THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Madrama, Mulyagonja & Mugenyi, JJA

CIVIL APPEAL NO. 180 OF 2018

BETWEEN

MACDOWELL LIMITED :::::::::::::::::::::::::::::: **APPELLANT**

AND

TAMPA ENGINEERING CONSULTANTS LIMITED ::::::::::::::::::::::::::::::**RESPONDENT**

(Appeal from the decision of Lady Justice Flavia Senoga Anglin dated 25th January 2016, in High Court (Commercial Division) Civil Suit No. 224 of 2010)

JUDGMENT OF IRENE ESTHER MULYAGONJA, JA

Introduction

This is an appeal from the decision of the High Court, Commercial Division, at Kampala in which the trial judge awarded the respondent special damages of UGX 372,452,331, general damages of UGX 20 million, exemplary damages of UGX 5,0000,000, interest on the special damages at 21% per annum, interest at 6% per annum on the exemplary and general damages, as well as the costs of the suit. The trial judge further ordered that the appellant do return the respondent's equipment from South Sudan, or in the alternative that its value be assessed and paid to the respondent.

Background

The facts upon which the appeal is based which were accepted by the trial judge were that on 15th August 2008, the respondent entered into a

contract with the appellant to rehabilitate Hilaya-Ikwotos Tseretenya, Madi Opeji Road in the Republic of South Sudan. The road covered a stretch of about 100.4 km and the cost of the construction was given as U GX 1,600,000,000/=. The appellant gave respondent an advance payment of U GX 700 million to the respondent, upon which the latter mobilised and opened up a camp in South Sudan to execute the contract. After the respondent had built about 50 km of road a further sum of about UGX 527,547 669 was paid to her to repair equipment that had broken down so that she could continue with the rehabilitation of the road.

It was the evidence of the respondent that the road was commissioned on 19th December 2008 by the Governor of Equatorial State in South Sudan. On 20th December 2008 the respondent stopped work for the Christmas break and some of her staff returned to Uganda for the holiday. That upon reporting back to the camp in South Sudan, on 18th January 2019, the respondent's staff found that the appellant had taken over the camp and the operations and was carrying out the work using the respondent's equipment.

There were efforts between the parties to settle the dispute between them but they proved futile. The respondent then filed this suit to recover the outstanding amount from the contract, being UGX 372,452,331, release of her equipment, general and exemplary damages, interest and costs of the suit. After the respondent completed adducing her evidence in the case in the presence of counsel for the appellant who cross-examined all witnesses, Mr Nuwagaba Gilbert who represented the appellant informed court that he was stepping down from the case. The reason that he gave was that he was no longer in touch with his client.

As a result, the respondent's counsel prayed that the court allows him to continue with the suit in the absence of the appellant, under the provisions of Order 17 rule 4 of the Civil Procedure Rules (CPR). The trial judge

granted the prayer and directed counsel for the respondent to file written submissions upon which judgement would be given on notice. Judgement was then delivered on 25th January 2016, granting the orders stated above.

Being aggrieved with the whole of the judgement of the trial judge, the appellant brought this appeal on the following grounds:

1. The learned trial judge erred in law and in fact when she failed to evaluate the evidence on record thereby arriving at a wrong decision and occasioning a miscarriage of justice.
2. The learned trial judge erred in law and in fact when she proceeded and decided the suit under Order 17 rule 4 of the CPR without summoning the defendant to appear in court after its advocate stepped down, thereby arriving at a wrong decision and occasioning a miscarriage of justice.
3. The learned trial judge erred in law and in fact when she ordered that the parties should have the alleged abandoned properties valued and the value thereof paid to the plaintiff, thereby arriving at a wrong decision and occasioning a miscarriage of justice.
4. The learned trial judge erred in law and in fact when she ordered the appellant to pay the value of the respondent's vehicles and equipment and yet in the same judgement she found that the respondent did not adduce any evidence of the value, thereby arriving at a wrong decision and occasioning a miscarriage of justice.
5. The learned trial judge erred in law and in fact when she entertained the cause of action founded in detinue which was alleged to have occurred in South Sudan outside the territorial jurisdiction of the court thereby arriving at a wrong decision and occasioning a miscarriage of justice.
6. The learned trial judge erred in law and in fact when she relied on hearsay evidence to decide that the appellant had taken over the site

thereby arriving at a wrong decision and occasioning a miscarriage of justice.

