THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 152 – 2015

(Arising out of Civil Suit No. 154 of 2009)

JAMES SEBAGALA ::::::::::::::::::::::::::::::
APPLICANT/DEFENDANT

VERSUS

CHINA PALACE (U) LTD ::::::::::::::::::::::::
RESPONDENT/DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

The Applicant, James Ssebagala brought this application seeking for orders that the decree passed on 17/06/09 by this court in CS 154/2009; **China Palace (U) Ltd V Witsman Contractors & 3 Ors** be set aside and that the Respondent, China Palace (U) Ltd be ordered to meet the costs of the Application.

The background to this application is that the Respondent entered an agreement with Witsman Contractors (U) Ltd (1st Defendant) together with the Applicant (2nd Defendant), Richard Mbonye (3rd Defendant) and Marani Anthony (4th Defendant) who were directors in the 1st Defendant company. In this agreement the Respondent/Plaintiff lent the Defendants USD$ 240,000 on 21/05/08 to be repaid in two months; that is by 20/07/08. It was further agreed that if payment delayed beyond this date, a surcharge of USD$20,000 would be charged. The Plaintiff alleged that the Defendants later borrowed a further USD$ 66,000 to be repaid in addition to the outstanding USD$ 240,000. The Defendants subsequently defaulted in repaying the loan on time. The Applicant undertook to surrender his property at Namasuba Para valued at USD$ 30,000 to the Respondent. It is for the recovery of the amount still unpaid and outstanding that the Respondent sued the Applicant and the other Defendants vide HCCS 154/09.

On 17/06/09 a default judgment was granted in favour of the Respondent ordering that USD$ 466,000 be paid to the Respondent, an interest on that sum at a commercial rate from 21/05/08 til payment in full and costs to be borne by the Defendants.

The Application is grounded on the following;-

(a) That the Applicant was not served with the summons to apply for leave to appear and defend the suit and only learnt of the judgment against him when he was arrested by the Respondent in October 2014,

(b) That the Applicant and his Partners borrowed from the Respondent the sum of USD$ 240,000 yet a judgment was entered against them for the sum of US$ 654,730,

(c) That the Respondent has unlawfully sought the execution of the decree against the Applicant only inspite of the fact that the Applicant's partners are equally liable for the same debt,

(d) That the Applicant has a good defence against the Respondent in HCCS 154/09.

In his affidavit in support of the Application, the Applicant deposed that he was not served with the summons to file an application to appear and defend HCCS 154/09, that the affidavit of service sworn by Mubiru Emma of Muganwa, Nanteza and Co. Advocates on 10/06/09 is false and the signature on the summons is a forgery.
He also deposed that unbeknown to him, the Respondent proceeded with HCCS 154/09 and on 17/06/09 judgment was entered against all the Defendants in the sum of US$ 446000 without any explanation as to how a claim of US$ 240,000 as set out in the plaint increased to US$ 446000.

Further that after disposal of the suit, the Respondent commenced execution against him only even though his two other partners, Mbonye Richard and Marani Anthony, were also liable under the judgment. He stated that he would suffer irreparable harm and injury if the Application was not granted as the Respondent's agents would arrest and remand him in civil prison.

In their affidavit in reply to the Application, the Respondent deposed that the Applicant and his Partners borrowed money from them sometime in 2008 to the tune of US$ 654,730. They also deposed that following default in payment, they filed HCCS 154/09 and service of process was effected at the Applicant's offices

situated on Suite 233-235 Serena Conference Centre P.O.Box 1957 Kampala which address has always been known to the Respondent and the Respondent's lawyers, following various dealings between the Applicant and the Respondent.

They further deposed that basing on their interactions with the Applicant and by virtue of the cheques signed and issued by the Applicant to the Respondent company, the working relationship between him and the Respondent's former lawyers, Muganwa, Nanteza and Co. Advocates, they were certain that the Applicant was personally served with the summons and duly acknowledged receipt thereof.

They also deposed that the Applicant was sued jointly and severally, leaving them with the option of whom to execute against and that any acts of prosecuting or staying the execution proceedings could cause them irreparable harm.

At the hearing of the application, Counsel for the Applicant submitted that the Applicant and two others only borrowed USD$ 240,000 from the Respondent which they failed to repay. He also submitted that the Applicant was not served since the signature on the summons differed from his and that the Applicant was not aware of the suit until he was arrested. Further that the applicant is being required to repay the loan alone and that he is willing to pay his share, that is, 25% as the Defendants are four. Finally, that the Defendants were not sued jointly as it is not written in the plaint; he prayed the judgment be set aside.

This application is brought under Order 36 Rule 11 of the CPR which provides;

> *"After the decree the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the*

summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit.

In the instant case, HCCS 154/09 was filed in this court on 06/05/09 and summons issued on the same day. In an affidavit of service deposed on 25/05/09, one Mubiru Emma of Muganwa, Nanteza & Co Advocates stated that he received the summons and proceeded to the offices of the Defendant located at Suite 233-255 Serena Conference Centre at 9:00am but failed to trace the Defendants. That he returned at 10:00, 11:00, 1:00pm in vain and at 4:00pm he fixed a copy of the summons on the Defendant's office door in the presence of one Kivumbi Peter, who was known to the Defendants.
The Plaintiff was directed by Court on 26/05/09 to serve the Defendant again "ordinarily".

