

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HIGH COURT CIVIL APPEAL NO. 07 OF 2014

VICTORIOUS EDUCATIONAL SERVICES LTD:::::::::: APPELLANT

VERSUS

MEGA CONSULTS LIMITED:::::::::: RESPONDENT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO:

JUDGMENT:

1. Background:

This is an appeal arising from the decision of the learned Chief Magistrate of Mengo which was delivered on the 28th day of October, 2013. The Appellant is dissatisfied with the decision of the learned Chief Magistrate. In the Chief Magistrate's Court the Appellant was sued by the Respondent company that it had breached a consultancy agreement which been executed between the two. In the suit the Respondent had claimed the sum of Uganda Shillings 37,500,000/= and the costs of the suit. It did not pray for interest on the said amount. The lower court granted the prayers of the Respondent. The Appellant was dissatisfied with the court's decision for it denies any liability to the Respondent as it contends that the Respondent did not render to it any services to deserve to be awarded such sums of money as the basis of the consultancy agreement was that the Respondent would help it secure a loan from Uganda

1: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adonyo: March, 2015.

Development Bank but the Respondent did not do so thus the Appellant deemed that it was not duty bound to pay the respondent any more for no services rendered.

The perusal of the lower court records show that the court having received evidence from either party in the matter and proceeded to give judgment in the favour of the Respondent for it awarded the Respondent the sum of Uganda Shs 37,500,000/= together with interest at the rate of 25% per annum from the date of filing the suit which was the 30th day of January 2008 till payment in full in addition to costs of the suit.

The appellant was aggrieved by that decision and thus this appeal.

2. Grounds of the Appeal:

This appeal is premised on six (6) grounds which are set out in the Memorandum of Appeal as follows;

Ground 1: That the learned trial Chief Magistrate erred in law and fact; when he selectively evaluated the evidence on record, thus arriving at a wrong conclusion.

Ground 2: That the learned trial chief magistrate erred in law and fact; when he held that there was a valid and enforceable consultancy agreement between the parties.

Ground 3: That the learned trial chief magistrate erred in law and fact when he held that the defendant/appellant breached the terms and conditions of the consultancy/brokerage.

Ground 4: That the trial Chief Magistrate erred in law ad fact; when he held that the plaintiff/respondent had provided consultancy services to the defendant, upon which the defendant obtained a loan from Uganda Development Bank.

2: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

Ground 5: The learned trial Chief Magistrate erred in law and fact when he held that the plaintiff/respondent was entitled a commission of 5% under the brokerage/consultancy agreement.

Ground 6: The learned trial chief magistrate erred in law and fact when he granted the plaintiff/respondent special damages totaling to Shs 37,500,000/= and exorbitant interest thereon at a rate of 25% per annum from the date of filing of the suit.

3. Duty of this Honourable Court:

As the first appellate court, the duty of this court is now well settled in that this court could subject the entire evidence received in the lower court to a fresh and exhaustive scrutiny and come to its own conclusion and it is under no obligation to agree with the decision trial court if it finds that the evidence on record presumes otherwise as was pointed out in holding in the case of **Rev. Richard Mutazindwa v J.B. Agaba & 3 others CACA No. 40 of 2012.**

The other cardinal principle which guides this court as the first appellate court is that since this matter is coming on appeal for the first time the parties are entitled to obtain from this court decisions on each issue of fact as well as of law since this court is entitled to weigh any conflicting evidence and draw own appropriate inference and conclusion to each of the issue of fact and law proposed in the lower court and as was directed by the Supreme Court through the decision of Gaudino Okello Ag JSC in the case of **Margret Kato & Joel Kato v Nulu Naluwoga SCCA No 03 of 2013** when it cited with approval the decision in the English case of **Coughlan v Cumberland [1898] 1 Ch. 704.** The Supreme Court held and I quote;

“...even where as is in this case the appeal turns on a question of fact the Court of Appeal (as a first appellate Court) has to bear in mind that its duty is to rehear of the case and the

3: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

court must reconsider the material before the judge with such other materials as it may have decided to admit. The court must make up its mind not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...”.

