

**IN THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION
HCT-00-CC-CS-0257-2010**

TINASH INVESTMENTS LTD}PLAINTIFF

VERSUS

AJUK RONALD JIMMY}

NANKYA FARIDAH T/A OFFENDERS}

REHABILITATION INTERNATIONAL}DEFENDANTS

ONYOK MOSES ALIAS ABDU}

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises from a preliminary objection to the suit on the ground that the plaint discloses no cause of action against the third defendant. At the hearing the third defendant was represented by learned counsel Richard Rugambwa while the plaintiff was represented by learned counsel John Kaddu. On the 1st of March, 2012 both counsels agreed to put in written submissions for and against the objection by the third defendant.

Written Objections of the Third Defendants Counsel

Counsel for the 3rd defendant submitted that the suit does not disclose a cause of action against the 3rd Defendant and relied on Order 7 rule 11 (a) of the Civil Procedure Rules SI 71 – 1, which provides that a Plaint shall be rejected where it does not disclose a cause action. Learned counsel submitted that the rule is mandatory and relied on **Auto Garage and others vs. Motokov (1971) EA** for the ingredients of a cause of action and submitted that the case establishes that the plaint must show the plaintiff enjoyed a right, the right has been violated and the defendant is liable. He submitted that Paragraphs 6 (a-i) of the plaint which give the facts constituting the cause of action do not to give the essential three ingredients necessary to establish a cause of action against the third defendant. The paragraphs are reproduced as follows:

- (a) The 2nd Defendant while in her course of employment with Offenders Rehabilitation International issued a Local Purchase Order to the Plaintiff for the supply of 450 pieces.
- (b) The plaintiff on the 21st and 22nd day of October 2009 delivered to the office of Offenders Rehabilitation International on Mawanda Road the said merchandise.
- (c) The 2nd Defendant was arrested by Police and she confessed that the 1st Defendant was her employer who terminated her services before closing the offices of the organisation.
- (d) That through police investigations that it was discovered that the merchandise supplied to Offenders Rehabilitation International had been transported to the 3rd Defendants business premises in Lira.
- (e) That the defendants had been arrested and charged with the offence obtaining goods by false pretence.

Counsel for the defendant submitted that the above paragraphs show that the plaintiff supplied merchandise to Offenders Rehabilitation International, an Organisation where the 3rd Defendant was not a Director, Shareholder or Promoter, and that the plaintiff has neither stated nor attached in the Plaint and its annexure that the 3rd Defendant was a director, Shareholder or promoter. Furthermore, that the Local purchase order for the supply of the merchandise was issued to the Plaintiff by the 2nd defendant.

Counsel further submitted that the 3rd Defendant has since been acquitted of any criminal charges of obtaining goods by false pretence that had been brought against him by the Plaintiff at the chief Magistrate Court Holden at Kampala City Council, a fact well known to the Plaintiff, and that the 3rd Defendant, a business man runs a hardware business in Lira and therefore, for the plaintiff to state that the investigations showed that the merchandise ended up at the 3rd Defendant's premises and was later sold off, in itself whether true or false does not disclose a cause of action against the 3rd defendant.

Counsel further relied on the case of **Attorney General Vs Major David Sejusa (formerly known as Tinyefunza) (SCCA No. 1 of 1997)**, where it was held that a plaint should contain all necessary facts which if proven would give the plaintiff a right to Judgment.

Learned Counsel submitted that the cause of action must be antecedent to the institution of the suit, and that the Plaintiff has failed to prove in the pleadings and the annexure attached thereto that she enjoyed a right, that right was violated and that the 3rd Defendant was liable. The plaintiff supplied the merchandise to Offenders Rehabilitation International having been issued with a Local Purchase Order by the 2nd Defendant, and the plaintiff later learnt that Offender Rehabilitation International was not registered and in this suit the 2nd defendant is titled as "Nankya Farida t/a Offenders Rehabilitation International". Counsel contended that if the Plaintiff enjoyed a right and that right was violated then it would arise from the fact that merchandise was supplied and not paid for, but in that regard the 3rd defendant did not violate that right because the merchandise was not supplied to him and there are no facts in the pleadings to show that the 3rd defendant was a director, shareholder, or promoter in the said Offender Rehabilitation International. In the premises there is no cause of action against the 3rd Defendant and as such the suit is misconceived, incompetent bad in law and an abuse of court process and should be struck out and/ or dismissed with costs.

