

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL APPEAL 27 OF 2013**

5 **CMA CGM UGANDA LTD ----- APPELLANT**

**VS**

**M/S H. SSEKATAWA INTERNATIONAL LTD ----- RESPONDENT**

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

10 **JUDGMENT**

This appeal arose from the decision and orders of His Worship Vincent Emmy Mugabo, Chief Magistrate of Mengo (as he then was) dated the 16<sup>th</sup> day of September, 2013, in Civil Suit no. 811 of 2013, formerly High Court Civil Suit 337of 2012.

**Background:**

15 The Shipper for the Respondent, contracted with CMA CMG- Societe Anonyme, 4 quai d'Arenc of Marseille, France, to transport goods from Tokyo, Japan, to Kampala, at a cost of US\$ 7, 987.60.

The bill of lading was executed by CMA CMG Japan KK, agents of CMA CMG S.A. The agreed cost was payable to the Appellant upon delivery of the goods from Mombasa, Kenya,  
20 to Kampala, Uganda.

During the transit of the goods, extra costs were incurred which gave rise to a dispute as to the amount payable by the Respondent. The Appellant then instructed Damco Logistics Ltd not to release the container to the Respondent until the amount invoiced by the Appellant was paid.

25 The Respondent filed a suit before this court. The Appellant filed a defence together with High Court Misc. Applcn.No 734 of 2012, for a temporary injunction, seeking to restrain the Respondent from taking away or in any way dealing with the container having the goods, in the custody of Haks Investments Ltd and Damco Logistics Ltd, pending the disposal of the main suit. The Appellant also filed a counter claim in the main suit. Justice Kiryabwire as he  
30 then was, dismissed the application with costs and directed that the main suit, which was below the jurisdiction of High Court, be transferred to the Chief Magistrates for trial.

The file was accordingly transferred to the Chief Magistrates Court, Mengo.

Upon hearing the application, the learned Chief Magistrate His Worship Vincent Emmy Mugabo, dismissed with costs both the application and the main suit, on the grounds that basing on the documents and submissions, the contract between the parties was made in Japan, and the Uganda Courts therefore had no territorial jurisdiction to determine the matter.

5 The Appellant/Defendant's counter claim was dismissed along with the suit; and hence this appeal.

The appeal is on 5 grounds to wit:

1. The learned Chief Magistrate erred in law and fact in dismissing the Appellant's counter claim without hearing the parties on merit.
- 10 2. The learned trial Magistrate erred in law and fact in holding that the Court in Uganda had no jurisdiction to entertain the suit between the parties.
3. The learned Magistrate erred in law and in fact in holding that the parties should have filed the suit only in Japan, where the contract was concluded.
4. The learned Magistrate erred in law and in fact in dismissing Miscellaneous  
15 Application N. 326 of 2013, without considering its merits.
5. The learned Magistrate erred in law and in fact in holding that the High Court had no jurisdiction to entertain the dispute and as such could not transfer the suit to the Magistrates' Courts.

The appeal was heard *ex parte* on the grounds that the Respondents had been served with the appeal documents but had never appeared in court despite service of hearing notices on their  
20 Counsel.

Grounds 2, 3, and 5 were argued together, and grounds 1 and 4 were also argued together. This court will deal with those grounds in the order that they were presented.

### **Grounds 2, 3 and 5:**

25 These three grounds raise the issue of **whether the trial Magistrate erred in law and fact in holding that the courts in Uganda had no jurisdiction to entertain the dispute, that the parties ought to have filed the suit only in Japan where the contract was concluded and that the High Court should not have transferred the suit to the Magistrates Court.**

**Jurisdiction:** It was submitted by Counsel for the Appellants that where parties contract out of Uganda and agree that any dispute shall be determined by courts with jurisdiction outside  
30 Uganda, the contract must clearly and concisely state that the jurisdiction is exclusively conferred to a foreign court. To support his submission, Counsel relied upon the case of **Uganda Telecom Ltd Vs Rodrigo Chacon, H.C.M.A. No. 337 of 2008.**

He contended that in the present case, the Magistrate erred to hold that the Courts in Uganda  
35 had no jurisdiction to try the matter. He cited S. 15 of the Civil Procedure Act which provides that ***"subject to the limitations set out in SS.11 -14 of the said Act, every suit shall be instituted in the Court within the local limits of whose jurisdiction, (C) the cause of action wholly or partly arises as per the explanatory notes."***

In the present case, looking at Annexure “A” to the affidavit in support, which is the bill of lading, the last paragraph 30 (2), in respect of other terms, it provides that:

5 “Actions against the carrier under the contract of carriage evidenced by this Bill of Lading **shall** be brought before “Tribunal de Commerce de Marseille” and **no other court shall have jurisdiction** with regard to any such action. **Actions against the Merchant under the contract of carriage** evidenced by this Bill of Lading **may** be brought before the “Tribunal de Commerce de Marseille” **or, in carriers’ discretion, in another court of competent jurisdiction.**

10 While Paragraph 3 of the bill of lading p.1 regarding “**law and jurisdiction**” provides that French law was applicable to the terms and conditions of the bill of lading, and in interpreting the terms and conditions thereof; “**except as specifically provided elsewhere therein**”.