This court being a first appellate court is bound to follow that pronouncement of the Supreme Court since that court is the highest superior court of record in Uganda and for avoidance of doubt, I must state here that in resolving the instant appeal I have taken into account all the material evidence received in the lower court which included documentary exhibits and all properly admitted oral evidence as was the position in the case of **William Alfred Ksembo & Another v Kiiza Rwakaikara Ivan HCCA No. 7 of 2013**.

4. Consideration of this Appeal:

The grounds of appeal are resolved in the manner they were argued as follows;

a. Ground 1:

That the learned trial Chief Magistrate erred in law and fact when he selectively evaluated the evidence on record, thus arriving at a wrong conclusion:

In respect to this ground, it is the appellant argument that it is trite law that a decision of a court of law ought to be based on the law and evidence properly adduced before the court as was pronounced by the Court of Appeal when considering the role of a trial court in **the Court of Appeal Civil Appeal No. 26/2009 Brian Kaggwa v Peter Muramira** while citing the Nigerian case of **Osuna v The State (210) LPELR/CA/OW/150/2009** as follows;

“A trial court no doubt is a court of law and facts. It has no other source of generating its decision except from the solid facts established before it and from the law governing the subject matter of litigation before it. Its primary role thereof is to even handedly evaluate
4: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court’s decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

the evidence placed before it by the parties not only through witnesses but including evidence by affidavits. A trial court in other words has the primary duty to fully and consciously consider the totality of the evidence preferred by all the parties before it in whatever way, ascribe the probative value to it and put it on an imaginary scale of justice to determine the party in whose favour the balance tilts...”

Arising from this holding, it is the Appellant’s case that the learned Chief Magistrate while considering evidence in relations to the dispute between the parties before failed to consider the fact that while it was the Respondent which had instituted the suit and had made its claim in that court that a breach of a valid contract for the provision of a consultancy service executed between itself and the Appellant had occurred with the Respondent claiming that on its part it had provided the services envisioned in that contract which enabled the Appellant to obtain a loan from the Uganda Development Bank, the Respondent did not adduce evidence to prove that fact yet it was duty bound to do so by adducing evidence of witnesses in that respect. That because the Respondent failed to do so then its case fell short of the required standard of proof required in civil suits where it is a legal requirement that a plaintiff in a civil matter ought to adduce sufficient evidence on a balance of probability if it is to prove its case against a defendant as was summed up by Bamwine J (as he then was) in the case of **Dr. Karuhanga v NIC & Another [2008] HCB 151**.

The Appellant argued that this was so for the Respondent had the duty to lead evidence to prove that there existed of a valid and an enforceable consultancy agreement which had indicative requisite elements found in such contracts including things like the nature of services to be provided, the qualification of consultants and a consultancy end report which showed the results of the consultancy and the deliverables which would in the instance case show that the

5: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court’s decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

Appellant obtained a loan from the Uganda Development Bank which it would never have done so in the first place save for the services rendered on its behalf by the Respondent who thus was entitled to its lawful reward in the form of payments of a commission.

The Appellant pointed out that the respondent in a bid to prove its case called one witness only called **Mr. Christopher Makodde (PW1)** who stated that he was the Managing Director of the Respondent company Mega Consultants Ltd. which did enter into a consultancy agreement with the Appellant after one of the directors of the Appellant called Barbara Ofwono approached him to help the Appellant secure a loan which the Appellant was pursuing at the Uganda Development Bank for expansions of the Appellant's educational services. That this witness stated that to put the intention of the parties in its proper perspective an agreement dated 19th December, 2006 was executed and this witness tendered a copy of the said agreement in court as **Exhibit P1.**

I have had the occasion to peruse the agreement which is found at page 9 of the records of appeal. For avoidance of doubt I take liberty to quote its full text below;

“Mega Consults (U) Ltd. Tel. 041-268202, 0782339421, 0772610942, of Plot 24 East View Road Naguru Hill, P.O. Box 3639 Kampala Uganda.

AGREEMENT

This agreement is made on the 19th December 2006, between Victorious Educational Services Ltd of P.O. Box 26278 Kampala on one hand and Mega Consults (U) Ltd. of P.O. Box 3639 Kampala.