The appellant proposed that the appeal be allowed and that the judgement and decree of the trial court be set aside. Further that the appellant be allowed to adduce evidence in the High Court, and the costs of the appeal be provided for. The respondent opposed the appeal.

Representation

At the hearing of the appeal the appellant was represented by learned counsel, Mr Nelson Nerima. Mr Andrew Ankunda and Miss Eva Nabitaka, learned counsel, represented the respondent. The parties were directed to file written submissions and the appeal was decided on that basis.

Duty of the court

The duty of this court as a first appellate court, is stated in rule 30(1) of the Rules of this court (**SI 10-13**). It is to re-evaluate the whole evidence adduced before the trial court and reach its own conclusions on the facts and the law. But in so doing the court should be cautious of the fact that it did not hear and observe the witnesses testify.

Submissions of counsel

In his written submissions, Mr Nerima addressed grounds 1 and 6 first. He then addressed grounds 3 and 4 together, and grounds 2 and 5 each separately. The respondent's counsel replied in similar fashion. However, I will not review the submissions of counsel here. I propose to review them as I dispose of each of the grounds of appeal.

Consideration of the appeal

The appellant raised a point of law about the propriety of the High Court entertaining a suit founded in detinue which was alleged to have occurred

in Southern Sudan, outside the territorial jurisdiction of the court. This is an important question that ought to be resolved first. The appellant also raised a procedural issue about judgement having been delivered without first hearing the evidence of the appellant in the matter, which too is an important point that could invalidate the whole process and render the judgment irregular. I will therefore dispose of grounds 5 and 2 in that order, before I consider the rest of the grounds of appeal. In the event that the two grounds are resolved in the positive, there will be no need to consider the rest of the grounds of appeal. I will now proceed to dispose of grounds 5 and 2 of the appeal.

Ground 5

Submissions of Counsel

In this regard, Counsel for the appellant submitted that since the detention of the equipment allegedly occurred in South Sudan the court in Uganda had no jurisdiction to order the return of property which was in Sudan. He submitted that it was the courts in South Sudan which were clothed with jurisdiction to adjudicate upon trespass to goods in that country. That similarly the court in Uganda could not order the valuation of property in South Sudan. He prayed that ground 5 of the appeal be allowed.

In reply counsel for the respondent submitted that the appellant's challenge of the court's jurisdiction in her written statement of defence was that the appellant company was not registered in Uganda. He asserted that this was obviously fraudulent and a blatant lie. He drew the attention of court to **Exhibit P3**, which was a Certificate of Incorporation, No. 44073 dated 11th April 2000 issued by the Registrar of Companies in Uganda. He asserted that the contest was never about trespass to goods. And that notwithstanding that, the contract between the parties vested full jurisdiction in the courts in Uganda by stating in the Contract Data, under

clause 7, that the law that applies to the contract shall be the law of the Republic of Uganda. That the learned trial judge was therefore justified in finding, as she did, that the court had jurisdiction to hear the matter. He prayed that this court upholds the judgement of the trial court and dismisses the appeal.

Resolution of Ground 5

The jurisdiction of the High Court is provided for in section 14 of the Judicature Act. It is there provided that the court has unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or the Judicature Act or any other law. The place of suing is then provided for by the Civil Procedure Act (CPA) in sections 12 to 14 thereof. Section 14 in particular provides for suits for compensation for wrongs to persons or movables in the following terms:

> **"Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the courts."**

Section 15 of the CPA goes on to provide that other suits may be instituted where the defendant resides or where the cause of action arises. It is provided in subsection (b) thereof that a suit can be commenced where any of the defendants at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain. According to subsection (c) thereof the suit may be instituted where the cause of action wholly or in part arises.

The evidence on the record shows that the contract in issue was signed in Kampala on the 15th day of August 2008. It is also evident from the contract itself, in the Contract Data, at page 79 of the record of proceedings, that the law that the parties agreed upon to apply to this

contract was the law of the Republic of Uganda. It was further agreed that the currency of the contract was to be Uganda shillings.

