

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

HCCS NO 169 OF 2013

ZTE CORPORATION}.....PLAINTIFF

VS

UGANDA TELECOM}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This is ruling on a preliminary objection by the Defendants Counsel to the Plaintiff's suit on the ground that the Plaintiff has no locus standi to bring this action. The Plaintiff is represented by Counsel Terrence Kavuma while the Defendant is represented by Counsel Rashid Kibuuka.

In the written preliminary objection the Defendant's submission relies on the facts averred in the plaint that on 29 October 2007, the Defendant, Uganda Telecom Ltd executed a contract for design, planning, installation, integration, operation and maintenance of the microwave backbone link project with ZTE (H.K) Ltd, a company incorporated in and under the laws of Hong Kong, China with a registered office at RM 2906 29/F, China Resources Building 26 Harbour Road Wamnchai Hong Kong, China according to annexure "A" attached to the plaint.

On 21 June 2011 the Plaintiff ZTE Corporation, the company incorporated under the laws of the People's Republic of China having its registered office at ZTE Plaza, Keji Road South, High-Tech Industrial Park Nanshan District, Shenzhen, and the People's Republic of China is alleged to have executed a repayment agreement annexure "C" attached to the plaint.

On 5 April 2013 the Plaintiff Corporation filed HCCS No. 169 of 2013 against the Defendant claiming US\$6,738,232.38 for breach of contract.

The preliminary objection is that the plaint does not disclose a cause of action because the Defendant does not have any contractual relationship with the Plaintiff. Counsel submitted that this was the point of law which had to be tried first under Order 15 rule 1 (2) of the Civil Procedure Rules and the case of **Mukisa Biscuit Manufacturing Company Ltd versus West End Distributors Ltd [1969] 1 EA 696** at page 700. The preliminary objections are that the plaint does not disclose a cause of action because the contract does not confer any contractual rights on the Plaintiff, and the Plaintiff is not privy to the contract. He submitted that the question of whether the plaint discloses a cause of action is determined upon perusal of the plaint alone and any attachments. (See the cases of **Ismail Serugo versus Kampala City Council and the Attorney General Constitutional Appeal Number 2 of 1998**, **Sun Air versus Nanam Transpet Company Ltd HCCS 2 to 9 of 2009 (unreported)**, **Attorney General versus Olouch [1972] EA at page 392.**)

ZTE (H.K) Ltd is a company incorporated under the laws of Hong Kong with particulars as described above while the Plaintiff ZTE Corporation is a company incorporated under the laws of the People's Republic of China having its registered office as described above. He submitted that the law of contract is clear on the doctrine of privity of contract. Generally a contract cannot as a general rule confer rights or impose obligations arising under it on any person except the parties to it. (See **Chitty on Contracts, 12th edition page 662 paragraph 1221; Dunlop Pneumatic Tyre Co Ltd versus Selfridge & Co Ltd [1915] AC 847 at 853 per Viscount Haldane L.C.; the National Social Security Fund and Another versus Alcon International Supreme Court Civil Appeal No. 15 of 2009**) In the above authorities the principle that only a person who is a party to a contract can sue on it was discussed and upheld. On the other hand under the doctrine is that a contract cannot confer rights, or impose obligations on strangers to it hence a non-party to a contract cannot seek to enforce it.

The Defendant's Counsel further submitted a plaint which discloses no cause of action must be rejected (see **Larco Construction Ltd versus Attorney General and Combined Ltd HCCS Number 0318 of 2004; Auto Garage and Others versus Motokov (Number 3) [1971] EA 514.**) In the premises Counsel invited the court to reject the plaint under the provisions of Order 7 rule 11 (a) (e) of the Civil Procedure Rules.

