Last Updated: 12 July 2007

Eastern and Southern African Trade & Anor V Hassan Basajjabalaba & Anor- HCT-00-CC-CS-0512-2006 [2007] UGCommC 30 (13 April 2007)

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

HCT-00-CC-CS-0512-2006

1. Eastern and Southern African
2. Trade and Development Bank Plaintiff

Versus
1. Hassan Basajjabalaba (Aka Hassan Basajja)
2. Aisha Basajja Defendants

13 April 2007

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G

The plaintiff's claim against the defendants jointly and severally is for specific performance of the terms of the Deed Guarantee dated 10/7/2002 entered into between the plaintiff and the defendants; general damages for fraud and misrepresentation; costs and interest.

When the case came up for a scheduling conference on 2/4/2007, Mr. Kavuma – Kabenge for the defendants raised an objection regarding jurisdiction. He contended that the parties in their dealings agreed that the Guarantee would be governed and construed in accordance with the laws of England and that any dispute would be resolved through arbitration.

He also contended that the amended plaint is not accompanied by a list of documents, list of witnesses and the summary of the case as the law under 0.6 r. 1 (2) of the Civil Procedure Rules requires. He therefore invited me to find that this Court has no jurisdiction over the matter and that the suit is in any case incompetent. In support of his argument on jurisdiction, Mr. Kabenge cited to me two cases:
Fonville V Kelly 111 and Others [2002] 1 EA 71 and Tononoka Steels Ltd V East & Southern African Trade & Development Bank [2002] 2 EA 536.

Mr. Sogi Katende and Mr. Arthur Sempebwa, learned counsel for the plaintiff, have invited me to over-rule the three objections and set down the suit for a scheduling conference. They filed written submissions on the matter. It is, therefore, not necessary to repeat their arguments verbatim.

I have addressed my mind to the arguments of all counsel on the matter. The Deed of Guarantee which the plaintiff is suing on is on record as annexture 'B' to the plaint. Clause 12 thereof provides as follows:

> "12. Governing Law: This Guarantee shall be governed by and construed in accordance with the laws of England."

From the pleadings, therefore, the law of England is the applicable law to the transaction. The issue is whether the Ugandan Courts have jurisdiction to hear and determine the dispute between the parties.
The Constitution of Uganda (Article 132) read together with the Judicature Act (S. 14 (2)) grant the High Court original jurisdiction in all matters. The contract Act (cap. 73, S. 2 (1) thereof) allows for the application of the common law of England that relates to contracts as modified by the doctrines of equity; public general statutes in force in England on the 11th August, 1902; and the Acts of Parliament of the United Kingdom mentioned in the Act.

Under the principles of Common Law of England that relate to contracts, which principles do apply to our very own situation, I reckon, English Courts are mandated to determine disputes as long as the person served with summons to file a defence is within England. I cannot see why, as a general principle, the same would not apply to our Courts.
I have looked at the two authorities cited to me by Mr. Kabenge in support of his argument.

The first one, ***Fonville V Kelly,*** supra, is a case that started in the High Court of Kenya. Kenya has comparable jurisprudence in matters of contract. The Court in that case held that where the parties to a contract expressly agreed that the contract was to be governed by a particular law, that law was the proper one to be applied. I agree. In that case, the subject matter of the suit was a breach of the Stock Purchase Agreement. Clause 12 of the agreement provided that the contract would be construed in accordance with the law of the State of Florida, USA and that the venue of the proceedings would be Orange County, Florida. The jurisdiction of the Kenyan Courts was therefore ousted with regard to any dispute arising from the agreement. In the instant case, the Loan Facility Agreement and the Guarantee agreement do not provide that the venue of the proceedings would be in England. The mere fact that the law applicable to the transaction was the law of England would not in itself be ground to shift the venue of the trial to England unless the parties so wish. If the parties felt that Ugandan lawyers would not serve them to their satisfaction, as would their English counterparts, they (the parties) would be at liberty to fly in lawyers of their choice. I do not think that it would be necessary to fly in English Judges as well. In my view, the case cited to me is distinguishable on facts and inapplicable to the instant case.

The second case, ***Tononoka Steels Ltd***, supra, is relevant to the facts herein. The appellant borrowed money from the respondent. Thereafter, a dispute arose and the appellant sued the respondent. The respondent argued that the law applicable was English law by virtue of a clause to that effect in the contract, and the trial Court (in Kenya) agreed with that argument. The Court decided that it had no jurisdiction in the matter. On appeal, the appellate Court reversed the lower Court decision. Lakha JA's observation is instructive herein. He stated:

> "Whatever else may or may not be the effect of this clause, in my judgment, it does not oust the jurisdiction of this Court. The learned Judge, in holding as he did, that the jurisdiction of the Court was ousted, was, with respect, clearly in error."

