THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION,

CIVIL SUIT NO 594 OF 2007

HYDRO ENGINEERING SERVICES (U) LTD (HESCO) PLAINTIFF} ..... PLAINTIFF,

VERSUS

THORNE INTERNATIONAL BIOLER }

SERVICES LIMITED (TIBS) }..... DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiff filed a summary suit claiming the sum of **US$ 27,758.63** or its equivalent in Uganda currency, together with costs of the suit. The plaintiff avers in the plaint that was filed in court in November 2003 that the defendant executed oral contracts for man-hour and hire of welding machines with the plaintiff for a sum of United States dollars **27,658.63** inclusive of VAT. It further alleges that the plaintiff company duly executed the said two contracts and completed the work on the 5th of December, 2003. The plaintiff then sent two different invoices for payment to the defendant company. The plaintiff further avers in the plaint that on the 23rd of December, 2003 the plaintiff company received an email from the defendant company in which the latter acknowledged receipt of the plaintiff's two invoices and liability. The plaintiff further sent an e-mail demanding a total of **United States dollars 27,768.63** which the defendant is alleged not to have paid to date.

The defendant was given leave to defend the suit. In its defence, the defendant denies being indebted to the plaintiff in the sum of **US $ 27,758.68**. The defendant instead raises a plea of res judicata that the claim in the current suit was part of the plaintiff's claim in **High Court Civil Suit No. 818 of 2003 Hydro Engineering Services Company (Uganda) LTD verses Thorne International Boiler Services Ltd**. (hereinafter referred to as the "former suit"). The defendant's contention is that the former suit was eventually concluded. When the matter came before me on the 19th of May 2011 both counsel agreed that the main issue in controversy is whether the current suit namely HCCS No. 594 of 2007 is *res judicata*. After agreeing on the actual matter in controversy the suit was fixed for arguments on the 8th of July 2011. When it again came up for hearing on the 8th of July 2011, The defendants counsel applied to cross examine PW1 in the former suit namely the managing director of the plaintiff. The plaintiff's counsel did not object to the application and I allowed the managing director Mr. James Oduori to be cross examined by defendants counsel for purposes of the plea of *res judicata*. Thereafter

no further evidence was adduced and the parties made written submissions. The Plaintiff was represented by Counsel Mangeni of Messrs Mangeni Law Chambers and Co. Advocates while the defendant was represented by Dr. Byamugisha of Messrs J.B. Byamugisha Advocates.

Due to the preliminary nature of a plea of *res judicata* the defendant commenced submissions and contended that at the scheduling, issues one and two in the joint scheduling memorandum were abandoned and it was noted that it was not necessary to quote oral evidence after annexure C" to the defence was admitted. He relied on the evidence adduced in cross examination of the plaintiffs witness PW1 in the former suit. Referring to the joint scheduling memorandum of the parties counsel contended that the plaintiffs claim is for recovery of **27,756.63 United States dollars** or its equivalent with costs arising from an oral (additional) contract for man-hours and for hiring of welding machines which agreement was executed on the 5th day of November 2005, and was completed on the 5th of December, 2005. Thereafter the plaintiff sent two sets of emails to the defendant for payment. On the other hand the defendant's case in the joint memorandum is that it denies liability to the plaintiff in the sum of 27,458.63 United States dollars and further contends that the claim in the instance case was part of the plaintiffs claim against the defendant in HCCS No. 818 of 2003.

Consequently counsel submitted that the remaining agreed issues are:

1. Whether the instant claim was part of the claim in Civil Suit No. 818 of 2003.
2. What are remedies are available to the (sic) party.

Referring to the testimony of PW1 in cross examination that before PW filed the current suit they had filed another suit namely **HCCS No. 818 of 2003**. Counsel went ahead to review this testimony and exhibits D4 and P18 in the former suit admitted by the witness and item 6 of exhibit P18 thereof which contains the claim in the current suit. He concluded that the current suit cannot be tried in terms of section 7 of the Civil Procedure Act because the suit was res judicata.