This party agrees as follows;

- (1) That in consideration of the consultancy services offered to Victorious Educational Services ltd. by Mega Consults in securing a loan of Ushs. 750 million from Uganda**

6: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

Development bank Ltd. Victorious Educational Services Ltd. is to pay Mega Consults Ltd. 5% of the loan amount as consultancy fee.

(2) That Victorious Educational Services Ltd. shall pay 5% of the loan offered on receipt of the funds from Uganda Development Bank Ltd.

(3) That in case of failure, mega Consults Ltd. shall be at liberty to retrieve the loan offer from the bank directly upon presentation of this agreement.

For and on behalf of :

Victorious Educational Services Ltd.

Sign.....

Sign.....

Sign.....

For and on behalf of:

Mega Consults Ltd.

Sign.....

Sign.....

Sign.....”

The agreement is signed by the parties to it as there are scribbling to that effect. The parties that signed it are not disclosed though for no names are revealed at the point of signatures and so are the capacities of the persons who signed it. Of interest, however, is the agreement’s paragraph 1 which states that;

“In consideration of the consultancy services offered to Victorious Education Services Ltd...”

And so on and so forth.

These words when given their ordinary meaning would suppose that the services indicated in the agreement had already been rendered for the word **“offered”** according to the Online Thesaurus

7: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court’s decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

English Dictionary in its adjective form means presented, existing, undertaken, on hand and obtainable meaning something had already occurred.

PW1, however, in his oral testimony in court the agreement was signed before the consultancy services were rendered. When this statement is related to the above provision in the consultancy agreement, it would apparently seem odd and misplaced for if the parties to the agreement were committing themselves to future actions as stated by PW1 what would be the purpose of stating in an agreement that an action had occurred in the past. It would only render preposterous for parties to sign an agreement with those particular words if their intentions were different but assuming that the parties did in fact mean that the services had been rendered, then I would suppose that the next step would be for the Respondent to be rewarded for its efforts. But if, as stated by PW1 in his oral statement in court to the effect that the said agreement was meant to secure future actions then the wordings as indicated in the quoted paragraph above would appear misplaced.

In my view, this seemingly contradictory position should have alerted the learned Chief Magistrate to find otherwise than he did that a contract existed before the execution of the services for which a demand for payment was made before his court for as it were the learned Chief Magistrate was dealing with two contradictory positions which would have necessitated additional evidence in form of whether the contract was for services to be rendered or for services already rendered for him to come to one firm conclusion. Additionally, the agreement itself shows a marked lack of depth for it is too general as it does not stipulate the nature of the consultancy to be offered, the expertise expected from the consultants, the methodology to be used in its execution as well as the persons to be consulted and the expected results. This is because when the testimony of Mr. Makodde Christopher (PW1) is considered taken into

8: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

account it would appear that there were indication of the details of what the consultants were to do for this witness had this to say, among many things ;

“...they submitted to us the documents which the bank requested and they did, we looked at the documents; some of them were not meeting the required standards of the bank, they did not present to us a letter of registration from the Ministry, the building plan did not have an endorsement by the City Council and we told them to go and have it furnished...”

A closer look at this particular statement would indicate to me that it appears that other than the Respondent there were other persons who had the tasks to carry out certain activities for PW1 refers to activities which had to be handled by others such as those activities relating to letters of registration, approval of building plans and so forth which were external to the Respondent but which seemed to be necessary for the loan process and so the question which would by necessity arise here would be that if those unidentified persons were undertaking those aspects of the loan processing what as the role of the Respondent in this mix, would that be that of a coordinator or chief consultant or an advisor. But from this statement of PW1 it would appear that the Respondent was a bystander, present and merely observing and out of necessity could offer insights here and there but really in the thick of things as it were to ensure stipulated results. This is because nowhere does this witness indicate whether the Respondent was crucial in the procurement, the processing, the rectification, the drawing or the submissions of needed documents by the bank on behalf of the Appellant. Neither does he testify to the fact that the bank relied on the Respondent's expertise or advice to grant the loan to the Appellant. The only verifiable statement of this witness in court was to the effect that he looked at the documents and saw that they were inadequate and advised accordingly.