In reply the Plaintiff's Counsel did not deny the relevant facts as presented by the Defendant's Counsel in objection. He submitted that the plaint discloses a cause of action against the Defendant. This is because the plaint is premised on a contract dated 29th of October 2007, the purchase order requisitions and the repayment agreement dated 21st of June 2011 all of which are attached to the plaint. The Defendant's objection is only premised on the contract dated 29th of October 2007 and therefore the Plaintiff's case on the basis of the purchase order requisitions and the repayment agreement is unchallenged on disclosure of a cause of action with the result that in the worst case scenario, this suit shall be maintained as regards the purchase order requisitions and the repayment agreement.

The Plaintiff's Counsel further submitted that notwithstanding his submissions all payments in respect of the contract dated 29th of October 2009 which is annexure "A" to the plaint were being made to the Plaintiff as provided for at page 4 of the contract. It is provided that payments shall be made to the Plaintiff as described above. As such the submission that the contract dated 29th of October 2007 did not confer any contractual rights on the Plaintiff is erroneous in light of the above facts. The fact that the Plaintiff was intended to be a beneficiary of all the contractual sums certainly constitutes an enforceable right under section 65 of the Contract Act 2010. The fact that the Defendant has not fully paid the said sums constitutes breach for which the Plaintiff is entitled to redress. In the premises he contended that under the circumstances the cause of action is disclosed by the Plaint read together with the contract.

The Plaintiff's entitlement to the contractual sums indicated in the contract dated 29th of October 2007 is also pleaded in paragraph 4 (d) of the plaint as

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acknowledged and admitted by the Defendant in a repayment agreement dated 21st of June 2011 executed by the Plaintiff and the Defendant. The agreement is annexure "C" to the plaint wherein it was written that this sum due to the Plaintiff on Phase (I) is US\$1,065,891 and on Phase (II) is US\$1,152,891. On the face of it the repayment agreement demonstrates that the Plaintiff has a right to receive the sum of US\$6,738,272 from the Defendant. The Defendant has not paid the sum and is in breach of contract. Furthermore the repayment agreement constituted an independent cause of action against the Defendant sufficient to allow trial of the suit on the merits.

Lastly while the Defendant disputes the contractual relations with the Plaintiff, annexure "B" up to annexure "B6" show otherwise. The purchase order requisitions addressed to the Plaintiff by the Defendant. The Plaintiff's case is that the goods and services ordered therein were supplied but not fully paid for by the Defendant. Lastly the repayment agreement dated 21st of June 2011 clearly stipulates the sums due on each of the purchase order requisitions and this would certainly give the Plaintiff an independent cause of action against the Defendant. In the premises the Plaintiff's Counsel prays that the objection is dismissed with costs.

In rejoinder the Plaintiff's Counsel cited the case of **Halal shipping company limited versus securities Bremer Allegemeine and Another [1965] 1 EA 694** for the principle that it is a fundamental principle that a stranger to a contract cannot sue on it and a stranger to a contract cannot, take advantage of the provisions of the contract even if they were clearly intended to benefit him.

The Plaintiff's Counsel submitted that the local purchase order issued to the Plaintiff were incidental to the contract dated 29th of October 2009 executed between the Defendant and ZTE (H.K) Ltd and therefore form part of the contract. He submitted that the preamble of that agreement makes it clear and provides that it is the intention of the parties to enter into a contract for microwave transmission projects, or purchase orders issued to the second party by the first party during the term of the contract and that it shall be governed only by the terms and conditions of the contract. Consequently the Plaintiff cannot found a

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cause of action based on the local purchase orders issued under the head contract to which it is not a party. He prayed that the court finds that there is no cause of action in respect of the local purchase orders.

