at the wrong decision when she held that "the assignment to the 3rd party was void ab initio as it was in total disregard of the Court of Appeal Order to preserve the property and maintain the status quo until the disposal of the main suit". At the time of the assignment in 2008, there was no order in place from the Court of Appeal as stated by the Judge. The case had never been taken to the Court of Appeal by either party. Furtherstill the learned Judge failed to appreciate the point of the appellants that the assignment had excluded the plant and crane which were the subject of a pending suit at that time. The Deed of Assignment exhibited in court is very clear on this.*

b) *The learned trial Judge misled herself and thereby arrived at a wrong decision when in her judgment she states that*

*"both counsel informed court that they had agreed a joint scheduling memorandum where the following issues were framed for determination: (1) whether the 1st plaintiff purchased the disputed properties...."*

c) *The learned trial Judge misinterpreted the facts and thereby arrived at a wrong decision when she understood the claim of "Euro 150,000/=" to be separate and distinct from the claim of UGX 340,459,000/= set out in the plaint and further misled herself and arrived at a wrong decision when she found that in 1996 the 1st respondent advanced the sum of Euro 150,000/= to the appellants, failing to take Judicial Notice of the fact that the Euro as a currency was never in use in the Euro zone countries before 2nd January 2002.*

d) *The learned trial Judge again misinterpreted the facts and thereby arrived at a wrong decision when she held that the sum of US$ 151,000/=had been paid by the appellants to the respondents. this mistake of fact formed the basis for the award of UGX 96,759,000/= in special damages. But the appellants have never paid this sum to the 1st respondent. What the appellants paid was Euro 140,000/=".*

All issues raised in this ground have already been determined in the first four grounds. This ground raises nothing new. Since we have already determined this ground while we considered the first four, this ground accordingly also fails.

In the result this appeal fails and is hereby dismissed with costs to the respondents.

Dated at Kampala this 20th day of December 2013.

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**HON. SOLOMY BALUNGI BOSSA**
**JUSTICE OF APPEAL**

**.....**
**HON. ELDAD MWANGUSYA**
**JUSTICE OF APPEAL**

**.....**
**HON. KENNETH KAKURU**
**JUSTICE OF APPEAL.**