THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: EGONDA-NTENDE, KIBEEDI & GASHIRABAKE, JJA]

CIVIL APPEAL NO 69 OF 2019

(Arising from Civil Suit NO.395 of 2014)

ELIZABETH KOBUSINGYE .....APPELLANT

VERSUS

ANNET ZIMBIHA.....RESPONDENT

(Appeal from the Ruling and Orders of Margaret C Oguli, J delivered on the 15th day June, 2017 at the Civil Division of the High Court of Uganda at Kampala)

JUDGMENT BY CHRISTOPHER GASHIRABAKE, JA

This is an appeal made against the ruling of the High Court of Uganda, (Oguli J,), delivered on the 15th day of June, 2017 at Kampala. The appeal was on grounds that;

1. The learned trial Judge erred in law and in fact when she decided that the contract between the Appellant and the Respondent fell within the law of Champerty thus occasioning a miscarriage of justice to the Appellant.
2. The learned trial Judge erred in law and in fact when she reached a decision that the contract offends public policy thereby occasioning miscarriage of justice to the Appellant.
3. The learned trial Judge misdirected herself in law and fact when she imputed a fiduciary relationship between the Appellant and the Respondent thereby reaching a wrong conclusion.
4. The learned trial Judge erred in law and in fact when she ignored the principle of Quantum meruit in determining the Appellant's entitlement thereby causing a miscarriage of justice to the Appellant.
5. The learned trial Judge erred in law and fact when she considered facts were meant for trial thus occasioning a miscarriage of justice to the Appellant.
6. The learned trial Judge erred in law and in fact when she failed to properly evaluated the evidence on record therefore reaching a wrong decision thus causing miscarriage of justice to the Appellant.

The appellant prayed that;

1. The appeal be allowed.

2. The ruling be set aside.
3. Costs for this court and lower court be granted.

Background.

The Appellant brought a suit against the Respondent for declarations that the Respondent breached the Memorandum of Understanding entered into between the Plaintiff and the Defendant and an order of Specific Performance of the same Memorandum of Understanding. All the other prayers in the plaint are related to the same contract/ Memorandum of Understanding including a claim for Ug. Shs.3, 578,130,766/= (Three billion, five hundred and seventy eighty million, one hundred thirty thousand, seven hundred sixty six shillings) arising from the memorandum of understanding which the plaintiff is claiming from the Defendant.

The Appellant entered into an agreement with the Respondent wherein the Appellant was to facilitate the Defendant in meeting the cost of surveying the land, cost of negotiating with the government, meeting the upkeep costs of beneficiaries of the estate and meeting litigation costs, upkeep costs because of the gross financial incapacity of the Respondent.

The Appellant thus claimed Ug Shs. 3,578,130,566 (Three billion five hundred seventy eight million one hundred thirty thousand , seven hundred sixty six shillings) being 10% of the value of the subject matter, viz the compensation the Defendant was awarded after successfully suing the Government in Civil suit No.109 of 2011.

The High Court upheld the Respondent's preliminary point of law that the Memorandum of Understanding was illegal, null and void and not enforceable in law. The Court dismissed the Appellant's suit and the Appellant filed this appeal against the Respondent to challenge the ruling of the High Court.

Representations

The Appellant was represented by Mr. Odokel Opolot Deogratius. The Respondent was represented by Mr. Max Mutabingwa.

Consideration of the Appeal.

The duty of a first appellate court is laid down in Rule 30 of **The Judicature (Court of Appeal Rules) Directions S.I 13-10** and in the case of ***Fr. Narsensio Begumisa and 3 Ors V. Eric Kibebaga SCCA No. 17 of 2002*** (unreported): thus:

> "The legal obligation of the 1st appellate court to reappraise the evidence is founded in the common law rather than rules of procedure. It is a well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses."

The above principles will guide this court in the determination of the grounds of appeal as here below;

Ground one

The learned trial Judge erred in law and in fact when she decided that the contract between the Appellant and the Respondent fell within the law of Champerty thus occasioning a miscarriage of justice to the Appellant.

Submissions for counsel for the Appellant

Counsel for the Appellant submitted that it is not in doubt that court cannot enforce champertous agreements since they are illegal and said to be against public interest. However, there is need to consider each case in its own right given that there are exceptions to the rule against enforcement of illegal agreements. He averred that this case presents those exceptions.

Counsel for the Appellant conceded that the trial Judge rightly relied on **Section 19 (1) of the Contracts Act 2010**. However, **Section 19(2) of the Contracts Act 2010** is elaborate on the exceptions against the rule created in subsection 1.

