

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 64 OF 2018

(ARISING FROM CIVIL SUIT NO.945 OF 2016)

ICCO COOPERATION

UGANDA:.....APPLICANT

VERSUS

TRIVISION UGANDA

LIMITED:.....RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

The Applicant ICCO Cooperation Uganda filed this Application against Trivision Uganda Limited herein referred to as the Respondent seeking a declaration that this Honourable court has no jurisdiction over the Applicant in respect of the subject matter and reliefs sought by the Respondent/ Plaintiff in the main suit.

The Applicant also seeks orders that Civil Suit No. 945 of 2016 be dismissed as against the Applicant/1st Defendant and costs.

The Application is premised on the ground that the parties having executed a contract were exclusively bound by Dutch law. In event of a dispute arising out of the agreement either party could refer the

dispute to the jurisdiction of the district court of Utrecht in the Netherlands.

The background to this Application as discerned from the pleadings is that the Respondent together with Irene Kulabako Kakembo filed Civil Suit No. 945 of 2016 on 8th December 2016 as Plaintiffs against the Applicant and Media Focus on Africa as Defendants.

The claim against the Defendants is for breach of contract alleged to have resulted from the Defendants non-payment for services rendered on the “Yat Madit” TV Series, failure to carryout capacity building trainings at all stages of the project, failure to provide clear contractual terms of reference within the contract upon the expiry of the previous contract, assigning editing work to third parties without notice or approval.

The Plaintiffs also claim for specific performance on the unpaid contractual balances, general damages and costs.

Upon receipt of a grant from the European Union the Applicant entered into a contract with the Respondent for production of thirteen episodes of a television series called “Opera Crossroads” which were later named “Yat Madit Television Series.”

On 1st October 2015 Irene Kulabako Kakembo was appointed as the director of the “Yat Madit” TV series to provide services as an independent contractor.

The entire production project was to be completed between August and December 2015 however the same was not possible. This resulted from a number of delays namely; request from the Defendants to have the 13 episodes produced in diverse length of 24 minutes, 30 minutes

and 45 minutes, the rainy season that delayed filming, the print scripts which were longer than what had been expected, sit down strikes of actors and replacement and training of actors.

As a result of these anomalies the 2nd Defendant Media Focus on Africa granted the Respondent a three-week contract extension on 25th November 2015 to run till January 2016. The contract between the parties was extended and consideration paid.

The Respondent/1st Plaintiff contends that she continued to carry out the project works despite the challenges however the Applicant sent her a notice of breach with intention to unilaterally terminate their contract.

The Plaintiffs then notified the European Union seeking mediation in the matter giving reasons that the Respondent had not carried out any capacity building regarding the job training. Instead they had proceeded to hire independent editors to do the work.

On 23rd August 2016 the Plaintiffs received a termination letter from the Applicant/1st Defendant working with the Media Focus on Africa purporting to unilaterally terminate two contracts signed separately and by different parties.

Contending that the termination was done before fully paying them, they filed this suit.

On the 30th of January 2018 the Applicant filed an Application seeking court to dismiss the suit because it had as they said no jurisdiction. They relied on Clause 31 of the agreement.

Annex 3 Clause 31 states that;

“If a dispute exists which cannot be resolved in mutual consultation, nor through the ICCO Foundation complaint or objection procedure, one or more of the Parties may submit the dispute to the District Court in Utrecht, the Netherlands. Dutch law shall exclusively apply to this contract. The contract has been translated from English. In case of a difference of opinion about the interpretation, the English text shall apply.”

Counsel for the Respondent submitted that this court has jurisdiction as provided under the Constitution of the Republic of Uganda. He also contended that this Application was brought in bad faith because the main suit involves property rights and the Application as it stands did not consider the other parties in the main suit being Irene Kulabako Kakembo the 2nd Plaintiff one of the managing directors of the Repondent/1st Plaintiff company and Media Focus on Africa the 2nd Defendant.

Furthermore, all witnesses are in Uganda and it would be prejudicial to subject them to the expenses of submitting to the jurisdiction of the District court of Utrecht in the Netherlands.

This is clearly indicated in paragraph 4 of Irene Kulabako Kakembo’s affidavit in rejoinder. In Paragraph 4(d) she states;

“The said agreement was duly executed in Uganda with all the parties in Uganda, and cause of action arose in Uganda between the parties.”

