

Last Updated: 19 March 2007

Amis Olaboro V Kumi District Local Government- HCT-00-CC-0479-2005 [2007] -UGCommC-  
No 4 (15 January 2007)

THE REPUBLIC OF UGANDA

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

HCT-00-CC-MA-0479 -2005

AMIS OLABORO T/A LOPAI HARDWARE..... PLAINTIFF

VERSUS

KUMI DISTRICT LOCAL  
GOVERNMENT COUNCIL.....DEFENDANT

**15<sup>th</sup> January 2007**

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING

The Plaintiff Amis Olaboro t/a Lopai Hardware filed this suit against Kumi District Local Government Council on 29<sup>th</sup> June 2005 to recover Ug. Sh. 5,944,000/=, general damages for breach of contract, interest and costs. The Plaintiffs cause of action as per the plaint is that sometime on 22<sup>nd</sup> December 2000 the plaintiff was requested by the Defendant to supply materials for the construction of Omatenga Primary School and Acekun Primary School. The plaintiff supplied the materials per delivery notes No. 138 dated 10<sup>th</sup> February 2001, No. 380 dated 18<sup>th</sup> February 2001 and No. 389 dated 28<sup>th</sup> February 2001, but that the Defendant had up to the date of filing the suit failed, referred ignored and/or neglected to pay. Thus this suit.

Mr. James Okulu, counsel for the Defendant under 6 rules 28 and 29 of the Civil Procedure Rules raised a preliminary point of law that the suit was time barred under the provisions of section 3(2) of the Civil Procedure and Limitation (Misc. Provisions) Act and prayed that the suit be accordingly dismissed.

Section 3(2) of the said Act provides:-

*"(2) No action founded on contract shall be brought against the Government or against a Local authority after the expiration of three years from the date or which the came of action arose."*

In **Francis Nansio Michael v/s Nava Walakira [1993] VI KALR 14** it was held by Supreme Court that clearly if the action was time barred then that was the end of it. **Attorney General v/s Obote Foundation [1994] KALR 47** Ntabagoba PJ held that Court's interest powers are not involved where a matter is time barred by limitation. Also in **Peter Mangeni t/a Makerere Institute of Commerce v/s DAPC SCCA No. 13 of 1995** it was held that negotiations of parties neither extend the limitation period nor govern the date on which the cause of action arises non do they amount to a disability. In **Uganda Revenue Authority v/s Uganda consolidated properties Ltd 1997 [2001] UCL 151** at page 155 Twinomujuni JA stated:-

*"Time limits set by statutes are matter of substantive law and not mere technicalities and must be strictly complied with."*

Among the annexures to the plaint were annexure C1 and C2. C1 dated 17<sup>th</sup> February 2001 was the Plaintiff's letter to the Defendant's CAO whereby he was claiming for payment for materials supplied to Omatenga Primary School C2 was the Plaintiffs letter dated 28<sup>th</sup> February 2001 whereby the Plaintiff was claiming for payment for materials supplied to Aalumu Primary School. On the basis of the above two letters counsel for the Defendant argued that when demand was made by the Plaintiff payment by the Defendant had to follow. That where there is no payment the other party has right to take action to enforce payment. He submitted that payment was expected to be made immediately. Counsel submitted that no payment was made. Despite the non-payment no suit was filed until June 2005, a period of over four years. No exemption was pleaded as required under 0.7 rule 6 of the Civil Procedure Rules. The Defendant's Counsel submitted that the suit was time barred. In **Iga v/s Makerere University [1972] EA 65** it was held that if a suit is brought after the expiration of the period of limitation and no grounds exemption are shown the plaint must be rejected. And Order 7 rule 11(d) CPR provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by and law.

Clearly the Plaintiff's cause of action was founded on contract. It is against a Local Authority. As such time barred after the expiration of three years from that date on which the cause of action arose.

Mr. Omongole Counsel for the Plaintiff argued that the pleadings do not indicate when the cause of action arose. He argued that the cause of action was continuous because the Defendant had not specifically denied payment but had failed to pay. He sought to rely on **Auma Motor Dealers v/s A/G [1997] V KALR 32** wherein Justice Byamugisha held:-

"General in a suit based on contract, the plaint must allege the contract, and its breach. The plaint must state the terms of the contract as it was when the Plaintiffs of action arose, whether the contract was express or implied; whether it was written or oral and if written the dates and the names of the to the contract must be given in order of course to identify the document. The plaint also has to show the breach which is alleged to have been committed by the Defendant and when it occurred, failure to state when the breach occurred contravenes the provisions of 07 rule 1(e) CPR which provides that the plaint shall state the facts constituting the cause of action and when it arose. Before it is concluded that a cause of action time barred it must be shown when the said cause of action arose.

