

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

**HCT-OO-CC-CS 432/2012**

**ABDULRAHMAN ELAMIN .....PLAINTIFF**

**VERSUS**

**DHABI GROUP & 2 OTHERS.....DEFENDANT**

**BEFORE: HON. JUSTICE WILSON MASALU-MUSENE**

**RULING**

The plaintiff, Abdul Rahaman Elamin filed the present suit, Commercial Division Civil suit No. 432 of 2012 against three Defendants, namely Dhabi Group, Warid Telecom Uganda LTD and Warid Uganda Holdings LTD.

According to paragraph 2 of the plaint, the 1<sup>st</sup> Defendant, Dhabi group is a United Arab Emirates based conglomerate with diversified business interests and is the holding company of the second and third Defendants.

Paragraph three of the plaint describes the 2<sup>nd</sup> defendant as a limited liability company incorporated in the Republic of Uganda, and a subsidiary of the 1<sup>st</sup> defendant. The third defendant is described as a share holder in the second Defendant Company. And according to paragraph (5), the plaintiff filed the suit for inter-alia, general damages for breach of contract and interest the on.

The plaintiff was represented by Mr. Edgar Tabaro of M/S Karuhanga, Tabaro & Associates, while the defendants were represented by Mr. Sim Katende and Mr. John Bosco Mude of M/S Katende Ssempebwa & CO advocates.

In their written statement of defence under paragraph 3, it is stated that the defendants shall at the trial raise a preliminary objection to the effect that the plaintiff's suit is bad in law, misconceived, prolix, frivolous, vexatious, and is contrary to public policy, an abuse of court process and does not disclose a cause of action and that the suit should be dismissed and /or

struck out with costs. And indeed on the date before a scheduling memorandum could be settled, both Mr. John Bosco Mude and Mr. Sim Katende raised a preliminary objection that no cause of action was disclosed against all the defendants. They cited the re-known authority of **Autogarage Another Vs Motokov (No.3)(1971) E.A.314** where three essential elements are needed to support a cause of action. These are that the plaintiff enjoyed a right, secondly that the right has been violated, and that the defendant is liable. They urged that according to **0.7 r.11 of the civil procedure rules**, the defendant interests and reliability should be shown in the plaint, and that specifically under **O.7 rule 11 A**, the plaint shall be rejected where it does not disclose a cause of action.

Starting with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, they submitted that to justify the plaintiff rights to demand from the Defendant, reference has to be made to the legal violation committed. That it is not enough to state that a set of events occurred that entitled the plaintiff to a relief, but that the violations have to be set out as facts that give a person a legal right to seek judicial redress against another. And that such facts have to be contained in the pleadings in a law suit.

It was further submitted that all elements of each cause of action must be detailed in the complaint supported by relevant facts. It was further submitted that under paragraph 6( c) of the plaint, the plaintiff states that he was notified by way of electronic mail from the 1<sup>st</sup> Defendant of the under taking to a lot 3% share holding in Warid Telecom Uganda Limited, valued US\$ 1,500,000 (one million five hundred thousand United States dollars). And that under paragraph 6 (d) the plaintiff alleges that the Defendants have refused and / or neglected to make good the under taking under para 6 (c).

Counsel for the Defendants urged that where as it was clear that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were separate and distinct legal entities to act on their own, that it was not stated in the plaint that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants ever made any undertaking or promise or entered into any contract with the plaintiff as alleged in paragraph 6 (c). Reference was made to the case of **Attorney General Vs Olwoch 1972 E. A. 392** where it was held that the questions as to whether a plaint discloses a cause of action is determined upon perusal of the plaint and attachment there to with the assumption that the facts pleaded or implied are true.

They added that the present plaint therefore discloses no cause of action against 2<sup>nd</sup> and 3<sup>rd</sup> defendants in respect of the plaintiff's claim. The advocates for the defendant also submitted that as against the 1<sup>st</sup> Defendant who is referred to as a holding company in the plaint that in fact the 1<sup>st</sup> Defendant was a non existing legal entity and therefore no cause of action can be brought against it. Mr Sim Katende added that even if the court was to hear the case, it would pass a ruling against a non existing party and that such matters cannot be cured by Amendment. The other ground is that where there is a disclosed principal, then the suit cannot be filed against the agent, in this case the 1<sup>st</sup> Defendant.