It is therefore clear that the proper law of the contract is the law of Uganda. The *"proper law"* of the contract is the system of law which the parties expressly or impliedly choose as the law governing their contract or, in the absence of such choice, the *"system of law with which the contract has its closest and most real connection."* (**Amin Rasheed Shipping Co v Kuwait Insurance Co [1984] AC 50 at 69**).

I therefore find that in spite of the fact that the contract was to be performed in South Sudan, the trial judge made no error when she entertained the suit in the High Court of Uganda because having agreed to be governed by the laws of Uganda, the appellant could not dispense with the jurisdiction of the courts in this country.

Ground 5 of the appeal therefore had no merit whatsoever, and I would dismiss it.

Ground 2

Ground 2 was the complaint that the trial judge erred when she proceeded under Order 17 rule 4 of the CPR without summoning the defendant to appear after her advocate stepped down from the case. The appellant asserts that she thereby arrived at a wrong decision and occasioned a miscarriage of justice.

Submissions of Counsel

In this regard counsel for the appellant submitted that when Mr Gilbert Nuwagaba withdrew from the conduct of the suit, the trial judge ought not to have proceeded under Order 17 rule 4 CPR. That instead the appellant should have been served with process personally to enable her present her defence. Counsel went on to submit that whenever an advocate intends to

withdraw from the conduct of a case he/she must give his or her client, the court and the opposite party sufficient notice of his or her intention to do so. He referred to regulation 3 (2) (a) of the Advocates (Professional Conduct) Regulations, S.I 267-2.

Mr Nerima went on to submit that the withdrawal was abrupt and made in court; the client was not in court and therefore not aware. That she should have been served with a hearing notice. That in any case the judge also wrongly proceeded under Order 17 rule 4 CPR. That rule 4 is applicable where the court will decide the suit immediately. But this suit was not decided immediately; the judge adjourned to receive the written submissions but did not order service on the appellant. That as a result the appellant was denied a fair hearing. He prayed that ground 2 of the appeal be allowed and that the case be remitted to the High Court for the appellant to present her defence.

The respondent's counsel offered no submissions on this ground of the appeal.

Resolution of Ground 2

It is evident from the record that on all occasions that he appeared in court Mr Nuwagaba's client, the appellant, sent no representative to follow the proceedings. It was therefore not surprising when on 26th May 2015 Mr Nuwagaba decided to step down from representing the appellant.

I observed that when the matter was called on for hearing on the 26th May 2015, at the very onset Mr Nuwagaba informed court that he had failed to get in touch with the appellant. Counsel for the respondent then enumerated what had taken place before that date and pointed out to the court that it was counsel for the defendant who sought for a date when he

would proceed with the defence. He emphasised the fact that it had been 3 months since the last hearing and the defendant had failed to proceed with her case. He therefore applied that the respondent's case be closed under order 17 rule 4 CPR so that the court proceeds to decide the matter. He prayed for 2 weeks within which to file written submissions. The court did not take Mr Nuwagaba to task for this impromptu withdrawal from the conduct of the case. Instead the trial judge ruled as follows:

> *"It is true that the plaintiff's case was closed on 04.12.2014 and the defence was informed of the date counsel would proceed with defence on 02.02.2015. Since then, a number of adjournments have been given and today 26.06.15 the defence is not ready to proceed with the case and counsel for defence says he has lost touch with his clients. This is a case of June 2010 and it is therefore in the interests of justice that the court proceeds to determine the case without hearing the defence, under order 17 rule 4 CPR. It is so directed. The plaintiff to file written submissions in 2 weeks from today that is by 10. 06. 15 and have the judgement delivered by 26.05.15."*

Regulation 3 (2) (a) of the Advocates (Professional Conduct) Regulations provides as follows:

> **"2) Whenever an advocate intends to withdraw from the conduct of a case, the advocate shall—**
>
> **(a) give his or her client, the court and the opposite party sufficient notice of his or her intention to withdraw; and**
>
> **(b) refund to his or her former client such proportionate professional fees as have not been earned by him or her in the circumstances of the case."**

Clearly, the appellant's advocate did not give sufficient notice to the court and to counsel for the respondent of his decision to withdraw from the conduct of the case. He therefore did not comply with the provisions of the Advocates (Professional Conduct) Regulations in that regard. He withdrew without notice to his client, and I say without notice, because he did not demonstrate that he made an effort to inform his client that he would withdraw from the conduct of the case. Clearly this was prejudicial to his

client as is evident from the judgment that was given against them in their absence, though they filed a defence in the matter which to me raised substantial issues for determination of the court. A miscarriage of justice was thereby occasioned.