As far as remedies are concerned the Defendant's counsel prayed that the plaintiff's suit is dismissed with costs.

In reply the plaintiff's counsel did not dispute the facts as set out by his learned friend. He agreed that a former suit was filed on the 16th of December 2003 for recovery of **USD 64,606.67** being the excess amount incurred in execution of a fixed price contract. He submitted that the former suit arose from a lump sum contract for a fixed price of **USD 139,015**. He further submitted that the plaintiff was awarded **16,213 USD** which had been withheld by the defendant. Counsel further agreed that the court in the former suit rejected the plaintiffs claim for additional sums beyond the contract price of **USD 139,015**.

The plaintiff's counsel further agreed that exhibit D18 was admitted in evidence in the former suit and DW1 in cross examination admitted that there were other agreed extras for **USD**

27,758.63 for manpower and hiring of welding machines as evidenced under invoice 0057 and 0058 admitted in evidence as exhibits P2 and P3.

Counsel contended that exhibit D4 contains the underlying several claims of the plaintiff against the defendant and that what is in the current plaint before court is not part of the plaint in the former suit. Counsel further submitted that at the time of filing of the former suit the parties had not yet agreed on the price for the man power and hiring of welding machines and that it was until the 23rd of December 2003 that the defendant agreed to pay **USD 27,758.63** after filing of the former suit. He further submitted that in its defence the defendant admitted that it was agreed extra/additional works for manpower and hiring of welding machines apart from the lump sum.

Counsel then submitted on the law of *res judicata* under the provisions of sections 7 of the Civil Procedure Act. He submitted that res judicata presupposes a dispute between two opposing parties with a definite issue for trial between them which a competent tribunal has adjudicated upon. Once adjudicated upon it cannot be raised again in a subsequent suit between the same parties. He further submitted that the test is whether the plaintiff in the second suit is trying to bring before court in another way in the form of a new cause of action a transaction which had already been presented before a court of competent jurisdiction in an earlier proceeding and which had been adjudicated upon.

In order to distinguish the current suit from the former suit, counsel for the plaintiff submitted that it was correct to say that both suits relate to the indebtedness of the defendant to the plaintiff. He however contended that the judgment in **HCCS 818 of 2003** adjudicated an issue in controversy which was whether or not there was a fixed price contract. He submitted that the court decided this point on page 11 of the judgment where the court held that the matter before it concerned a lump sum contract for a fixed price which ought not to be confused with additional works which were separately quoted and agreed upon by the parties. Counsel submitted that the instant claim in the suit was not directly for determination by the high court in the former suit. He contended that exhibit D4 contained various claims and that the instant suit was not for determination in the former suit.

As far as remedies were concerned the plaintiff's counsel prayed that the figures quoted in the invoices exhibits P1 and P2 should be accepted by the court as admitted by the defendant and that the defendant does pay the sum of **US $ 27,758.63** or its equivalent in Uganda shillings with interest at 25% from the 5th of December 2003 till payment in full and costs of the suit.

In rejoinder the defendant's counsel contended that the record of proceedings relied on by the plaintiff was not proved in this court and cannot be relied upon as evidence in the suit.

As far as exhibit D4 contains additional underlying civil claims of the plaintiff against a defendant is concerned, the defendant's counsel submitted firstly that the exhibit speaks for itself and does not require any explanation or addition. It is headed HESCOS claims from TIBS are as

follows" and it was proved in HCCS No. 818 as such, including its item 6 which is for the sum of United States dollars 27,768.63.

Secondly as far as the submission of the plaintiff's counsel that the sum of United States dollars 27, 768.63 is not claimed in the current suit because it was agreed on 23 December 2003, is concerned, the defendant's counsel contended that the plaintiff claims the sum on the basis of the invoices, exhibits P2 and P3 respectively, which was rendered on the 5th of December, 2003 and 6 December, 2003 on their face. That is when the total amount of United States dollars 27, 768.63 became due and that was before HCCS No. 818 of 2003 was filed.