In reply Mr Edgar Tabaro for the plaintiff's contention was that the matters raised in the preliminary objection were matters of evidence to be proved through trial and witnesses. And his prayer was that as to whether or not there is a cause of action should be treated as a trial issue under **O. 15 r. 2 and 3** of the Civil Procedure rules. He also made reference to **O. 6 rules 27 and 28** of the Civil Procedure rules, urging that the matter of principal and disclosed agent was not a matter of law but of fact to be proved by evidence.

Mr. Edgar Tabaro further added that any defect or commission can be put right by an amendment citing **O. 6 rules 11, 12, 17 and 19** of the Civil procedure rules which he added do away with Technicalities of Form. He cited the case of **Kitgum District Administration Vs Print Supplied Ltd Civil Appeal No 44 of 1988**, where the court of Appeal held that under O. 1 r. 12 (2) of the Civil Procedure rules, that names of Kitgum District Administration be struck out and replaced or substituted by Kitgum District Resistance Council. Mr Edgar Tabaro cited **O. 49** of the Civil Procedure rules that no suit shall be defeated by reason of a misjoinder, and that the plaint in totality discloses a cause of action.

This Court has carefully considered the submissions by both sides on the preliminary objection that the plaint discloses no cause of action against the Defendants. I find that the basis of the plaintiff's case is paragraph 6 of the plaint, particularly, 6 (b) (c), (d), (e) and paragraph 7. The same will be reproduced in this ruling as I proceed. And I shall start with the preliminary objection as far as 2<sup>nd</sup> and 3<sup>rd</sup> Defendant are concerned. Under paragraph (6) c, it states:-

**“C. That on or about the 22<sup>nd</sup> November 2007, the plaintiff was notified by way of electronic mail from the first Defendant of the undertaking to allot 3% share holding in Warid Telecom Uganda Limited then valued at United States \$1,500,000 (one million five hundred thousand United States Dollars) a copy of the said e-mail is here attached and marked as “C”**

And then paragraph 6 (d) provides:-

**“d. that in total breach of the foregoing the Defendants have refused neglected and /or failed to make good the under taking”**

So as far as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are concerned, this court finds and hold that the two are distinct legal personalities as stated under paragraphs (3) and (4) of the plaint. And whereas the undertaking to a lot 3% share worth US\$ 1,500,000 was between the plaintiff and the 1<sup>st</sup> Defendant, where does the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant come in as a party to that under taking which the plaintiff alleges under 6 (d) that in total breach of the foregoing, that defendants have refused to make good the undertaking?

In the case of **Wakiso Cargo Transporters Co Ltd. Vs Wakiso District Local Government Council and Attorney General, Commercial Division HCT-00-CC-CS-0070-2004 Before the**

**Honourable Justice Egonda Ntende** as he then was, the plaintiff entered into an agreement with the 1<sup>st</sup> Defendant on 3.9.2003 to manage Kasenyi landing site. During the currency of the agreement the plaintiff would pay to the 1<sup>st</sup> Defendant, Wakiso District Local government Ushs 500,000/= per month. The agreement was terminated by the 1<sup>st</sup> Defendant without Notice on Colour of right abruptly. The plaintiff filed an action seeking special damages of Shs200,000,000/= general damages and exemplary damages against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant (Attorney General).

Mr Mwaka for the Attorney General submitted that there was no privity of contract between the plaintiff and 2<sup>nd</sup> Defendant, and that the contract was between the plaintiff and 1<sup>st</sup> defendant who has a corporate personality with the authority to sue and to be sued, and that it was independent of the 2<sup>nd</sup> Defendant. Honourable Justice Egonda- Ntende agreed with the submissions of Mr. Mwaka for 2<sup>nd</sup> Defendant that no cause of action had been disclosed against the 2<sup>nd</sup> Defendant. He added that if a party is not a party to a contract, such person cannot be responsible under the contract for any breach of the contract. Quoting the earlier case of **Kayanja Vs New India Assurance Company Ltd (1968) E.A. 295** Justice Egonda –Ntende concluded that a person who is not a party to a contract save for certain exceptions, cannot sue or be sued for breach of contract.

