

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

5

HCT - 00 - CC - CS - 857 - 2007

1. HANSA & LLOYDS LTD

2. EMMANUEL ONYANGO :::::::::::::::::::::::::::::::::::::: PLAINTIFFS

10

VERSUS

1. AYA INVESTMENTS LTD

15 **2. MOHAMMAD HAMID :::::::::::::::::::::::::::::::::::::: DEFENDANTS**

BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE

20

J U D G M E N T:

The second plaintiff who is the Managing Director of the first plaintiff brought this suit against the first defendant and it's Managing Director the second defendant for the recovery of Shs. 25 643,098,975/= being unpaid fees for consultancy services.

The case for the plaintiff is that the second defendant who is the Chairman/Managing Director of several companies including the first defendant collectively known as Aya Group of Companies instructed the second defendant to undertake various financial services which included the design 30 of an Equity Model and Equity Memorandum for Aya Investments Limited; preparation of consolidated group accounts and audit reports; a statement of the state of affairs for Aya Biscuits (U) Ltd; a valuation report of goodwill for Aya Group and its associated companies; a

certification of work-in-progress for a loan and preparation of a financial model for Fifi Transport (U) Ltd among others.

The plaintiffs claim that they submitted invoices for these services that remain unsettled.

5 The defendants deny any business dealings with the plaintiff as alleged. The defendants further deny that any of their group of Companies instructed the plaintiff to carry out financial services for them. The second defendant however acknowledges that he received an invoice from the plaintiffs of Shs. 14,602,500/= which has now turned into a claim for US\$ 372,811 both which are denied.

10

The parties at the scheduling conference agreed to the following issues for trial:

1. Whether the plaintiffs rendered financial services for the defendants
2. If so, how much are the plaintiffs entitled to as fees or remuneration?
3. Remedies.

15 Mr. Nelson Nerima appeared for the plaintiffs while Mr. Moses Kimuli appeared for the defendants. The second plaintiff Mr. Emmanuel Onyango gave evidence for the plaintiff while the second defendant Mr. Mohammed Hamid gave evidence for the defendants.

Issue No. 1: Whether the plaintiffs rendered professional financial consultancy services for the defendants.

20

The second plaintiff testified that he originally worked as a financial controller for M/s Fifi Transport Ltd but did other administrative work for the Aya Group of Companies. He however resigned his position in May 2007 largely due to non-payment of his wages. The second
25 defendant later approached Mr. Onyango after he had resigned to reconsider his position. The second plaintiff then agreed to do work for the defendants but this time as a private contractor of financial services which was agreed.

It is the second plaintiff's case that he carried out financial services and issued six invoices to the
30 defendants in respect of;

- 1). The design of an equity model and memorandum for Aya Investments Ltd. This was with respect to a loan application to ICD Bank of South Africa for the Hilton Hotel Project.

- 2). Preparation of consolidated group accounts and audit report.
- 3). A statement of confirmation of the State of Affairs of Aya Biscuits (U) Ltd
- 5 4). A valuation of goodwill for the Aya Group to establish the extent of image damage that resulted from receivership effected by Barclays Bank.
- 5). A certification of work in progress for a loan credit drawn down for November 2007.
- 10 6). A combination of services being –
 - a) Financial model for Fifi Transport (U) Ltd
 - b) Audit report and financial statements for M/s Pan Afric Commodities Ltd for the years 2004, 2005 and 2006
 - 15 c) Hotel intelligence study for the Hilton Project
 - d) VAT analysis for Fifi Transport Ltd.

Counsel for the plaintiff submitted that evidence of all the above services rendered were exhibited in court. Counsel for the plaintiff further submitted that the defendants did not challenge the exhibits and even omitted to cross-examine the second plaintiff on them. Counsel for the plaintiff relied on the case of **Habre International Co. Ltd vs Ebrahim Alarackia Kassim & Others** SCCA No. 04 of 1994 for the proposition that an omission or neglect to challenge the evidence in chief of any material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently
25 incredible.

Counsel for the plaintiff further submitted that the denials of the second defendant were an afterthought as the defence filed by the defendants was nothing more than a generalized denial.

30 Counsel for the defendants submitted that the second defendant in his testimony stated that he did not know the first plaintiff or engaged it in his personal or executive capacity to do work for the Aya Group. Counsel for the defendants denied that any of the e-mails relied upon by the plaintiffs showed that the second plaintiff was acting on behalf of the first plaintiff. While

counsel for the defendant conceded that the e-mails show communication between the second defendant and the second plaintiff they do not show that the first plaintiff rendered any services. He submitted that in such a situation court cannot make a contract on behalf of the parties

[**Trollope & Colls vs Northwest Metropolitan Regional Hospital Board** (1993) 2 all ER 260 pp 267 – 8 per **Lord Person**]

5

Counsel for the defendant also submitted that it was not believable that the second plaintiff who had resigned his position with the defendant because of remuneration issues could thereafter enter into an unwritten service agreement for the sum of Shs. 643,811,975/=. He referred to the testimony of the second defendant that it was the second plaintiff who as an individual solicited for part time or adhoc work from the second defendant as and when it was available.