9: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

When this particular aspect of the witness statement is compared with that of Yeri Ofwono who testified as DW who testified that he was the one who followed up the loan processing to the end with no help from the PW1 and that of Steven Opeitum (DW2) who also testified in court that the bank could not deal with PW1 or the Respondent company without an official letter from the Appellant company authorising either the Respondent or PW1 to act as an agent of the Appellant in its dealings with the Bank. Indeed DW2 was very categorical in his statement for he informed court as follows;

“I met PW1, and I told him, that our procedures were that we deal with the owners of the company/shareholders so I advised him to get a letter from company with its initials if he is to act as the agent of the company, this was a letter authorising him to deal in confidential matters between the bank and client, where he was now a 3rd party. He left and I thought he took my advice in good faith. After that there was several months, he had sued the school...”

This testimony tends to rule out any alleged services carried out by the Respondent or its agents in respect of the loan processing for it appears to show since the respondent or its agents lacked the necessary accreditation and authorisation of the Appellant company and this piece of information was coming from a person who was working in the bank itself tends to rule out any claim by the respondent that it was due to its services that the Appellant got the loan it was seeking.

There was also this extraneous matter which I read from the judgment of the court where the learned Chief Magistrate had this to say;

10: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adonyo: March, 2015.

“Even the loans officer DW2 admits meeting the plaintiff’s managing director on several occasions on the loan issue up to the time the bank sent its team to visit the premises before the loan was approved”

This conclusion is not supported by evidence on record and seems to be in direct contradiction with what was stated by the very witness quoted, that is, Steven Opeitum (DW2) who stated in court he worked with at the Uganda Development Bank in the position of a Senior Project Analyst whose duties included the monitoring, evaluation, appraisal and debt collection in Kampala and western region. He does not state anywhere in his testimony that he was a loans officer for the bank and thus were the learned Chief Magistrate properly alive to the evidence of this witness who was even from the said bank he would not have come to the conclusion as he did that this witness was a loans officer at the bank for this witness even went on to rule ruled the Respondent’s or its agents’ role in the procurement of the loan by the Appellant when as he emphatically stated in court;

“...I met PW1 and I told him that our procedures were that we deal with the owners of the company/shareholders so I advised him to get a letter from in company initials if he is to act as the agent of the company, this was a letter authorizing him to deal in confidential matters between the bank and client, where he was now a 3rd party. He left and I thought he took my advice in good faith. After that there were several months he had sued the school...”

DW2 was the only witness who came from the bank who even discounted ever meeting PW1 many times as the learned Chief Magistrate was made to believe for he testified in that regards that;

11: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court’s decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

“...he never came to me 16 times as he alleged. It is not true at all. The only time I met him is when he came and I advised him about the procedure to follow of a letter and that was all...”

The strength of this witness statement is avowed discounting of fact that led to the learned Chief Magistrate to conclude that he was a loans officer of the bank and that he met PW1 several. To disprove this point, it was necessary for the Respondent did discount these positions by adducing in court the evidence of this officer being a loans officer as well as the incidences of meeting him several times through independent corroborative evidence which did not happen leaving the conclusions of the learned chief magistrate to have been arrived at based on evidence which he did receive in court.

In addition, PW1 made several statements in court which appears to necessitate corroboration. For example his testimony of going or being taken to his own company's Auditor called Mr. Iga by Mr. Ofwono Yeri (DW1) needed the said Mr. Iga have been brought in court to testify to this seemingly contradictory position. The failure of by the respondent to bring this particular person to court should have cautioned the learned Chief Magistrate to draw an adverse inference to this aspect of the evidence of PW1 as being untenable and not to be relied upon as was held in the case of **Post Bank (U) Ltd v Wandera Masudi HCCA No. 154 of 2012**.

PW1 also stated in his testimony in court that he worked hand in hand with several persons working in the mentioned Bank in the processing of the loan application for the Appellant. However, in his testimony he does not give particulars of those bank officials nor is this testimony corroborate by an official from the bank for noe other than DW2 appeared in court and clearly ruled out any of the supposed activities of PW1. It was imperative for the Respondent to call to its aid such bank officials as may be necessary verify the truth or not of PW1's testimony

12: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

which tended to point to the fact that the Respondent Company dealt with the bank and its officials during the processing of Appellant's loan application.