In the present case, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not privy to the contract under 6 (c) of the plaint, and as counsel for the plaintiff has not shown or demonstrated any exceptions in the plaint, I find and hold that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cannot be sued for the alleged breach of contract under **paragraph 6 (d)**.

I therefore entirely agree with the submissions by the Advocates for the Defendants that it is not enough to state that a set of events occurred that entitled that plaintiff to a relief. The violations have to be set out as facts that give a person a legal right to seek Judicial redress against another. And such facts had to be contained in a pleading in a law suit. I find that no such facts have been stated as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the present plaint before this court. And indeed that was the position taken by My learned brother Judge Stephen Musota in **HCT-00-CV-Orishaba and 2 others Vs Global Trust Bank (U) Ltd**.

Learned counsel for the plaintiff submitted that any defect or omission can be put right by an amendment. He cited O. 6 rules 11, 12, and 17 of the Civil Procedure rules in support of his submissions. However and with respect, I find that and hold that the provisions cited are not applicable in this case O. 6 r. 11 of the Civil Procedure rules talks about **Denial of Contract**. In the present case, the court has found that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants **were not privy to the contract** under paragraph 6 (c) of the plaint. O. 6 r. 17 of the Civil Procedure rules provides that no Technical Objection shall be raised to any pleadings on the ground of alleged want of form. Unfortunately, that is not the Nature of Objection in the present case. So the Civil Procedure

rules referred to by Counsel for the plaintiff are irrelevant to the circumstances of the present case.

Counsel for the plaintiff further laboured to quote the case of **Tororo Cement Co Ltd. Vs Frokina International Ltd Supreme Court Civil Appeal No. 2 of 2002**, to support his case.

He particularly relied on Judgment of Oder, JSC (now dead) on page 3 where his Lordship reiterating the guidelines stated by the then **Court of Appeal for East Africa in Auto Garage Vs Motokov No 3**, ( already referred to) notably that;

- (i) The plaint must show that the plaintiff enjoyed a right;
- (ii) That right has been violated and;
- (iii) That the defendant is liable.

His Lordship then added:-

**“if all three elements are present, then a cause of action is disclosed and any defect or omission can be put right by amendment.”**

Unfortunately for counsel for the plaintiff in the present case, not all the three elements pointed out by the late Justice Order JSC are present as far as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are concerned, because they were not privy to the contract. The third element is missing, hence no cause of action.

I now turn to the preliminary objection as regards to the 1<sup>st</sup> Defendant, Dhaba group. Mr. Sim Katende referred this court to the first paragraph of the attached copy of e-mail to paragraph 6 (c) of the plaint. He submitted that in the e-mail the 1<sup>st</sup> Defendant disclosed a principal, **Warid Telecom International LLC**, on whose behalf he was acting. And that since the 1<sup>st</sup> Defendant had disclosed a principal, the 1<sup>st</sup> Defendant was an agent and it should have been the principal to the sued. Mr. Sim Katende quoted the case of **Phenehas Agaba Vs Swift Freight International Ltd, HCCS No 1403- 2004** to support his submissions. The other contention with regard to the 1<sup>st</sup> Defendant was that the 1<sup>st</sup> Defendant does not exist. And that any ruling or Judgment against him or her would be futile.

Mr Edgar Tabaro for the plaintiff’s submissions relied on the case **Lt Kabarebe Vs Col. Nalweyiso Court of Appeal Civil Appeal No 43 of 2003**. And O. 6 r 28 of the Civil Procedure rules. The contention was that such a matter raised with regard to the 1<sup>st</sup> defendant could be treated as an issue after the hearing of the case. And that the trial court should have been given an opportunity to adduce evidence on whether or not the 1<sup>st</sup> Defendant was suing as agent of a disclosed principal. He emphasised that it is not a matter of law but of fact which calls for evidence.