As far as the Plaintiff sought to rely on section 65 of the Contracts Act No. 7 of 2010, it was not in force at the time the suit contract was executed on 29 October 2007. The Defendant's Counsel contended that the applicable law was the Contracts Act cap 73 which had no such provision for a suit by a beneficiary who is not a party to the contract. The Defendant's Counsel cited the case of **Butime Tom vs. Muhumuza David and Electoral Commission, Election Petition Appeal Number 11 of 2011** (and reported) where honourable Justice Remmy Kasule cited with approval the principle in **Phillips versus Eyre [1870] 1 LR 6 QB 1** for the proposition that the court will not ascribed retrospective force to new laws affecting rights unless by express words or necessary implication that such was the intention of the legislature. He submitted that no such intention was expressed in the Contracts Act 2010 and the Plaintiff cannot rely on the provisions of section 65 of the Contracts Act 2010 to enforce third party rights in the contract executed in 2007.

The repayment agreement:

As far as the repayment agreement is concerned the Defendant's Counsel contended that firstly the Plaintiff had no capacity to enter into a repayment agreement in as far as it purported to vary/amend the contract dated 29th of October 2007 executed between the Defendant and ZTE (H.K) Ltd. The repayment agreement does not show whether the Plaintiff executed it in the capacity of an agent or under authority or as an assignee and a novation. Consequently the Plaintiff had no capacity to execute the repayment agreement without authority of ZTE (H.K) Ltd neither does the plaint show in what capacity the Plaintiff executed the repayment agreement. The Plaintiff cannot enforce rights it was never privy to.

The Defendant's Counsel submitted without prejudice that should the court find that the Plaintiff had capacity; the Defendant contends that the officer who

purported to sign the agreement on behalf of the Defendant did not have actual or implied authority to bind the Defendant which is a limited liability company. Consequently the repayment agreement is ineffective. He relied on section 33 (1) of the Companies Act cap 110 he contended that the effect of the provision is that contracts may be made on behalf of the company in writing signed only by persons acting under its authority, express or implied. The Defendant averred in the written statement of defence that the officer who signed the purported repayment agreement did not have authority actual or implied and the Plaintiff never challenged this pleading. If an officer of the company purported to act outside the scope of his apparent authority, the Plaintiffs should have made proper enquiry before entering into a contract with the Defendant. He contended that in the instant case the officer is not a director of the company and does not have the express or implied authority to enter into contracts on behalf of the company and therefore cannot bind the company. He invited the court to find that the Plaintiff is a third-party. Secondly a beneficiary of the contract between the Defendant and the other contracting party cannot enforce rights conferred there under. Thirdly the plaint ought to be struck out with costs under Order 7 rule 11 (a), (e) of the Civil Procedure Rules.

Ruling

I have carefully considered the preliminary objection, the submissions of Counsel the authorities cited as well as the pleadings of the Plaintiff and attachments thereto. By the amended plaint the Plaintiffs claim is for US\$6,738,272.38, general damages, interest arising there from and costs of the suit arising from breach of contract.

The crux of the objection is that the Plaintiff is not privy to the contract alleged to have been breached by the Defendant and cannot enforce rights under it or even sue upon it. The Plaintiff's Counsel does not oppose the question of fact that the Plaintiff is not the party which executed the contract attached to paragraph 4 of the plaint as annexure "A". It is alleged in paragraph 4 (a) that on 29 October 2007 the Plaintiff executed a contract for designing, planning, installation, integration, operation and maintenance of a microwave backbone link project with the

Defendant. Subsequently it is averred that the Plaintiff discharged its obligations under the contract by supplying and installing the specific components and hardware and subsequently the said contract was by conduct varied by the parties as the local purchase orders exceeded the contract sum. The contract was for a total sum of US\$3,436,369. It is averred that the Defendant defaulted on the payments towards the contract price as payments were intermittent and inconsistent and by reason thereof the parties executed a repayment agreement specifically to agree on the mode of payment.

Additionally the Plaintiff avers that the sum due to the Plaintiff in the repayment agreement is US\$ 6,738,272.38 and the parties agreed to have the said sum paid over a period of time with the last instalment falling due on 30th of April 2012.