10

Counsel for the defendants further submitted that some of the documents relied upon by the plaintiffs showed that services were actually rendered by another firm namely M/s Knick Waks & Co. Certified Public Accountants. He further submitted that the testimony of the second plaintiff that he would prepare the said financial documents on behalf of the defendants who would then take them to M/s Knick Waks & Co. for signature and stamping was uncorroborated and unbelievable. That on the authority of **Kamotho vs Kenya Commercial Bank Ltd** [2003] 1 EA 108 it can be inferred by court that the failure by the plaintiffs to call a witness from the said audit firm is proof that such evidence would not be favourable to the plaintiff.

15

20

I have read the submissions of both counsel and perused the evidence before me in the case. Even before I address the issues I need to point out how enigmatic the evidence is in this case. The relationship between the parties was complicated and with respect to this dispute very informal indeed. Court is left with the difficult task of ascertaining what the real facts of this case are as none of the parties agree to anything.

25

Whereas the defence pleadings of the defendants is a denial of any relationship, the second defendant testified that after the second plaintiff resigned his position in the Aya Group he would still do what he termed part-time work for him. The second defendant was not however really forthcoming as to what this part-time work was, its terms and remuneration.

30

There are however quite a number of e-mails in 2007 between the first plaintiff, the second defendant and one Enrico de-Rosso said to be a personal assistant to the second defendant. This is a period after the second plaintiff had resigned and yet at the same time showing that a relationship of sorts between parties still subsisted. These e-mails were not contested during the evidence of the second defendant. What is even more illuminating is the evidence in some of the e-mails that the second plaintiff retained an e-mail account with the Aya Group namely emmanuel@ayagroupafric.com. This clearly shows a course of dealings between the second plaintiff and the second defendant. What then becomes confusing in light of the above is why a lot of the final documentation relating to the alleged financial services done by the second plaintiff is under another audit firm M/s Knick Waks & Co. Certified Public Accountants and not the first plaintiff.

As further evidence of a highly informal relationship between the parties is exhibit D.1 which is a petty cash payment voucher No. 2298 dated 11th May 2007 in the names of the second plaintiff. The narration therein reads “Full and final settlement up to 1st April 2007” for Shs. 3,517,025/=. A simple reading and understanding of the said narration suggests a settlement of some obligation upto 1st April 2007 with further settlement thereafter to be made at a later date. The voucher is in the names of M/s PAN AFRIC COMMODITIES LTD not any of the defendants (though it is part of the Aya Group pf Companies). Unfortunately there is no reference therein to which invoice of the second plaintiff is being settled. There are further hand written (or scribbled notes) in exhibits

1) **Exhibit D5** which are signed by the second plaintiff showing payments of some monies. These are:

25

- i) Emmanuel (Fifi) Transport 20,000/=
- ii) Emmanuel 200,000/= (*no indication what the payment is for – addition mine*)

30 2) **Exhibit D.5 (ii)** dated 4th July 2007

- i) Emmanuel fees 200,000/=

3) **Exhibit D.5 (iii)**

i) Emmanuel 200,000/=

5 The second plaintiff does not deny receiving these monies.

Counsel for the plaintiff submitted that these payments were petty cash. I see that Exhibit D.5 (ii) which was signed by the second plaintiff has the narrative “Emmanuel fees” that in my view cannot be a petty cash payment unless the said fees were treated as petty cash items.

10

There is however some correspondence that requires some scrutiny and that is Exhibits D.2, D3, D4 and D7. Exhibit D.2 is an e-mail from the second plaintiff to the second defendant dated 8th November 2007. It reads:

15 “... Dear Sir,

Have attached the invoices No. 100726 and 100737 totaling to (U) Shs. 14,602,500/= being consultancy and audit fees for work done to date for your kind attention. Invoice 100726 covers the period to July 26th 2007 whereas invoice No. 100737 covers the period July to date. Details of the work are in the invoice. Included in the invoice is an amount

20 *of (U) Shs. 650,000/= on Invoice No. 100726 and Shs. 530,000/= on Invoice No. 100737 being amounts severally advanced to facilitate the work leaving the balance due at (U) Shs. 13,422,500/= I forwarded to you on 26th of July but has not yet been attended to (emphasis mine).”*

