THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 1012 OF 2017

(ARISING FROM CIVIL SUIT NO. 047 OF 2015)

JOHN BOSCO MUWONGE (SUING THROUGH HIS LAWFUL ATTORNEY SSENTUMBWE HASSAN) .....APPLICANT/PLAINTIFF

VS

1. MUSA TIBAMANYA

2. TARGET PROJECT ..... RESPONDENT/DEFENDANTS

BEFORE HON. MR. JUSTICE RICHARD WABWIRE WEJULI

RULING

This Application was brought under Order 52 R1 & 2, Order 13 R 6 and Order 6 R 30 of the Civil Procedure Rules seeking orders that judgment on admission be entered against the Respondent for Ush 172,800,000, interest thereon from date of breach, general damages and costs of suit and this Application. Or alternatively and without prejudice an order striking out the defence for lapse of time and disclosing no reasonable defence and judgment be entered in favor of the Plaintiff.

The brief background to the Application is that the parties entered into a

transaction by which the Defendant undertook to sale to the Plaintiff 26 units of 40feet containers for which the Plaintiff paid Ush 300,000,000/= on 17th September 2013.

All the containers were to be delivered by March 2014 however, the Defendant delivered only 11 out of the six containers in September 2014.

On 10th September 2014 the Defendant wrote the first Plaintiff regretting delay to make full delivery and undertook to deliver the remaining 15 containers within 90 days. The 15 containers remain undelivered to date, and hence civil suit to recover Ush 172,800,000/= being the value of the containers.

The Plaintiff/Applicants counsel submitted that paragraph 6 of the 1st Defendant's written statement of defence Five of the 2nd Defendant's written statement of defence amount to admissions of the fact to deliver 26 containers of which 15 remain undelivered per the letter of the first Defendant dated 10th September 2014 whose contents are not retracted or contradicted by the Defendants.

Counsel further submitted that paragraph 3 of the first Defendant Written Statement of Defence and paragraph 2 of the 2nd Defendant's written statement of defence amounted to an admission as to the receipt of consideration from the plaintiff.

He cited the cases of **Jamil Senyonjo V Jonathan Bunjo CS 180/2012**, **Excellent Assorted Manufacturers v UNRA HCCS 165/2015 and Sietco v Impreligo SARL JVC** **HCCS 980/1999** to back his submissions.

Having drawn Courts attention on order 13rule3 of the Civil Procedure Rules section 16 of the Evidence Act which mandate a party to apply for judgment on admission for Court to grant admission. He cited the case of **African insurance Co.**

V Uganda Airlines [1985] HCB 53 and submitted that once an admission is made Court may upon Application by a party make such order or file such judgment.

In reply Counsel submitted for the first Respondent, that the 1st Respondent had never admitted any wrongdoing on his part and that there was no cause of action against him.

He submitted that the 1st Defendant's written statement of defence is a denial of liability and he faulted the Applicants for not calling the Defendant to admit prior to the hearing. He cited order 13 rule 4 CPR and the case of **Nasra Ali Warsame v Osege Rajab, HCCS 3/2013** contended that since the Applicant did not move Court under order 13 Rule 4 of the CPR, the Application was procedurally defective. He referred to the case of **Nasra Ali Warsame v Osege Rajab, HCCS 3/2013** for the argument that the parties who intended to apply for judgment on admission must notify the other party.

I have looked at order 13 r 4 and it says **May** not **Must**. It is therefore not correct to say that the requirements of order 13 r 4 are mandatory. The Omission to do so does not in my opinion negate the option taken by a party who chooses to seek judgment on admission without first having asked the other party to respond under Order 13 rule 4. To do is optional and is in my further opinion intended to save time and resources of the parties and curt on unnecessary litigation but is not a bar to raising it without fast sounding out the other party.

The letter of 10 September 2018 cannot be given any other interpretation or meaning other than the ordinary meaning of its contents. In that letter the first Defendant acknowledges receipt of the Ush 3, 00,000,000/=, short delivery of the containers and undertakes to deliver the balance of the containers within 90 days. He also states the unit price the containers.

The Respondents counsel argues that the Power of Attorney granted to the Applicant was only limited to him to proceed against Target Projects, - the 2nd Defendant and not the 1st Defendant and that the Applicant therefore lacks *locus standi* to bring the suit against the 1st Defendant.

I have critically read through and analyzed the Power of Attorney at paragraph 2 thereof and my interpretation is that the it grants broad possibilities that the Donee can undertake towards the cause of recovering the money and that the PA does not limit the Donee to only proceeding only proceed against the 2nd Defendant/Respondent to the exclusion of anyone else.

