THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO 13 OF 2002

HIMA CEMENT LTD…..... PLAINTIFF

VERSUS

CAIRO INTERNATIONAL BANK LTD.....… DEFENDANT

BEFORE HONOURABLE MR. JUSTICE CHRISTOPHER MADRAMA

RULING ON ADMISSIBILITY OF EVIDENCE

This ruling arises from an objection by Counsel for the Defendant Mr. Masembe Kanyerezi on the admissibility of the oral testimony of PW1 for its exclusion under sections 91 and 92 of the Evidence Act when PW1 made reference to Ayoubco Contracting Co. Ltd as the party which obtained a guarantee and made an order for the supply of cement when the offer for the supply of cement was made to an entity known as Ayoubco Ltd. The background of the matter is that the defendant executed a guarantee in favour of Ayoubco Contracting Company Ltd. The plaintiff alleges in the plaint that it supplied cement to Ayoubco Contracting Company Ltd on credit. On the 30th of November 2001 the plaintiff demanded for payment for goods supplied to Ayoubco Contracting Co. Ltd whereupon Ayoubco Contracting Co. Ltd defaulted and the plaintiff invoked the guarantee against the defendant. The WSD of the defendant avers inter alia that the plaintiff contracted with a company known as Ayoubco limited whereas the defendant by guarantee deed guaranteed a company known as Ayoubco Contracting Company Limited which is distinct from Ayoubco Ltd (Uganda). On the 11th of March 2003 the counsels for the parties Mr. Tumusinguzi for the plaintiff and Masembe for the Defendant agreed pursuant to a search conducted by the plaintiff's counsel at the Company registry that the entity referred to as Ayoubco Limited does not exist while Ayoubco Contracting Company Ltd was incorporated on the 28th of January 1998.

On the 29th of September, 2003 the plaintiff's counsel and the defendants counsel appeared in court and discussed the issue of the misdescription of the company whereupon the Hon. Justice

Stella Arach judge of the high court as she then was permitted the plaintiff to amend the plaint on that point and file an amended plaint within 7 days.

Paragraph 4 (a) of the plaint originally read as follows:

"4. The facts constituting the cause of action arose as follows:

(a) The plaintiff entered into a contract with Ayoubco Contracting Company Limited, on the 6th December 2000 wherein the plaintiff was to supply and did supply Ayoubco Contracting Company Limited with Cement and allied products over a period of time. (Find a copy of the Contract attached hereto and marked "**HIMA I"**)"

On the other hand the amended plaint paragraph 4 (a) thereof reads as follows:

"4. The facts constituting the cause of action arose as follows:

(a) The plaintiff entered into a contract with Ayoubco Contracting Company Limited, on the 6th December 2000 wherein the plaintiff was to supply and did supply Ayoubco Contracting Company Limited with Cement and allied products over a period of time. (Find a copy of the Contract attached hereto and marked "**HIMA I**") the Plaintiff shall aver that while Annexure Hima 1 refers to AYOUBCO LTD, this mistake was a misdescription of the company and that the same should have read AYOUBCO CONTRACTING COMPANY LIMITED, located at Banda Jinja Road, whose General Manager at the time of the contract was Mr. Paul Souvertis, who was dismissed when the said AYOUBCO CONTRACTING COMPANY LIMITED was placed under receivership. (a copy of the dismissal letter is attached and marked "**HIMA 1A"**

When the suit came for hearing on the 1st of June 2004 and PW1 Mr. V Agrawal commenced his testimony in chief. PW1 testified that they supplied cement to Ayoubco Contracting Company Ltd and also that in their letter of offer they made it conditional that Ayoubco Contracting Company obtains a bank guarantee which it got from the defendant bank, Counsel Masembe at this stage objected to reference by PW1 to Ayoubco Contracting Company Limited as far as the

document “HIMA 1” attached to the plaint is concerned. He made the objection under sections 91 and 92 of the Evidence Act cap 6 Laws of Uganda.