In fact my perusal of the records of appeal show that even efforts were made by court to summons from the bank to go to court to testify on behalf of the respondent in vain leaving the testimony of PW1 to lack that crucial discount it would have dealt to the testimony of DW2 that met PW1 only once.

The learned Chief Magistrate also in drawing his conclusions and making the decision which he did seems to have disregarded completely Appellant's evidence for the testimony of Yeri Ofwono (DW1) who stated that by the time PW1 came on board the loan application had already been lodged in the bank and that he Ofwono followed the loan processing by himself with no assistance rendered to him by PW1 was never considered at all yet this piece of testimony was backed by that of Steven Opeitum(DW2) who was a staff member of the bank thus if the testimony of PW1 which was to the effect that he had interactions with the bank in connection with the Appellant's loan application was to be believed then the trial court should have considered the fact that indeed one staff from the bank testified in court not on behalf of the respondent but against him and so would have discounted PW1's testimony as being uncorroborated in respect of avowed several appearances in the bank save for his own personal diary

In view of these many gaps in the testimony presented by the Respondent, it is the view of this Honourable Court that the learned trial Chief Magistrate selectively evaluated presented before him during the trial of this matter for the evidence on record discounts his eventual findings which he made in the favour of the Respondent which totally failed to the level of the standard required which is on a balance of probabilities and thus I make findings that the learned Chief Magistrate should have made conclusions otherwise than he did.

13: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

b. Grounds 2 and 3:

These two grounds were submitted for and against together and I will similarly resolve them in that manner.

Ground 2. That the learned trial chief magistrate erred in law and fact when he held that there was a valid and enforceable consultancy agreement between the parties.

Ground 3. That the learned trial chief magistrate erred in law and fact when he held that the defendant/ appellant breached the terms and conditions of the consultancy/brokerage

The exhaustive discussions in regards to Ground 1 above proved that the learned Chief Magistrate reached a wrong conclusion to find that there was a genuine contract for consultancy agreement yet this was supported by proven evidence on record and thus based his judgment on unsubstantiated testimony of PW1. It would thus have not been necessary to discuss these and other grounds but suffice to mention that from the pleadings found in the record of appeal, it is apparent to me that both the Appellant Company and the Respondent Company are limited liability companies meaning that they fall squarely and are governed by the provisions of the Company Act in their day to day operations.

Thus relating the provisions of the Companies Act to the dealings between the two parties before me I will start with the issue of the agreement stated to have been executed between the parties which Exhibit P1. This document I have earlier alluded to on scrutiny possess signatures of undisclosed persons with no stated capacities. It also bears no common company seals. This is contrary to the Companies Act for it is a legal requirement that documents executed for and on behalf of a company is required to show on its face the names of officers signing it and in what capacity they are doing so. The document is also required to bear the common seal of the company involved. Without these being done such document purported is of no legal

14: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

consequence for it remains unauthorized. In addition, it is apparent from the records of appeal that the Respondent did prove to the court that it had a Memorandum and Articles of Association to show that among the registered objectives of its business was the offering consultancy services. For a company to transact business such as the one which the Respondent stated to have carried out, a company resolution was necessary to be produced in court and this would affect both the Appellant Company and the Respondent Company for the resolutions would show that the two parties had authority of the companies' to execute the agreement in question. (**See: The Companies Act, 2012.**) Thus there could not have been entered any valid and enforceable agreement where no such evidence as stated above to grant the necessary legal authority to either of the parties in accordance with the decision of the Supreme Court in the case of **General Industries (u) Ltd v NonPerforming Assets Recovery Trust SCCA No. 5 of 1998** which was followed by this very court in the case of **Alice Okiror & Another v Global Capital Save 2004 & Another Civil Suit No. 149 of 2010** where my learned sister Justice Hellen Obura held that ordinarily a limited liability company executes a document by affixing its common seal which is witnessed or authenticated by two directors or one director and company secretary. Where the execution is done by an agent(s) as was done by UCB, the agents are named and stated to sign or behalf of the principal and so when this principle of the law is related to the instant matter, it will be found that the agreement tendered in court only bore scribbled signatures with none of the conditions indicated in the above cases complied with thus the agreement cannot be held to be valid.

