

**THE REPUBLIC OF UGANDA**

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

**ORIGINATING SUMMONS NO. 12 OF 2013**

**LUBMARKS INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL AND  
THE COMMISSIONER GENERAL URA .....DEFENDANTS**

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

**JUDGMENT**

The Plaintiff Company brought this suit against the two Defendants by way of Originating Summons, claiming to be an interested party in two contracts executed between the Company and the Government, through the Ministry of Local Government and the Ministry of Agriculture, Animal Industry and Fisheries respectively.

Both contracts provided for payment of the contract price exclusive of VAT, which was indicated to be independent of the contract price.

It is the contention of the Plaintiff that the VAT in both cases was to be paid by the respective Ministries as per the terms of contracts.

The first contract with the Ministry of Local Government was worth shs. 297,869,880/- with VAT calculated to be shs. 53,583,504/-. The additional works were worth shs. 255,410,100/- with VAT totaling shs. 45,973,813/-

The second contract with the Ministry of Agriculture, Animal industry and Fisheries was worth shs. 265,039,035/- excluding value added tax (VAT) of shs. 40,429,683/-.

Upon execution of the contracts, the First Defendant failed to remit the VAT payments to the Second Defendant. As a result the Second Defendant demanded VAT from the Plaintiff and has closed the Plaintiff's premises on a number of occasions, confiscated and advertised the Plaintiff's properties and that of its directors for failure to remit the VAT, interest and penalties.

As a result of the Second Defendant's said above action, the Plaintiff claim to have suffered loss and great inconvenience.

The Plaintiff accordingly filed this suit seeking determination of the following issue to wit.

Whether or not the First Defendant is entitled to pay the Plaintiff VAT in respect of the two contracts, for remission to the URA (Second Defendant).

The following reliefs were also prayed for:-

- a) An order directing the First Defendant to remit VAT together with interest and penalties to the Plaintiff, for onward transmission to the Second Defendant as per the terms of the contract.
- b) A permanent injunction restraining the Second Defendant from issuing agency notices to the Plaintiff's clients and banking institutions.
- c) An order restraining the Second Defendant from confiscating, advertising and selling the Plaintiff's and its director's properties.
- d) An order restraining the Second Defendant from denying the Plaintiff tax clearance certificates.
- e) General and punitive damages for inconvenience caused to the Plaintiff.
- f) Interest and costs of the suit.

The Originating Summons was supported by the affidavit of Sebyala Moses Kiwanuka.

Both Defendants filed affidavits in reply deponed/affirmed by Sandra Mwesigye and Mbeeta Haruna respectively. They both denied the claims of the Plaintiff. The Plaintiff filed an affidavit in rejoinder.

When the matter was called for hearing on 08.04.14, Counsel for the Defendants failed to appear, although they had consented to the hearing date and hearing notices had been served.

The Plaintiff's Counsel filed written submissions and the defendants were required to do the same. The First Defendant filed submissions together with an additional affidavit, stating that they had not been served with the Plaintiff's submissions. The Second Defendant did not file any submissions.

In the first affidavit in reply of the First Respondent/Defendant, there was a contention that the suit was improperly brought by Originating Summons.

However, Counsel for the Plaintiff/Applicant was of the view that Originating summons was the Proper procedure as the question to be determined was one concerning the construction of the contracts for which the suit arose, and the rights of the person (s) interested.

Counsel relied upon the case of **Testimony Moths Ltd Vs the Commissioner of Customs URA OS. 004/2011** where Justice Madrama cited the case of **Pearl Impex Ltd Vs Attorney General O.S. 3/2011** to conclude that the term " Other Instruments" under 0.37 rule 6 C.P.R construed ejusdem generis includes other private documents.

It was argued that a contract is a private document envisaged under the order and the question set for construction and envisaged under the law.

The purpose of construction is to ascertain the meaning, will or intent of the matter of the contract so that what is provided for may be enforced.

In the present case, the question to be determined is whether or not the First Defendant is entitled to pay the Plaintiff value added tax (VAT) in respect of the two contracts, for remission to URA. The suit court finds, was properly brought under Originating Summons.

To decide as to whether the First Defendant is entitled to pay value added tax to the Plaintiff to pass onto the Second Defendant, the court has to look at the rights and obligations of the parties, created by the contracts in relation to the payment of VAT.

The Plaintiff's Counsel insists that the First Defendant is unable to pay VAT to the Plaintiff, together with interest and penalties, since the two Ministries never remitted it to the Plaintiff.

The Second Defendant asserts that it is the duty of the Plaintiff to collect and remit the VAT in relation to the taxable services rendered by it.

The First Defendant on the other hand contends that, since the two contracts between Plaintiff and First Defendant were VAT exclusive, the VAT liability is the sole responsibility of the First Defendant.

As submitted by Counsel for the First Defendant, the Plaintiff and First Defendant representing the Ministry of Local Government executed a contract for shs. 297,869,880/- - See Annexure A.

The contract clearly provides that the contract figure was exclusive of VAT (18%0 – which amounts to shs. 53,583,504/-.

The Applicant and the Ministry of Agriculture, Animal industries and Fisheries also executed a contract for the construction of a new hostel at the Entebbe Fisheries Institute for the contract sum of Ug. Shs. 265,039,035/- - See Annexure “C” hereof.

