THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MICELLANEOUS CIVIL APPLICATION No. 1018 OF 2020

(Arising from Civil Suit No. 0949 of 2018).

M/A SILVERY DRAGON GROUP TECHNOLOGY AND TRADING GROUP } …… APPLICANT

VERSUS

1. JOSE MUKASA
2. EKIRING GIBSON DEOGRATIUS
3. OCHOM SIMON PETER
4. M/S HARDI UGANDA LIMITED
} …… RESPONDENTS

Before: Hon Justice Stephen Mubiru.

RULING

Through a one Sserwanga Tonny, the applicant sued the respondents jointly and severally under summary procedure for the recovery of US $ 191,259.81 being the price of 71 coils of hot rolled PC steel strands (prestressed concrete twisted steel cable) of 12.7 mm and 11.1 mm specifications. It was the applicant's case that during or around the month of August, 2017 the 4th respondent, through its directors, the 2nd and 3rd respondents, and its employee, the 1st respondent, placed an order of the said products from the applicant. During or around the month of November, 2017 the applicant shipped the said items aboard eight (8) 20 feet containers which were duly received by the respondents in Kampala on or around 4th December, 2017, having been duly cleared on their behalf by a clearing firm, M/s Ark Freight (U) Limited. The respondents thereafter refused or failed to pay the agreed contract price, hence the suit.

The applicant applied for and was on 22nd January, 2019 granted leave to serve the respondents by way of substituted service through advertisement in a widely circulating newspaper within the court's jurisdiction. The respondents having failed to apply for leave to appear and defend the suit within the time allowed by the law, a default judgment was entered against them on 4th March,

2019. In execution of the resultant decree, the 3rd respondent was arrested and committed to civil imprisonment. The 3rd respondent then applied for setting aside the default judgment and for enlargement of time within which to aper and defend the suit. Upon consideration of the submissions of counsel for both parties, but without delving in its merits, the court allowed the application, set aside the default judgment and dismissed the suit on ground that the powers of attorney given to Sserwanga Tonny by the applicant, had not been duly notarised. The applicant filed the instant application seeking a review of that order on ground that

Order 46 rules 1 of *The Civil Procedure Rules*, empowers this court to review its own decisions where there is an error apparent on the face of the record. The error or omission must be self-evident and should not require an elaborate argument to be established. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record (see *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173)*. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court.

In the instant case, the court's orders sought to be reviewed were premised on an erroneous finding that the powers of attorney presented by the applicant's agent, Sserwanga Tonny, were not notarised. In his affidavit supporting this application, the applicant attached a copy of a power of attorney registered in Uganda on 4th December, 2018 as document number 25770. It has a notarial certificate in Chinese, but translated into English, attached to it, showing that it was notarised in China by a notary public on 2nd November, 2018. It is on basis of the said powers of attorney that the suit was filed 8th December, 2018.

Section 73 (b) of *The Evidence Act* classifies as public documents, public records kept in Uganda of private documents, while section 75 thereof permits certified copies of public documents to be received in evidence. Under section 78 (a) of *The Evidence Act*, the court is required to presume every document purporting to be a certified copy, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in Uganda, to be genuine, if the document is substantially in the form and purports to be executed in the manner directed by law in that behalf. Consequently, the notarised powers of attorney presented

to court by Sserwanga Tonny, having been duly registered in Uganda, is presumed to be genuine and capable of proof by way of a certified copy. For that reason, the court proceeded on an error that is apparent on the face of its record, when it allowed the application, set aside the default judgment and dismissed the suit on a false premise that the power of attorney had not been duly notarised. The application for review is accordingly allowed and consequently, the suit is reinstated. Furthermore, the default judgment too is reinstated as against the 1st, 2nd and 4th respondents.

As regards the 3rd respondent, according to Order 46 rule 6 of *The Civil Procedure Rules*, when an application for review is granted, the court may at once rehear the case or make such order in regard to the rehearing as it thinks fit. I find in the instant case that re-hearing the application by the 3rd respondent at once is the most appropriate option, since the application was not considered on its merits, yet both parties presented written submissions.

