


THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS APPLICATION No. 37 OF 2021
(ARISING OUT OF HCCS No. 1099 OF 2020)
ROKO CONSTRUCTION LTD:..... APPLICANTS

VERSUS

ISA MALE:..... RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA
RULING

- [1] This is a ruling on an application for leave to appear and defend the suit brought under S.98 of the CPA Cap 71, Order 36, rule 3 & 4 & Order 52 rule 1, 2 & 3 of the Civil Procedure Rules that the applicants be granted leave to appear and defend HCCS No. 1099 of 2020 and costs of the application be provided for.
- [2] The grounds of the application supported by the affidavit of **MARK KOEHLER** are that; *it is not true that the applicant is indebted to the respondent as alleged in the Plaint and Affidavit; that the Applicant orally contracted the Respondent to transport aggregate stones; that the figures contained in the attached documents are computer*

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generated unsupported by relevant documents and are a figment of the Respondent's imagination; that the Respondent does not attach any proforma invoices from the Applicant requesting for the services stated; that the trucks that delivered the purported aggregate stones are not indicated; that there are no delivery notes for the delivered aggregate stones; that the trucks that delivered the aggregate stones are also not indicated; that the suit by the respondent is only intended for unjust enrichment and that it is just and equitable that the application for leave to appear and defend is granted.

[3] This application raises one issue;

Whether the applicant satisfies the conditions for the grant of orders for leave to appear and defend Civil Suit No. 1099 of 2020.

[4] Counsel for the applicant submitted by way of written submissions. Counsel submitted that the grounds for the grant of unconditional leave to appear and defend have been enunciated under case law in **Benon Tamusange & Timothy Justin Rover Mathew vs Exim Bank (U) Ltd M.A No. 1213 of 2016** where Billy Kainamura, J, stated that, *"the settled law is that for an application for leave to defend to be granted, the applicants have to show that there is a bonafide triable issue of fact or law that they will advance in defence of the suit."* He went further to cite **Makula Interglobal Trade Agency vs Bank of Uganda [1985] HCB 65, at 66** while considering the above rule held that;

"Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is reasonable ground of defence to the claim, the defendant is not entitled to summary



judgment. The defendant is not bound to show a good defence on the merits but should satisfy the court that there was an issue or question in dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage."

- [5] Counsel submitted that owing to the violation of the Limitation Act by the Respondent/Plaintiff the suit is barred by law and cannot stand in the courts of law. This is because the Act restricts disputes of a contractual nature to be brought within six years and upon grant of unconditional leave to appear and defend, the applicant will raise the preliminary objection as the claims brought by the plaintiff/respondent are over 8 years.
- [6] Counsel for the applicant further submitted that the purported oral contract involving a sum of UGX.135, 729,745/= is unenforceable as per Section 10 (5) of the Contracts Act which states that a contract with a subject matter that exceeds twenty-five currency points shall be in writing which is a mandatory provision of the law and cannot be determined in a summary manner. The same position was highlighted in **Karangwa Joseph vs Kulanju Willy, Civil Appeal No. 03 of 2016.**
- [7] Counsel submits further that there is also a triable issue as to whether the applicant is indebted to the respondent to the tune of UGX.135, 729,745/= because the applicant orally contracted the Respondent for transportation of aggregate stones. The Respondent's services were paid for as admitted by the Respondent in both the Plaint and Affidavit in reply. Court therefore has to determine whether truly the Applicant is indebted to the Respondent. The applicant has also attached an



intended written statement of defence as required by law. See **Uganda Commercial Bank vs Mukoome Agencies [1982] HCB 22.**

- [8] In response to the issue of limitation, counsel for the Respondent cited the case of **Sembule Investments Limited vs Uganda Baati Ltd Misc App 0664 of 2009 arising from C.S No. 410 of 2009** where it was stated that

"if the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment..."

- [9] Counsel further asserted that in the instant case the applicant's intended point of law in regard to limitation can be disposed of in this application since it does not require further evidence. That according to Section 3(1) (a) of the Limitation Act actions founded on tort or contract shall not be brought after the expiration of six years. That the respondent engaged the applicant to offer transport services of aggregate stone between 2014 and 2020 and the invoices raised range from 2014 to 2020 (5th January 2015 to 17th August 2020) and the suit was filed on 20/12/2020 which is within the limitation period of six years. That further according to Section 22 of the Limitation Act, when someone acknowledges a debt or makes a payment in furtherance of the same the right shall be deemed to have accrued at the date of payment and not before and that between January 2015 and August 2020(from 29 / 06 /15 to 06/07/2020) the applicant made payments amounting to 2,014,961,030/=.



- [10] On enforceability of the contract, counsel for the respondent stated that this is a preliminary objection that can be disposed of at this stage as per the Sembule case (supra). Counsel relying on Section 10(2) of the Contracts Act 2010 stated that invoices issued by the respondent to the applicant, acknowledgement of the said invoices by the applicant and the cheques or payment vouchers issued by the applicant constitute a written agreement. See Musoke Kitenda vs Roko Construction Limited Miscellaneous Civil Application 1240 of 2020 in which Justice Stephen Mubiru stated that;

"The writing envisaged does not require a formal written contract. This requirement is satisfied by any signed writing that; reasonably identifies the subject matter of the contract; is sufficient to indicate that a contract exists, and states with reasonable certainty the material terms of the contract. It can be a receipt or even an informal letter."