In Paragraph 4(f) and (g) she also avers that;

“This current Miscellaneous Application is irregular and void as it omits me, a fundamental party involved in this matter. I have claims for money unpaid to me by the Applicant/1stDefendant. First , a claim for money, for my time and services rendered in supervising the postproduction of the Yat Madit TV Series from 24 minutes to 45 minutes. This work was work done during the novation discussions. This Novation was the merging of both my and the Trivision Contracts.

The second claim is for damages for the infringement of my rights and use of my and Trivision’s name on the aired Yat Madit TV Series and its related promotional materials without my consent and approval. This violation occurred here in Uganda, long after and outside the contracts afore mentioned.”

It is my opinion that when parties have bound themselves by an exclusive jurisdiction clause, they ought to comply with that obligation unless a party suing outside this prescribed jurisdiction gives justification for suing contrary to the contract. In this I am further buttressed by the holding in **Raytheon Aircraft Credit Corporation and Another vs Air Al-Faraj Limited [2005] 2 EA 259(CAK) which was also cited in Donohue vs Armo INC [2002] 4 LRC 478;**

“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.”

It is the Applicant’s contention that she ought to submit her agreement and the subject thereto to the jurisdiction of Dutch courts because she is an International organisation with tentacles in multiple jurisdictions all over the world, with different legal regimes and a uniform law creates uniformity in its application.

Because of the need to protect the public policy of freedom of contract, the parties are usually free to nominate the proper law under which all relevant disputes will be resolved. Where there is an express selection, the choice should be respected so long as it is made bonafide. That is to say that the subjective intention will prevail unless it is shown that the purpose of one of the parties is to;

- a) Evade the operation of some mandatory provisions of the relevant law,
- b) There is an element of fraud or duress or undue influence involved in the signing of the agreement or
- c) There was other evidence of malafides.

If the above are not established, then the selected forum will most probably deal with the matter. The foregoing may however not suffice more so if the only thing the parties did was simply to nominate a forum and do no more. It simply remains an indication that they intend that forum’s law to apply.

Where there is resistance to a forum by one of the parties, the following will work in favour of the party who wants to remain in the jurisdiction he has filed the case;

- a) It is useful to show that the forum has in its affairs established significant expertise in the relevant areas of law governing the subject matter.
- b) The standard of judicial decision making is high like the one in the area named in the clause
- c) That there is no corruption or other outside influence to affect the fairness of judgment
- d) The procedures may be efficient and minimize losses arising through any delay in arriving at a judgment
- e) And that all major witnesses may be resident within the jurisdiction making the forum convenient.

From the foregoing is established a position that in choosing a foreign forum, the party was acting in good faith and not simply intending to make it difficult for the other party. A key issue here is that of distance, cost and convenience. In the instant case all the drama, which included film and movie making, acting, editing and production was done in Uganda, via broadcast and via outreach programmes in North and North Eastern Uganda namely; in sub regions of Acholi, Lango, Karamoja and Teso.

The contract was drawn and executed in Uganda. The Plaintiffs are from and reside in Uganda. If the suit is heard outside Uganda, the cost of transporting, housing and feeding of such a number of witnesses, the cost of litigation and the fee of counsel in the Netherlands will

weigh heavily on the Respondents which would possibly deny them access to the court.

The case as seen from the pleadings does not require any more expertise as would not be found in the Ugandan courts, nor is there anything to show that there would be outside influence as would affect the fairness of judgment. The procedures in the Ugandan Commercial Court are good in as much as they are geared towards quick case disposal.

It is also important to note that while there are two Plaintiffs, the Application is against the 1st Plaintiff leaving out the second Plaintiff. If this Application is allowed, the 2nd Plaintiff will be condemned unheard. This in my view is a serious breach of the right to be heard.

Furthermore, the form of the agreement written on the Defendant's headed paper looks more of one sided agreement in which the Respondent played no role in choosing the forum of dispute resolution. Under such circumstances the Respondent is disadvantaged.

The Constitution of the Republic of Uganda provides jurisdiction to the High Court of Uganda and this cannot be ousted by a clause between two parties, who have entered into an agreement of a contract to be performed in Uganda.

Lastly, in a situation such as this where one of the parties might fail to carry litigation to Europe, it would amount to denial of access to justice which is founded upon the Constitution of the Republic of Uganda.

Taking all the foregoing into consideration, I find the prayer to dislodge this case from Uganda a recipe of injustice. It is also court's finding

that based on the reasons given above, the court is encased with jurisdiction to handle this matter.

The Application is therefore denied with costs to abide the results of the main suit.

Dated at Kampala this 23rd day of May 2018

HON. JUSTICE DAVID WANGUTUSI

JUDGE.