> (2) An agreement whose object or consideration is unlawful is void and a suit shall not be brought for the recovery of any money paid or thing delivered or for compensation for anything done under the agreement, unless—

(a)the court is satisfied that the plaintiff was ignorant of the illegality of the consideration or object of the agreement at the time the plaintiff paid the money or delivered the thing sought to be recovered or did the thing in respect of which compensation is sought;

(b).....

(c)the court is satisfied that the consent of the plaintiff to the agreement was induced by fraud, misrepresentation, coercion or undue influence; or(d)the agreement is declared illegal by any written law, with the object of protecting a particular class of persons of which the plaintiff is one.

In regard to **Section 19 (2) (a)**counsel for the Appellant submitted that the actions of the Appellant were done in complete and utter good faith with no knowledge of or consideration for any illegality.

Counsel emphasized that the good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose. The Appellant averred in her affidavit that she offered the Respondent financial support based on the fact that the Respondent is her daughter in law. This issue was handled in **Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd 2004 (6) SA 66 (SCA)** where court held that champertous agreements are not ex facie contrary to public policy or void. At paragraph 27 on page 15 of judgment noted that;

"However, it is clear that the Courts acknowledged one exception. It was accepted that is any one, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void"

Counsel for the Appellant further argued that the prohibition against Champerty needs to be balanced against the right of access to justice, under Article 28 , freedom of contract this court held that;

" the reasons for champertous agreements being considered to be contrary to public policy have not, so far been reconsidered or tested by the courts in the light of changed circumstances and , in particular , in the light of the Constitution"

Submissions of counsel for the Respondent

Counsel for the Respondent submitted that the trial Judge made the right decision when she held that the Memorandum of understanding entered into by the Appellant was champertous and was unenforceable. According to the Memorandum of understanding, it was provided that;

> "The payer provided and continues to provide material and financial support to the payee to facilitate the process of administration of the estate, surveying the land, negotiations with the Government, up keep of the beneficiaries in the estate and litigation costs
>
> In consideration for the material and financial support provided by the payee, the payer agrees to pay the payees the capped amount of the money in the proportion specified below:
>
> 10% of the value of the subject matter to the 1st payee
>
> 1% of the value of the subject matter to the 2nd payee"

With the provisions in the Memorandum of understanding, Counsel for the Respondent argued that this Memorandum of understanding falls within the definition of champerty and maintenance since the Appellant did not have any interests in the action or any motive recognized by law.

In Rejoinder

In rejoinder, Counsel for the Appellant submitted that this is a unique agreement that has no tendency to be champertous given that the Respondent through her lawyers prepared the terms of the agreement. Counsel further submitted that court should consider case by case when it comes to champerty.

Counsel for the Appellant submitted that according to **Price Waterhouse Coopers Inc V. National Potato Co-o Ltd** (*Supra*), court should not implement such agreements if there's manifest harm to the public. He submitted that this agreement does not manifest harm to the public because;

1. There was no fiduciary relationship between the Appellant and the Respondent.

2. That it is the Respondent's counsel who drafted the said agreement and there's no way the Appellant could influence the outcome of the agreement.
3. That the proceedings were an eventuality and not the prime interest of the Appellant as per the agreement

Ground 4

The learned trial Judge erred in law and in fact when she ignored the principle of quantum meruit in determining the Appellant's entitlement thereby causing a miscarriage of justice to the Appellant.

Submissions of counsel for the Appellant.

Counsel submitted that the trial judge on page 17 the last paragraph acknowledged the fact that the Appellant actually used her money to assist the Respondent to pursue her claim but still declined to grant her claim. He defined Quantum Merit according to Black's Law Dictionary 7th Edition on page 1255 to mean "*as much as he deserved*".

Counsel submitted that the Respondent signed the Memorandum of understanding well aware of the above mentioned clause in the presence of her advocates. That the trial judge should have severed the issue of litigation from the other contributions, such as surveying the land and maintaining the beneficiaries of the Estate among others.

Submissions of counsel for the Respondent.

Counsel submitted that the trial judge did not determine the Appellant's entitlements but only upheld the Respondent's objection. The Judge rightly found that the agreement upon which the claim was based fell within champerty and maintenance. The plaint does not seek recovery of the money paid which even is not disclosed in the plaint. The Appellant does not state anywhere in the Pliant the amount of money given to the Respondent.

Submissions in rejoinder

Counsel for the Appellant submitted that preliminary objection is merely a technicality. That this court has wide discretion under Articles 126 (2) (e) and Rule 2(2) of the Rules of this court to administer justice without undue regard to technicalities.