Mr. Tumusinguzi in reply submitted that if it was necessary to amend the plaint to pray for the order of rectification which he thought was so dear to his learned friend he will do so. He submitted that the amended plaint avers that the reference to Ayoubco Ltd was a mistake and a misdescription of the company. He contended that the sections which is learned friend referred to apply to different instances and not where there was a mistake and it has been pleaded and attempts are being made to lead evidence to show that mistake. The rationale of that section is to espouse consistency between the oral evidence as given and the documents as made. He submitted that the rule is not cast in stone as to ensure that any court faced with such a dispute would close its eyes to mistakes just because of the rule. He referred to the amended WSD filed in reply to the amended plaint and contended that It does not deny the fact in the plaintiffs averments that there was a misdescription of the relevant company. Counsel for the plaintiff submitted that the only contention in that paragraph which referred to that mistake is that it does not pertain to the defendant. He submitted that his duty was to prove the averments as pleaded in the amended paragraph 4 of the plaint. That if what his learned friend contends is to be sustained, then any document which had any mistake or any defect would never find its way in a court of law. He submitted that it was up to the court to look at the document, the surrounding circumstances and other documents in totality and come to its own conclusion. One way or the other the mistake as pleaded is either genuine or not and the court has powers to make a finding that it was not a mistake as pleaded. Furthermore that there were other documents on the file (as I understand it which confirm the identity of the company to whom exhibit P1 was addressed) and the objection is in effect a technicality intended to defeat the plaintiff’s case. Plaintiff’s counsel also referred his learned to examine annexure “C” to the plaint. This annexure being a document of the plaintiff also makes reference to AYOUBCO LTD (UGANDA). Plot 1622/1638 Banda Jinja Road 33647 Kampala. He prayed that the objection is overruled and PW1 allowed to continue testifying.

Counsel Masembe in rejoinder submitted that reference to the document AYOUBCO LTD in paragraph 5 (b) to the WSD is further and in the alternative and so there is nothing contradictory. For rectification he referred to the Indian Evidence Act. He contended that the remedy can only

be obtained by the plaintiff amending the agreement in a suit between the plaintiff and the defendant. Counsel referred to the Indian Evidence Act, Halsburys laws of England volume 26 3rd Edition paragraphs 1676 for the proposition that the plaintiff has first to get the document rectified before his client can deal with them. The pleading that there was a mistake is not enough. In any event he submitted that the plaintiff should bring the evidence of rectification first otherwise it would not be admissible. He contended that the WSD did not deny it because it was a third party (paragraphs 3). He submitted that paragraph 5 (a) brings out the real point i.e. the statement by the defendant that the plaintiff contracted and invoiced Ayoubco Limited. That is not the party the defendant guaranteed. He submitted that at this stage what is in issue is the admissibility of evidence and not the whole case. He suggested that the other option is for the plaintiff to forget the document and instead lead oral evidence.

Counsel Tumusinguzi prayed for time to read through the references made by Counsel Masembe and come back with a reply on the ground that he was ambushed. He sought an adjournment and Counsel Masembe did not object. The court adjourned to the 29 June, 2004 at 2.30 PM for Counsel Tumusinguzi to reply to the new matters raised and if any new points are raised for Masembe to make a rejoinder thereto.

By 2006 the trial judge had left for the Civil Division of the High Court and the matter was transferred for her direction. Since then the case lost position when in August 2010 the trial Judge Hon. Justice Stella Arach was elevated to the Court of Appeal while the case remained in the registry.

The case was assigned to me and mentioned for the first time on the 7th of March 2011. I agreed that the plaintiff's counsel does make his reply in writing so that the matter progresses. I must express my concern about the delay in handling a case which proceeded in 2004 and was adjourned shortly for a response to an objection on admissibility of evidence. The matter has been in limbo for 6 and ½ years without further action. Possibly the case was never brought up for the attention of the trial judge to take down the oral reply of the plaintiff's counsel for which the last adjournment had been granted.

The court has now received the written reply of counsel Tumusinguzi (about 6 ½ years later) on the 15th of March 2011.