It therefore follows that for the learned trial Chief Magistrate to conclude that there was a valid contract he should have investigated the legal requirements stated above which complies with the law and if he did find that they were complied with then he would have been proper for him to

15: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adonyo: March, 2015.

conclude the way he did but since he did not find so, I would find that there was no legal basis for him to conclude as he did there was no valid consultancy agreement between the parties and none such agreement was breached for it did not legally exist.

c. Grounds 4, 5 and 6 :

These three grounds are considered together as follows;

Ground 4. That the trial Chief Magistrate erred in law ad fact when he held that the plaintiff/ respondent had provided consultancy services to the defendant, upon which the defendant obtained a loan from Uganda Development Bank.

Ground 5. The learned trial Chief Magistrate erred in law and fact when he held that the plaintiff/respondent was entitled a commission of 5% under the brokerage/ consultancy agreement.

Ground 6. The learned trial chief magistrate erred in law and fact when he granted the plaintiff/respondent special damages totaling to Shs 37,500,000/= and exorbitant interest thereon at a rate of 25% per annum from the date of filing of the suit.

The combination of consideration of these three grounds together for is based on the fact that after the findings in the preceding grounds, it would have not been necessary to discuss these grounds at all for they collapsed by virtue of the earlier findings but suffice to state that it is trite that a party which claims that it is entitled to a remedy in court arising from a valid and lawful contract must prove through properly adduced evidence that that it has one and that as a result of having such a valid contract it performed its part of the bargain in accordance with such a contract. In the instant matter for the Respondent made claim in court that it had entered into a valid contract with the Appellant. To prove this contention the respondent adduced the evidence of one single witness and a document said to be the contract itself. As has been found already, ***16: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.***

the evidence of the single witness was unsubstantiated and the contract document was not legally obtained for it lacked the prerequisites of doing so. Thus it was imperative that additional evidence linking the performance of the contract with the actions of the Respondent be adduced to show that were it not for the actions of the Respondent, the Appellant would not have secured a loan from the Uganda Development Bank. This summation would therefore call for confirmation of the role the Respondent played in the loan process which entails adducing evidence from the bank itself to confirm that indeed the bank dealt with the Respondent while processing and the eventual granting of the loan the Appellant. By doing this, the Respondent would have established its case in accordance with the requirement that he who claims must prove to the satisfaction of the court for this aspect of the burden of proof was considered by my learned brother Musoke Kibuuka, J while considering a similar situation in the case of **Emily Luwedde v Yafesi Katimbo High Court Civil Suit No. 1081 of 1999**. The learned judge while relying on the case **Olinda de Souza v Kassamali Nanji [1962] E.A.756** had this to say;

“As a general rule in civil cases the burden of proof lies upon the plaintiff who must prove his or case on the balance of probabilities if he or she is to deserve the reliefs he or she seeks”

When this holding is related to the instant matter, it was the duty of the Respondent to prove to the court that not only did it have the expertise and qualifications necessary to execute the services it was to offer to the Appellant in its quest to obtain a loan with the Uganda Development Bank but that as a result of the expression of such skills the Appellant got the loan it was seeking. However, no such linkage was adduced though the learned trial Chief Magistrate in his findings went on to state otherwise that;

17: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

“According to the plaintiff due to his numerous activities, indeed the defendant secured a loan but the defendant reneged on the agreement and refused to pay the 5%”

The learned Chief Magistrate went on to state that;

“Even the loans officer, DW2 admitted meeting the respondent’s managing Director on several occasions on the loan issue up to the time the bank sent its team to visit the premises before the loan was approved”.

