THE REPUBLIC OF UGANDA

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

HCT-00-CC-MA-0832-2005
(Arising from C.S No. 556 of 2005)

BIGWAYS CONSTRUCTION LTD :::::::::::::::::::::::: APPLICANT

VERSUS

TRENTYRE (U) LTD :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

This application by Notice of Motion was brought under 0.33 r. 11 and 0.48 r. 1, 2 and 3 (as the law then was) and S.33 of the Judicature Act. It is for orders that the exparte judgment entered against the applicant by the High Court on 13/8/2005 in HCCS No. 556/2005 be set aside; that the execution of the decree in the said suit be set aside; that the applicant/defendant be granted leave to appear and defend the suit; and, that costs of the suit be provided for.

The case has a simple background. The respondent herein filed HCCS No. 556/2005 in which it alleged that the defendant was truly indebted to it to the tune of Shs.21,958,000= on account of tyres which had been sold to the defendant on credit and the defendant had failed to pay for. The suit was filed on 26/7/2005 under Summary Procedure.

From the records, summons to file a defence was issued on 27/7/2005 and according to the affidavit of service of Apollo Kisawuzi dated 5/8/2005; the defendant was served on 2/8/2005. The days within which to apply for leave to appear and defend having expired on 12/8/2005, the plaintiff proceeded to apply for judgment against the defendant as by law established. It was

entered as prayed on 15/8/2005. A decree was extracted on 11/10/2005 and execution ensued. The applicant's moveable property was attached and sold on 21/11/2005. The subject of sale was one unit of Caterpillar Model 428C Backhoe Loader Reg. No. UAD 754 U. It fetched Shs.17, 000,000=. The Bailiff duly filed a return and the matter appeared to have been put to rest till the defendant, through its lawyers Muwanguzi, Ziwa and Musisi Advocates, wrote to their counterparts on 28/11/2005:

> ***"The managing Director of our client, Mr. Henry Bugembe, contends that upon receipt of the warrant of attachment he approached you and notified you that he had already paid part of the sum indicated in the warrant, directly to your client M/S Twentyre (U) Ltd in two installments of Shs.7,000,000= on the 24th May, 2005 and another installment of Shs.3,000,000= on 27th October 2005, this a total sum of Shs.10,000,000= (shillings ten million) and that he had never received Court Summons. Copies of the receipts from your client are hereto attached marked 'A' and 'B'.***
>
> ***Our client further contends that he was given your assurance that the matter will be solved amicably by payment in installments and that he does not need to waste money engaging a lawyer. You referred him to your associate one Paul Rutisya, who kept on deferring the appointment until our clients' construction equipment registration number UAD 754 U caterpillar worth Shs.90,000,000= was cheaply sold, according to the Court records at Shs.17,000,000= (shillings seventeen million). ……"***

The letter is quite a long one. It is not necessary to run it to the end. When the lawyers failed to favourably respond, the applicant filed the instant application. At the hearing, Mr. Musisi for the applicant stated that the applicant did not dispute Shs.21, 958,000= being the debt due to the respondent under the contract. Hence the applicant's failure/refusal to file a defence. And this is where the problem lies.

The debt arose out of an agreement to sell tyres for a grader to the applicant by the respondent. The money was to be paid within 60 days. It was not paid and the respondent filed the suit on 26/7/2005 in which the amount to be recovered was stated to be Shs.21, 958,000=. This is the same amount the applicant admits was recoverable under the contract. Hence the justification for the decision not to seek leave to file a defence.

The affidavit of Henry Bugembe in support of the application has its own problems. He alleges in para 9 thereof that while applying for judgment, the respondent withheld information from the Court that the applicant had at the time of applying for judgment paid Shs.10m. This averment is false. Judgment was entered on 15/8/2005. Payment of Shs.3m to make a total of Shs.10m was, according to records, on 27/10/2005. In view of this evidence, the question of the respondent withholding information to Court about a payment of Shs.10m at the time of applying for judgment in default of the defence does not arise. The Shs.3m had simply not yet been paid. Equally false is para 10 thereof where Mr. Bugembe alleges that at the time of filing the suit and Court's issuance of judgment, the amount due to the respondent was Shs.11,958,000=. That could not have been the position when from the applicant's own evidence the Shs.3m was paid in October 2005. These are, in my view, obvious false hoods in the applicant's affidavit. Such falsehoods rendered the entire affidavit suspect. An application based on such an affidavit must fail.