Mubiru Emma deposed that he proceeded to the above mentioned offices of the Defendant on 28/05/09 at 9:00am. That he met the Applicant/2nd Defendant who informed him that the 3rd and 4th Defendant were out of the country but he accepted to receive service on behalf of all the Defendants. A signature of the Applicant is evident on a copy of the summons which were returned to Court. It is this signature that the Applicant contests as being forged.

An allegation of forgery is quite serious and the Applicant should have produced evidence to validate this allegation. He did not. He left it to Court to ascertain for itself. Ms Miao Hua Xian, a Director of the Respondent Company deposed in Paragraph 8 of her Affidavit in reply that she was familiar with the Applicant's signature by virtue of cheques issued by him to the Respondent Company and that she was certain he was personally served with the summons.

I have looked at the alleged forged signature on the summons vis a vis the Applicant's signature in his affidavit in support of the Application, his signature on the Financial Agreement between the Respondent and the 1st Defendant, his signature on the Memorandum of Understanding all annexed to the plaint in HCCS 154/09 and they all seem similar. The Applicant did not point out the differences between his normal signature and that on the copy of the summons. He has therefore not discharged his burden of proving that the signature was forged; in the absence of which this Court finds that the signature on the summons was his and that he was effectively served with summons.

The Applicant contends that they only borrowed US$240,000 and not US$ 654,730 which the Respondent seeks to reclaim. However the Financial Agreement annexed to the Plaint as "A" is for a loan of US$ 240,000 plus a surcharge of US$20,000 per month in the event of default. Further, per Annexture "C" to the Plaint, the Respondent further advanced sums of US$6,000 on 06/08/08, US$ 40,000 on 06/08/08 and US$ 20,000 on 31/07/08 which brought the total to US$306,000; which inclusive of the surcharge amounted to US$ 466,000 which the Plaintiff sued for. The Respondent was awarded interest on that sum at a commercial rate from 21/05/08 til payment in full which amounted to US$ 654,730 which it seeks to reclaim from the Applicant.

The Applicant also contended that the US$ 20,000 surcharge was unconscionable. However, this surcharge was a term of the Financial Agreement that was agreed upon by all parties to it.

It is now settled that people who freely negotiate and conclude a contract should be held to their bargain and that Courts should not be seen to intervene by substituting, according to their individual sense of fairness, terms which are

contrary to those which the parties have agreed upon themselves. **Stockloser V Johnson (1954) 1 All ER 630**

It is not open to the court to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what the court may think the parties really intended or ought to have intended. But if, from the document itself and the admissible background, the intention of the parties can reasonably be discerned, then the court will give effect to that intention even though this involves departing from or qualifying particular words used. **Chitty on Contracts Vol 1 Paragraph 12-070 at page 615**

In **Printing and Numerical Registering Company V Sampson (1875) Lr Eq 462, Lord Jessel MR** observed:

> *If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and that their contracts, when entered freely and voluntarily, shall be held enforceable by the Courts of Justice.*

Further, Lord Morris in **L Schuler AG v Wickman Machine Tools Sales Ltd [1974] A.C. 235, HL** stated that

> *Subject to any legal requirements businessmen are free to make what contracts they choose but unless the terms of their agreement are unclear a court will not be disposed to accept that they have agreed something utterly fantastic. If it is clear what they have agreed a court will not be influenced by any suggestion that they would have been wiser to have made a different agreement.*

In light of the foregoing therefore, the Applicant who willingly agreed to the terms of the Respondent before taking the loan, cannot turn around and claim that the term regarding surcharge is unconscionable and harsh.

Turning to the issue of execution of the decree, the Applicant contended that in the course of execution, the judgment creditor had singled him out to make good the debt, leaving out the other three Defendants. It was his contention that since four persons were sued and the plaint did not specifically point out that they were being sued jointly and severally, they should each pay 25% of the debt. In this, he was contesting the rule of joint and several liability.

When two or more Defendants are liable for a Plaintiff's injury or loss, the rule of joint and several liability makes each of them liable for the entire amount of damages regardless of their liability. In my view, this leads to unfair outcomes when a Defendant who minimally contributed to the Plaintiff's harm or loss may have to foot the entire award because the Defendant who is principally responsible is insolvent or not traceable. This situation at times turns the proceedings of the suit into a search for a Party with a deep pocket.

The Plaint in the instant case did not specifically state whether the Defendants were being sued jointly or severally. In such a situation, one would be inclined to believe that there was proportionate liability in the mind of the Plaintiff. However, I do not think that was the case. The solution to the puzzle lies in the intention of the parties. The agreement that the parties entered into and the cheques that they issued did not apportion liability and it could only be interpreted that it was a joint and severally based undertaking.

The reason for this is because while all the Defendants contributed to this indebtedness, no reasonable division can be made by way of apportionment of the debt.

Furthermore, it would be unfair for the judgment creditor to be under compensated because one of more of the Defendants is insolvent and cannot pay his or their share of proportionate liability.

Lastly, their agreement did not contain any words of limitation or conditions. It was typically an absolute document giving the judgment creditor the freedom to recover from any of the judgment debtors.

In the premises, the judgment creditor could proceed against any of them and it is upon whoever is aggrieved with this procedure to pursue the other obligators for a contribution to their share of the liability.

It is therefore this court's finding that the judgment creditor did not breach any procedure by proceeding to execute against the Applicant.

Having found that the Applicant was effectively served with court process, that the surcharge of US$ 20,000 in default of payment was mutually agreed upon, and further, that the judgment creditor could lawfully execute under the joint and severally liable rule, I find no merit in this Application and it is hereby dismissed with costs.

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David K. Wangutusi
JUDGE

Date: 02/04/2015