While this particular contract stipulated in paragraph 2 that the VAT was inclusive, it is clear that VAT was not included in the total bid price. VAT was calculated separately at 18% and it amounted to a figure of shs. 40,429,683/-

It is therefore apparent from the contracts that the parties agreed that the price payable for the services would exclude VAT, although it was calculated.

However, S.4 (a) of the Value Added Tax (VAT) Act imposes tax on every taxable supply in Uganda by a taxable person. And in the present case, the Plaintiff was a taxable person under S.6 of the VAT Act. And the supply of goods and services was taxable supply under S.18 D) the VAT Act.

Under S.5 of the VAT Act – the tax payable (a) in the case of a taxable supply is to be paid by the taxable person making the supply. That would mean that it was the Plaintiff who was under obligation to pay the VAT in the present case.

But as already indicated the parties in this case excluded the VAT from the contract price. And contrary to the provisions of the Contract Act, the Plaintiff did not at the time of the supply of goods and services, avail to the First Defendant the original tax invoice for the supply together with the particulars set out in S.2 of the Fourth Schedule to the Act – See S.29 (1) and (8) of the VAT Act.

It has been emphasized by learned writers that “ whenever a taxable persons supply goods and services to another taxable person, he charges the basic costs of the goods and services **plus** the amount of the VAT **thereon**, and **must** give a tax invoice showing the amount of these items”. – See **Revenue Law**

**comprising Income Tax, Capital Gains, Corporation Tax...** including section on VAT – 6<sup>th</sup> Edition Paragraph 39-62 by **Berry Pinson and John Gardiner**.

Decided cases have established that, **“it is the issue of the tax invoice which renders the person issuing it liable to pay tax, and it follows that the vital date is the date of the invoice”**.

- See case of **Customs and Excise Commissioner vs. Wells [1982] IALL ER 920**.

Since the contracts between the parties excluded VAT and no tax invoices were issued by the Plaintiff, I agree with Counsel for the First Respondent that the Tax liability in the case remained the sole responsibility of the First Defendant as far as the two contracts were concerned.

It has also been brought to the notice of the court that, the Ministry of Local Government in line with its contractual obligations wrote to the Second Defendant on 17.03.14 – requesting for information regarding the payment of the outstanding VAT amount for the Plaintiff, due from the Ministry so that appropriate action could be taken – See Annexure A affidavit of Kiyingi Josephine.

As pointed out by Counsel the First Defendant, this is an indicator that First Defendant is willing to settle the outstanding VAT amount. Accordingly, I agree that the VAT need not be remitted to the Plaintiff but to the Second Defendant directly. The Ministry of Local Government acted as a withholding agent of the VAT.

In respect of the second contract between the Plaintiff and the Ministry of Agriculture, there is evidence produced by First Defendant, that the VAT was paid directly to the Second Defendant – See payment voucher Annexure B to the affidavit of Josephine Kiyingi.

For all those reasons, it is the finding of this court that the First Defendant is liable to pay the unpaid VAT directly to the Second Defendant, but not remit it to the Plaintiff. The payment should include interest and penalties accruing to the Second Defendant. An order to that effect will therefore issue.

This brings me to the rest of the remedies sought by the Plaintiff.

- **Permanent injunction:** The First Respondent/Defendant having admitted that they are holding the VAT due on behalf of the Plaintiff, an injunction is

granted restraining the Second Defendant from issuing agency notices to the Plaintiff's clients who were not involved in the contracts and are not part of this suit; and to the Plaintiff's banking institutions concerning the VAT due in this case.

- The Second Defendant is further restrained from confiscating, advertising and selling the Plaintiff's and its director's properties in a bid to recover the VAT due from the First Defendant in the present case.
- Court also grants an order restraining the Second Defendant from denying the Plaintiff tax clearance certificates in respect of this matter, since First Defendant admits that it was not the Plaintiff's obligation to pay the tax. The Plaintiff further sought general and punitive damages for inconvenience suffered.

It is trite law that "general damages are such damages as the law presumes to be the direct or natural or probable consequence of the act complained of: - See **Strams vs. Hutchinson [1905] AC 515**

In this case the affidavit in support of the application indicates that the Plaintiff suffered inconvenience due to the Second Respondents lock up of its business, attaching property and advertising it for sale.

Though the Second Defendant has a right to lock up premises and seal business where tax is not remitted, in the present case, the second affidavit of the First Defendant clearly indicates that it was the Ministries that withheld the tax so that they could pay it directly to the Second Defendant. Therefore failure to remit the tax was not the Plaintiff's fault and Plaintiff ought not to have been inconvenienced for no fault of its own.

Nominal damages of 2,000,000/- granted plus Interest is granted on the sum at court rate from the date of Judgment until payment in full.

The damages to be paid by the Second Defendant.

Half of the fixed costs are also granted to the Plaintiff.

The following orders are made:-

- The VAT still due and owing to the Second Defendant to be remitted directly by the First Defendant together with the penalties and interest accrued.

- An Injunction to issue restraining the Second Defendant from issue agency notices to the Applicant's clients who were not party to the contracts and to the Plaintiff's banking institutions.
- The Second Defendant is further restrained from selling the Plaintiff's and its directors properties since the VAT is to be paid by First Defendant.
- The Plaintiff should not be denied tax clearance certificates in respect of this matter.
- Half of the fixed costs of the suit are granted to the Plaintiff.

**FLAVIA SENOGA ANGLIN**  
**JUDGE**  
**13.06.14**