The plaintiffs counsels reply is to the effect that the objection raised by counsel for the defendant is to the effect that the plaintiffs cannot lead evidence to show that the words "Ayoubco Ltd" in exhibit P1, (annex 1, to the plaint) should have read Ayoubco Contracting LTD as such evidence is not admissible under section 92 of the Evidence Act. This was pleaded by the defendant in paragraph 5 of the amended written statement of defence.

Firstly he submitted on what the rationale of section 92 of the Evidence Act is. According to Sarkas Law of Evidence commenting on the section which is in Pari material with the Ugandan section 92 of the Evidence Act he observes as follows:

> "extrinsic parole evidence contradicting varying or adding to or subtracting from the terms of a solemn written agreement is inadmissible chiefly because the parties having made a complete memorial of their agreement it must be presumed that they have put into writing all that they consider necessary to give full expression to their meaning and intention, and secondly because the reception of oral testimony would create mischief and open the door to fraud", page 1194.

He submitted that the rationale for the inadmissibility of parole evidence is premised on the protection of the sanctity of what parties to an agreement have agreed upon and reduced in writing. Further that what the plaintiffs witness intended to adduce does not fall within the ambit of this section for the reasons that: -

1. The document sought to be admitted is not an agreement between the parties. By its nature, the document is a letter written by Hima Cement the plaintiff to another party to supply cement. That party was indicated on the letter as Ayoubco Ltd when it should have been Ayoubco Contracting Ltd as the various correspondence and documents produced by both plaintiff and defendant attest. It a unilateral document and not a bilateral one where the parties have reduced their agreement in writing. He referred to Sarkars Law of Evidence, page 1196. "The words as between parties and the reference to a separate oral agreement in section 92 seem to point out that the section does not apply to unilateral documents".

2. What is sought to be explained is not a term of the agreement but an explanation that the description of the company in the letter is wrong. What the section prohibits are amendment to terms of the agreement or of the document. The evidence sought to be adduced to explain the document seeks not to explain a term of the document. He likened the situation to attempts to correct a mistake of a date on a document drawn in 2011 but whose year is indicated as 2012. That does not add, vary or contradict the terms of the agreement or document. Quoting from Sarkas Law of Evidence:

> "there is nothing in section 92 to exclude oral evidence of an oral agreement which contradicts, varies and not the terms of the contract but some recitals in the contract itself", page 1197.

Lastly what the plaintiff is seeking is not to add to the terms of the agreement or document which section 92 seeks to prohibit but to correct a mistake, outside the ambit of the terms of the agreement and accordingly such evidence is admissible.

I have carefully considered the objection of the defendants counsel and the replies thereto by the plaintiff's counsel. From the outset I must say that the matter to be decided is whether oral testimony of PW1 as to whether the document marked exhibit P1 was written to and refers to Ayoubco Contracting Company should be admitted. However the question of mistake and rectification of a company name has been bundled up with exclusion of oral evidence to vary, add, or subtract the terms of a document.

The basis of the objection to specific testimony of PW1 is sections 91 and 92 of the evidence Act. Section 91 specifically applies to exclusion of oral evidence by document evidence in specific instances namely:

- Terms of a contract
- Terms of a grant
- Or other disposition of property.

The plaintiff's counsel submitted that the document in issue was as unilateral document and that section 92 does not apply to unilateral documents. Section 92 of the Evidence Act cannot be read in isolation of section 91. Section 91 as I have noted deals with exclusion of oral evidence to vary or contradict the terms of a contract, terms of a grant and/or other disposition of property. It specifically states that no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of such matter except the document itself. This has often been termed the best evidence rule. I must note that exhibit P1 is the document itself and the contents thereof must be taken to have proved by the admission of the document itself as exhibit P1.

Secondly section 92 of the evidence Act deals with a situation where the terms of the contract or grant, or other disposition of property has been proved in court under section 91 as in the above case by the production of exhibit P1 which is addressed to Ayoubco Ltd (Uganda) and dated 6th December 2000. Having been proved in evidence can PW1 say that the document was sent to Ayoubco Contracting Company Ltd? Section 92 provides that "no evidence of any oral agreement or statement shall be admitted as between the parties for purposes of contradicting, varying, adding or subtracting from its terms; but oral testimony may be given of matters described in sections 92 (a) – (f).

