

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0711-2005

(Arising out of HCT-00-CC-CS-0635-2005)

Wamiko Construction Co. (U) Ltd

Applicant

Versus

Trans Action International Ltd

Respondent

Before: The Honourable Mr. Justice FMS Egonda-Ntende

Ruling

1. This is an application by Wamiko Construction Co. (U) Ltd, hereinafter referred to as the applicant, seeking leave to appear and defend the head suit. It is supported by two affidavits sworn by Mr. Alex Rezida, the Receiver of the applicant.
2. This application is opposed by the respondent and an affidavit in reply sworn by Mr. Kassami, the Managing Director of the respondent was filed in support thereof.
3. The application puts forth the following ground for the application. That on 17th Day of March, 2004, the applicant subcontracted the respondent to carry out certain works. These works were not completed as agreed upon in the contract. And that this non-completion amounted to a breach of the contract by the respondent, resulting in the owner of the works, refusing to pay the applicant, who was the main contractor. It is therefore contended that there are triable issues of fact and law.
4. Mr. Alex Rezida in his supplementary affidavit, filed without leave of this court, stated at paragraph 5, 'That the respondent/plaintiff did not receive payment for the construction

work since they did not complete the external works as specified in the building contract and the breach caused by them resulted in the withholding of payments and levying of penalties.’

5. In the earlier affidavit Mr. Alex Rezida had inter alia stated, ‘7. That the plaintiff only completed two components of the construction (and defaulted on technical specifications) that is the office and warehouse buildings without carrying out the external works.
6. In answer to the case put forth by the applicant, the respondent in the affidavit of Mr. Kassami stated, that the contract agreed had contained three components, office, warehouse and external works. He asserted that they completed the office and warehouse but were stopped from continuing with the external works by the applicant. This variation was contained in a letter from the applicant to the respondent dated 19th October 2004. I shall set it out in full.

‘Our Ref: UG/264/AL/4009

October 2004

International (U) Ltd

Dear Sir,

*RE: CONSTRUCTION OF OFFICE AND WAREHOUSE AT
ENHAS*

Reference is made to the Sub Contract agreement we signed with you on the 7th March 2004 to undertake Civil works for office warehouse and external works for the above project.

Following discussions held with you we have decided to exclude the external works from your contract. We have also omitted some works from Office and Warehouse as you are aware.

We would now request you to make a revised claim as per our signed Contract and variation with other claims separately.

Yours faithfully,

Wamiko Construction company (U) Ltd.

ANDREAS LYBAERT

19th

Transaction

P.O. Box 6002

for

CHAIRMAN.’

7. It is clear from the foregoing that the external works that the applicant contends the respondent did not execute were excluded from the contract by the applicant as of 19 October 2004. To claim now that the respondent failed to execute those external works is

patently false as this obligation had been removed from him. The claim of default on technical specifications made in Para 7 of Mr. Rezida's first affidavit is totally devoid of any meaning. No particulars are provided whatsoever. No regard can be taken of it.

8. In fact a final account between the parties was done by the applicant. It is annexed to the plaint. It has not been denied or put in issue. The applicant in that final account certifies that US\$125,021.22 was due to the respondents. This note is signed by officials of the applicant. In addition, the applicants, by their Managing Director, a certain Mr. Karl Wipfler, wrote on 19th July 2005, to a Mr. Phillip Curtin, acknowledging indebtedness to the respondent in the sum claimed in the plaint, among others, and requesting that payment be effected directly to the respondent and other affected parties. No claim is made against the respondents by the applicant by way of set off or counter claim.
9. Mr. Kassami in his affidavit stated that since filing this suit, the applicant paid to the respondent, part payment of US\$30,000.00 and that this accordingly reduces their claim on the applicant.
10. The law with regard to applications of this nature is fairly established. The applicant will have discharged the burden upon it, in an application of this nature, when it shows it appears to have a good defence, or that there is a triable issue of fact or law arising on the pleadings and evidence. See *Hasmani v Banque du Congo Belge* (1938) 5 EACA 88, *Toro & Mityana Tea Co. Ltd v Ibingira Charles* HCCA No. 11 of 1995 (unreported). Nevertheless the application of this principle is not without trouble.
11. The words of Sir Graham Paul, V-P, in *Churanjila and Co v A. H. Adam* (1) (1950) 17 EACA 92, at Page 92 easily come to mind. He stated,

“There is no difficulty about the principles to be applied in deciding this appeal. The law on the point is clear and only its

application to the facts gives any trouble. It is desirable and important that the time of creditors and of Courts should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only, embodied in the Rules of Court, and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the Court. All the defendant has to show is that there is a definite triable issue of fact or law.”

12. I have carefully reviewed the affidavits filed in this case with all annexures, and I am satisfied that the sum claimed in the plaint is truly due and owing to the respondent from the applicant. There is no defence disclosed on this application against this claim. The allegations of breach of contract for none execution of the external works are patently false. And if they had any substance it would raise only a possible counter-claim and or set-off against the respondent.
13. The applicant raises by way of the supplementary affidavit that it received a claim for liquidated and ascertained damages from the owner of the buildings recently. No information is provided to show that this relates to the works carried out by the respondent or those the respondent was excluded from carrying out. No connection or link is therefore drawn between this claim and the respondent at this stage. It cannot be used to defeat the respondent's claim. The applicant is of course at liberty to file a separate suit and pursue that claim, if it wishes. It is no bar to judgement being entered for the respondent in the head suit.
14. In the result I dismiss this application for leave to appear and defend with costs as without merit. Judgment is entered for the respondent in the sum of US\$ 95,021.22 as prayed for by the respondent with costs of the suit.

Dated, signed and delivered this 7th day of December 2005

FMS Egonda-Ntende
Judge