Written submissions in reply of the Plaintiff

Learned Counsel for the plaintiff in reply submitted contended that the plaint discloses a cause of action against the 3rd defendant, and it has been generally held that to determine whether or not a plaint discloses a cause of action, the court must look only at the plaint and its annexure if any and nowhere else. Counsel relied on the case of **Al Hajj Nasser N. Ssebagala Vs Attorney General and Others (Constitutional Petition No. 1 of 1999)** in which the constitutional Court defined a cause of action as

"A cause of action means every fact, which if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of Court. ... every fact necessary for the plaintiff to prove to enable him obtain

a decree and, everything that if not proved would give the defendant a right to an immediate judgment must be part of the cause of action. “

Counsel submitted that the cause of action against the 3rd Defendant is made out in paragraph 6 (g), and 7 of the Plaintiff which as follows;

“Paragraph 6 (g)

It was also discovered in the course of the police investigations that before the closure of the offices of Offenders Rehabilitation International, the merchandise supplied by the Plaintiff to Offenders Rehabilitation International had been transported to the 3rd Defendants business premises in Lira and later sold off.”

Paragraph 6 (h)

“The 1st and 3rd Defendants who had gone into hiding were later arrested and charged with the 2nd Defendant before Kampala City Council Magistrates Court with the offence of obtaining goods by false pretences.”

Paragraph 7

“The plaintiff avers that the defendants jointly and or severally conspired to cause loss to the plaintiff for which they should be held individually or severally liable. “

Counsel submitted that from the foregoing; more particularly paragraph 6 (g) and paragraph 7, it is clear that the plaintiff has made out a cause of action against the 3rd defendant.

Counsel further submitted that it was pleaded that the merchandise which the plaintiff supplied to Offenders Rehabilitation International was found in the business premises of the Defendant, and that the plaintiff averred that the Defendants conspired to cause loss to it, and therefore, the essential ingredients of a cause of action were made out by the Plaintiff. Counsel for the plaintiff submitted that the pleadings show that the plaintiff enjoyed a right, which was payment for the merchandise supplied to Offenders Rehabilitation International, and that that right was violated by the defendants when they conspired to cause loss to it. The question as to whether the 3rd defendant was acquitted, or not is not shown in the Plaintiff. Whether the 3rd Defendant was a Director, Shareholder or Promoter of Offenders Rehabilitation are not pre requisites for making out a cause of action. Furthermore, that what the court is being invited to do at this

stage is to establish whether on the face of the Plaint, a cause of action has been made out against the 3rd Defendant, and in this case, the Plaint discloses a cause of action against the 3rd Defendant. Counsel for the plaintiff invited the Court to dismiss the preliminary objection with costs.

Ruling

I have carefully considered the pleadings of the plaintiff and the submissions of both counsels. The plaintiff sued the 3rd defendant together with the first and second defendants jointly and severally for special damages, general damages, interests and costs of the suit. The facts averred in paragraph 6 of the amended plaint are that the second defendant issued a local purchase order to the plaintiff for the supply of 450 wheelbarrows and 450 rolls of barbed wire at a total cost of **Uganda shillings 85,050,000/=** on the 21st and 22nd of October, 2009 the plaintiffs delivered to the offices of Offenders Rehabilitation International on Mawanda road in Kampala District the items indicated in the local purchase order. Upon returning to the offices of the offices of Offenders Rehabilitation International a few days later to collect payment for the merchandise supplied, the plaintiffs Director Mrs. Tina Ssali learned that the Offenders Rehabilitation International had vacated without trace its offices on Mawanda road. The plaintiff's director filed a complaint with the police and the initial police investigations revealed that Offenders Rehabilitation International was an unregistered entity and various attempts were made to trace the second defendant who had disappeared without trace. On or about February 2010, the second defendant was arrested by the police wherein she confessed that the first defendant was her employer and that he had terminated her services upon closing the offices of Offenders Rehabilitation International. It was further discovered in the course of police investigations that before the closure of the offices of Offenders Rehabilitation International, the merchandise supplied by the plaintiff had been transported to the third defendant's business premises in Lira and later sold off. The first and third defendants who had gone into hiding were later arrested and charged together with the second defendant before Kampala City Council Magistrates Court with the offence of obtaining goods by false pretences. At the time of filing the suit the plaintiff had not yet been paid for the merchandise it supplied to Offenders Rehabilitation International which amount is claimed as special damages. The plaint further avers that the defendants jointly and/or severally conspired to cause loss to the plaintiff for which they should be held individually

or severally liable. The plaintiff further seeks general damages against the defendants for breach of contract.

The principles for determination of the question of whether a plaint discloses a cause of action are not in dispute and have been set out in the written submissions of counsels written above. The law is clear that for a plaint to disclose a cause of action it must be averred and demonstrated from the pleadings and Annexure to the plaint that the plaintiff enjoyed a right, that the right has been violated and the defendant is liable. The plaint describes the third defendant as a male adult Ugandan believed to be of sound mind. Paragraph 6 (e) of the plaint avers that “the initial police investigations revealed that Offenders Rehabilitation International was an unregistered entity and various attempts were made to trace Nankya Faridah who had disappeared without trace.” It is further pleaded that the merchandise was transported to the third defendant’s business premises and later sold off. That the first and third defendants had gone into hiding and were later arrested by the police and charged at Kampala City Council Magistrates Court. Paragraphs 8 and 7 are produced for ease of reference:

- “7. The plaintiff avers that the defendants jointly and/or severally conspired to cause loss to the plaintiff for which they should be held individually or severally liable.
8. The plaintiff further avers that the defendants are liable in general damages for breach of contract.”