The right to a fair hearing is a cardinal principle of natural justice supposed to be observed by the parties, the advocates and protected by the court. It is enshrined in Article 28 of the Constitution of the Republic of Uganda. And according to Article 44(c) of the Constitution the right to a fair hearing is non-derogable.

It is for that reason that Order 17 rule 4 CPR envisages that the court has a duty to ensure, to the utmost, that all parties to suits are given an opportunity to present their case to the court. It provides as follows:

> **"4. Court may proceed notwithstanding either party fails to produce evidence**
>
> **Where any party to a suit *to whom time has been granted* fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, *for which time has been allowed*, the court may, notwithstanding that default, proceed to decide the suit *immediately*."**
>
> ***{Emphasis is mine}***

The expression *"to whom time has been granted,"* is very important. My interpretation of it is that apart from the time that court granted to the respondent on 2nd February 2015 to serve notice on the appellant's counsel for the hearing on the 6th April 2015, which seems not to have taken place, the court was under an obligation to give the appellant more time to organise herself and call her witnesses after her advocate withdrew from the case.

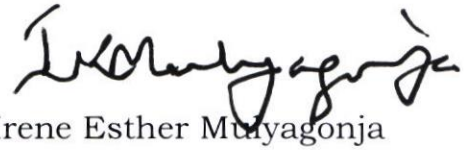
The requirement to give the defaulting party time is reiterated in the expression *"for which time has been allowed."* It is my view that the court may only proceed to decide the case *"immediately,"* after the party who has been given time to call his/her witnesses, or perform any other step required in the suit, fails to do so after the court is moved, or moves itself under Order 17 rule 4 CPR. In such a case, judgment should fall immediately, not after the protracted process of filing and receiving submissions from the party present.

In my opinion, what ought to have happened in this case is that after Mr Nuwagaba withdrew from the case, the trial judge ought to have ordered counsel for the respondent to find the appellant and serve her with notice of the next hearing. The last known address was indicated in the letter dated 30th May 2009, **ExhD1**, in which the appellant terminated the contract with the respondent, as P. O. Box 70587 Clock Tower Kampala, P. O. Box 64 Kitgum, and South Sudan at Lubra-B Juba. However, the address that was given in the contract data was Torit, Macdowell Ltd. In the event that the company could not be found at or through the addresses above, substituted service ought to have been effected on her as is provided for by Order 5 rule 18 CPR.

In the absence of an opportunity to the appellant to present her case to court, the directive to the respondent to file written submissions was premature. I therefore find that the trial judge erroneously applied the provisions of Order 17 rule 4 CPR. The resultant judgment and orders were therefore also premature and I would set both of them aside. In view of this, there is no need to delve into the rest of the grounds raised by the appellant in this appeal.

In conclusion, this appeal succeeds. I would then order that the suit be remitted to the trial court for it to complete hearing of the appellant's case before judgment is delivered. Due to the fact that the error in rendering

judgment prematurely was occasioned by the court, I would further order that each party bears their own costs for this appeal.



Irene Esther Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA

CIVIL APPEAL NO. 180 OF 2018

BETWEEN

MACDOWELL LIMITED ..... APPELLANT

AND

TAMP ENGINEERING CONSULTANTS LTD ..... RESPONDENT

(Appeal from the Judgment of the High Court of Uganda (Anglin, J) in Civil Suit No. 224 of 2010)

JUDGMENT OF MONICA K. MUGENYI, JA

1. I have had the benefit of reading my sister, Hon. Lady Justice Mulyagonja's draft judgment in this case. I am in general agreement with the conclusions arrived at therein but do deem it necessary to highlight the following brief observations.

2. I do abide the position advanced in the lead Judgment that the circumstances of **Civil Suit No. 224 of 2010** did warrant the allotment of time to the Appellant to retain another advocate to propel its case, the company's previous advocate having stepped down from the case. However, I would not go so far as to impute an obligation upon courts to mandatorily allow time for parties in similar circumstances. In my view, each case should be considered on its merits and the circumstances thereof considered on case-by-case basis. To decide otherwise would be to obviate judicial discretion and the inherent powers of courts to make such orders, within the ambit of the law, as the justice of the matter dictates.