Grounds 5

The learned trial Judge erred in law and fact when she considered facts which were meant for trial thus occasioning a miscarriage of justice to the appellant

Submissions for counsel for the Appellant

Counsel for the Appellant submitted that the preliminary objection was raised before hearing of the matter and before the evidence could be led, however the trial judge considered many facts that were meant for trial and that required evidence to be led.

Counsel further submitted that the agreement was based on mutual trust since the Respondent is the daughter in law of the Appellant, the Appellant made some of the deposits on the Respondent's accounts. Counsel noted that this evidence would be established through cross examination.

Submissions for counsel for the Respondent.

Counsel for the Respondent submitted that the judge did not consider any issue which was for trial. Counsel further submitted that the preliminary objection was rightly upheld.

Submissions in rejoinder.

Counsel submitted that the trial judge prematurely decided the matter by a preliminary Objection.

Ground 6

The learned trial Judge erred in law and in fact when she failed to properly evaluate the evidence on record therefore reaching a wrong decision thus causing miscarriage of justice to the appellant.

Submissions for counsel for the Appellant

Counsel for the Appellant submitted that the trial judge failed to properly evaluate the evidence as a whole given the facts of this matter and some of the documents that had already been part of court record. That the Appellant's trial bundle specifically pages No.62 and No.63 contain receipts and a car hire agreements that would have put the judge on notice of contributions

Submissions for counsel for the Respondents.

Counsel submitted that the issue of appeal contradicts Rule 86 of the Rules of this Court and should be struck out.

Submissions in rejoinder

Counsel submitted that for court to strike out this issue borders on stopping this honorable Court from carrying out its work.

Consideration of court.

Counsel for the Appellant conceded that it is not in doubt that the court cannot enforce Champertous agreements since they are illegal and against public interest. He averred that the trial judge properly considered the matter under **Section 19(1) of the Contracts Act 2010.** He however noted that **Section 19(2) of the Contracts Act 2010** elaborates the exceptions to the general rule.

It is my observation that by the time the agreement was signed or concluded this Act of Parliament had not come into force. The agreement in contention was concluded on the **25th day of August 2010**. By then the **Contracts Act 2010** had not yet come into force. According to **Rule 2 of the Contracts Act, 2010 Commencement Instrument, 2011**, the Contracts Act commenced on the 15th day of September 2011. **Section 14(2) of the Acts of Parliament** Act, provides that every Act shall be deemed to come into force at the first moment of the day of commencement.

The implication of this is that the Appellant cannot seek refuge from the Act which was not in force at the particular time the contract was concluded. This is because the law cannot act retrospectively

unless if expressly provided for in the Act, which it does not in this particular case.

The previous Contract Act did not have an equivalent provision of the law concerning the enforcement of Champerty or maintenance agreements in exceptional circumstances. In the circumstances the guiding position of the law is the common law.

Under common law Champerty or maintenance agreements were considered void and illegal and could not be enforced by courts of law. The **Halsbury's laws of England volume 9,** define *Champerty* or *maintenance* agreement as;

> " maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in litigation nor any other motive recognized by the law as justifying his interference. *Champerty* is a particular kind of maintenance namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action"

In **Trepca Mines Ltd [1962] 3 ALLER 351**, court articulated the reason why common law condemned Champerty agreements, court held that;

> "The reason why the common law condemns Champerty is because of the abuses to which it may give rise. The common fears that the Champertous maintenance might be tempted, for his own personal gain, to inflate the damages, to suppress evidence or ever to suborn witness"

The law on Champerty then, only rested on the rule of public policy capable of rendering an agreement unenforceable. Court in **Filesa vs. Thompson [1993]3 ALLER 321, Steyn L.J;**

> "Identified the public policy which renders Champertous agreements illegal as resting on the perceived need to protect the integrity of public justice later , at p336, he added that the policy focused on the protection of the party confronted with the maintained litigation , it did not exist to protect the plaintiff"

When assessing whether an agreement is Champerty, it is good to look at the agreement under attack in order to see whether it tends to conflict with existing public policy that is directed by protecting the due administration of justice with particular regard to the interest of defendant. In **Factortame and others vs. The**

Secretary of State for Transport [2002] QB 397, Lord Phillips held that,

> "When we come to consider the law of champerty we shall find that the application requires an analysis of the facts of the particular case"

The Memorandum of Understanding under attack provides that;