Two things are alleged in the plaint against the third defendant. Firstly it is alleged that the defendants jointly and/or severally conspired to cause loss to the plaintiff for which they should be held individually or severally liable. The facts showing the loss are pleaded in paragraph 6 in that 450 wheelbarrows and 450 rolls of barbed wire were received by the second defendant according to the delivery note issued. The premises of Offenders Rehabilitation International were later found to be closed after delivery of the items. Further details of the transaction were alleged to have been revealed by a police investigation in that the goods were transported to the third defendant’s business premises in Lira and later sold off. The first and third defendants went into hiding and were later arrested and charged. The plaintiff has not yet been paid for the merchandise it

supplied to Offenders Rehabilitation International. The particulars of special damages are also pleaded.

The second ground of claim that is pleaded is that the defendants are liable in general damages for breach of contract. I must admit that the plaintiff has chosen a complicated pleading of this cause of action. It is averred that Offenders Rehabilitation International is an unregistered entity according to police investigations. But at the same time the plaintiff pleads that the second defendant trading as Offenders Rehabilitation International received the goods. Thirdly the goods ended up in Lira in the premises of the third defendant. The question of breach of contract does not show the connection between the second defendant and the third defendant.

That notwithstanding, facts disclosing conspiracy to cause loss is pleaded. Can it be said that the plaint discloses no cause of action? It's also clear from the pleadings that the plaintiff is labouring with insufficient facts about what actually happened. What the plaint reveals is a criminal conspiracy in which goods were ordered by the second defendant in the name of Offenders Rehabilitation International whose premises were alleged to be on Mawanda road. After the goods were delivered, the premises were found closed and the defendant had disappeared. Police investigations revealed that the goods were transported to Lira to the premises of the third defendant and later sold off. The plaint also shows that the first and third defendants went into hiding and were later arrested.

In his written submissions learned counsel for the third defendant submits from the bar that the third defendant had since been acquitted of any criminal charges of obtaining goods by false pretences. Secondly, learned counsel further submits that the third defendant is a business man who runs a hardware business in Lira and for the plaintiff to state that the investigations showed that the merchandise ended up at the third defendants premises and were later sold off did not disclose a cause of action. The fact that the third defendant is a business man who runs a hardware business in Lira is not pleaded in the plaint and introducing that fact is a submission from the bar. In determining whether a plaint discloses a cause of action or not only the plaint and any annexure thereto may be perused (See **Attorney General vs. Oluoch (1972) EA.392** and **Jeroj Shariff & Co Vs Chotai Family Stores (1960) EA 374**).

Finally it is also a submission from the bar that the plaintiff did not supply the third defendant or that the merchandise was not supplied to him as contended by counsel for the third defendant. It is the contention of the third defendants counsel that no facts are alleged that the merchandise was supplied to the third defendant. Secondly, the pleadings do not show that the third defendant was a director, shareholder or promoter in the Offenders Rehabilitation International. I do not agree with these submissions because it is clearly averred that the investigations have revealed that Offenders Rehabilitation International is an unregistered entity. In other words it is a nonentity and cannot have directors, shareholders or promoters. Paragraphs 7 of the plaint clearly indicate that the plaintiff avers that the defendants should be held individually or severally liable. In other words the defendants have been sued in their individual capacity and not in any other capacity such as that of directors or shareholders. In the premises, the plaintiff may go ahead to prove whether there was a conspiracy causing loss to it by the defendants in their individual capacities. As to whether this can be proved is a different matter. Learned counsel for the third defendant did not submit on a point of law i.e. whether conspiracy to cause loss is actionable as a tort or contractual matter or any civil wrong but rather that the facts pleaded did not disclose a cause of action against the third defendant under order 7 rule 11 of the Civil Procedure Rules. A point of law could have been argued under order 6 rule 28 and order 15 rule 2 of the Civil Procedure Rules where facts are not in dispute. A plaint may be rejected on a point of law under order 7 rule 11 (d). This is not the case in this objection.

Last but not least because conspiracy is alleged, the facts pleaded which show that the second defendant was involved in obtaining goods from the plaintiff implicate all the conspirators who are alleged to be behind the acts of the second defendant as far as the conspiracy to cause loss is concerned.

In the premises, the facts pleaded in the plaint disclose a cause of action against the third defendant and the plaintiff may proceed to call its witnesses and have the suit determined on its merits. The objection of the third defendant is accordingly overruled with costs.

Ruling delivered at Kampala this 13th day of April 2012.

Christopher Madrama
Judge

Judgment delivered in the presence of:
John Kaddu for the plaintiff,
Richard Rugambwa for the 3rd defendants.
3rd Defendant in court
Ojambo Mokoha Court Clerk

Hon. Justice Christopher Madrama
13th of April 2012.