THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0596-2002

ROBERT MUJUNI NAMANYA :::::::::::::::::::::: PLAINTIFF

VERSUS

1. GEORGE & COMPANY LTD]
2. GEORGE TUMUSIIME] ::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's claim against the defendants is for recovery of Shs.15,705,600- being money allegedly owed to him by them, general damages, interest thereon and costs of the suit. He claims that the 1st defendant was awarded a contract to construct water reserve tanks in Kisiizi, Rukungiri District. That the contract was for Shs.37,317,964-. That the 1st defendant being financially incapacitated, its Managing Director, the 2nd defendant, called him in to co-finance the project. He claims that they agreed that upon completion of the project, they would value each party's contribution and share the profits equally. That acting on that promise, the plaintiff took over the supervision of the project and injected therein a cool Shs.15,705,600- which the defendants refused to pay upon receipt of all the payments. Hence the suit.

The defence denies the allegation that the company was financially incapacitated; that the plaintiff gave them any money; or that he supervised the project. They claim that the plaintiff introduced them to some people who would give them materials on credit. That the 1st defendant paid for those materials. The defendants therefore deny the alleged capital injection into the project.

It is not disputed that the 1st defendant won a contract for the construction of the Kisiizi water tanks for Shs.37,317,969-; that the 2nd plaintiff is the director of the 1st defendant; and, that the plaintiff was involved in the project. What is disputed is the capacity of his involvement.

There are four issues for determination:

1. Whether the 2nd defendant was properly sued.
2. Whether the defendants agreed with the plaintiff to jointly finance the implementation of the project.
3. If so, whether the plaintiff financed the project as alleged.
4. If so, whether the plaintiff is entitled to the remedies sought.

Counsel:
Mr. Obed Mwebesa for the plaintiff.
Mr. Kamugisha – Byamugisha for the defendants.

Before I proceed to assess the available evidence on the matter, I find it necessary to set out the law on some aspects of this case.

First, the burden of proof and standard thereof.

In law a fact is said to be proved when the Court is satisfied as to its truth. The general rule is that the burden of proof rests on the party who asserts the affirmative of the issue or question in dispute. When the party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. In the instant case the plaintiff has

alleged in the plaint that the defendants owe him Shs.15,705,600-. The defendants deny it. The burden lies on the plaintiff to prove that what he asserts against the defendants is true. The standard of proof is on a balance of probabilities.

Second, privity of contract.
This is the relation which exists between the immediate parties to the contract which is necessary to enable one person to sue another on it. It is a fundamental principle of law that a stranger to a contract cannot sue on it. It is an agreed fact that the 1st defendant won a contract for the construction of the water tanks. The burden lies on the plaintiff to prove that he was entitled to a benefit out of that contract.

I will now proceed to determine the framed issues.

As to whether the 2nd defendant was properly sued, speaking generally, a plaintiff is at liberty to sue anybody he thinks he has a claim against and cannot be forced to sue somebody. Where he sues a wrong party he has to shoulder the blame.

Relating the above principle to the facts of this case, the contract to construct the water tanks was awarded to the 1st defendant, a limited liability company. The 2nd defendant was not a joint awardee of that contract. The 1st defendant being an artificial person could of course only perform the contract through its agents. One such agent was the 2nd defendant. The 2nd defendant named another director, one David Bishereko. This other director did not appear as a witness. Even then, the company has not disowned the acts of its agent, the 2nd defendant, in enlisting the plaintiff's assistance in the performance of the tender contract. As Lord Reid observed in **Tesco Supermarkets Ltd –Vs- Nattrass [1972] A.C. 158** at 170.

> *"It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case, any liability of the company can only be a statutory or vicarious liability…………."*

I agree with the above principle. In the instant case, it is the plaintiff's evidence that the 2nd defendant requested him to inject money in the company, to capitalize it, so to say.

Learned counsel for the defendants has submitted that even if that were so, a limited liability company acts through human beings and the human beings do not become personally liable in contract nor do they inherit or take over the company's obligations with third parties. I accept that submission.

From the plaintiff's own evidence, he dealt with the 2nd defendant as agent and director of the 1st defendant. He knew that the tender contract had been won by the first defendant alone and from his pleadings, his whole mind is on those tender funds. It was not the 2nd defendant's money as George Tumusiime, plaintiff's cousin, but the 1st defendant's money.