With due respect I do not agree with Mr. Omongole that the cause of action was continuous. Where there is an agreement to pay and the parity under a duty to pay fails to pay when payment ought to have been made then the cause of action for the payment arises, upon such failure to pay. In the plaint there is not pleaded when payment was due. However in **Castelion v/s Rodrigues [1972] EA 223** it was held that a reference in a document to an Annexure incorporates the contents of the Annexures in the document. Annexed to the plaint are Annexures A,B,B, to B6 and C1 and C2. Annexures A and B were the Defendants letters to the Plaintiff requesting for the supply. In both letters it is stated:-

"-----

*To guarantee to you prompt payment, the District will undertake the obligation of paying you. Do serve us therefore with the delivery notes and invoices after supplying."*

Annexures B1 to B6 were Delivery Notes and corresponding invoices. Annexure C1 and C2 dated 17<sup>th</sup> February 2001 and 28<sup>th</sup> February 2001 are the letters whereby the plaintiff submitted his

claims for payment. The Concise Oxford Dictionary 7<sup>th</sup> Ed at page 824 defines prompt as follows:-

*"(Of payment) made forthwith; (Of good) for immediate delivery and payment."*

The plaint read together with the Annexures thereto show that payment was by agreement to be made forthwith upon submission of the delivery notes and invoices after supplying the materials. Therefore I agree with counsel for the Defendant that the cause action arose following the Plaintiff claim for payment vide Annexures C1 and C2 when the Defendant failed to pay forthwith. In the circumstances I find that when this suit was filed more than four years thereafter was time –barred. The Plaintiff did not plead any exemption or disability.

Mr. Omongole, counsel for the Plaintiff sought to rely on section 22 of the Limitation Act. Subsection 4 thereof provides that where any right of action has occurred to recover any debt or other liquidated pecuniary claim and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of the claim, the right shall be deemed to have occurred on and not before the date of acknowledgement or the last payment. The effect of the above provision is that such acknowledgement of the debt or payment rekindles the time which had otherwise expired see **K. Patel v/s Uganda Revenue Authority HCC-00-CC-CS-0014-2003.**

Whether or not the section applies to suits against the Government, or Local Authorities such is the Defendant has been a subject of determination in a number of cases including **National Pharmacy Ltd v/s K.C.C [1979] HCB 246, and Sour Fap Farmous,RZ "Pro Met" Belgrade Fransuska 61-65, & Anor v/s Attorney General [1997 -2001] UCL 396.** In both cases Courts held that the section applies to the Government and its statutory bodies. However section 23 provides:-

*"(1) Every such acknowledgement as is mentioned in section 22 shall be in writing and signed by the person making the acknowledgement.*

*(2) Any such acknowledgement a payment as is mentioned in section 22 may be made by the agent of the person by whom it is required to be made to the person, or to an agent of the person whose title or claim is being acknowledged or in respect of whose claim the payment is being made."*

In **Ismail Serugo v/s KCC & AG SC Constitutional Appeal No. 2 of 1998** it was held by Mulenga JSC that in application like the instant application, where the intention is to dispose of the suit or part thereof, on merit albeit on a point or points of law only, all pleadings (plaint, defence and reply, if any) have to be taken into consideration. I have studied the Defendants written statement of defence. The Defendant does not deny specifically requesting the plaintiff to supply the materials and does not delay supply and delivery of the materials by the Plaintiff. The Defendants only contents in paragraph 4 of its defence that *"the suit is incompetent, misconceived, vexatious and scandalous as it contraveners the provisions of the Local Financial and Accounting Regulations, 1998. The Defendant therefore avers that the alleged contract does not exist in law inasmuch as there was no tender awarded in its request and as there is no Local Purchasing Order to support it."* In paragraph 3 of his reply the Plaintiff contends that *"the said regulations do not apply to 3<sup>rd</sup> parties and as such in this particular case does not apply and in applicable"*. This is a matter which can only be resolved upon evidence being adduced upon hearing the suit on merits.

Further Mr. Omongole argued that a number of meetings had been held between the Defendants Officials and the Plaintiff wherein the debt had been orally acknowledged by the Defendant. He also referred minutes of a meeting of one of such meeting held on 28<sup>th</sup> September 2005 in the Defendant CAO's Office and filed in Court on 8<sup>th</sup> December 2005. At the meeting was Mr.

Omongole counsel and such agent of the Plaintiff and various officials of the Defendant, among whom was the CAO, ACAO. In the minutes they admits the Plaintiffs claim of Shs. 5,994,000/= and proposes to set-off the Defendants counter-claim of Shs. 3,039,000/= and pay the balance of Shs. 2,955,000/=. The minutes were signed by Ochon Rose, CAO Kumi District and Opolot Johnson who was the minute secretary and a ACAO of the District.

It is trite that negotiations between parties to a dispute have no effect on Limitation. A party with a claim should file a suit while negotiations continue to avoid the claim being caught up by the law of Limitation. See *Peter Mangeni v/s DAPCB (Supra)*. I have however carefully studied the minutes of the meeting held on 28<sup>th</sup> September 2005 and I find that the implication thereof is that the Defendant were acknowledging and agreeing with the plaintiff's claim but proposing a set –off of the Defendant's counter-claim against the Plaintiff. The Defendant's counter-claim can be proved at the hearing of the suit. The meeting was held after this suit had been filed and after the Defendant hand filed its written statement of defence whereby it had pleaded that the Plaintiffs suit was time-barred. Dispute the plea the Defendant at that meeting still acknowledged the Plaintiff's claim. This was an acknowledgment made in a meeting attended by the Plaintiffs counsel and agent, it was reduced in writing and signed by the Defendants CAO and ACAO.

It was therefore an acknowledgment within the meaning and of context of section 22(4) of the Limitation Act.

I accordingly find that though at the time when this suit was filed it was time-barred, the meeting subsequently held and the minutes thereof acknowledged the Plaintiffs claim. The acknowledgement rekindled the Plaintiffs claim such that by the time the preliminary point of law was raised when this suit came up on 30th August 2006 the rekindled cause of action was still within the three years limitation period.

In the find result the preliminary objection fails and the suit shall proceed to be heard on merit. Costs shall bind the order as to costs – the main suit. I so order.

Lameck N. Mukasa  
JUDGE  
15/01/07