

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

HCT - 00 - CC - CS - 0113 - 2011

OLAL BOSCO}..... PLAINTIFF

VERSUS

1. NSEREKO LUCKY }

2. AVON AFRICA INVESTMENTS LTD}..... DEFENDANT

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises from a preliminary objection raised by the second Defendant under order 7 rules 11 of the Civil Procedure Rules for the plaint to be struck out for disclosing no cause of action against the second Defendant.

In the written submissions of the second Defendant, the second Defendant's Counsel defines a cause of action and also relies on the case of *Auto Garage and Another versus Motokov* (No. 3) [1971] EA 514 which gives the ingredients of a cause of action.

Learned Counsel for the second Defendant submitted that the result of paragraphs 5, 6, 7, 8, 9, 13 and 14 of the plaint show that the Plaintiff bought the vehicle from the first Defendant. It is pleaded that upon the Plaintiff submitting the logbook to Uganda Revenue Authority (the third party), the third-party declared the logbook to be fake and accordingly cancelled it and punched holes in it. It is averred that the Plaintiff asked the first Defendant to ensure that the vehicle is lawfully registered and provide a genuine logbook but the first Defendant alleged that was the duty of the second Defendant.

Learned Counsel submitted that it is clear from the Plaintiffs pleading that he bought the vehicle from the first Defendant and all attempts to ensure that the vehicle obtained third-party insurance were made by the two parties to the vehicle sale agreement. In paragraphs 9 and 10 of the second Defendant's written statement of defence, the second Defendant states that upon receipt of the notification stated in paragraph 14 of the plaint, the second Defendant wrote to both the Plaintiff and Uganda Revenue Authority informing them about the fact that the logbook had been obtained in accordance with the provisions of section 12 of the Traffic and Road Safety Act, 1998. It is not disputed that the Plaintiff that had a right to possession and use of his motor vehicle and that upon purchasing the said motor vehicle from the first Defendant, the Plaintiff enjoyed the aforementioned rights. The plaint shows that Uganda Revenue Authority declared that the logbook was fake and consequent cancelation and punching a hole in the same is the act which violated the Plaintiff's right. This therefore means that although the Plaintiff enjoyed a right, the right was not violated by the second Defendant and as such the second Defendant was wrongly sued in this matter.

Learned Counsel further contended that although Uganda Revenue Authority did not act upon receipt of the second Defendant's letter, it issued a logbook to the Plaintiff upon being brought before this honourable court as a third party to the suit. She contended that it means that the logbook was never fake and/or forged. If the Plaintiff had instead of pursuing a criminal matter, taken cognizance of the provisions of section 12 of the Traffic and Road Safety Act 1998 and pursued the matter with Uganda Revenue Authority, he would not have incurred any loss or damages.

Learned Counsel further submitted that under the doctrine of privity of contract, there is no cause of action disclosed against the second Defendant. Under paragraph 5 of the plaint, it is averred that the vehicle was bought by the Plaintiff from the first Defendant. The Plaintiff's suit is for recovery of general and special damages for breach of a sale agreement. The second Defendant was not a party to the said agreement and cannot be sued for damages arising from its breach. Learned Counsel for the second Defendant therefore contended that the plaint

does not disclose a cause of action against the second Defendant and prayed that the plaint is rejected under order 7 rule 11 (a) of the Civil Procedure Rules. Alternatively she prayed that the suit is dismissed under order 6 rule 29 and 30 of the Civil Procedure Rules.

In reply the Plaintiff's Counsel contended that the submissions of the second Defendant's Counsel are premised on the sale agreement between the Plaintiff and the first Defendant. However she invited the court to read the entire plaint which she asserts discloses a cause of action. The Plaintiffs claim and the whole transaction did give rise to the cause of action are based on failure of sale agreement and transfer of ownership. Inasmuch as the first Defendant had been in possession of the motor vehicle the subject matter of the suit, he had not completed paying for it and the second Defendant had retained the logbook waiting for the balance which fact the first Defendant disclosed to the Plaintiff whereupon the two agreed to go together to the second Defendant's office and complete payments and obtain the logbook. She contended that the transaction was done in such a manner that the balance of money was paid by the Plaintiff at the second Defendant's office and the logbook was handed over to both in the same office. She submitted that paragraph 4 of the second Defendant's written statement of defence admits paragraph 6 of the plaint as annexure "G" to the written statement of defence. The second Defendant acknowledges the fact that the logbook in question originated from the second Defendant, the Plaintiff should be given an opportunity to put the second Defendant to strict proof of the averments in the written statement of defence.

