

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
MISCELLANEOUS CAUSE NO. 17 OF 2012

**UGANDA SOUTH SUDAN GRAIN TRADERS
AND SUPPIERS ASSOCIATION LIMTTED:.....:APPLICANT**

VERSUS

**THE GOVERNMENT OF THE
REPUBLIC OF SOUTH SUDAN:.....:RESPONDENT**

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

This application was brought under Article 50(1) and (2) of the Constitution, Judicature (Fundamental Rights and Freedoms) Enforcement Procedure Rules 1992, Order 52 rules 1 and 2 of the Civil Procedure Rules, Section 15 of the Civil Procedure Act and Section 65 of the Contracts Act 2010 seeking for:

1. A declaration that the respondent's refusal to execute and or perform its commitments under the Memorandum of Understanding (MOU) between the respondent and the Government of the Republic of Uganda (GOU) (dated 21st November 2010), for the benefit of the applicant, is unlawful and an infringement of the applicant's right to property under Article 26 of the Constitution of the Republic of Uganda.
2. An order that the respondent doth execute and or perform its commitments under the said MOU.
3. The respondent pays the costs of this application.

The grounds of the application are stated in the notice of motion and the affidavit in support deposed by Apollo Ngyemagahe, the applicant's treasurer. The gist of the grounds is first, that the GOU engaged the Government of South Sudan (hereinafter referred to as the respondent) on behalf and for the benefit of the applicant in order that the applicant's claims are duly settled. Secondly, that on the 21st November 2010 the respondent entered into a MOU with the GOU wherein the respondent made commitments to settle all the applicant's claims by 21st June 2011.

Thirdly, that the MOU expressly conferred a benefit unto the applicant as third party and the applicant is entitled to enforce the respondent's commitments under the MOU. Fourthly, that the respondent in breach of its commitments under the said MOU neglected or failed and/or refused to settle all the applicant's claims. Lastly, that the respondent has continuously deprived the applicant and/or its members of and denied them access to their financial assets and/or resources in contravention of their right to property under Article 26 of the Constitution of the Republic of Uganda.

The background to this application as stated by the applicant is that the applicant is a company limited by guarantee. It is constituted by Ugandan grain traders and suppliers who formed the body as, inter alia, a common medium of speaking in one consolidated voice, in protecting and pursuing their interests in debts owed to them by the respondent. The applicant was assigned the right to protect, pursue and secure or recover the debt interests of its members by engaging both the respondent and the GOU. The applicant petitioned the GOU which, through its relevant Ministries, caused a verification and confirmation of the claims.

Subsequently the GOU engaged the respondent and a MOU was signed between the two countries wherein the respondent agreed to settle the debt claims which are the subject of this application. It is alleged that the respondent has since reneged on its commitments to pay the monies to the applicant and hence this application.

When this application came up for hearing, the applicant was represented by Mr. Brian Kabayiza. He informed court that they had served a copy of the motion on

the respondent's Embassy in Uganda. However, there was no appearance for the respondent. Court declined to order that the matter proceeds ex parte as prayed by counsel and directed fresh service to be effected. The matter was adjourned to enable service to be done as directed. No appearance was made by the respondent on the adjourned date despite service being made on its Embassy as per the affidavit of service on court record.

Counsel for the applicant was allowed to file written submissions and directed to serve a copy on the respondent. Upon proof that a copy of the written submissions was served on the respondent's Embassy the matter was fixed for ruling. As at the time of preparing this ruling there was no reply from the respondent.

In his written submissions, counsel for the applicant raised five issues for the determination of this court. These are:

1. Whether the applicant has locus standi to sue on the MOU in question.
2. Whether the respondent enjoys any immunity from such judicial proceedings as are instituted by this application.
3. Whether this Honorable court has appropriate jurisdiction to entertain and determine this matter.
4. Whether the Attorney General of Uganda should have been joined in this matter.
5. Whether the applicant is entitled to the remedies sought.

As regards the 1st issue, counsel for the applicant submitted that the MOU between the respondent and the GOU, annexure "A", expressly conferred a benefit to Ugandan creditor companies with claims against the respondent. Relying on annexure C, it was the submission of counsel for the applicant that the creditor companies formed the applicant association with a principle objective of protecting the rights of association's member companies, by all legal means including commencing proceedings such as the instant one. He argued that their rights were in effect assigned to the applicant company for collective or coherent and more effective enforcement.

It was further submitted that the applicant has a right under section 65(1) (b) of the Contracts Act 2010 to sue as a third party to the MOU in question in enforcement

of the benefit conferred upon it or its member companies by parties to the MOU which is the payment of the sums specified and acknowledged as owing from the respondent and set out in the Addendum to the MOU.

In addition it was submitted that the exception in section 65(2) of the Contracts Act 2010 does not apply in the instant case because the benefit was conferred to the claiming companies. According to the applicant's counsel the second reason for the exception not to apply to the applicant is that it is a well settled principle that a third party can sue to enforce a term of the contract to which he or she is not a party.

For that position of the law counsel for the applicant cited **Harlsbury's Laws of England 3rd Edition Vol. 8** which makes reference to the case of **Drive Yourself Hire v Strutt (1952) 2 All ER 1475 at 1483** where Lord Denning L.J stated;

“Where an Act of Parliament provides for a third party to sue as a beneficiary to a contract, then the general rule of strangers to contract will not apply”

It was also argued in the alternative but without prejudice that a third party can sue where a contract is entered into by an agent on behalf of a disclosed principal. According to counsel for the applicant the GOU was acting as an agent of the applicant's member companies being the principal and thus can sue on the MOU even when it was not party to the contract.