These conclusions appears erroneous for they are not based on evidence received in court as there is no evidence of the fact that a loans officer from the bank testified in court for the witness who came from the bank who was DW2 testified to his role in the bank which did not include loan processing. Further no evidence was received from the bank of its sending a team to the Appellant’s premises before the loan was approved making it suspect as to how the learned Chief Magistrate came to include such facts which was not proven in court yet the evidence court received only pointed to the fact that the Appellant did obtain a loan but there was no evidence adduced in court as to the process which led to the approval of the loan much less as to whether it was through the efforts of the Respondent and thus I find that the authority of **Lukyamuji James v Akright Projects Limited** which cited by the learned Chief Magistrate to reinforce his finding to be not useful for it is clearly distinguishable on its facts to the instant one for in that case the plaintiff did prove to court that he had an agreement which provided that were he to look for a plot for purchase on behalf of the defendant, then he would be entitled to a commission. Lukyamuzi complied with the terms of the agreement and indeed secured a plot which was purchased by the respondent Akright and so he was properly entitled to a commission yet in the instant matter, the Respondent failed to link the granting of the loan to the Appellant to its efforts at all for no witness from the bank testified that because of the efforts of the Respondent,

18: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court’s decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

the bank considered favorably the loan application of the Appellant thus entitling the Respondent to a commission or reward.

As regards to the issue of interest at the rate of 25% from the date of filing of the suit as ordered by the learned Chief Magistrate, there is no basis for it for parties must stick and be held to their pleadings. In the instant matter the Respondent did not plead for interest on the reward as can be adduced from the plaint on record neither did the Respondent lead any tangible evidence to prove that it was entitled to any and such should not have been awarded the said interest for the law on award of interest has been well settled by the Court of Appeal in **Uganda Revenue Authority v Wanume David Kitamirike CACA No. 43 of 2010** where Kasule JA held that whereas court has discretion under **Section 26 of the Civil Procedure Act** to award interest the burden is on the party claiming interest to plead and adduce evidence entitling it to the interest. The learned justice pointed out rightly in that case that since the cross appellant (just like the Respondent in this case) had not pleaded any claim of interest and did not adduce any evidence in that regard and thus provided no basis for the trial court to exercise its discretion one way or the other on the issue of interest then it was not entitled to it just like in the instant matter.

From the above, it is clear to me that after thorough evaluation of evidence received during the trial of the dispute between the two parties before me now, the finding is that that no proof was adduced to prove that a valid consultancy contract was entered into for which payment of a commission would result for the uncontested evidence on record show that the Appellant did on its own obtain the loan in question from the Uganda Development Bank without the intercession or input of the Respondent inspite an illegal agreement stating so and inspite of the Respondent's uncorroborated evidence stating otherwise. In the premises, it is the finding of this court that the conclusions arrived at by the lower court which led it to grant the award Ug. Shs. 37, 500,000/=

19: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

as 5% of the loan sum secured was not based on proven and appropriate evaluation of evidence received in court and thus was erroneously arrived at. In the same vein, the award of the relief of interest which was not prayed for nor evidence led to prove it were completely outside the pleadings of the parties concerned and thus should not have been granted by the trial court.

All in all, it is the finding of this first appellate court that, based on the evidence adduced before the trial court, the learned trial Chief Magistrate arrived at wrong conclusions as he did when he found that there existed a valid consultancy agreement for services between the Appellant and the Respondent which entitled the Respondent to a grant of a 5% commission on the amount received by the Appellant as loan from the Uganda Development Bank including the grant of interest on the said commission which was not pleaded or evidence led to prove so.

5. Orders:

In the premises I find that on the whole the Respondent failed to discharge its burden of proof on a balance of probability to show that the Appellant obtained a loan from Uganda Development Bank on the basis of a consultancy service which it rendered to the Appellant through which the Appellant was able to secure a loan for I find no nexus linking the two events at all for the trial court to have arrived at the conclusion that the Respondent was entitled to the reliefs it had prayed for.

Thus I would allow this appeal and proceed to set aside the decision and orders of the learned Chief Magistrate.

In addition by virtue of the powers of this court as stipulated under **Section 80(2) of the Civil Procedure Act**, I would proceed to dismiss the Respondent's claim against the Plaintiff in the lower court for it was not proved and clearly based on unreliable and uncorroborated evidence.

20: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adony: March, 2015.

This appeal is therefore allowed with costs to the Appellant here and in the lower court accordingly.

Henry Peter Adonyo

Judge

13th March, 2015

21: Judgment on appeal from the Chief Magistrates Court of Mengo wherein the court's decisions have found to be grounded on evidence not adduced on record: per Hon. Justice Henry Peter Adonyo: March, 2015.