Again, I have carefully considered all the relevant submissions on the 2<sup>nd</sup> leg of the preliminary objection concerning the 1<sup>st</sup> Defendant. I have also read and internalised the judgment of **Justice Arach Amoko**, as she then was in **HCCS No 143/2000 Phenehas Agaba Vs Swift Freight International Ltd**. It was held that where an agent, makes a contract on behalf of the Principal, the contract is that of the principal, not that of the agent, and Prima Facie at Common Law the only person who can sue or be sued is the principal. And the suit in that case was found to be unsustainable against the defendant who was a mere agent of a disclosed principal. I agree with and adopt the judgment in the Phenehas Agaba case and hold that the same applies to the circumstance of the present case. The 1<sup>st</sup> Defendant Dhabi Group was acting on behalf of **Warid Telecom International LLC**. When he offered a beneficial interest of 3% shares to the plaintiff. The 1<sup>st</sup> Defendant was indeed an agent of **Ward Telecom International LLC**. And it should have been the disclosed Principal, **Warid Telecom International LLC** to be sued. The suit as it stands therefore discloses no cause of action against the 1<sup>st</sup> Defendant, Dhabi group.

As far as the submissions by counsel for the plaintiff that these are matters of Evidence I am unable to agree with learned counsel. This is because in deciding whether or not a suit discloses a cause of action one looks ordinarily, only at the plaint and assumes that the facts alleged in it are true. The relevant authorities on this point are **Jaraj sheriff & Co Vs Chatai Fancy Stores (1960) E.A. 374, and Attorney General Vs Olwoch (1972) E. A. 392**.

In the case of **Attorney General Vs Olwoch**, the Respondent had sued the Attorney General as a result of Execution of a warrant issued by a magistrate's court to a police officer. It was held that the Attorney General could not be sued under vicarious liability for the actions of the magistrate and Police Officers under the Government proceedings Act. Magistrates like any other judicial officers enjoy judicial immunity. In that case, Mr. Othieno, Counsel of the Respondent Olwoch submitted that the evidence at the trial might disclose lack of good faith and that the plaint was sufficient to allow the introduction of such evidence. These were similar arguments advanced by Mr. Edgar Tabaro, Counsel for plaintiff. However, such arguments that details will come out in the evidence were rejected by the court of **Appeal for East Africa in the Attorney General Vs Olwoch case**

I similarly reject them as not being applicable. In any case O. 6 r 28 of the Civil Procedure rules relied on by Counsel for the plaintiff gives this court the discretion to dispose off a preliminary point of law either after the hearing (when it is treated as an issue) or before the hearing. This court has chosen to dispose of the preliminary objection before the hearing.

Lastly, the submissions by counsels for the Defendants in addition to principal/agent principal were that the 1<sup>st</sup> Defendant was non-existent and that a case should not proceed against a non-existing party.

In the plaint the 1<sup>st</sup> Defendant is described as a United Arab Emirates based conglomerate with diversified business interests. Although this court enjoys unlimited territorial jurisdiction in the

Republic of Uganda, the same does not extend to Dhabi Group, a limited Arab based conglomerate. It is outside the territorial jurisdiction of this court and it has not been stated what as a holding company for the second and third defendant mean. It is not registered under the laws of Uganda and so it will indeed be difficult to find in the event of the case being decided against it. And I cannot buy the argument of Amendment or misjoinder of parties submitted by counsel for the plaintiff because there cannot be a misjoinder or a non-existing party under O. 49 of the Civil Procedure rules referred to by Counsel for plaintiff. .

In the case of **Benjamin Ssajjabi T/A Namataba Vs Timber Manufactures Ltd (1978) HCB 202**, it was held that a non-existent person cannot be sued. And that no amendment could be effected under O. 1 r. 10 of the Civil Procedure rules because it is only applicable where the defendant wrongly sued has a legal existence and a question arises of suing a wrong party who may be substituted by the right one. It was concluded that O.1 r.10 of the Civil Procedure rules does not apply where a party with no legal existence is sued. That is exactly the case with the 1<sup>st</sup> Defendant, Dhabi group whose address in Uganda has not been given and whose legal status is not known or stated at all.

In the premises, and in view of what I have outlined, I uphold the preliminary objection raised by counsel of the Defendant that the suit is misconceived and bad in law and does not disclose a cause of action against all the Defendants. The same is hereby dismissed and / or rejected under O.7 r.11 of the Civil Procedure rules. I also award costs to the Defendants.

Judge

PRESENT:

Edgar Tabaro for the plaintiff

John Bosco Mudde for Defendant

Ojambo Court Clerk

Justice W. M. Musene

**High Court Judge**

**4/6/2013**