In brief rejoinder learned Counsel for the second Defendant reiterated that the Plaintiff bought the motor vehicle from the first Defendant and not the second Defendant. She contended that the second Defendant's submission deals with the transfer of ownership of motor vehicles and in particular the provisions of section 12 of the Traffic and Road Safety Act 1998 which empowers the licensing officer to deal with applications for transfer of motor vehicles. The second Defendant is not the licensing officer envisaged under the provisions of the law and cannot be faulted for failure of transfer of ownership.

Ruling

I have carefully considered the submissions of both Counsels and perused the Plaintiff. In determining whether a plaintiff discloses a cause of action or not, the court only peruses the plaintiff and any attachments thereto. In considering the question, the court does not look at the defence. In **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998** Wambuzi CJ as he then was held that in determining whether a plaintiff discloses a cause of action under Order 7 rule 11 or a reasonable cause of action under order 6 rule 29 of the Civil Procedure Rules only the plaintiff can be looked at. In the case of **Major General David Tinyefunza vs. Attorney General of Uganda Const. Appeal No. 1 of 1997** the court upheld a passage in Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206 where it was stated that a cause of action is a bundle of facts which is necessary for the Plaintiff to prove if taken with the law applicable to them would give the Plaintiff a right to relief claimed against the Defendant. The authors further state:

But it has no relation whatever to the defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff.

The necessary facts disclosing the cause of action must be alleged in the plaintiff itself. It was further held in **Attorney General vs. Oluoch (1972) EA.392** that the question of whether the plaintiff discloses of cause of action is determined by a perusal of the plaintiff and attachments thereon and with the assumption that the facts so pleaded or implied in the plaintiff are true. In that case, the court held that the question is determined upon perusal of the plaintiff and attachments thereon with an assumption that facts pleaded or implied therein are true.

Paragraph 4 of the plaintiff avers that the Plaintiff brings the suit against the first and second Defendants jointly and severally to recover the principal sum of Uganda shillings 17,500,000/=, general and special damages for breach of sale agreement and loss of business income, interest and costs of the suit. Paragraph 4 in itself shows that the cause of action arises from a breach of a sale agreement.

However this paragraph just pleads the cause of action but does not give the facts disclosing the cause of action. The facts disclosing the alleged cause of action are in additional paragraphs.

In paragraph 5 of the plaint, the Plaintiff avers that by a sale agreement made on 7 January 2009, the Plaintiff bought the vehicle, the subject matter of the suit, from the first Defendant. The vehicle registration number is UAL 740L, Tipper, and Truck Dumper. Paragraph 6 avers that prior to the Plaintiff buying the said motor vehicle; it had initially been sold by the second Defendant to the first Defendant.

That the Plaintiff upon taking possession of the motor vehicle put it to use as a transporter of goods for gain. In paragraph 8 upon the Plaintiff submitting the registration logbook of the motor vehicle for transfer, the Uganda Revenue Authority declared that the logbook of the vehicle was fake and accordingly cancelled it. The Plaintiff notified the first Defendant and reported the matter to the police. The third-party insurance policy of the vehicle expired on the 4th of May 2010 and in the absence of an authentic certificate or logbook, the Plaintiff could not renew the statutory and mandatory third-party insurance policy. Consequently, the traffic police stopped the Plaintiff's vehicle from further operations on the road. As a result of non-use of the motor vehicle, the Plaintiff has been subjected to loss of business income for which the Plaintiff prays for special damages. It is further averred that by letter dated 6th of December 2010 the Plaintiff notified the second Defendant of intention to sue but the second Defendant denied liability and did not make good on the Plaintiffs complaint. Because of the Defendants conduct the Plaintiff has been subjected to psychological torture, inconvenience and loss of available business opportunities. That in the absence of a genuine lawful certificate of registration, there is no evidence of title of ownership and the Defendants are jointly and severally liable and in breach of the sale agreement and failure to provide the consideration for it after payment by the Plaintiff.