- [11] That the applicant in paragraph 4 of the affidavit in rejoinder denies invoices and acknowledgement of receipt but acknowledges payments in paragraph 5 thereof. That there was a contract between the applicant and respondent that satisfies the requirements of Section 10(5) and as stated in Musoke Kitenda (supra) part performance of an oral contract makes it enforceable in equity and the applicant does not deny taking benefit of the services rendered by the respondent. See Face Technologies (PTY) Limited Vs Attorney General & Anor Civil Suit No. 248 of 2008.

- [12] On the aspect of triable issues, counsel for the Respondent stated that the applicant does not attach any proof of its assertions that the respondent was paid and as such the applicant has made vague and



general allegations which are unsupported by material facts in sufficient detail.

- [13] In rejoinder the applicant stated that it has made elaborate arguments before court which go to the root of the matter and ought to be investigated by court and that the facts in the Sembule case (supra) are distinguishable from the facts at hand. That the point of law as regards enforceability of the contract from which the claim arises is one that cannot be merely resolved without additional evidence and without grant of unconditional leave to appear and defend. Further that the documents attached are computer generated and are unknown to the applicant and as such there is need for the court to investigate such an issue since the documents are objected to and as such the applicant has raised triable issues before this court.

Preliminary Point of Law;

- [14] **Section 3 (1)(a) of the Limitation Act** is to the effect that;

*(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose—
(a) actions founded on contract or on tort;.*

Section 22(4) of the Limitation Act states thus;

“Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest in it, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of the claim, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment; but a payment of a part

of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt."

[15] It is the respondent's assertion, and the same can be confirmed from the invoices contained in annexure that between the period of January 2015 to July 2020, (from 29 / 06 /15 to 06/07/2020) the applicant made some payments amounting to Ugx 2,014,961,030/= (Uganda Shillings Two Billion Fourteen Million Nine Hundred Sixty One Thousand thirty). See annexure 'C' to the affidavit in reply. This the respondent maintains was within the limitation period allowed by the law. The applicant asserts that it never made any such payment and further states that the receipts presented by the respondent were computer generated, the applicant however, provides no alternative receipts to rebut those presented by the respondent. It is also important to note that the applicant does not deny acknowledgment of receipt of the invoices presented to it by the respondent as evidenced by annexure 'B' to the affidavit in reply.

[16] Furthermore, this court is of the opinion that the cause of action arose the moment the applicant stopped effecting payment which was in July 2020. See **F.X. Miramago v. Attorney General [1979] HCB 24**, where it was held that;

"The period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run against the plaintiff."

[17] In light of the above discourse therefore, this court comes to the conclusion that the respondent filed the suit well within time and that



this cause of action accrued in 2020 upon default of the applicant to make further payments for the services rendered by the respondent.

- [18] The applicant further states that the contract entered into with the respondent was oral and this was in contradiction with the law since the money involved was over and above that allowed by the law.

Section 10(5) Contracts Act 2010 states that;

"a contract the subject matter of which exceeds twenty-five currency points shall be in writing."

- [19] As earlier stated in the case of **Musoke Kitenda** (supra), the presence of signed documents is enough to indicate presence of a written contract. It could also be added that the applicant was aware that the contract entered was outside the law and further even took an extra step by performing the said contract. See paragraph 5 of the applicant's affidavit in rejoinder, whereof it disputes the outstanding amounts and further indicates the need for reconciliation of accounts. Such part performance of the oral contract made it enforceable in equity. See **Musoke Kitenda** (supra) where Mubiru J, held thus;

"Part performance of an oral contract makes it enforceable in equity.....it is a doctrine of equity that a contract required to be evidenced in writing will still be enforceable even if it is not so evidenced provided that one of the parties does certain acts by which the contract is partly performed..... part performance is achieved when pursuant to the contract visible acts are taken by the party seeking to enforce it, such as handing over possession of the subject matter of the contract. The fact of possession is a



substitute for the contract required by the contract's Act, 2010 because it would be intolerable in equity for one party to knowingly suffer another to invest time, labour and money on the item, upon the faith of a contract which did not exist....."

- [20] Furthermore, the applicant nevertheless entered the same contract willingly and even benefited from it. It can then not be seen to state that the same contract was illegal.
- [21] For the applicant's case to be convincing at least he ought to have presented some evidence of the actual invoices he intends to rely on or concrete evidence of payment. The applicant presents a very vague and unclear picture regarding the payment of the outstanding claim, stating that a reconciliation of accounts ought to be done. This, after contesting the invoices presented by the respondent as having been computer generated but without any proof thereof. The applicant also denies any indebtedness to the respondent but presents no evidence or proof of having fully settled its invoices. Moreover, all these assertions were raised in the same affidavit which I find to be tainted with falsehoods and contradictions.
- [22] The grounds advanced by the applicant cannot therefore be said to have raised any real or bonafide or triable issue worth entertaining by Court. The grounds are actually mere allegations, sweeping statements and or a sham incapable of constituting a plausible defense. **See Abubaker Kato Kasule Vs Tomson Muhwezi [1992-1993] HCB 212.** The application is calculated and aimed at evading Justice and payment of the respondent's money.



[23] In the premises therefore, in the absence of any evidence indicating a plausible defence to the claim or that the applicant is not indebted to the Respondent, this court finds no bonafide triable issues of fact or law upon which the application to appear and defend can be granted. This application lacks merit and is a wastage of the precious judicial time. Accordingly, it is denied and dismissed with costs.

I so order.

Dated, signed and delivered this 3rd day of September, 2021



Duncan Gaswaga

Judge