THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISC. CIVIL APPLICATION NO. 940 OF 2018

(ARISING FROM HCCS 1255/1998)

NATIONAL SOCIAL SECURITY FUND:::::::::::::::::::::::: APPLICANT

VERSUS

ALCON INTERNATIONAL LIMITED:::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

RULING

This is an application by National Social Security Fund (hereinafter called the Applicant) against Alcon International Limited (referred to as the Respondent).

The Applicant seeks orders that the plaint in Civil Suit No.1255 of 1998 be struck out with costs.

The Application is grounded on the following:

(a) The plaint in HCCS 1255 of 1998 does not disclose a cause of action against the Applicant.

(b) The Supreme Court of Uganda has determined that the plaint in HCCS 1255 of 1998 does not disclose a cause of action against the Applicant.

(c) It is in the interest of justice that the plaint in HCCS 1255 of 1998 be struck out.

The background to this application is that on 21st July 1994 the Applicant desirous of completing a partially constructed multi story office complex entered into an agreement with Alcon International Limited (Kenya) as the Contractor to execute the building works. The contractor's offices were on Enterprise Road, Industrial Area, Nairobi.

The Applicant handed over site but unknown to them the "Contractor" who had signed the agreement was not the one who took over the site. It was Alcon International Limited (Uganda) instead of Kenya.

In 1998 the Respondent alleging breach of the contract, terminated it on the 30th November 1998, the Respondent filed a suit seeking;

1. A declaration order that the notice of termination of the contract was wrongful, null and void.
2. General damages for wrongful termination of contract.
3. Interest on the decretal amount at 45% from date of termination till payment in full.
4. Costs.

These pleadings underwent several amendments later adding claims of special damages of unpaid work done, value of equipment and loan and interest due to the Respondent.

This matter was eventually referred for arbitration. The Applicant was not satisfied by the arbitral award and sought to have it set aside but her applications were dismissed by the High Court.

Not to give up, the Applicant appealed to the Court of Appeal seeking an order overturning the decision of the Learned High Court Judge. The appeal was dismissed.
The Applicants then appealed to the Supreme Court. The appeal was grounded on several grounds, the Learned Justices of the Supreme Court reduced them to five but only four were argued.

The first ground, and which in my view is relevant to the question before this court was framed thus;
"The Learned Judges of Appeal erred in law in upholding an arbitration award of breach of contract to the Respondent in the absence of a cause of action against the Appellants."

The Supreme Court in its decision found like the Court of Appeal did, that the Applicant was not a Kenyan company but a Ugandan one.
That it was the Kenyan company which signed the contract to construct the house.

That the contract was however performed by the Respondent. That since the Respondent was not a party to the Agreement between the Applicant and Alcon International Kenya, she could not claim based on the Agreement. That in that case therefore the Respondent had no cause of action against the Applicants.

The learned Chief Justice then remitted the case back to the High Court for trial.

When the matter returned to the high Court, the Respondent sought leave to amend the pleadings. The ground for the application was that;

"*Since the time of filing the suit, a lot of events have transpired which necessities the amendment of the plaint to enable the issues in this suit to be finally determined*."

This application was not granted for the reason that the amendment sought would be introducing a new suit.

Secondly the amendment would be in respect of a matter based on a contract to which the Respondent was not privy and thirdly that the transaction was tainted with fraud.

After that dismissal on 27th October 2017 the Respondent made no effort to proceed with the case. The Applicant then filed this application to dismiss the suit because the pleadings did not establish a cause of action.

In his submission counsel for the Applicants contended that since the Supreme Court determined that there was no cause of action on those pleadings, this Court could not find any cause of action on the same pleadings.

In reply Mr. Kabega for the Respondent submitted that the pleadings disclosed a cause of action.

He submitted that the pleadings as they stood fulfilled the test namely;

"*Whether the Plaintiff had a right.*

Whether this right had been violated.

Whether it was the Defendant who violated the right."

