

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT CASE

HCT-00-CC-MA 172 OF 2011

(ARISING FROM HCT-00-CC-0201-2008)

COMPLANT ENGINEERING

& TRADE LIMITED :::::::::::::::::::::::::::::::::::APPLICANT/PLAINTIFF

VERSUS

JOSEPH KIRONDE:::::::::::::::::::::::::::::::::RESPONDENT/DEFENDANT

BEFORE: THE HON. MR. JUSTICE LAMECK N. MUKASA

Representation:

Mr. Sebuliba Kiwanuka of counsel for Applicant

Mr. Moses Kigumikiriza of counsel for Respondent

Court clerk:

Ms. Rose Akullo Obote

RULING:

This is an application brought by Notice of Motion under Order 52 rule 1 of the Civil Procedure Rules, Section 98 of the Civil Procedure Act and section 4(2)(c) of the Judicature Amendment Act 2002. The Applicant, Complant Engineering and Trade Ltd, who is the plaintiff in HCT-00-CC-CS-0201-2008, is seeking orders that:

- (a) The Applicant/plaintiff be allowed to reopen the plaintiff's case and present testimonies from a handwriting expert.
- (b) Costs of the application be in the cause.

Prior to this application both the plaintiff and the defendant had, respectively, called their witnesses and closed their cases. The matter had been fixed for submissions. Then the applicant made this application on the following grounds;

1. That during the scheduling of HCCS No. 201 of 2008, the parties agreed that a handwriting expert would be presented to provide expert opinion on the documents presented by the plaintiff.
2. That the applicant vide letter to court written on the 7th July 2010 informed court of its intention to present expert testimony from a handwriting expert.
3. That the Applicant/plaintiff closed its case having erroneously presented only two witnesses during examination in chief.
4. That following the said closure, the Defendant delivered testimony which put to question a significant majority of the documentation relied upon by the plaintiff thus necessitating additional testimony from a handwriting expert to be called.
5. That it is in the interest of justice and equity that the Applicant/plaintiff be allowed to reopen its case and present the testimony from a handwriting expert to allow substantive justice to be administered without undue regard to technicalities

The Application is supported by an affidavit deposed to by Mrs. Juliet Kamuse Nsamba an advocate working with F. Mukasa & Co. Advocates wherein she reproduces the above grounds.

The Respondent, Joseph Kironde, filed an affidavit in reply wherein he denies an agreement at the scheduling conference that a handwriting expert would be presented. He contends that to allow the applicant to reopen his case at this stage would be prejudicial to the defendant and a waste of courts time.

Section 98 of the Civil Procedure Act grants court unlimited inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of process of court. While section 4(2)(c) of the Judicature Amendment Act, Act 3 of 2002 provides:

“2 With regard to its own procedures and those of the magistrates’ courts, the High Court shall exercise its inherent powers

(c) to ensure that substantive justice shall be administered without undue regard to technicalities”.

However Article 126 (2) of the Constitution provides;

“(2)In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles.

.....

(b) justice shall not be delayed

(c) Substantive justice shall be administered without undue regard to technicalities.”

It is against the above legislative background that I will consider this application.

Among the issues agreed for court determination were:

- Whether the Defendant presented to the plaintiff company forged delivery invoices for materials supplied to the plaintiff.

- Whether the Plaintiff company made any over payments to the defendant, if so, how much?

In his testimony the first plaintiff’s witness, Zhang Qiping, stated that the plaintiff company had made payments against fake Delivery Notices presented by the plaintiff. In his testimony the defendant disputed some of the receipts exhibited in the plaintiffs’ evidence as issued by him. He denied the signatures therein attributed to him.

Mr. Sebuliba Kiwanuka, for the Applicant, argued that the above two issues can only be answered upon the evidence of a Handwriting Expert. Further that both the Plaintiff and the defendant, in the evidence adduced by them respectively acknowledged that there are questioned Receipts and Delivery Notices. He submitted that there is a question as to who authored the questioned payment Receipts and Delivery Invoices. Counsel cited **Andrew Owiti vs. John Opoya [1977] HCB 123** where it was held that in an action to recover misappropriated funds based on false receipts and books of accounts the false receipts and books should be produced for the examination of court and expert evidence adduced.

Mr. Kagumurinza opposed the application and argued that the application is prejudicial in that expeditious trial of the matter is being compromised with no good reason why the witnesses had not been called earlier. He further submitted that even at this stage there was no Handwriting Expert's Report for the Expert to testify on. He argued that the witness is only intended to tailor up the evidence on record which is reversionally conduct of the proceedings.

Procedural amendments have been effected in our procedural laws to ensure efficient and expeditious disposal of court matters. One of such provisions is Order 6 Rule 2 of the Civil Procedure Rules:

“Every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of the witnesses, a list of documents and a list of authorities to be relied on, except that an additional list of authorities may be provided late with the leave of court”

The rule is intended to ensure that a party comes to court when he or she has fully internalized and prepared his/her case. In the instant case the plaintiffs' witnesses listed were:

**“1. Officials of the Plaintiff
- 2. Others with leave of court”**

A handwriting expert was never envisaged.

Another such provision is Order 12 Rule 1 of the Civil Procedure Rules where the court is required to hold a scheduling conference to sort out points of agreement and disagreement prior to setting down the suit for hearing. At the scheduling conference held on 8th April 2010 the plaintiff amended its list of witnesses to include:

1. Zhong Qiping – Project Manager of plaintiff company
2. Steven Nagimensi
3. Busingye David
4. Wang Yan – from Anhui Foreign Economic Construction Group Corporation
5. An Officer of China Nanjing International Engineering Construction Ltd.

Again a Handwriting Expert was not among the intended witnesses. The record does not show any alleged agreement that a handwriting expert would be presented to provide expert opinion on the documents presented by the plaintiff. What is on record is a letter by the plaintiffs’ counsel to the Registrar of the Court wherein they state:

1. With reference to the above and following a directive of the presiding Justice His Lordship Lameck Mukasa during the scheduling of the captioned matter, we request that the court arranges for documents entered and registered at scheduling as plaintiffs documents P3A and P3B to be sent off to a handwriting expert for examination and verification to establish whether forgeries were included amongst them as is claimed by the plaintiff “

The court endorsed thereon that:

“There is no court order to that effect. The documents are already received in evidence and can only be removed with the consent of the opposite counsel/party”.

No further steps were taken and on 1st September 2010 hearing proceeded as scheduled with the plaintiff calling its witnesses.

I agree that where authorship of documents is questioned the Handwriting Experts evidence is relevant. The Plaintiff was aware of the need to adduce the evidence of Handwriting Expert but proceeded to conclude its case without taking any steps to adduce that evidence. There are no sufficient reasons given for the failure to adduce the evidence when it should have been adduced. I agree with Mr. Kungumirikiza that equity helps the vibrant.

In the result the application fails. It is dismissed with costs.

LAMECK N. MUKASA

JUDGE

17/05/2011