

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)

CIVIL SUIT NO. 59 OF 2003

EDWARD MAKUBUYA T/A

M. EDWARD ENGINEERING WORKS..... PLAINTIFF

VERSUS

KAMPALA CITY COUNCIL

KAWEMPE DIVISION..... DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

JUDGMENT

The Plaintiffs claim in this suit was for recovery of Ushs.9, 526,150/= based on a contract between himself and the Kampala City Council pursuant to which the Plaintiff repaired 32 skips (i.e. dust or refuse bins) for the City Council. The plaint avers that:

- (a) between the dates of 2 1/02/2000 and 06/03/2000 the Plaintiff repaired, on the average, two skips per day for a total of 32 skips at the cost of Ushs.9,526,150/= (see Certificates of Works attached to the plaint and marked as Annexures “A” to “M”, respectively);

- (b) that on 17/03/2000, the Refuse Supervisor, one James Sempebwa, confirmed in writing the satisfactory completion of the repair of the 32 skips (see Memorandum marked Annexure “N” to the plaint);
- (c) that on 22/03/2000, the Principal Assistant Town Clerk directed the Division Finance Officer, Kawempe Division, to pay and indeed that officer did pay on that date Ushs.1m/ to Plaintiffs, and another Ushs.lm& on the following day - leaving a balance of Ushs.9,526,150/= (see Annexures “N” & “P” to the plaint).

2. In his written submissions in this case, learned counsel for the Plaintiff stated that:

“the facts of the case as stated in the plaint are not disputed and the documents on record are also admitted as exhibited. The defendant ‘s only contention is that there is no valid contract.”

That indeed was the position that the learned counsel for the Defendant had already articulated orally during the hearing of the matter on 28/11/2003, when he expressly stated that:

“I have agreed with the Plaintiff’s counsel, Mr. Rutiba, that we await the Tender Board’s decision next Tuesday/Wednesday. If the decision is negative, then we should simply make submissions on only one legal issue (i.e. whether there was a valid contract between the Parties). In this regard, I do concede all the facts averred by the Plaintiff”. [emphasis added]

- 3. Given the above position amicably agreed by both parties, there is only one issue to be addressed by the Court - namely, the validity of the contract between the parties. The Defendant’s contention was extremely brief and direct — namely, that the alleged

contract between the parties for the repair of the 32 skips did not go through the District's Tender Board as otherwise required by the law: Sections 91 and 92 of the Local Governments Act (now Cap 243); and, especially, Regulation 75(1) of the Local Governments Financial and Accounting Regulations, 1998, which Regulation states that:

“The District Tender Board or Urban Tender Board shall award all contracts for Works, Services and Goods and shall decide on disposal of Local Governments assets within its jurisdiction.”

4. As I understand it, the Defendant's contention was that the suit contract never went through the City Council's Tender Board, the only institution that has exclusive authority to contract for all services rendered to the City; and that as a consequence of that failure, the suit contract was invalid and of no legal effect at all. In this regard, the Defendant argued that it did not matter whether some officials of the Council sanctioned the repairs, for they had no powers to do so. Moreover, the Defendant averred that the reason for the above legal requirement concerning the tendering of services was *“to stop abuses and to safeguard public funds.”* Therefore, one cannot even plead estoppel, since that doctrine cannot be invoked to render valid a transaction which the legislature has invalidated on grounds of public policy - **see Attorney General v Abdul Karim Winyi, S.Ct Civil Appeal No. 24 of 1992; see also Halsbury's Laws of England, 3rd Edition, Vol. 15 at p. 156.**

5. For their part, the Plaintiffs averred that indeed their defence in this matter was the plea of estoppel, based on the Evidence Act (Cap. 6) section 114 of which provides that:

“When one person has, by his act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her

representative, to deny the truth of that thing.”

6. The Plaintiff contended that the contract was not void, but voidable (i.e. capable of being ratified — see **Halsbury’s Laws** (*supra*), **4th Edition, para. 1044, at p. 908**; and that therefore, the Defendant had the option either to affirm or ratify the contract or otherwise exercise its rights of rescission within a reasonable time and not take a benefit under the contract - see **Osborn’s Concise Law Dictionary (7th Edition), page 341**.