I do not need to we dwell on subsections (a) – (f) of section 92 of the Evidence Act which gives instances of when oral evidence is permitted. The question I need to deal with is whether section 92 applies to unilateral documents? If it does not, then it cannot be invoked to exclude oral testimony as envisaged under section 92 of the Evidence Act. Firstly the head note or side note of section 92 clearly and expressly shows that the section is about the "Exclusion of evidence of oral agreement". It suggests very strongly as further bolstered by Sarkars commentary that the provision excludes *oral agreements* to vary, contradict, add or subtract terms of a written agreement between the parties. While making the point that the testimony which is the subject of exclusion must be of an *oral agreement* there is the separate point that it deals only with agreements between two or more persons and not unilateral documents. **Sarkar's Law of Evidence Volume 116th edition reprint 2008 at page 416 states** that section 91 (Sections 91 and 92 referred to in Sarkar are in *pari materia* with the Ugandan sections 91 and 92 of the Evidence Act) deals with *exclusiveness* of documentary evidence while the following section 92 deal with or relates to its *conclusiveness*. I am persuaded by the analysis of Sarkar that the

provision does not deal with unilateral documents but agreements. An agreement by necessary implication has to be between two or more persons. In this case the exclusion sought under section 92 must by necessary implication be the exclusion of an oral agreement. Was the testimony of PW1 testimony about an oral agreement?

Exhibit P1 is a letter written by the plaintiff and signed by PW1. It is addressed to Ayoubco Ltd (Uganda), P.O. Box 33647, Kampala and for the attention of Mr. Paul Souvertis, General Manager. The terms of the document are merely an offer to supply ordinary Portland Cement of which clause 6 of the letter may be of concern to the defendant because it makes the issuance of a Bank Guarantee for S**hs: 200,000,000/=** in favour of the plaintiff a term of the offer. The object of the objection to the testimony of PW1 is to exclude reference orally to Ayoubco Contracting Company as if the letter exhibit P1 was written to it. The problem with this line of objection may be outlined as follows:

Exhibit P1 refers to a previous conversation or discussion with Mr. Souvertis Paul. The scope of that discussion is unknown as it is not part of the document. Can evidence about it be excluded?

The defendant's objection was made when PW1 referred to exhibit P1 as the offer of the plaintiff and the managing director of Ayoubco Contracting Co. Ltd furnished a bank guarantee and placed orders on behalf of Ayoubco contracting company Ltd. The objection was that reference to Ayoubco Contracting Co. Ltd should not be made (in that context). The testimony of placing orders by Paul Souvertis does not add, vary or subtract from exhibit P1. To put it mildly a wrongly addressed letter can be sent to a correct address. The placing of orders on behalf of Ayoubco Contracting Company Ltd would be a question of fact. An objection cannot be raised to it under section 92 of the Evidence Act as it does not seek to vary, add, subtract or detract a term from a document proved under section 91.

Counsel Masembe had referred the court to Halsburys laws of England third edition volume 26 Simonds Edition. Pages 906 – 907 and specifically to paragraphs 1679 and 1682 thereof. Firstly the general heading of the quoted provision is **Remedies** and deals with instances where a remedy may be refused for mistake of a party. Paragraph 1679 is not very relevant in that it provides:

> "1679. **Instances where relief will not be granted**. The court will not interfere in favour of a man who is wilfully ignorant of what he ought to know, or, in other words, or commits the mistake without exercising the due diligence which the law would expect of a reasonable and careful person, nor will relieve be granted when the ignorance was due to the negligence of the party's legal adviser. When the common mistake has been acted upon for a long period, one of the parties may be deprived of any right to relief by his acquiescence."

The provision deals with instances where relief will not be granted. At this stage of the suit, and as submitted by counsel for the defendant, the question is whether oral testimony of PW1 should be admitted in evidence and not whether any relief should be granted. The next paragraph deals with equitable rule of admissibility of parole evidence.