See: **Joseph Mulenga –Vs- Photo Focus (U) Ltd HCMA No. 308/96** reproduced in **[1996] VI KALR 19.**

For this reason alone, I would disallow the application.

Turning to the merits, the applicant states that the Shs.7m was paid to the respondent on 24/5/2005. This was long before the suit was filed on 26/7/2005. The respondent does not deny the payment. This being so, then the outstanding amount could not have been Shs.21, 958,000= but Shs.14, 958,000=. Since the amount stated in the plaint was Shs.21, 958,000=, a sum the applicant is now not happy with, Court has failed to appreciate the applicant's failure/refusal to challenge the claim at that stage. As long as the applicant saw the claim in the plaint, decided not to challenge it, execution took place, again without the applicant seeking to stay it, I do not see how it can now be heard to complain that the claim was false. Failure to file a defence raises a presumption or constructive admission of the claim made in the plaint. The story told by the plaintiff, in the absence of a defence to contradict it, must be accepted as the truth. From the facts as stated to Court and from the available records, the applicant would be estopped from challenging the respondent's claim. A person who stands by and keeps silence when he observes another person acting under a misapprehension or mistake, which by speaking out he could have prevented by showing a true state of affairs, can be estopped from later alleging the true state of affairs. Relating this principle of equitable estoppel to the instant suit, the applicant was sued for

Shs.21, 958,000=. It did not seek leave to appear and defend the suit because in counsel's own words, the amount "*was not disputed as debt due to the respondent*". The respondent went ahead and obtained a warrant of attachment in which the amount recoverable was still stated to be Shs.21, 958,000=, plus costs of the suit. In my view, if the applicant had spoken out at that stage about the amount paid before the suit was filed, Court would have halted the execution process and the problem sorted out before a third party acquired interest in the attached property. From the applicant's own averment in Mr. Bugembe's affidavit, the fact of the execution was not kept a matter of secret. Still the applicant opted not to draw the issue to the attention of Court. The property was advertised for sale and actually sold without any protest to Court. In my view, if there has ever been a case fit and proper where the doctrine of equitable estoppel ought to be invoked, this is it.

Learned counsel for the applicant has cited to me two cases: **Okwajja –Vs- Okello [1985] HCB 84** and **Lawrence Muwanga –Vs- Stephen Kyeyune SCCA No. 12/2001.** The issue in both cases was sale at the instance of the judgment debtors of property which did not belong to them. The sales were nullified at the instance of the real owners. I have not found any of these two cases relevant to the issue under consideration in as far as the property attached and sold herein was the applicant's. While the sales in the two cases were set aside on account of sufficient cause, no sufficient cause has been shown herein to warrant the orders sought.

In para 14 of Mr. Bugembe's affidavit, he avers that the non-disclosure of the money paid had led to unjust enrichment of the respondent at the expense and detriment of the applicant. In the affidavit in rebuttal, Pieter De Bruto, the Country Director of the respondent company, states that even after the execution which took into account the applicant's Shs.10m, the applicant remains indebted to them in the sum of Shs.2,144,348=.

What Mr. Bugembe alleges in his affidavit is the issue of money had and received, a quasi-contract on which the applicant can base a cause of action to recover whatever may have been paid by them in excess of the decretal sum and costs, if it so desires. A suit of this nature based on affidavit evidence is not the most appropriate forum to address complex issues of settling accounts.

The applicant also alleges that the caterpillar was of higher value than the respondent fetched out of it. From the records, the warrant of attachment was made available to the applicant. The

applicant did not raise the issue of possible over attachment. The valuer assessed its value at Shs.34m, and put the forced sale value between Shs.17m – 18m. The sale was a forced one and the property went for Shs.17m. The applicant has given no basis for the allegation that the attached property was over Shs.100m in value. In these circumstances, Court is unable to fault the sale.

For the reasons stated above, I would disallow the application and order it dismissed. I would also order that each party bears its own costs.

I so order.

Yorokamu Bamwine
J U D G E
25/05/2007

Order: This ruling shall be delivered on my behalf by the Registrar of the Court on the due date.

Yorokamu Bamwine
J U D G E
25/05/2007