7. I have given great attention to the contentions of both counsel. I find three decisive factors in this matter:
 - (i) the doctrine of estoppel;
 - (ii) the rule of ratification of a contract; and
 - (iii) the principle of unjust enrichment.

Estoppel:

8. The doctrine of Estoppel was the Defendant’s major bone of contention, For this, the Defendant relied on two enactments:
 - (a) the Local Governments Act (Cap.243), and
 - (b) the Local Governments Financial and Accounting Regulations, 1998.Sections 9 1(1) and 94 of the Act mandate every district and urban council to have a tender board. The function of the tender board is stated to be to “*award all contracts*” for the procurement of goods, services and works for the council. The tender board is required to do so in conformity with the standards established by the central tender board and to be guided by the Local Governments Financial and Accounting Regulations. From all this, the Defendant concluded that:

“... The above law came into force to stop abuses and to safeguard public funds. This matter did not go through the Tender Board, which has the power

to award contracts. It does not matter whether some officials of the council sanctioned the repairs for they had no powers to do so and these are the abuses the law was enacted to cure. One cannot even plead Estoppel for the doctrine of Estoppel cannot be evoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted shall be invalid. Supreme Court Civil Appeal No. 24 of 1992 Attorney General vs Abdu Karim Winyi refers; and Halsbury's Laws of England, 3rd Edition, Volume 15 at page 176."

9. I am not satisfied that the Defendant has made out a case against the doctrine of estoppel. In my view, the law as referred to above lays the obligation on the council (not on innocent third parties, such as the Plaintiff in this case) to establish and utilise a tender board. Once so established, it is not for the innocent third party (such as the Plaintiff) to activate the tender board. Rather, it is for the council itself to trigger the move.

10. It is evident therefore that any breach or violation of the law relating to the tendering of the suit services could not have been perpetuated by the Plaintiff - a mere third party. Indeed, no such breach or violation of the law was even as much as brought to this Court's attention. To that extent, the Defendant's reliance on **Attorney General v Abdul Karim Winyi** (*supra*) was misplaced. In the **Winyi** case, the third party was himself *guilty* of a direct violation of the statute prohibiting importation/exportation of chimpanzees from a non-prescribed place. Indeed, Winyi was even found to have smuggled out one more chimpanzee than the number that was strictly authorised. In these circumstances, PLATT JSC concluded that the doctrine of estoppel was indeed applicable against Winyi. In the instant case, the third party - (Makubuya) is an *innocent* party. He cannot similarly be estopped.

Ratification:

11. The Plaintiff contended that the suit contract was not void, but voidable - and that, therefore, the Defendant had the option to affirm or ratify that contract; or else, to rescind or repudiate it and not take any benefit under that contract. I agree. On the facts of this case, no other conclusion can be reached. Plaintiff repaired the 32 skips over a period of two weeks. Eleven days after the repairs (i.e. on 17/03/2000), KCC's Refuse Supervisor, one James Sempebwa, confirmed in writing the satisfactory completion of the repair of the 32 skips. Five days later on 22/03/2000, the Principal Assistant Town Clerk directed the Division Finance Officer of Kawempe Division to pay the Plaintiff for his repair services, On that very same day, the Finance Officer did indeed pay the Plaintiff a sum of Ushs.1m/=. Again on the following day, the Finance Officer released another payment of Ushs. 1m/= - leaving a balance of Ushs.9,526,150. Indeed, all these payments had also been approved by all the relevant Division officials, including the Division Engineer and the Division Financial Engineer - see Annextures "N" and "P" to the plaint. The latter (i.e. Finance Officer's letter of 17/07/2001) is totally transparent as regards the reason for the nonpayment of the outstanding balance of Ushs.9m/. The reason was not invalidity of the contract. It was purely due to "cash flow problems." For greater emphasis, the letter stated that "the debt will be settled as soon as our revenue improves." All these actions of the relevant officials of the Division - and senior ones at that - do in my view constitute an explicit affirmation of the contract; and do amount to ratification of that contract. An even more important piece of evidence of that ratification was the letter of 04/11/2003 written by the Secretary of the Kampala District Tender Board to the Principal Assistant Town Clerk. That letter shows beyond any shadow of doubt that the Defendants' Tender Board had powers of ratification.
12. In this regard, the case of **Janfred Properties Ltd v Ente Nazionale per II Turismo [1989] 2 All ER 444**, is extremely instructive. First, the case established that in considering voidable contracts,

"... the correct question to ask is whether the [Defendant] had power to ratify or affirm the ... agreement or to enter into afresh contract on the same terms."