> "1682. **Equitable rule**. In equity, however, parole evidence is admissible to make out a case for rectification or rescission of an instrument, or to show that what purports to be an agreement is not in fact an agreement at all, as, for example, where it is been signed by mistake. In such cases the evidence is admissible, not contradict what appears on the face of the agreement, a procedure the court will not allow, but to prove the existence of a mistake and which could not otherwise be proved. So, also, where mistake cannot be established without evidence, equity will allow a defendant in an action for specific performance to support a defence founded on mistake by evidence *dehors* the agreement, the evidence being introduced, not to explain nor alter the agreement, but, consistently with its terms, to show circumstances of mistake or surprise which would make the specific performance of the contract as executed unjust."

The above passage strangely from Halsbury's Laws of England permits rectification of mistakes in an instrument through parole evidence and aids the plaintiff's case rather than the defendant's case. Secondly, the passage was cited presumably for the proposition that the plaintiff should first apply for rectification of the name which appears on exhibit P1. In my understanding, the issue here is not rectification of the name or the stage at which and the parties by whom it may be made but the exclusion of oral testimony as to whom the letter applied to. In view of my finding that section 92 does not apply to exhibit P1 there would be no need to consider the

question of misnomer. In case I am wrong however I will without prejudice make a few remarks about this.

The question of rectification deals with an alleged misnomer in the name and not admissibility of oral evidence. Misnomer or misdescription is a separate subject that deals with identity of the parties. It accepts the document as it is and would seek the court either to reach a conclusion that there was a mistake in the name or that it should be amended to substitute the proper name. In either case, there would be no variation, addition or subtraction of a term of the document but a finding as to whether there was a genuine mistake in description of the name. The bona fides of the alleged mistake may be proved through evidence.

The question of mistake in the names of parties in suits is addressed in terms of whether it was a misnomer or a fundamental mistake. These apply analogously to the matter at hand with the exception that in this case, the parties to the suit are properly described. What is in issue is the proper description of the party to whom exhibit P1 is addressed.

In **A.N. Phakey vs. World Wide Agencies limited [1948] XV EACA page 1** the East African Court of Appeal considered the misdescription of the plaintiff. The plaintiff was mistakenly described as Traders Limited. The court found that the defendant was not misguided at all but answered all the allegations in the plaint in its written statement of defence. It was also established that no company by the name Traders limited was registered and what was registered was World Wide agencies limited. An amendment without leave was allowed. The objection that the suit was a nullity was overruled. The Court observed that the defendant was no prejudiced and knew who sued him. His appeal on the ground that the plaint was a nullity was dismissed. The cases of **Mitchell vs. Harris Engineering Company Limited [1967] 2 Q.B. 703 and Rodriquez vs. Parker [1967] 1 QB 116,** are persuasive authorities for holding that where the name of a party is wrongly stated, it may be corrected. The correction may be made even if the effect is to substitute a new party provided the wrong name was given through a genuine mistake which was not misleading or such as to cause any reasonable doubt as to the identity of the intended plaintiff or defendant.

I do not agree that there is a need to amend exhibit P1 prior to the suit. I agree with the plaintiff's counsel that evidence may be admitted as to whether the description of the company in exhibit

P1 was a genuine mistake or not and whether it misled anybody as to the identity of the party addressed in Exhibit P1. Such evidence will not add or vary or subtract from the term of any agreement but deals with the identity of the party to any alleged agreement. Further I see no prejudice to the defendant in the admissibility of the testimony as it does not alter any term in the document in question whatever its classification.

For the reasons given above the issue of misnomer or misdescription is to be addressed through evidence and as pleaded in the amended plaint. The objection of the defendant under sections 91 and 92 of the Evidence Act is misconceived and is accordingly overruled with costs. PW1 testimony is admissible and he may proceed with his testimony in chief.

Ruling delivered this 24th day of March 2011 in open court.

Hon. Mr. Justice Christopher Madrama

Judge

Ruling delivered in the presence of

Hon. Mr. Justice Christopher Madrama

Judge