A careful scrutiny of the above provisions shows that the foreign court had jurisdiction by agreement of the parties, in cases filed against the carrier of the goods. The contract concerns carriage of goods by sea.

15 To determine whether courts in Uganda could exercise jurisdiction over the parties, we have to look at the law governing carriage of Goods by sea. There is no specific law in Uganda governing the carriage of goods by sea, although Uganda is a signatory to the United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) 1978.

20 In absence of specific legislation, this court turns to S. 14 (2) (b) & (3) of the Judicature Act, which empowers courts to apply common law principles and doctrines of equity as defined under S. 14 (5) of the same Act. And as laid down in the case of **John Russell & Co. Ltd Vs Cayzer, Irvine & Co. Ltd [1916] 2 AC 298 at p. 302**, “*the common law general rule is that exercise of jurisdiction depends on service of originating court process, as service can only be effected on those actually present in the jurisdiction, or those who submitted voluntarily*  
25 *or by contract to the jurisdiction*”.

In the present case the parties filed both the suit, and counter claim in Ugandan Courts, although they had contracted in Japan, and agreed that the disputes against the carrier would be filed in the French Court, while disputes against the merchant could be brought in the French court or **in any other court of competent jurisdiction.**

30 This court finds that, in the circumstances the parties voluntarily submitted to the jurisdiction of the Ugandan Courts; despite the fact that they had agreed to give the French Court exclusive jurisdiction to rule on a claim between the merchant and the carrier.

To submit to jurisdiction has been defined to mean “*to put oneself under the power of the court to adjudicate over the matter in issue. Under S. 3 (2) (b) Code of Civil Procedure;*  
35 *(See Mulla on the Code of Civil Procedure 14<sup>th</sup> Edition) 2 instances of submission are given. In one case a party appears in a foreign court in answer to a process of that court to participate in the adjudication and in the other a party agrees before hand to have dispute resolved in the jurisdiction of the foreign court. Accordingly, “otherwise to submit to jurisdiction must mean some other act, which a party performs in that court to give*

*jurisdiction to adjudicate on the particular matter*". See **Bank of Uganda Vs Transroad Ltd S.C. C.A. 03/97-** Hon. Justice Wambuzi CJ as he then was.

Before dismissing the Suit and counter claim, the trial Magistrate ought to have given the Plaintiff/Respondent a chance to show reasons why the suit was being filed in Uganda.

5 **Courts have held that “Where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in the non contractual forum discharges the burden cast on him by showing strong reasons for suing in that forum” – See the case of *Raytheon Aircraft Credit Corporation and another v Air Al-Faraj Limited* [2005] 2 EA 259 (CAK) where the case of *Donohue v Armo INC***  
10 **[2002] 4 LRC 478, was relied upon.**

In addition to which the trial Magistrate should have taken into account all the circumstances of the case and in particular:

- 15 a) In what country the evidence on the issues of fact is situated or more readily available and the effect of that on the relative convenience and expense of trial between the Uganda Courts and the French Court.
- b) Whether the law of the Foreign Court applies and, if so, whether it differs from the Ugandan law in any material respects.
- c) With what country either party is connected, and how closely.
- 20 d) Whether the Defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages
- e) Whether the Plaintiffs would be prejudiced by having to sue in a foreign country.

Refer to the case of **Donohue Vs Armco Inc. & Others [2001] 1 Lloyd’s Rep. 425 at Pp. 432 – 433**

25 In the present case, both the Plaintiff/Respondent and Defendant/Appellant are limited liability companies incorporated and registered in Uganda. The courts in Uganda were therefore more readily available, and have competent jurisdiction and were therefore the appropriate forum for the trial of the matter for the case to be tried more suitably for the interests of the parties and the ends of justice.

30 Also considering that the cost of the carriage of goods was payable to the Appellant upon delivery of goods from Mombasa to Kampala. And it is the extra costs that arose during transit that gave rise to the dispute; these extra costs could be claimed in the courts in Uganda.

The courts in Uganda had jurisdiction and the Carrier exercised its discretion to bring such a suit in Uganda and by virtue of the fact that that the contract was partly performed in Uganda.  
35 In those circumstances, the question was “**what the most convenient forum for the trial of the matters in issue**”.

The suit was originally filed in the High Court before it was transferred to the Chief Magistrates Court. Under Article 139 (1) of the Constitution and S. 14 (1) of the Judicature

Act.; any person whether natural or artificial within Uganda is subject to and falls within the jurisdiction of the High Court in any civil matter.

The fact that the parties decided to apply French law is immaterial to the jurisdiction issue. The jurisdiction is a matter of the law here in light of both the contract and the contract law in Uganda. Ugandan Courts have the jurisdiction to try the matter here and would then be obliged to apply French law.

The parties, in the circumstances set out did not have an obligation to file the suit in Japan and the trial Magistrate erred to hold that the suit ought to have been filed in Japan.