It is averred that to date despite numerous demands from the Plaintiff the Defendant refused to settle the amount thereby breaching the contract referred to. Furthermore in response to the demands of the Plaintiff, the Defendant admitted the repayment agreement was signed for and on behalf of Uganda Telecom Limited by its officers but denied the capacity of the Plaintiff's officers to bind the Defendant according to the letter Annexure E". The Plaintiff claims to have discharged all its obligations and the Defendant does not have any justification for withholding payments due to the Plaintiff. On the basis of the averments the Plaintiff claims general damages, recovery of the sum of US\$6,738,272.38, interest at the rate of 20% from the date of the cause of action till payment in full and costs of the suit.

In the written statement of defence the Defendant averred that it would raise a preliminary objection to the suit on the ground that the plaint discloses no cause of action against the Defendant and that the suit is frivolous, vexatious and an abuse of the process of court. In paragraph 5 (c) of the written statement of defence the Defendant avers that the repayment agreement is not binding on it as the person who purported to sign it had no authority from the Defendant to do so. Secondly under paragraph 5 (b) of the written statement of defence the Defendant avers that the contract signed on 23 October 2007 was never varied by

the conduct of the parties as article 27 of the contract stipulates that any amendment to it is to be in writing and signed by the parties.

I have carefully considered the objection that the Plaintiff has no locus standi to file this action by virtue of the fact that it was not a party with executed the main contract annexure "A". Annexure A is a contract executed on 29 October 2007 in Kampala, Uganda between Uganda Telecom and ZTE (H.K) Ltd. I particularly note that the description of the parties at page 1 of the contract provides as follows:

"this contract is concluded...

BY AND BETWEEN

Uganda Telecom, sometimes referred to as "UTL", a company incorporated under the laws of Uganda with its registered office at Rwenzori Courts, Plot 2 and 4A, Nakasero Road, Kampala... (Hereby referred to as "The First Party").

And

ZTE (H.K) LIMITED sometimes referred to as "ZTE", a company incorporated in and under the laws of Hong Kong, China with registered office at RM, 2906, 29/F, China resources building 26 Harbour Rd Wanchai Hong Kong, China tel: 00852-25198983, Fax, 00852 - 25198986, Cell 00852 - 25198986... (Hereby referred to as "the second party").

In the amended plaint the Plaintiff Company is described as a company incorporated in and under the laws of Hong Kong and China with a branch in Uganda. The preliminary objection of the Defendant is that the Plaintiff was incorporated under the laws of Hong Kong.

ZTE Corporation a company under the laws of the People's Republic of China having its registered office at ZTE Plaza, Keji Rd South Hi - Tech industrial Park, Nanshan District, Shenzhen and the People's Republic of China purportedly on 21 June 2011 executed a repayment agreement annexure "C" attached to the plaint.

I have further considered annexure "C" attached to the plaint. Annexure "C" is a repayment agreement between Uganda Telecom and ZTE Corporation dated 21st of June 2011 executed in Uganda. It indeed describes the Plaintiff as ZTE Corporation, a company incorporated under the laws of the People's Republic of China having its registered office at ZTE Plaza, Keji Road South, High-Tech Industrial Park, Nanshan district Shenzhen, People's Republic of China.

The first observation to be made is that the Plaintiff purports to be a company incorporated in Hong Kong, the People's Republic of China. The objection of the Defendant in paragraph 3 of the written objections is that on 5 April 2013 ZTE Corporation filed HCCS 169 of 2013 against the Defendant claiming US\$6,738,272.38 for breach of contract. The preliminary objection is that the Defendant does not have any contractual relationship with the Plaintiff.

There are several factual matters which need to be established. In the contract annexure "A" it is specifically provided that ZTE (H.K) is sometimes referred to as ZTE a company incorporated under the laws of Hong Kong. The Plaintiff is described in the title as ZTE Corporation. In paragraph 1 it is averred that the Plaintiff is incorporated in and under the laws of Hong Kong China.