3. The circumstances of the case before the trial court were that the parties had unsuccessfully attempted to resolve their dispute by an out-of-court settlement. Thereafter, following the closure of the Respondents' case, the Appellant's advocate withdrew from the matter citing loss of contact with his client. On the Respondent's motion, the court invoked Order 17 rule 4 of the Civil Procedure Rules (CPR); ordered the Respondent to file written submissions in the matter, and thereafter delivered its judgment. Order 17 rule 4 provides as follows:

> **Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to determine the suit immediately**. *(Emphasis mine)*

4. With respect, I do not deduce that provision to be couched in such mandatory terms as would oblige a court that invokes it to immediately render its decision in a matter. It seems to me that the decision to determine the matter immediately is left to the discretion of the court but, in any event, I find nothing therein that forestalls a court

that has received the plaintiff's evidence seeking to be addressed in submissions before rendering its decision. That, in my view, is the import of the inherent powers enshrined in section 98 of the Civil Procedure Act (CPA). Order 17 rule 4 of the CPR should not be construed so stringently as to offend the letter and spirit of Article 126(2)(e) of the Constitution.

5. Nonetheless, as indicated earlier in this Judgment, I do agree that the justice of this case in this matter was that the Appellant's advocate having withdrawn as he did, the said company should have been allowed time to retain another advocate. I do respectfully agree with the conclusion in the lead Judgment that this Appeal should fail. I do similarly abide the decision on costs.

6. As I take leave of this Appeal, I am constrained to provide necessary context to the Court's decision. By way of background, following judgment in its favour in High Court **Civil Suit No. 224 of 2010** and subsequent failure to trace any of the Company's assets in Uganda, the present Respondent filed **Miscellaneous Application No. 2803 of 2016** in the High Court Executions and Bailiffs Division seeking to have the Company's corporate veil lifted under section 20 of the Companies Act, 2012. The trial court allowed the Application; lifted the corporate veil, and directed the Appellant's Directors to make good the Company's legal obligations towards the Respondent (judgment creditor). That decision was upheld by this Court vide its Judgment in **Civil Appeal No. 8 of 2020**. Having now determined the present Appeal as the Court has, it seems to me that whereas the questions of law addressed in **Civil Appeal No. 8 of 2020** would remain in force, the execution proceedings that should have ensued from the lifting of the corporate veil therein might perhaps be rendered moot.

Dated and delivered at Kampala this 18th **day of** March **, 2022.**

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

CIVIL APPEAL NO 180 OF 2018

MACDOWELL LIMITED} ..... APPELLANT

VERSUS

TAMPA ENGINEERING CONSULTANTS LTD} .....RESPONDENT

(Appeal from the Judgment of the High Court Lady Justice Flavia Senoga Anglin dated 25th January 2016, in High Court (Commercial Division) Civil Suit No 224 of 2010)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the Judgment of my learned sister Hon. Lady Justice Irene Esther Mulyagonja, JA.

I agree with her that the appeal be allowed for the reasons she set out in her judgment and have nothing useful to add. Since Hon. Lady Justice Monica K. Mugenyi, JA also agrees and I agree with the further order she proposed in her Judgment, the following orders issue:

1. The Judgment of the High Court in Civil Suit No 224 of 2010 is set aside.

2. Civil Suit No 224 of 2010 is remitted to the trial court to complete the hearing of the Appellant's case before judgment is delivered.

3. While the principles of law in the Judgment of this court in **Beatrice Odongo and Noah Ochola v Tamp Engineering Consultants; Civil Appeal No 8 of 2020** are valid and remain, any execution proceedings and orders pursuant to the judgment in **High Court (Commercial Division) Civil Suit No 224 of 2010** cannot proceed, the judgment from which execution proceedings arose having been set aside in this

appeal pending the hearing and outcome of High Court Civil Suit No. 224 of 2010 pursuant to order 2 above.

4. Each party will bear its own costs of the appeal.

Dated at Kampala the 18th day of March 2022

Christopher Madrama Izama

Justice of Appeal