The basis of the claim against the second Defendant is the authenticity of the logbook. It is an assertion that the logbook is fake or a forgery. However, the plaint does not indicate how the second Defendant is at fault for the alleged fake

or forged logbook. Apart from the fact that Uganda Revenue Authority impounded the logbook and punched a hole in it, no further details as to why the logbook was considered a fake log book or a forgery are given. Instead the foundation of the case against the second Defendant is the fact that the first Defendant sold the vehicle to the Plaintiffs.

Secondly, the sale agreement attached to the plaint is between the first Defendant and the Plaintiff. It is the first Defendant who bought the vehicle from the second Defendant. As far as the plaint is concerned, it is difficult to connect the second Defendant to the transaction of sale. I agree with learned Counsel for the second Defendant that the sale agreement for the sale of the vehicle to the Plaintiff was between the Plaintiff and the first Defendant. Secondly it is very clear from paragraphs 6, 7, 8, and 9, that the Plaintiff had possession of the logbook and indeed commenced business with the lorry. The logbook was impounded when the Plaintiff submitted the log book of the vehicle for a transfer into his names to Uganda Revenue Authority. The annexure attached to the plaint shows that the vehicle log book is still registered in the names of the second Defendant. In other words, the plaint shows the connection to the second Defendant. Paragraphs 6 of the plaint aver that the Plaintiff bought the vehicle from the first Defendant to whom the vehicle had been sold by the second Defendant. The quarrel of the Plaintiff arises from the logbook which was allegedly impounded because it was allegedly fake. The Plaintiff avers that he lost business on account of the alleged fake log book because it had been impounded. In paragraph 10 the Plaintiff avers that in the absence of an authentic certificate log book the Plaintiff could not renew the statutory and mandatory third party insurance policy in order to operate his transport business. In fact the police stopped him from carrying out any business using the vehicle. It was due to non-use of the motor vehicle and that the Plaintiff was subjected to loss of business income. The non-use of the motor vehicle arose from the impounding of the logbook by officials of Uganda Revenue Authority. As far as the plaint is concerned, it does not blame officials of Uganda Revenue Authority for impounding the motor vehicle log book. The plaint avers that the motor vehicle log book was found to be fake. Having established that the first registered owner

of the vehicles in Uganda was the second Defendant and that the first Defendant had bought the vehicle from the second Defendant, the authenticity of the logbook is a matter for which the Plaintiff holds the Defendants liable jointly. The question also remains as to who was responsible for transferring the vehicle from the names of the second Defendant in which it is registered to the Plaintiff since the first Defendant does not feature in the logbook. Much as the second Defendant submits that under the Traffic and Road Safety Act, it is not responsible for issuing motor vehicle log books, the plaint clearly indicates that there was a fake log book. It follows that it couldn't have been issued by the issuing authority as an allegation of fact in the plaint. The second Defendant on the other hand submits that the vehicle logbook was issued by Uganda Revenue Authority. As to whether the second Defendant is not liable for the act of impounding of the logbook, is a matter on the merits of the suit.

Finally the question is whether the issue of whether the plaint discloses a cause of action can be determined on the basis of the plaint alone. Both Counsels referred to the written statement of defence of the second Defendant in their address to court on the issue. Where facts are insufficient or in dispute in the determination of the question of whether the plaint discloses a cause of action or a reasonable cause of action, the court should refrain from handling the matter as a preliminary point of law. Much as it is not pleaded that it is the fault of the second Defendant that there was a fake or allegedly fake log book, the issue remains as to who is liable for the loss of business of the Plaintiff on account of the alleged fake logbook first registered in the names of the second Defendant.

In the case of **NAS Airport Services Limited v The Attorney-General of Kenya [1959] 1 EA 53** (CAN) the Court of Appeal at Nairobi held that where facts are in dispute a preliminary objection should not be upheld until the dispute is resolved. Windham JJA who delivered the judgment of said at pages 58 – 59 as far as an equivalent of order 6 rule 29 of the Civil Procedure Rules is concerned:

“Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not

one which will not arise if some fact or facts in issue should be proved; for in such a case the short-cut, as is so often the way with short-cuts, would prove longer in the end. ... It is very rarely that the facts are so clearly and definitely stated in pleadings (in this case supplemented by the clear and precise language of a document in writing-namely, the contract between the parties) that the court can say that it has all the necessary facts before it and can therefore decide the case, without hearing any witnesses or any more about it, on the pleadings and certain admitted documents."