The other alternative argument made by counsel for the applicant was that the effect of the principle of *cestui que trust* is that a beneficiary to a contract who is clearly intended by the parties to the contract as such can legally sue to enforce his or her intended benefit as provided in the contract, even when he/she is not a party thereto. See the case of **Gandy v Gandy (1885) 30 Ch. D 57** as per Cotton L.J.

I have carefully considered the grounds of this application and the elaborate submissions of counsel for the applicant. Indeed the parties to the MOU acknowledged that the amount claimed by the Uganda Grain Traders was about US \$ 56,431,987/=. The respondent accepted to settle that amount to the Uganda Grain

Traders listed in annex 1 after the process of verification. The Uganda Grain Traders listed in annex 1 are members of the applicant company apart from African General Stores. It is on that basis that the applicants have brought this application.

I do agree with the submission of counsel that the beneficiary of an agreement who is clearly intended by the parties to the contract as such can legally sue to enforce his or her intended benefit as provided in the contract, even when he/she is not a party. However, I do have reservations about the nature of the agreement the parties to the MOU entered into. Much as it was for the benefit of the applicant's members I do not think it was intended that the applicant would go behind the GOU to enforce it in a court of law. This is because the MOU was a mutual understanding between two sovereign states. This view is strengthened by clauses 6 and 7 of the MOU which states:-

Clause 6:-

“In the event of any dispute that might arise and which is related to this Memorandum of Understanding, the aggrieved party shall give a written notice to the other identifying the causes of the dispute.”

Clause 7:-

“Within thirty (30) days of the notice of a dispute, the parties to the Memorandum of Understanding shall attempt in good faith to settle such disputes through their representatives with the appropriate decision making authority of the two governments.”

The MOU provided for a dispute resolution mechanism as the parties might have envisaged a situation like the current one. What is not clear is whether that avenue was explored and the parties failed to agree. The applicant has not adduced any evidence to that effect. It is the considered view of this court that since the MOU was signed between the two governments it would be most appropriate for the applicant to pursue its members' claims through the GOU that represented their interest using the dispute resolution process stipulated under the MOU.

In the circumstances, the applicant has no locus standi under the MOU to bring this application to seek redress from this court because of the parties involved and their intention which is explicit in the MOU itself. This answers the first issue in the negative and disposes of this application without need to consider the other issues.

Be that as it may just to mention in passing, as regards the 2nd issue this court agrees with the submission of counsel for the applicant that pursuant to the restrictive principle of sovereign immunity, where a sovereign state descends into the market place and carries out, conducts or indulges in commercial transactions, a suit can legally be brought against such a state in domestic courts of another state in relation to such commercial transactions. See the definition of restrictive principle of sovereign immunity in **Black's Law Dictionary 7th Edition at page 1316** and the dictum of Lord Denning in the case of **Rahimtoola v H.E.H The Nazim of Hyderabad & Others [1957] All ER 441** which was referred to by the Tanzanian Court of Appeal in the case of **East African Development Bank v Blueline Enterprises Limited Civil Appeal No. 110 of 2009 [2011] TZCA 1**.

In the instant case the dispute between the parties arises from the supply of grain to the respondent's various departments for consideration and as such is a commercial transaction. In the circumstances, under the restrictive principle of sovereign immunity the respondent would not be immune from being sued upon commercial transaction as it is not part of its public functions save for my findings above on the 1st issue.

On the 3rd issue I also agree with the submission of counsel for the applicant that this court has jurisdiction to entertain and determine this application owing to section 15 (c), explanation No. 3 (b) and (c) of the Civil Procedure Act which provides that in suits arising from breach of contract, the cause of action arises within the meaning of this section at the place where the contract was to be performed or its performance completed or the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. This is because under the MOU the parties intended the contract sum to be paid in a special account in the Bank of Uganda.

On the 4th issue, this court is of the considered view that since members of the applicant company had in the first place opted to pursue their claim through the GOU, it could only sue under the MOU through the Attorney General as the chief legal representative of the GOU. Otherwise if it prefers to sue the respondent directly then it can only do so on the basis of the respective contracts between its members and the respondent but not on the MOU.

Finally on remedies, counsel for the applicant submitted that an agreement such as appears in the present MOU in relation to acknowledged or admitted liability as in the instant case, is analogous to and has the same force and confers equally enforceable proprietary rights or benefit under Article 26 of the Constitution.

The applicant relied on the case of **Goodman Agencies Ltd v Attorney General and Another Constitutional Petition No. 3 of 2008** wherein the Constitutional Court referred to the case of **Edward Fredrick Ssempebwa v Attorney General Constitutional Petition No. 1 of 1986** and held that the benefits of a judgment is property and an act to deprive a person of it if without compensation is unconstitutional.

It is my firm view that the above case is distinguishable from the instant one. The applicant has not obtained any judgment whose benefit they are being deprived of without compensation unlike in the above case where the petitioner had obtained a consent judgment but had failed to access the court file to pursue the benefit of the judgment. I do not agree with the argument that a MOU is analogous to and has the same force and confers equally enforceable right as a judgment.

On the contrary, a MOU is ordinarily an agreement whose breach by either party entitles the aggrieved party to bring an action for special and general damages. It is only upon obtaining a judgment in its favour that the successful party would be entitled to enforce its rights under article 50 of the Constitution as conferred by that judgment. The applicant has opted for a short cut by bringing this application under article 50 of the Constitution which in my view is misconceived. Consequently, I find that the applicant is not entitled to any remedies and decline to grant the orders sought.

In the result, this application is dismissed with no order as to costs since it proceeded ex parte.

I so order.

Dated this 28th day of March 2013.

Hellen Obura

JUDGE

Ruling delivered in chambers at 3.00pm in the presence of Mr. Brian Kabayiza for the applicant.

JUDGE

28/03/13