**Transfer of the suit to the Magistrates Court:** This court finds that in transferring the suit to the Magistrates Court, the High was acted entirely within its powers and the law. The trial Judge found that the main suit was below the jurisdiction of the High Court, and hence the order for transfer of the suit. Under S. 18 (1) (a) of the Civil Procedure Act, the High Court *“has powers on its own motion without notice to the parties to transfer any suit, appeal, or other proceeding pending before it for trial or disposal to any magistrate’s court competent to try or dispose of it.”*

For those reasons, issues 2, 3 and 5 are answered in the affirmative.

Court now proceeds to determine grounds 1 and 4.

**Ground 1: Whether the learned Chief Magistrate erred in law and fact in dismissing the Appellant’s counter claim without hearing the parties on merit.**

It was submitted by Counsel for the Appellant that upon determining that court had no jurisdiction, the trial magistrate dismissed the main suit with costs. That this was contrary to Article 28 (1) of the Constitution that guarantees that *“in the determination of civil rights every party is entitled to a fair, speedy and public hearing before an independent and impartial court”*. And further that it was the Appellant’s right under Article 44 (c) of the Constitution to be heard before a decision was made against it, as the Appellant had filed a counter claim.

Counsel argued that under O.8 r.12 of the Civil Procedure Rules, *“where a Defendant sets up a counter claim, and the suit of the Plaintiff is stayed, discontinued or dismissed, the counter claim may nevertheless be proceeded with”*.

The Court of Appeal has established that *“O. 8 r. 13 CPR gives court discretion to proceed with the Defendant’s counter claim if the Plaintiff’s suit is dismissed”*. - Refer to the case of **Twiga Chemical Industries Ltd Vs Viola Bamusedde t/a Triple B. Enterprises, CACA No.09/2002** – Byamugisha JA

Having found that the parties had submitted to the jurisdiction of court and that the trial Magistrate erred in holding that the court had no jurisdiction to entertain the matter, and considering that according to the agreement between the parties *“Actions against the*

Merchant under the contract of carriage evidenced by this Bill of Lading could be brought before the “Tribunal de Commerce de Marseille” **or, in carriers’ discretion, in another court of competent jurisdiction;** and the law in Uganda allows a counter claim to be heard although the main suit has been dismissed, it follows that the trial Magistrate erred in law and fact in dismissing the Appellant’s counter claim without a hearing.

The issue is also answered in the affirmative.

The last issue for court to determine is **whether the trial Magistrate erred in law and in fact in dismissing Miscellaneous Application N. 326 of 2013, without considering its merits.**

This ground is in respect of the temporary injunction that was filed by the Appellant against the Respondent. The submissions made by Counsel in respect of this ground are similar to those made in respect of ground 1.

While giving the background to the case, the trial Magistrate observed that while the matter was in the High Court Commercial Division, a concurrent application no. 737/2012 had been filed and set up for hearing before Justice Kiryabwire who had dismissed the same with costs. The Magistrate noted that subsequently, the Applicant now Appellant filed before the Magistrates court, an application for a temporary injunction and another for an interim order. The interim order was granted while the parties were required to file written submissions in the main application.

The trial Magistrate also noted that the main contention of the Respondent in the main application was that the application was res judicata, having been heard by the High Court and dismissed. The Magistrate then dealt with the issue of jurisdiction before concluding the issue of res judicata. After dealing with the issue of jurisdiction, the trial Magistrate dismissed the application with costs.

While the trial Magistrate did not consider the merits of the application, it is apparent that he was conscious that that the same was res judicata. He was consequently not obliged to hear the application.

S. 70 of the Civil Procedure Act provides that **“no court shall try any suit or issue in which the matter directly and substantial in issue has been directly and substantially in issue in a former suit between the same parties, or parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court”**.

The Magistrate was right in dismissing the application.

For all the reasons set out here in the appeal is allowed on grounds 1, 2, 3, and 5. The judgment and decree of the trial Magistrate in respect of these grounds is set aside.

The main suit (if not overtaken by events) and counter claim to be retried before another Magistrate with competent jurisdiction. The file should be returned to the lower court for that purpose. This decision is fortified by S. 80 (1) (e) of the Civil Procedure Act and O. 43 r.21 Civil Procedure Rules.

5 Under S.80 (1) (e) CPA powers of the appellate court include powers ***“to order a new trial”***.

O.43 r.21 CPR empowers the High Court to order a new trial. It provides ***“if upon the hearing of an appeal it shall appear to the High Court that a new trial ought to be had, the High Court may, if it shall think fit, order that the judgment and decree shall be set aside, and that a new trial shall be had.”***

10

However, ground 4 is disallowed and the order dismissing the temporary injunction is upheld. As already pointed out herein, the application was res judicata. And in any case, it has as of now been overtaken by events, as the goods the Appellant intended to preserve were released to the Respondent.

15

**Costs** of the Appeal are also granted to the Appellant. Under S. 27 (1) of the Civil Procedure Act ***“costs follow the event unless for good cause court orders otherwise”***.

The Appeal is allowed on those terms.

20

**FLAVIA SENOGA ANGLIN**

**JUDGE**

**26.03.15**

25