When it came to proving plaintiffs claim in HCCS No. 818 of 2003, the bundle of exhibits containing exhibit D4 was produced, item No. 6 was asserted by the plaintiff and its witnesses was examined in chief upon it. Counsel reproduced the evidence of PW1 in cross examination where he admitted that his advocate in the previous case:

> "… Showed me exhibit PE 18 and asked me about VAT. I said VAT was shillings 29,599,043. I said I had a claim of damages and profits of shillings 40,000,000. I said there was non-payment of cement for Bavima Enterprises of shillings 21,261,240… I said USD 27, 758.63. I said we were demanding this for Manpower services given to them in November/December 2003".

Therefore, evidence was given claiming United States dollars 27, 758.63 in the previous suit. It does not matter that the judge did not award this sum in the judgment in the previous suit. Section 7 of the Civil Procedure Act on *res judicata* has explanation 5 which states:

> "Explanation 5: Any relief claimed in a suit, which is not expressly granted by decree, shall, for the purposes of this section, be deemed to have been refused".

He prayed that I dismiss the plaintiff's suit with costs.

Judgment

I have carefully perused the submissions of the parties, the pleadings in HCCS 818 of 2003, the pleadings in the current suit, and the evidence on record generally and considered the law on *res judicata*. As far as the law is concerned, the doctrine of *res judicata* is a complete bar to a subsequent suit and is based on a statutory provision namely section 7 of the Civil Procedure Act cap 71 Laws of Uganda 2000 which provides as follows:

> "7. Res judicata.
>
> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in

a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Explanation 1: The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.

Explanation 2: For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation 4: 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.

Explanation 5: Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation 6: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

The court is barred under the said statutory provisions from trying any suit or issue which has been directly or substantially in issue in a former suit between the same parties or their/his/her representatives or successors which has been substantially raised and finally decided by a court of competent jurisdiction. The word “former suit” is defined by explanation 1 to mean a suit decided prior in time irrespective of the time of its filing. In other words even if the suit is filed after the current suit so long as it is decided prior in time, it can qualify to be termed a “former suit”. The words “former suit” are linked to the fact of the suit having been finally determined by a court of competent jurisdiction on a controversy which is again confronted by a court of competent jurisdiction and between the same parties. Explanations 1 – 6 of section 7 of the Civil Procedure Act give guidelines as to when a suit may be found to be *res judicata*. In the case of **SEMAKULA VS. MAGALA & OTHERS digested in [1979] HCB 90,** the Court of Appeal of Uganda (then the highest Court in the land) held that the doctrine of *res judicata* is a fundamental doctrine to the effect that there must be an end to litigation and therefore, every matter should be tried fairly once and having been so tried, all litigation about it should be concluded forever between the same parties. In determining whether a suit is barred by *res judicata*, the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of *res judicata* will then not only apply to all issues upon which

the first court was called upon to adjudicate but also to the very issue which properly belonged to subject of litigation and which might have been raised at the time, through the exercise of due diligence by the parties.

In my judgment the question of whether the issue of the claim in the current suit properly belonged to the subject of litigation in the former suit and ought to have in any case been raised by the plaintiff is the crux of this matter and on which judgment also depends if the court had not adjudicated on the matter. Before I conclude this question I refer to the East African court of Appeal case of **Kamunye and Others vs. The Pioneer General Assurance Society Ltd, [1971] E.A. 263.** LAW, Ag. V.-P. with the concurrence of Spry Ag. P. and Mustafa J.A. held at page 265 paragraph F – G that:

> "The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. *If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time* Greenhalgh v. Mallard, [1947] 2 All E.R. 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply Jadva Karsan v. Harnam Singh Bhogal (1953), 20 E.A.C.A. 74. The appellants in para. 13 of their defence in the earlier suit put the following matters in issue in contesting the validity of the mortgage:
>
> (a) that it was time barred;
>
> (b) that the mortgagees were guilty of laches;
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> (c) that the bargain was harsh and unconscionable.
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> These defences were raised against the mortgage as a whole, without distinction of the categories of land comprised therein; they were adjudicated upon and decided in a sense adverse to the appellants, and I have no doubt that it is not open to the appellants to bring these issues before the court again in the second suit." (Emphasis added)

Last but not least section 7 of the Civil Procedure Act and explanation 4 thereof provides that 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 such suit.