> " in consideration for the material and financial support provided by the Payees to the payer, the Payer agrees to pay payees a capped amount of money in protection the proportion specified below;
>
> a. UGX 300,000,000/=(Uganda Shillings Three Hundred Million) to the 1st Payee
> b. UGX 100, 0000, 000/=(Uganda Shillings One Hundred Million) to the 2nd Payee.
>
> The payer shall cause a meeting between the parties within 14(fourteen) days of the Compensation payment, to agree on the mode of payment under Clause 1 above"

In line with the definition of what amounts to a champerty agreement and the evidence on record the above provisions fall squarely in the definition. The Appellant seeks to get a capped 10% amount of the said compensation that was due from government to the Respondent if she succeeded. Counsel for the Appellant conceded that such agreements are not enforceable under the law but however sought to rely on the exception to the general rule on Champerty agreements. He argued that this agreement was done in good faith to support a suitor who needed help. Counsel relied on **Price Waterhouse Coopers** (*Supra*) where court held that;

> "However, it is clear that the courts acknowledged one exception. It was accepted that if any one, **in good faith** gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void."

This very court (**Price Waterhouse**) *supra* referred to **Ram Coomar Coondoo and Another vs. Chunder Canto Mookerjee (1886) 2 AC at 210**, where the Privy Council cautioned court while considering champerty agreements, court held that;

> " that agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made not with the bona fide

> object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefore , but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy effect ought not be given to them"

It is agreeable that the law on Champerty has created room for an exception of good faith however the very court cautioned that court must be very cautious in evaluating such an agreement to establish whether it is improper as for purposes of gambling in litigation so as to be contrary to public policy.

In **Giles vs. Thompson and related appeals [1993] 3 ALLER 320, court held that;**

> The correct approach is not to ask whether, in accordance with contemporary public policy, the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement. The question is whether the agreement has the tendency to corrupt public justice. **And this question requires the closest attention to the nature and surrounding circumstances of a particular agreement.** That is illustrated by the well-known decision of the House of Lords in *Trendtex Trading Corp v Credit Suisse* [1981] 3 All ER 520, [1982] AC 679.

In evaluating the evidence in this case I do not think this memorandum of understanding was signed in good faith. Considering the fact that Appellant did not specify how much she had invested in the prosecution process. She capped her claim at 10% if the respondent had succeeded. This squarely falls under the definition of champerty agreement. This kind of agreement, if upheld, would be tantamount to encouraging and justifying illegality. The Supreme Court in **Shell (U) Ltd and 9 others versus Muwema and Mugerwa Advocates SCCA No. 02 of 2013**, held:

> "Having considered that the 1st respondent sought to share in the proceeds of the appellants claim at 16% as per the remuneration agreement, the remuneration agreement is champertous in nature. It is therefore illegal and unenforceable and the 1st respondent cannot seek to enforce it. In Act Automobile Spares Ltd vs. Crane Bank Ltd and Rajesh Pakesh (supra) it was held that no court ought to enforce and illegal contract if the illegality has been brought to its notice, where the person seeking and of the court is party to the illegality"

It is therefore in the interest of justice and public policy that this court dismisses this appeal because it cannot enforce what is illegal in the eyes of the law.

Grounds 1, 2, and 3 therefore fail. Having found that grounds 1, 2, 3, fail similarly grounds 4, 5 and 6 which are closely linked also fail.

After the trial court finding that the memorandum of agreement which was the suit was premised was illegal, there was no need to waste courts time on evaluating evidence and determining how much the plaintiff was entitled to the basis of quantum meruit, under an agreement that had been declared null and void.

With regard to the issue of costs, the rule is that costs follow the event, unless for reasons expressed, it is ordered otherwise. I would hold that the appeal is dismissed with costs here and below. The suit in the original suit should not have been brought at all.

Dated, signed and delivered at Kampala this 14 day of AUG 2022

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi, & Gashirabake, JA]

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ANNET ZIMBIHA.....RESPONDENT

[Appeal from the Ruling and Orders of the Civil Division of the High Court of Uganda at Kampala (Oguli, J) delivered on the 15th day June 2017 in Civil Suit NO.395 of 2014)

JUDGEMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my brother, Gashirabake, JA. I agree and have nothing useful to add.

Dated at Kampala this.....14th.....day of.....AUG.....2022

Muzamiru Mutangula Kibeedi

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JUSTICE OF APPEAL

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JUDGMENT BY FREDRICK EGONDA-NTENDE, JA

[1] I have had the opportunity to read in draft the judgment of my brother, Gashirabake, JA. I agree with it.

[2] As Kibeedi, JA, also agrees, this appeal is dismissed with costs, here and below.

Signed, dated and delivered at Kampala this 1st day of June 2022

Fredrick Egonda-Ntende
Justice of Appeal