25 Exhibit D.3 is a M/s Hansa & Lloyds Invoice No. 100726 dated 26th July 2007 to Aya Investments (U) Ltd, Attn Mr. Mohammad Hamid. It is authorized by Mr. Emmanuel Onyango. The sum billed is Shs. 5,725,500/=. The particulars read

- 30
- “- preparation of Equity Memorandum for Aya Investments Ltd
 - preparation of Aya Bakery financial statements for 2004, 2005 and 2006
 - VAT returns for Aya Bakery
 - Interim consolidated accounts for Aya Investment Group for 6 months ended 30th June 2007

- *Financial Model for Fifi Transport (U) Ltd* “

Exhibit D.4 is also from M/s Hansa & Lloyds Invoice No. 100737 dated 8th November 2007 for the sum of (U) Shs. 8,850,000/=. The rest is the same as the last Invoice save for the particulars

5 which read

- “- *Hilton Financial Model New Vision Sunday September 9th 2007*
- *Hilton Financial Model Analysis Wednesday September 12th 2007*
- *Certification of NBV for Aya Biscuits October 10th 2007*
- 10 - *Audit Certificates for work in progress up to October 2nd 2007*
- *Audit Certificate, work in progress and Credit draw down analysis October 9th 2007*
- *Goodwill Valuation: Aya Investments (U) Ltd; Pan Afric Commodities Ltd; Aya Bakery (U) Ltd; Aya Biscuits (U) Ltd; and Fifi Transport (U) Ltd (consolidated)*
- 15 *October 12th – 18th 2007 “*

Exhibit D.7 is a letter from counsel for the defendants to counsel for the plaintiffs entitled

20 “*Demand for alleged professional consultancy fees US\$ 372,811 on behalf of M/s HANSA & LLOYDs*”

In that letter there is tacit mention of Invoices No. 100726 and 100737 for Shs. 14,602,500/=. The lawyers of the defendants then write

25 “... *By some strange process, the figure of (U) Shs. 14,602,500/= has changed to US\$ 372,811.*

3. *Clearly your clients are trying to extort money from our client ...*”

30 Certain conclusions and findings can be made from the above evidence. First is that it is not true that the second defendant is not aware of M/s Hansa & Lloyds (a Company belonging to the second plaintiff) because he does through his lawyers acknowledge receipt of those invoices. Secondly in light of the informal relationship I have already found above between the parties it is more likely than not that the work in Invoices 100726 and 100737 was done but part of the bill

remains outstanding as claimed. I see no other logic for the second defendant to acknowledge part payment of the said invoices. In any event I believe this part of his evidence.

5 Thirdly Invoices from M/s Hansa & Lloyds Nos. 100724, 100725, 100733, 100734, 100735 and 100736 are problematic. The items billed in these invoices either duplicate the items in invoices No. 100726 and 100737 or are extracted from documents attributed to M/s Knick - Waks & Co. Certified Public Accountants who are not party to this case. I am not convinced as counsel for the plaintiff submitted that Invoices Nos. 100727 and 100737 were “billed for immediate payment so that he (second plaintiff) could continue work. There is nothing in the invoices to suggest this.
10 Furthermore both parties did not call any witness from M/s Knicks – Waks & Co. Certified Public Accountants so it is difficult to determine their role in this dispute. That being the case court cannot on the evidence before it grant the plaintiff’s billed invoices for work attributed to someone else.

15 I therefore find that the plaintiffs did render professional financial services to the defendants. I further find that those services were part paid for leaving a balance of (U) Shs. 13,422,500/=

Issues No. 2 and 3: How much are plaintiffs entitled to as fees or remuneration and remedies.

20

In light of my findings above I grant the plaintiff judgment against the defendants for Shs. 13,422,500/= as special damages.

The plaintiffs did not pray for general damages so I grant them none. I shall however grant the plaintiffs nominal damages of (U) Shs. 2,000,000/= for breach of financial consultancy contract
25 by the defendants.

I grant the plaintiffs interest on the special damages at 21% p.a. from 8th November 2007 until payment in full. I also grant the plaintiffs interest at 8% p.a. on nominal damages from the date of judgment until payment in full.

30

I grant the plaintiffs costs of the suit scaled down to a subject matter of Shs. 13,422,500/=.

.....

Geoffrey Kiryabwire

JUDGE

Date: 26th August 2010

5

10

26th August 2010

15 9:33am

G.S. Lule (SC) for the Defendants

N. Nerima for the Plaintiffs

20 **In Court**

The Plaintiff

Mr. Okune C/C

25 **Court**

Judgment read in open Court and signed.

30

.....

Hon. Justice Geoffrey Kiryabwire

Date: 26th August 2010