The case, though cited to me by the defendants' counsel, clearly favours the plaintiff herein. It is a case from a Sister Republic, with comparable jurisprudence. The decision, though not binding upon the High Court of Uganda, is pleasantly persuasive. The Kenyan Courts applied English law in Kenya. I do not see why we would not do the same in a situation where, as we are told, the guarantee agreement was entered into in Uganda; the defendants are Ugandans; and the money was used (or misused) by a Ugandan Company. The convenience of the case would dictate that the case be heard and determined here, in the absence of any prior agreement, between the parties, to the contrary. I would therefore find no merit in the objection and over rule it.

Mr. Kavuma-Kabenge's other argument relates to arbitration. Counsel is of the opinion, that in

accordance with the Arbitration and Conciliation Act of this country, the Court should be compelled to refer the matter to arbitration, presumably in England. It would appear that counsel is basing his argument on Annexture 'A' to the plaint, Article 24, which states that any dispute between the parties to that agreement should be settled by an Arbitration Tribunal. In my view, this argument should also fail. Annexture 'A' is a loan facility agreement between the plaintiff and a company, Basajjabalaba Hides and Skins Ltd, a limited liability company. The same has nothing to do with the defendants herein, who are being sued on another agreement, a Guarantee Deed, they signed with the plaintiff, Annexture 'B' to the plaint. My careful perusal of the annextures to the pleadings shows that annexture 'B', unlike annexture 'A', does not have any clause in it to do with arbitration. Any arbitration conducted in the matter would, in my view, be procedural rather than contractual. I would also over-rule this objection.

The final objection relates to the alleged unsustainability of the plaint. It is alleged that the plaintiff did not attach a summary of facts and evidence, and the necessary lists of documents and witnesses. The plaintiff's counsel deny it. There are two aspects to this matter. The first one is that both parties agree that the law applicable to the dispute is the law of England. 0.6 r. 1 (2) is a local law, not the law of England. Be that as it may, it would appear to me that the law envisioned by the parties in the Guarantee Deed is the substantive law of contract, not the procedural law relating to filing of pleadings. Since this point was not argued before me, I beg to offer no further comment on it.
The other aspect relates to the point raised by Mr. Kavuma- Kabenge about alleged non-filing of some documents.
I have looked at the very first plaint filed herein on 21/8/2006. It had the impugned attachments. The defendants do not seem to dispute that. The problem appears to be with the subsequent amendment. The Court record shows that even the amended plaint has all the required lists. It is not clear to me whether or not the same were smuggled on to the record after the point had been raised by Mr. Kavuma-Kabenge. If this is so, God should forgive litigants and/or their lawyers with such dishonest inclinations. There is of course the possibility that the copy supplied to the defendants, unlike the Court copy, did not, deliberately or otherwise, have the impugned attachments. It is a matter of great regret that at the time of hearing, Court did not make any verification as to whether or not the Court record, like Mr. Kabenge's, lacked the impugned attachments. In view of this doubt, Court is unable to make a definite finding of fact on the matter. Be that as it may, the plaintiff filed the first plaint with all the requisite lists. They were served on the defendants. Within the time allowed by law, the plaintiff amended its plaint, making a very minor alteration to the original plaint. The rest remained the same. In my view, mindful as I'm, that one of the intentions of amending 0.6 of the Civil Procedure Rules was to avoid surprises or ambushes in matters of this nature, the defendants cannot plead surprise in this case. The case cited to me, ***Sule Pharmacy Ltd V The Registered Trustees of the Khoja Shia Itana Shari Jamat (Misc. Application No. 147/1999*** arising out of ***HCCS No. 30/99*** – unreported) covered this kind of situation. Applying the ratio *decidendi* in that case to the facts herein, and given that the Constitution of Uganda mandates Courts to administer justice without un due regard to technicalities, I'm inclined to over-look the omission, if any, in the greater interests of justice and in accordance with Article 126 (2) (e) of the Constitution.

In the result, the objections are overruled. The case shall be set down for a scheduling conference where the possibility of Alternative Dispute Resolution (ADR), particularly mediation, and the possibility of staying proceedings pending exploration of ADR, shall be explored.

Costs herein shall abide the outcome of the main suit. It is so ordered.