Secondly, the Court in that case held that:

“...even no contract, whether voidable or otherwise, had been effectively entered into..., the subsequent acts of the defendant’s president in authorising payment of the deposit and offering to complete the purchase by installments constituted under Italian law the ratification of the July agreement or the entry into a fresh contract on the same terms..”

Third, the Court in addressing the specific significance of the payment of the contract amount, pronounced itself in no unmistakable terms as follows:

“It is difficult to conceive of an act more clearly calculated to ratify or affirm a previously unauthorised contract for the purpose of land... than purchase by deferred installments ... it is difficult to conceive of a more vivid act of ratification or affirmation...”

In my view, all the above principles of the **Janfred** case are on all fours with the acts of the Kawempe Division officials who certified the Plaintiff’s work as satisfactory, approved payment for that work, and proceeded to make actual part payment for that work, with an express written undertaking to settle the remainder of the debt as soon as the Defendant’s revenues improve. In the words of the **Janfred** case, it is difficult to conceive of an act that would be clearly calculated to ratify or affirm the suit contract than the above acts of the Division officials in making current and future contract payments to the Plaintiff.

Unjust Enrichment:

13. A final consideration in this matter is the principle of unjust enrichment or quasi-contract. It is trite law that faced with a voidable contract, a Defendant has the choice of either affirming or ratifying that contract, or otherwise exercising his rights of rescission within a reasonable time and not take a benefit under the contract - see **Osborn's Concise Dictionary** (*supra*) at page 341. In the instant case, the Defendant took a benefit - namely, the repair of the 32 skips that was done by the Plaintiff. The Defendant's officials repeatedly and consistently issued certificates of completion of the works (see Annextures "A" through "L" - (i.e. 12 certificates in all).

14. The final certificates, Annextures "N" and "P" categorically acknowledge the value of the repair work of these 32 skips as amounting to over 11million/=. Of this amount, Ushs, 2m/= was paid to the Plaintiff, leaving a balance of some Ushs, 9m/=. The taking of that benefit under the contract was inconsistent with any rescission of the underlying contract. That taking of a benefit cannot co-exist with rescission of the same contract. On the contrary, the taking of a benefit is a clear manifestation of the ratification of the contract. For the Defendant to succeed, he must prove that he has received no part of what he was promised under the challenged contract - see **Corpe v Overton (1833) 10 Bing 252** - quoted in CHESHIRE, FIFOOT & FURMSTON'S **Law of Contract (13th Edition, Butterworths 1996) at p. 449.**
In the instant case, far from proving that he had not received any benefit at all under the challenged contract, the Defendant conceded to the Plaintiff's services as well as the monetary value of those services. The Defendant cannot in equity and in good conscience be allowed to keep the benefit under that contract but rescind the contract.

15. In light of the foregoing, judgment is hereby entered for the Plaintiff:
 - (a) in the amount of the outstanding balance of Ushs.9, 526,150=;

 - (b) in the amount of Ushs.3, 000,000/= as general damages for breach of contract and inconvenience;

- (c) interest on the amounts in (a) and (b) above:
(i) at the rate of 15% p.a. from 17/03/2000 to today's date of judgment;
(ii) at the Court rate from 02/03/2004 until payment in full; and
- (d) the costs of this suit.

Ordered accordingly.

James Ogoola

JUDGE

01/03/2004

DELIVERED IN OPEN COURT, BEFORE:

Rutiba, Esq - Counsel for the Plaintiff

Mutyaba, Esq - Counsel for the Defendant

J.M. Egetu - Court Clerk