Unless the facts are so clear as to require no evidence and which facts must be sufficiently pleaded in the plaint, is when order 7 rules 11 can be invoked. In this case, the question of whether the plaint discloses a cause of action is partially determined on a point of law i.e. on the doctrine of whether a party who is not privy to a contract can sue upon it or be sued upon it. Additionally, the Plaintiff and the second Defendant filed a joint scheduling memorandum in which they agreed on certain facts. The scheduling memorandum is dated 24th of April 2012 in which the following facts are agreed:

Agreed facts for the Plaintiff:

- a. By a sale agreement made on 7 January 2009, the Plaintiff bought from the first Defendant motor vehicle registration number UAL 740 L Tipper/Truck Dumper at Uganda shillings 17,500,000/= fully paid and took possession of the said vehicle.
- b. That prior to the Plaintiff buying the said motor vehicle, it had initially been sold by the second Defendant to the first Defendant who had taken possession only and the logbook remained with the second Defendant waiting payment of the balance.
- c. That upon taking possession of the said vehicle, the Plaintiff used it for transportation of goods for gain.
- d. That upon the Plaintiff submitting the registration book for transfer, Uganda Revenue Authority declared that the logbook was fake and cancelled it and punched a hole in it. That the Plaintiff notified the first Defendant and ordered the matter Kiira road police

- e. That when the third-party insurance expired on the 4th of May 2010 the Plaintiff was unable to renew it without the logbook in his name. That as a result of the traffic woollies stopped the vehicle from further operations on roads and it was packed at Kitgum Central Police Station.
- f. That as a result of non-use of the said motor vehicle, the Plaintiff has been subjected to psychological torture, inconvenience and loss of viable business opportunities for which the Plaintiff prays for general damages and he has incurred costs.

For the second Defendant in the following facts are agreed:

- a. That the second Defendant imported a white Isuzu Elf dump truck, engine number 4BE1 – 166840, Chassis No. NKR588E - 7182577 (hereinafter the mode of vehicle) into Uganda vide export certificate dated 14th of February 2008, Bill of lading No. GNL/NMBA – 803 – 143 dated 27th of March 2008.
- b. That the Defendant gave its clearing agent, Penny International all their import documents for purposes of registering the motor vehicle in Uganda.
- c. That Penny International secured an assessment number 818 2877 dated 16th of December 2008 for purposes of paying the requisite taxes and registration fees to the tune of Uganda shillings 4,154,101/=.
- d. That the second Defendant duly paid Uganda shillings 4,154,101/= at Stanbic bank, and the third-party (URA) issued a release order with all particulars, dated 16th of December 2008.
- e. That upon presentation of the release order the third-party (URA), the third party (URA) registered motor vehicle as UAL 740L one issued a logbook number 521038 in the second Defendant's names.
- f. That the second Defendant further paid Uganda shillings 613,650/= to Kampala Modernity Ltd being storage charges for the motor vehicle since its importation into Uganda until the release from the bond.
- g. That the second Defendant wrote to the third-party (Uganda Revenue Authority), on 22 December 2010 requesting to the issue a new logbook after receiving complaints from the first Defendant that it's logbook was

destroyed by officers of the third-party (Uganda Revenue Authority) on grounds that it was fake or forged.

- h. That the second Defendant agreed to the fact that it sold the said motor vehicle by the first Defendant, handed over duly signed transfer forms, the logbook, and the first Defendant possession of the motor vehicle thereof.

The question for the court to determine is on whom to blame the impounding of the logbook. The second Defendant avers that the obtaining of the logbook was left to its clearing agent. It has not yet been determined whether the logbook was fake or not. This requires evidence and should not be determined on the basis that the plaint discloses no cause of action or a reasonable cause of action against the second Defendant. Last but not least the second Defendant took out third party proceedings against Uganda Revenue Authority on the ground that it was the one which issued a logbook. This issue substantially remains pending for determination by this court. For the reasons stated above, the objection of the second Defendant cannot be determined preliminarily but is stayed pending resolution as an issue after evidence is adduced. Costs of the objection shall abide the outcome of the main suit.

Ruling delivered in open court this 25th day of May 2012.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Serunjogi Nasa for the first defendant,

Plaintiff in court,

Hon. Mr. Justice Christopher Madrama

25th May 2012