As far as the proceedings in HCCS 818 of 2003 namely the former suit is concerned, I do not agree with the defendant's counsel that I should disregard the proceedings as it is part of the material relevant to determine of whether the matter was before a court in a former suit and finally decided. Secondly as a question of fact the defendant counsel contended that the claim in the current suit arose in December 2003 before the suit was filed. I have not had the privilege of reading a fair copy of the plaint in the former suit and I could not determine the date of its filing. It was however signed on the 16th of December 2003. After reviewing all the relevant evidence, this judgment may proceed without taking into account the particular date on which the former suit was filed. I assume it was filed on or after the 16th of December 2003. This would not prejudice the plea of *res judicata* which can then be considered on its merits.

Starting with the facts of the case, the plaintiff's plaint in the former suit **HCCS No. 818 of 2003** was for recovery of **USD 64,606.67** or its equivalent in Uganda currency from the defendant together with interest, general damages and costs of the suit. The crux of the defendant's objection in the current suit **High Court Civil Suit No. 594 of 2007** arise from exhibit P18 which was admitted in the former suit and item 6 thereof which is for the sum claimed in the current suit. The plaint in the former suit is signed by the plaintiff's counsel on the 16th December 2003. Thereafter there was a defence and counterclaim against the plaintiff for a sum of **USD 24,245.55**, general damages for breach of contract, interest and costs. It is very material and relevant that the counterclaim was filed on the 1st of December 2004 and is dated by the advocates on the 29th of November 2004 close to one year later. These dates are on the face of the document and include stamp duty payment No. Y0134005 also dated 30th of November 2004. Putting it in context, the plaintiff in the former suit adduced in evidence exhibit P18 which was to prove the indebtedness of the defendant, which exhibit included item 6 thereof which has a claim against the defendant of **US Dollars 27,758.63**, being payment for the man power services given to TIBS from November/December 2003. However there is no evidence before as to whether the plaintiff filed a defence to the counterclaim. Indeed if there was a defence to a counterclaim, it should have cross claimed or put in defence the current claim in the suit.

On cross examination in the current suit before court Mr. James oduori the Managing Director of the plaintiff company responding to a question about whether he was examined by Counsel Ntende in the former suit, answered that he tendered exhibits 1 – 21. He confirmed that exhibit P18 item 6 thereof is about the claim in the current suit.

The record of proceedings in the plaint seems to have commenced about the 16th of February 2006 Before Hon. Yorokamu Bamwine. Page 4 – 5 of the proceedings is relevant. Counsel Ntende for the plaintiff informed court and I quote:

> "I have all together 21 documents which the plaintiff is to rely on".

The court then admitted documents exhibits P1 – P21. At page 5 Counsel Ntende is recorded having said "which are not settled". It is clear that he meant that the claims according to the documents exhibited were not settled. The record at page 9 reflects what PW1 says about exhibit P18 as follows:

> "Counsel: tell us about the VAT component as reflected in the exhibit? PW1: P. EXh.18 refers. The VAT component is shs 29,599,043/= we also have a claim for damages and profit in the sum of shs 40M. There is payment of cement supplied by Bavima enterprises worth 21,261,240/=. The man power claim was a separate package. It was not part of the 189,000 or 137,000 contract price.
>
> I pray that judgment be entered in favour of HESCO. Client is not claiming damages of work done. i.e. not claiming the work was damaged. We shall be paid for the rough time we have gone through from the time of contract to date."

