THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 330 - 2009

BANSANGIRA BUILDING CONTRACTORS (1977) LTD :::::: PLAINTIFFS

VERSUS

ATTORNEY GENERAL :: DEFENDANT

BEFORE: THE HON JUSTICE GEOFFREY KIRYABWIRE

Ruling

This ruling arises from a preliminary objection by the defendant Attorney General on a point of law that the suit by the plaintiffs is bad in law.

The brief facts are that the plaintiff company filed a suit against the Ministry of Agriculture, Animal Industry and Fisheries (hereinafter referred to as "MAAIF") represented by the Attorney General for special and general damages for breach of contract. It is the case of the plaintiff that on or about the 22nd September 1997 it entered into a contract No. 17/02/97 with MAAIF for the construction/rehabilitation of valley tanks and dams at the price of Shs 1,817,292,883/= which was to be varied from time to time. The plaintiff company avers that on the 21 February 2004 the said contract was varied by way of an ADDENDUM at a revised price of Shs 2,523,193,939/=. The plaintiff further avers that the Inspectorate of Government (hereinafter referred to as "IGG") intervened and recommended the termination of the contract and the payment of special damages to the plaintiff in accordance with clause 60.2 of the contract. The plaintiff company has computed those special damages at Shs 1,797,940,000/=.

The defendants filed a defence but have also raised two preliminary points of law. The first point of law is that the suit is barred by law by virtue of the principle of res judicata and secondly that the suit is time barred.

On the objection of res judicata the defendants contend that the plaintiff's filed Civil Suit No 299 of 2001 involving the same parties which was settled by consent on the 24th July 2006. It is the position of the Attorney General that based on the word of the Consent Order the said settlement was in full and final settlement of the dispute. In particular the Attorney General points out special damages and interest were agreed at Shs 198,688,208/=.

Counsel for the Attorney General submitted that by reason of the consent judgment the plaintiff were barred under sections 7 and 8 of the Civil Procedure Act (CPA) and Order 7 rule 11 of the Civil Procedure Rules (CPR) from filing a fresh suit in the same matter.

On the objection of being time barred Counsel for the Attorney General referred Court to Section 3 (2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act (hereinafter referred to the CPLA) that no action founded on contract shall be brought against the Government after the expiration of three years from the date of the cause of action. Counsel for the Attorney General has submitted that the plaintiffs in their pleadings aver that from February 2004 when the addendum was signed to date "…the employer (that is Government) failed or neglected to facilitate further execution of the contract…" It is therefore his argument that the cause of action arose in 2004 and the time allowed by law therefore expired in 2007 and yet this case is filed in 2009 and is therefore bad in law.

Counsel for the plaintiff refutes the application of the principle of res judicata and submits that it would only be applicable in respect of certificates Nos 10 and 11, the security deposit and materials put on these finished sites. Counsel for the plaintiff submitted that the old suit related to certificates and not the contract. He further submits that the current suit seeks remedy for general breach of contract not the payment of the

submitted certificates. In this regard he submitted that the execution of this contract was divisible in that the plaintiff could sue for a single payment then subsequently pursues other sites. Counsel for the plaintiff therefore submitted that the matter before Court had not been adjudicated upon and in this regard he referred me to the cases of

Hawkesworth V Attorney General [1974] 1 EA 406 (at P 408) and

Ganatra V Ganatra [2007] 1 EA 76 (at P 82)

On the application of the principle of res judicata

On the objection regarding the claim being time barred Counsel for the Plaintiff submitted that the Ministry of Water and Environment had written a letter to the plaintiffs on the 23rd January 2008 that the contract had not been terminated and therefore breach could be calculated from that point on in which case the claim as filed was not time barred.

I have addressed my mind to the submissions of both Counsel and the documents relied upon.

The principles relating to res judicata are fairly well established and I shall not endeavor to restate them as both parties are in agreement on them. However I accept the tests applicable to res judicata as expounded on by **Justice Nyamu** in the Kenyan decision of **Ganatra (**Supra) where he held at P 82 that

> *"…for res judicata to be established three conditions have to be fulfilled. Firstly, that there was a former suit or proceedings in which the same parties as in the subsequent suit or proceedings was litigated. Secondly, that the matter in issue in that later suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try it had heard and finally decided the matters in controversy between the parties in the former suit…"*

I only wish to add these tests should be read subject to the explanations in section 7 of the CPA which brings more clarity to the scope of the principle res judicata as well. It is in my view important to note that the former suit 229 of 2001 was settled by the parties themselves in 2006. In other words I did not make a determination of the suit based on a hearing of the dispute. At that time of settlement the ADDENDUM of 2004 was clearly in trouble and had not been operationalised because of the IGG report of 2004 which recommended the cancellation of the award of the tender to the plaintiff.

The letter from the Ministry of Water And Environment dated 23rd January 2008 to the plaintiff company and referred to by Counsel for the plaintiff to my mind is clear as to what happened. In that letter Eng. S. M. Bomukama states that the plaintiff company had made "fatal errors" in understanding the situation that occurred in 2004 and states

> *"… The bids advertised in the New Vision of October 18th 2007 were for the National Livestock Productivity Project (NLPIP) which is a different from the former Livestock Services Project (LSP) except for the fact that three of the facilities earmarked for rehabilitation under NLPIP had been planned for implementation under LSP.*
>
> *In light of the above the said adverts cannot be interpreted as evidence of termination of the procurement process fort he new scope of work…"*

It is clear that at the time of the above letter the responsible Ministry had changed from MAAIF to the Ministry of Water and Environment and so had the procurement circle. What is not clear to my mind is if the position of the plaintiff is correct why the parties did not take advantage of settlement of 2006 to resolve all the issues relating to the contract of 1997 and its ADDENDUM of 2004?

Section 7 of the CPA Explanation note 4 on res judicata states that includes-

"…Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit…"

The parties in this suit and in former suit are the same, the contact is the same, the period in which the dispute arose is the same and more importantly the settlement reached by the parties themselves is in full and final settlement of the dispute. I do not see how the ADDENUM 2004 could not have been resolved in the mutual consent settlement of the parties of 2006 within the meaning of explanation 4 of the section 7 of the CPA and for purposes of this objection shall be deemed to have been directly and substantially in issue. I therefore find that the principle of res judicata is applicable in this case as well. That would in effect resolve this matter.

However I need also add that I respectfully disagree with the submission of Counsel for the plaintiff that the cause of action arose in 2008 by reason of the letter of 23rd January 2008 supra. That letter was just one of clarification and not termination. The real issue dispute arose with the IGG report of 2004 which was for purposes of this suit was five year ago and therefore also offends section 3 (1) of the CPLA and makes the current suit time barred.

All in all I agree with Attorney General that for the above reasons that the current suit is bad in law and I accordingly dismiss it with costs.

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Geoffrey Kiryabwire

JUDGE

Date: 12/07/10

12/07/2010

09:40

Ruling read and signed in open Court in the presence of:

- Baingana for Plaintiff
- Karuhanga for Defendant
- Basangira MD of Plaintiff
- Ruth Naisamula - Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 12/07/2010