As to the alleged promise by the 2nd defendant, the law as contained in S.3 (1) of the contract Act, Cap. 73, is that no suit is maintainable on certain guarantees or representations unless they are in writing and signed by the party chargeable. There is no such written personal guarantee. If there was any enforceable agreement as alleged, and I will shortly be commenting on that, the agreement was that of the principal. The agent is not himself a party because it was not personally his contract. The principle of law is that he who does something through another does it himself: **qui facit per alium, facit per se.**

For the reasons stated above, I would answer the first issue in the negative and I do so.

As to whether the defendants agreed with the plaintiff to jointly finance the implementation of the project, each party has his own version of what allegedly transpired.

For his part, the plaintiff states:

> *"In 2001 George & Company Ltd got a contract with Rukungiri District Local Government to construct gravity flow scheme located in Kisiizi, Rukungiri. Tumusiime George approached me. He said his company had no capacity to finance the project. I told him I could not work with him because work had been*

given to the company and not George himself. He told me that since he was Managing Director and signatory to the company account, I should not get worried. We sat down and agreed on the terms. We agreed that I inject in funds and he does the same. That upon completion of the project, we would share the profits. This was all oral. I requested for a written agreement. He said since he is a cousin brother (sic) to me and we have been dealing together, there was no need of writing the agreement. I trusted him and started the business."

And as for the 2nd defendant, he states:

> *"I got a job under names of George & Co. Ltd. I'm one of the Directors. The other is David Bishereko. On this particular job, I was the project manager. On getting the job in Kisiizi, under project called 'Amaizi Marungi Kabale', although it was in Rukungiri, the Amaizi Marungi headquarters was in Kabale. Supervisors told us where to get materials from: aggregates, sand, etc. They said these things had to come from Kabale Town. Mujuni was by then working as County Water Officer, Kabale District Local Government. The office he was working in was sharing same building with our supervisor, Amaizi Marungi. George & Co. Ltd is based in Kampala. So I found it necessary and easier to use my first cousin who was based in Kabale in the project. He was by then supervising similar works as I was going to do.*
>
> *With the few staff I had, I used him to recruit for me masons to execute the works. He did so successfully. One such worker was David Kakare. He testified as plaintiff's witness."*

He then continues:

> *"He did the recruitment and I was paying whatever money we were using. For sure he helped me in getting things on credit. He introduced me to Savida Enterprises."*

From the evidence, this case is one of those family arrangements which depend on good faith and are not intended to be rigid, binding agreements. I am saying so because of the fact that the 2nd defendant and the plaintiff are cousins and because of the absence of any written document on the matter. The 2nd defendant involved his cousin in matters of the company where he (the plaintiff) was neither a shareholder nor an employee. And that's where the problem stems from.

In legal terms, lawyers distinguish contracts from agreements. Every contract involves an agreement but not every agreement amounts to a contract. The element which coverts an agreement into a legally enforceable contract, whether the parties are close relations or strangers, is the intention of the parties to enter into legal relations and thereby bind themselves to carry out the agreement. And if there is failure by one party to carry out an agreement, as it often happens, there may well be a dispute as to whether the parties intended to enter into legal relations in the first place. And that is the central issue in this case.

In some instances, it may not matter whether or not a given undertaking or assurance is written. However, the plaintiff herein is seeking enforcement of a purported promise or representation that on injecting funds into the 1st defendant's business, they would upon the completion of the project share the 1st defendant's profits. Indeed according to the 2nd defendant, upon claiming of first payment under the tender, the plaintiff went to Amaizi Marungi and told them that he was the one performing the contract and the 2nd defendant should therefore not be paid.

I consider this to be the genesis of this claim. The plaintiff felt that he was losing out on the project funds. His thinking is reflected in the demand note to the defendants dated 9/7/2002. His lawyers wrote on his behalf:

> *"…………………..*
>
> *That whereas it is within your knowledge that sometime in August (sic) 2001 you together with our client were awarded a tender by Rukungiri Tender Board to supply water to Kisiizi ……………….. and whereas the contract was jointly carried out and financed by yourself together with our client with a view of making a profit ……."*

In other words, the plaintiff is through this suit seeking to enforce the purported promise and/or representation to him by the 2nd defendant touching on the first defendant's funds.