The contract attached annexure "A" does not make the controversy any easier by giving an alternative name to ZTE (H.K.). Secondly annexure "C" to the plaint is an agreement signed by the company incorporated under the laws of the People's Republic of China with a different registered office from that of the company in annexure "A".

There is correspondence between the parties where the Defendant in Annexure "B" to the amended plaint writes on the subject of indebtedness to ZTE Corporation. However the Defendant in that correspondence denies indebtedness to the Corporation. Secondly in annexure "E" the Defendant on 27 February 2012 specifically wrote that the agreement annexure "C" is void ab initio. It was signed on behalf of Uganda Telecom by someone who does not have authority to bind the company.

A careful analysis of the documents does not give a clear cut distinction between the two entities one of which is incorporated in Hong Kong and another incorporated "under the laws of the People's Republic of China". The distinction is made on the basis of having a different registered office. One has a registered office in Hong Kong while another has a registered office at ZTE Plaza, Keji Road South, High-Tech Industrial Park, Nanshan District Shenzhen, and the People's Republic of China. However both are incorporated in the People's Republic of China since Hong Kong is part of the People's Republic of China.

In my humble opinion despite the submissions of the Plaintiff's Counsel that they can rely on the repayment agreement and purchase order requisitions allegedly between the Defendant and ZTE Corporation, the Plaintiff cannot on the face of it escape paragraph 1 of the plaint which describes it as a company incorporated in Hong Kong and under the laws of Hong Kong China.

Secondly in paragraph 4 (a) it is clearly specified that the Plaintiff executed a contract on 29 October 2007 Annexure "A". The description of the party in that contract is different from that submitted upon by the Plaintiff's Counsel in reply to the objection.

The question of identity of the Plaintiff cannot only be resolved on the basis of the pleadings alone. The Plaintiff is either the party who executed annexure "A" or the party which executed annexure "C". In the premises the point of law argued before the court requires more factual matters to be clarified.

A point of law of a preliminary nature should be based on facts which are not controversial. In the case of **NAS Airport Services Limited vs. The Attorney-General of Kenya**, [1959] 1 EA 53 Windham JA at page 58 held Order 6 rule 28 permits a point of law to be set down for hearing preliminarily but that point of law:

“...must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a

case the short-cut, as is so often the way with short-cuts, would prove longer in the end.”

If the facts are not averred in the plaint, the facts must either be admitted or should not be in dispute. A similar holding can be found in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] 1 EA 696** per Sir Charles Newbold P at page 701 where he held that:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Both authorities are decisions of the Court of Appeal of East Africa as it then was. Whereas I agree with the Defendant’s Counsel that a point of law can be set down for trial under Order 15 rule 2 of the Civil Procedure Rule, it should be a point of law that does not require any facts to be ascertained if it is to be argued preliminarily. Otherwise evidence must first be adduced before it is resolved.

In the premises the Defendant’s preliminary objection is stayed. However because it affects the standing of the Plaintiff in the court, it shall be tried as a preliminary issue by calling evidence on the question of identity of the company which executed annexure "A" to the plaint and that in annexure "C" to the plaint. It cannot be resolved on the basis of submissions of the Plaintiff's Counsel.

Before a question of whether a different party which is a beneficiary under section 65 of the Contracts Act 2010 can be resolved, the question of identity as a matter of fact has to be determined before considering other matters.

In the premises the point of law raised by the Defendant remains a point of law to be tried together with the question of authority to execute the relevant agreement by any of the parties as far as annexure "C" to the plaint is concerned.

The point of law is stayed with costs to abide the outcome of the trial after adducing evidence.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

Ruling delivered in open court on the 8th of May 2015

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Kiggundu Mugerwa for the Plaintiff

Officer from Plaintiff Company Mr. Chao Chao in court

Rashid Kibuuka Rashid Counsel for the Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

8/5/2015