The witness in his testimony wanted the plaintiff to be paid from the time they went through a rough time to date. Had there been a reply to the counterclaim, Item 6 on exhibit P18 in the former suit could have been treated as an off set to the counterclaim in addition to any other defences. Additionally the record of proceedings shows that on the 8th of May 2008 at page 17 of the record and on a question put to DW1 by court on table 4 DW1 said:

> "Table 4 indicates other agreed extras for HESCO, 27,758$ and 63 cents the indicated man power and hire value invoice is 0057 and 0058 fax dated 21st January 2004 and table five which is the summary.

The judgment of the court in High Court Civil Suit No. 818 of 2003 being judgment in the former suit in this controversy was delivered on the 30th of September 2008. Page 1 of the judgment shows that the plaintiffs claim was for US $ 64,606.67 or its equivalent in Ugandan currency while the defendant counterclaimed for US $ 24,245.55. Counsel for the plaintiff

referred me to page 6 of the judgment of the court in the former suit and the finding of the court that there was a contract for a fixed price which should not be confused with the additional works which were separately quoted during the performance of the contract. However counsel's submission does not take into account the entirety of the judgment of the court. At page 11 of the judgment paragraphs 3 and 4 thereof, the court makes further findings on the issue of additional works. For purposes of ease of reference I will quote this in full. The court held:

> "The evidence on record makes no case of extra works. All we have on record is evidence of unexpected difficulties on site encountered by the plaintiff in the performance of the contract. It would appear to me that if unexpected difficulties on site or inadequacies of design or encountered during construction in the fixed price contract, the contractors price is presumed to indicate any additional work or expenditure, including varied work, which may be needed to achieve competition, and which must be carried out by the contractor without additional payment in the absence of express provision or successful negotiation of variation of terms.
>
> Court takes the view that no obligation exists on the client's part to vary the work in order to assist him. For this reason the plaintiff was in my view not entitled to any additional payment beyond the contract price of USD 139,015. I have already indicated that this amount included a VAT component.…".

Again at page 12 of the judgment the court comments on the counterclaim of the defendant.

> "… There is also no independent evidence or at all that the end product was shoddy. The defendant has stated in the counter claim that they spent United States dollars 24,245. 55 for the work which the plaintiff left undone but once again there is no independent valuation."

Finally at page 13 of the record the court to disallows the counterclaim of the defendant after taking into account the additional costs of completing the contract suffered by the defendant. The court further at page 14 of the judgment and paragraph 2 thereof declines to award the plaintiff any sums in damages beyond the sum admitted by the defendant and withheld namely USD 16,216. For purposes of completeness the same is quoted in full:

> "As regards the prayer for general damages, these are in law intended as compensation for loss occasioned to the plaintiff by the defendant and not as a punishment to the defendant. Court is inclined to the view that a person who sues for breach of contract is entitled to recover the amount of loss which he sustained due to the breach and the defendant is liable to make goods such loss. In view of the order for payment to the plaintiff of the contractual sum of United States dollars 16,213 and in view of the plaintiffs role in the termination saga I would not consider it just and equitable to make an award of general damages, be it nominal or substantial."

The court in assessing general damages, took into account the additional costs or loss occasioned to the plaintiff. The court had the material with which to award general damages inclusive of exhibit P18. It is therefore my conclusion that the court took exhibit P18 item 6 thereof into consideration in pronouncing judgment. Even if it did not, the counterclaim of the defendant was filed in 2004 after the alleged cause of action in the current suit arose. The plaintiff ought to have set it in reply to the counterclaim that the defendant additionally owes it the amount claimed in the former suit. For the above reasons if I am wrong that the court took the claim in the current suit into account, and even if the court did not decide the issue of 27, 758.63 US $ it was a subject matter which properly belonged to HCCS No. 818 of 2003 and could have been set up in reply to the counterclaim of the defendant. To open it up again resurrects the former suit which had been finally determined by a court of competent jurisdiction. In the premises the plea of res judicata succeeds and the plaintiff's suit is dismissed with costs

Judgment delivered in court this 22nd day of September 2011

Hon. Mr. Justice Christopher Madrama

Delivered in the presence of

Hon. Mr. Justice Christopher Madrama