The answer to this in my view lies in the law which I have already cited above, S. 3 (1) of the Contract Act, Cap. 73. It provides:

> *"No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which the suit is brought, or some memorandum or note of the agreement, is in writing and signed by the party to be charged with it or some other person lawfully authorized by him or her to sign it."*

There is no such note or memorandum. The plaintiff claims that he requested for something in writing but the 2nd defendant refused. The 2nd defendant denies it. As between the plaintiff and the 2nd defendant, considering that subsequently the plaintiff gathered all there was as evidence of what he did, I don't accept his evidence that such an agreement was made. Even if it was, it is barred by the cited law. The said law requires that such agreement be evidenced by a written document. Its object is in my view to protect people from litigants of the plaintiff's ilk.

From the evidence, Court has not seen any commercial element in the purported oral agreement to raise any inference that any legal relationship was intended. In any case even if such an oral agreement existed, its enforceability is barred by the law. Accordingly, Court is not satisfied that an arrangement binding in law had been intended by both sides. I would answer the 2nd issue in the negative and I do so.

As to whether the plaintiff financed the project as alleged and/or whether he is entitled to the remedies sought, the defence case is that the plaintiff introduced them to some people who advanced them credit which the first defendant paid. The defendants therefore deny the capital contribution of Shs.15,705,600-.

As evidence that the plaintiff injected funds in the business, he produced invoices detailing the materials he allegedly took from Savida Enterprises. The first defendant does not dispute the

fact of getting materials from Savida Enterprises. It is admitted that the plaintiff did so but that he was assisting in the procurement of materials and delivery of the same to the site. All defence witnesses said that the plaintiff was not the supervisor, that he would deliver materials and go back to Kabale. Some of the invoices are of course disputed. One such invoice is P. Exh. 1 (v), an invoice dated 13/4/2001. While the plaintiff's relationship with the defendants started in August 2001, this invoice shows that the items listed on it was taken long before the performance of the contract begun. This invoice was of course a deliberate lie by the plaintiff.

I have also considered D. Exh. 111, a document authored by the plaintiff. It is an accountability for Shs.3m. It is not dated. However, while the 2nd defendant says that the plaintiff was accounting for Shs.3m which he had received from him, the plaintiff says in one breath that the Shs.3m indicated therein was the estimated amount to finish the work and in another breath that they were saying that some work was yet to be done and that it was worth Shs.3m. When one reads the document, one does not get from it the construction ascribed to it by the plaintiff. It certainly gives the impression of the plaintiff accounting to the 2nd defendant money received from the 2nd defendant and how it was disbursed. I did not consider the plaintiff's evidence to be truthful on this point as well. On the whole, Court is of the view that as between the plaintiff and the 2nd defendant, the 2nd defendant's evidence is more credible. His (2nd defendant's) evidence is that for all materials delivered, he (2nd defendant) would pay for them on behalf of the 1st defendant and that in addition he paid the plaintiff in cash for services rendered. He cited a payment of Shs.1m to him when his (plaintiff's) mother was ill. The other defence witnesses talked about it as well. I have seen no reason to doubt that evidence. This is a claim for special damages. It is trite that special damages must be pleaded and strictly proved. Court is cutely aware that proof is on a balance of probabilities. In view of the doubts expressed upon the plaintiff's evidence as a whole, he has not satisfactorily or at all discharged the burden of proof cast upon him by the law. In view of that conclusion, Court holds that he is not entitled to the reliefs sought against the defendants. I would therefore dismiss the suit and I do so.

As regards costs, the usual result is that the loser pays the winner's costs. However, this practice is subject to the Court's discretion such that a winning party may not necessarily be awarded his costs, even though they probably ran into millions of shillings.

I have considered the peculiarity of the case, especially the blood relationship between the plaintiff and the 2nd defendant. I have also considered the admitted services rendered by the plaintiff to the 1st defendant. In all these circumstances Court has come to the conclusion that the greater interests of justice in this case warrant that each party be ordered to meet its own costs of litigation. I order so.

For the reasons stated above, the suit is dismissed. Each side shall bear its own costs.

Yorokamu Bamwine
J U D G E
14/08/2006

Order: In my absence, the Registrar of this Court shall deliver this judgment to the parties.

Yorokamu Bamwine
J U D G E
14/08/2006

14/8/2006   9:30 a.m
Obed Mwebesa for plaintiff.
Plaintiff in Court.
Defendant and counsel absent.
Clerk – Okuni.

Court: Judgment read in open Court.

John Eudes Keitirima
DEPUTY REGISTRAR

14/8/2006