Order 13 rule 6 of the CPR provides for judgment on admission. The rule provides that any party may at any stage of a suit, where an admission has been made, either on the pleadings or otherwise, apply to the Court for such judgment or orders as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon the Application make such order; or give such judgment, as the Court may think just.

The import of this rule is that admission may be express or implied from an omission by the party to controvert or traverse a material fact raised by the other party.

The Courts have guided that for admission to be relied upon it must be precise and unambiguous- see **Jamil Senyonjo V Jonathan Bunjo CS 180/2012**, **Excellent Assorted Manufacturers v UNRA HCCS 165/2015.**

In the instant case, In para 3 of the 1st Defendant /Respondents written statement of defence and para 2 of the 2nd Defendants written statement of defence they admit, amongst others, to the contents of paragraph 5 of the Plaint which states that Shs 300,000,000 was credited to the 2nd Defendants crane bank account 0145096002200 for the purchase of and delivery of 26 units of 40 ft. containers.

In his letter of 10th September 2014, the 1st Defendant wrote acknowledging the transaction and receipt of Shs 300,000,000/= being the purchase price for 26 containers at a unit cost of Shs 11.5 million each, of which 11 had been delivered and delivery of 15 was outstanding. He apologized for the delayed delivery and undertook to deliver the 15 containers within 90 days. This letter and its contents are not denied by the Defendants

The Applicant submitted that to date the 15 outstanding containers have not been delivered, which as well was not contested by the Defendants.

The foregoing are unequivocal acknowledgements and undertakings which in my opinion amount to precise and unambiguous admissions on the part of the Defendants.

Before I take leave of this matter I must address an issue that the Respondents Counsel alluded to regarding the participation of the 1st Defendant in this suit. Respondents Counsel contends that the 2nd Defendant was merely the Managing

Director of the 1st Defendant (*I imagine this cross reference was in error and that he meant it to be the other way round, i.e. that the1st Defendant was the Managing Director of the 2nd Defendants*) and that he did not sign the letter in his personal capacity but as Managing Director and that therefore to maintain a suit against him, the Plaintiff ought to first lift the veil of incorporation.

With due respect to counsel, I think that this notion is misconcieved. A Plaintiff is at liberty to bring on record all persons from whom he believes any right to relief arising out of the same transaction exists.

In the instant case, the 1st Defendant was the voice of the 2nd Defendants. He engaged the Plaintiff and corresponded with the Plaintiff regarding the Defendant's obligations to the Plaintiffs, and this comes with consequences. None else than him is a better placed person to continue to be the face and voice of the 2nd Defendant in this matter.

By brining all persons who are parties relating to the subject matter before Court, the dispute is determined in their presence to avoid a multiplicity of suits and optimize on use of resources.

But also, Courts of law are places for resolving disputes while dispensing justice and not places for individuals to seek refuge from obligations they have willingly and knowingly invited upon themselves. The Defendants cannot seek to hide in the shadow of the corporate cloak in order to avoid liability. The corporate veil is not intended to undermine but enhance commercial and corporate integrity. It should not be made easy for individuals to divorce themselves from the liabilities of their corporate creations by simply invoking distinction of persona by incorporation.

In the event, this Application succeeds.

Remedies

The Applicants Counsel submitted that for the mental anguish and financial loss occasioned by the Respondents/Defendants by non–delivery of the containers and failure to refund the value of the undelivered containers for the last five years, the Applicant be awarded Shs 50,000,000/= in damages.

S.61(1) of the Contracts Act provides that where there is a breach of contract the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her.

In determining the damages to award, Court may make a presumption in their (damages) favour once the Plaintiff proves that the Defendant owed him a duty which he breached- see **Meta Products (U) Ltd V People Health Care HCCS 83/2007**. Taking into account the facts of the case, the inconvenience, anguish and loss that must have been suffered by the Plaintiff/Applicant, I consider the sum of Shs 50, 000,000/= (fifty million) proposed by the Applicant an adequate award in general damages for the breach of contract.

In the result, judgment on admission is entered for the Plaintiff against the Defendant in HCCS 47/2015 in the following terms:

I. Payment of Ush 172,800,000/= (one hundred seventy two million eight hundred thousand only)
II. General damages of Ush 50, 000,000/= (fifty million only).
III. Interest on (i) above at the rate of 24% per annum from the date on which the defendants breached by failure to deliver as undertaken in the 1st

Defendant's letter of 10th September 2014, till payment in full.

IV. Interest on (ii) above at the rate of 24% per annum from the date hereof till payment in full.

V. Costs of the suit are awarded to the Plaintiff/Applicant.

Judgment delivered this 25th Day of March 2019

Richard Wejuli Wabwire

JUDGE

Order: The Registrar shall deliver this Ruling on my behalf on the due date. Ruling delivered in the presence of;