In their submissions, counsel for the 3rd respondent argued that the application was made under section 98 of *The Civil procedure Act*, Order 36 rule 11, Order 51 rule 6 and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. They sought orders that time be extended or enlarged to allow the respondents file a defence to the suit or leave be granted to file the defence out of time, the reasons being that the 3rd respondent has a plausible defence to the suit, since he has never transacted with the applicant herein, the plaint contained allegations of fraud and deceit that required formal proof which was not done, and the contract contains an arbitration clause that outs the jurisdiction of this court. In response, counsel for the applicant submitted that; the suit was for recovery of a liquidated sum of money that did not require proof of fraud and deceit, the 3rd respondent was not authorised by the rest of the respondents to make the application on their behalf,

In the first place, reliance by the counsel for the 3rd respondent on section 98 of *The Civil procedure Act*, Order 51 rule 6 and Order 52 rules 1 and 3 of *The Civil Procedure Rules* was erroneous. Proceedings under summary procedure are autonomous. All remedies are sought and provided for under that order without resort to any other. Order 36 of *The Civil Procedure Rules* is intended to enable the Plaintiff with a liquidated claim, one that can be ascertained or quantified at the time of filing the suit, to which there appears to be no good defence to obtain a quick and summary

judgement (see *Zola and another v. Ralli Brothers Ltd and another [1969] EA 691*). It applies to cases where there can be no reasonable doubt that a Plaintiff is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purpose of delay. Be that as it may, partial relance on the above provisions is not fatal to the 3rd respondent's application.

The law of pleadings has been undergoing changes in a bid to do substantial justice rather than uphold mere technicalities. Hence the court would give effect to the legal consequences following from the pleaded facts and not be held back by the formulation of the pleadings (see *In re Vandervell's Trust (No.2) [1974] 3 WLR 256* and *Belmont Finance Corporation Ltd v. Williams Furniture Ltd [1979] 1All ER 118*). By virtue of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*) which enjoins courts to administer substantive justice without undue regard to technicalities, it is not desirable to place undue emphasis on form rather than the substance of the pleadings. Courts are not expected to construe pleadings with such meticulous care or in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds. Courts have always been liberal and generous in interpreting pleadings. Although the application was filed as one seeking extension or enlargement of time in order to allow the respondents to file a defence to the suit, from the pleaded facts and by reference to Order 36 rule 11 of *The Civil Procedure Rules*, it is construed as essentially one for a belated leave to appear and defend the suit.

An application for leave to appear and defend may be granted although out of time (see *Twentsche Overseas Trading Co. ltd. v. Bombay Garage Ltd [1958] E.A. 741*). At the hearing of an application for unconditional leave to appear and defend the court is not required to determine the merits of the proposed defence, it is incumbent upon the applicant to present a plausible defence. Leave is declined where the court is of the opinion that the grant of leave would merely enable the applicant to prolong the litigation by raising untenable and frivolous defences.

A plausible defence is one that raises issues capable of being tried. The test is whether if the facts alleged by the applicant are established there would be a fair dispute to be tried, issues of such a nature as would entitle the applicant to interrogate the plaintiff or to cross-examine the plaintiff's witnesses. It is whether the defence raises a real issue and not a sham one, in the sense that if the

facts alleged by the applicant are established there would be a good or even a plausible defence on those facts. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the applicant to interrogate the plaintiff or to cross-examine the plaintiff's witnesses, leave should not be denied. Where also, the applicant shows that on a fair probability he or she has a bona fide defence, leave ought to be granted.

It was rightly pointed out by counsel for the 3rd respondent that the applicant's plaint included averments of facts that required proof before final judgment. Pleading fraud and deceit in the context of this case was primarily intended to justify the lifting of the veil of incorporation inherent in attributing personal liability to the 3rd respondent that led to the default judgment. Under section 20 of *The Companies Act, 1 of 2012* this Court may lift the corporate veil where a company or its directors are involved in acts including tax evasion and fraud. It is upon proof of fraud that the 3rd respondent's liability on what *prima facie* is that of the 4th respondent would arise. On that account, the 3rd respondent's intended defence of not being personally liable for the underlying transaction constitutes a plausible defence, which is clearly based on triable issues of mixed law and fact. The 3rd respondent has therefore made out a case justifying the grant of unconditional leave to appear and defend the suit, which order is hereby granted. The 3rd respondent is to file his defence to the suit within a period of fifteen days.

The 3rd respondent thus cannot avail himself of the alternative submission that the arbitration clause in the contract ousted the jurisdictions of this court. He cannot deny liability on the contract and at the same time seek to rely on it. In any event, inclusion of an arbitration clause in an agreement does not oust jurisdiction of courts (see *Bemba Ruth and another v. Departed Asians Property Custodian Board [1988-90] HCB 139*). In the final result, the cost of both applications shall be in the cause. The parties will proceed to file a joint memorandum of scheduling and their trial bundles after the 3rd respondent has filed his defence. Hearing of the suit is accordingly fixed for 29th day of March, 2021 at 11.00 am.

Delivered this 1st day of March, 2021

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Stephen Mubiru
Judge,
1st March, 2021.