I fully agree with those tests as laid out in ***Auto Garage & Others vs. Motokov [1971] EA 514***.

But those tests apply only when the party suing is the rightful Plaintiff. In the present case the Respondent could not have a cause of action because the pleadings on which the suit was based were pursuant to a contract to which the Respondent was not privy.

This position must have dawned on the Respondent which indeed led them to file an application to amend the pleadings. The application was indeed to fill up the gap that had been created by the Supreme Court's decision.

As I said earlier in this ruling this matter went to the Supreme Court and one of the grounds of Appeal was;

"*The Learned Justices of Appeal erred in law in upholding an arbitration award for breach of contract to the Respondent in the absence of a cause of action against the Appellants*."

The Supreme Court found that although the Applicant had entered into Contract with Alcon International Ltd (Kenya), it is the Respondent that sued on the contract.
The Supreme Court took into account that the cause of action was derived from the contract and therefore concluded that it was the Alcon International Limited (Kenya) that could make a claim in that regard. The Respondent could not have sued on a contract to which it was not party.

The Supreme Court came to this conclusion having found no assignment or novation. It relied on ***Halsbury's Laws of England 4th Edition Vol. 9*** which stated:

> "*As a rule a party to a contract cannot transfer his liability under the contract without the consent of the other party....*"

There were elements to be satisfied before such novation or assignment could take place. The court wrote;

"What is clear from this quotation is that while assignment or indeed novation is permitted by law, there still has to be a fulfilment of the elements necessary for a valid contract."

The Court found that the required elements of offer and acceptance between the parties and the intention to create legal relations between the new party with the employer were lacking. The need for both parties to be aware of the incoming party was not fulfilled. Thus the doctrine of privity of contract, namely that a contract cannot confer rights, or impose obligations "on strangers to it" was perforated. That since there was no consent by the Applicant to the purported assignment by Alcon International (Kenya) to Alcon International (Uganda), no legal relationship was ever created and an attempt by the Respondent to sue on the contract between Alcon International (Kenya) and the Applicant was an action in futility.

The other thing that makes this suit a non starter is because the Respondent took possession of the construction site through fraud. Fraud is defined in Blacks Law Dictionary;

"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right."

For something to constitute fraud, the act must be wilful. A representation is said to be fraudulent not only when the person making it knows it to be false, but also when he ought to have known that it was false.

In the instant case when the Applicant advertised for tenders, both the Alcons and others bided. The Applicant wanted a Contractor with experience in high rise buildings.
On evaluation of the bids, the Respondent was found devoid of experience and was rejected.
Alcon International (Kenya) was found to have the necessary experience and was successful.

Incidentally the two companies were run by the Hanspal family. The two knowing very well that the Respondent had been rejected, their directors and managers, passed on the construction works to her in a secretive manner. The Applicant was not informed. It was a deliberate concealment which induced the Applicant to rely on it and transact business with it. This was fraud.

Lady Justice Kitumba observed,

> "*the proceedings in this case were tainted with fraud and illegalities and cannot stand*."

In my view to allow a suit arising out of a fraudulent transaction would be frowned upon by public policy. One cannot even argue that the fraud was just to enable the Respondent obtain the building site and that what happened later was lawful. The original fraud continues in subsequent actions. It is a settled principle of law that if a transaction is originally founded on fraud, the original vice will continue to taint it. It would be wrong therefore for the party that committed the fraud to derive benefit under it.

That being the case, the assumption of a contract deceitfully like in this case, would on its on deprive the Respondent from laying a claim under it.

She could sue independent of the contract now in place. But that would require a fresh suit based on tort or conversion but not on the contract to which she was not privy.

In conclusion, since the pleadings speak of Alcon International Kenya instead of the Respondent, there is no cause of action in place and the suit is hereby dismissed with costs.

Dated at Kampala this 23rd day of May 2019.

HON. JUSTICE DAVID WANGUTUSI
JUDGE