THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

M.A No. 38 of 2021

[Arising from Civil Suit No. 1100 of 2020]

ROKO CONSTRUCTION LIMITED::::::::::::::::::::::::::::::APPLICANT

VERSUS

ADAM

SSEMPIJJA::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

[1] This is a ruling on an application for leave to appear and defend brought under Section 98 of the CPA Cap 71, Order 36, rule 3 &4 of the Civil Procedure Rules that the applicants be granted leave to appear and defend HCCS No. 1100 of 2020 and costs of the application be provided for.

[2] The grounds for this application were detailed in the affidavit of Mark Koehler in support of the application and these are that; *it is not true*

that the applicant is indebted to the respondent to a tune of Ugx 581,128,142/= as alleged in the plaint; that the applicant contracted the respondent to supply aggregate stones but that the oral contract exceeded the statutory amount and is therefore unenforceable; that Civil suit 1100 of 2020 is barred by limitation; that the figures contained in the attached documents are computer generated and unsupported by any evidence; that the respondent does not attach any delivery notes for the aggregate stones and the trucks that delivered the purported aggregate stones are also not indicated; that the applicant has a valid defence to the suit and that it is just and equitable that this application be allowed and leave be granted to the applicant to appear and defend the suit.

[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. 1100 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 satistfy 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] That the triable issues are; whether the applicant is indebted to the respondent to the tune of Ugx 581,128,142/= and whether civil suit from which this application arises is barred by limitation. That the applicant orally contracted the respondent to offer transport services of aggregate stones from its quarry in Bukerere between January 2013 and August 2020 and it settled all outstanding debts with the respondent prior to the civil suit. Further that documents presented by the respondent were computer generated because they are unsupported by any relevant documents in relation to the proforma invoice from the applicant requesting services or delivery notes for the aggregate stones. See paragraph 3 of the applicant's affidavit in rejoinder. Also that the oral contract between the applicant and the respondent exceeded its statutory limit and is therefore unenforceable under the law as provided in **Section 3 of the Limitation Act**, i.e matters founded on tort and contract shall not exceed six years. That the contract with the respondent was entered in 2013 January and six years have since elapsed which makes the respondent's suit barred by the statute. That the defenses raised by the applicant/defendant can only be determined on the merits at the trial. Counsel prayed that the

court grants unconditional leave to appear and defend and for costs of the suit.

[6] In reply thereof, the respondent stated that the applicant states that it paid the respondent and further denied the same. That the applicant does not have a defense and has only made general denials. See **Musoke Kitenda Vs Roko Constuction Limited M.A No. 1240 of 2020.** Further the respondent stated that the applicant's preliminary objection can be disposed of in this application since it does not require further evidence and we pray that the court finds as such. See **Sembule Investments Limited Vs Uganda Baati Ltd M.A No. 0664 of 2009** where Mulyagonja J, as she then was, relied on **Home & Overseas Insurance Co. Ltd Vs Mentor Insurance (UK) In Liquidation (1990) WLR** where it was stated that; "if the defendant's only suggested defense 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.

[7] That 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 the suit was filed on 22/12/2020 and **Section 22 of the Limitation Act** states that where any right has accrued to recover any debt or other liquidated pecuniary claim, and the person liable or accountable thereof 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 acknowledgement or the last payment. That the applicant made its last payment in December 2020 which was well

within the limitation period. That as such the point of law as to the suit being barred by limitation is misconceived. The respondent prayed that the court finds as such and dismisses the application on that ground.

[8] In a rejoinder, the applicant stated that the application discloses grounds that warrant grant of leave to appear and defend and that the applicant based on the statement by Mark Koehler to state that the applicant is not indebted to the respondent in the sum of Ugx 581,128,142/= and that the applicant will adduce evidence to prove the same at trial. That the respondent's stance to have the applicant provide all relevant evidence to prove the existence of a defense is over and above the prerequisite required for this application. The applicant has sustainably proven the grounds that warrant grant of leave to appear and defend and as such it ought to be heard and defend itself. That Section 23(1) of the **Limitation Act** states that every such limitation as is mentioned in Section 22 shall be in writing and signed by the person making the acknowledgement but no such acknowledgement was ever made by the applicant in writing or otherwise. That a litigant who puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time barred, the court cannot grant the remedy or relief sought and must reject the claim. See **Iga Vs Makerere University [1972] EA 65.** That as such the suit is statute barred by limitation and therefore the applicant's objection to the suit is not in any way misconceived.

[9] The court of Appeal in the case of **Kotecha Vs. Mohammed [2002] 1 EA 112** stated thus; *"the defendant is granted leave to appear and defend if he is able to show that he has a good defence on the merit;*

or that a difficult point of law is involved; or a dispute as to the facts which ought to be tried; or a real dispute as to the amount claimed which requires taking an account to determine; or any other circumstances showing reasonable grounds of a bona fide defence."

Preliminary Points of Law;

[10] **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."*

[11] It is the respondent's assertion, that between the period of 1st May 2013 to 13th August 2020, the applicant made some payments amounting to Ugx3,236,637,262/= (Uganda Shillings Three Billion Two hundred thirty six million six hundred thirty seven thousand two hundred twenty six) see paragraph 9 of the affidavit in reply of Adam Ssempijja. This the respondent maintains was within the limitation period allowed by the law. The applicant asserts that the documents presented by the respondent were computer generated, the applicant however, doesn't

provide alternative documents to rebut those presented by the respondent.

[12] Furthermore and in line with Section 22(4) (supra) and on the basis of the available evidence, this court is of the opinion that the cause of action arose the moment the applicant stopped effecting payment which was in 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."*

[13] In light of the above discourse therefore, this court comes to the conclusion that the respondent filed the suit well within time. This cause of action accrued in 2020 when the applicant stopped making payments to the respondent which payments are not denied.

[14] With regard to the objection concerning the lack of a written agreement/contract for a transaction whose value is more than twenty five currency points, it should be noted that just like the previous objection, this one too can be disposed of herein since it does not require any further adducing of evidence. The evidence on record clearly indicates that the parties were not in doubt at all of the terms and subject matter of their relationship (before buying stones from the plaintiff) for which the defendant (now applicant) paid consideration. There was part performance as the dealing event as for all those years. There are records provided by the respondent proving supply of goods and payments effected in part-performance of the contract.

[15] Had it not been for the default in payment by the applicant that occurred this matter would never have been raised. It therefore follows that even without a formal written contract the above evidence and relationship of the parties is sufficient to indicate that a contract indeed exists between them which states with reasonable certainty the material terms and has partly been performed.

[16] ***Section 10(2) of the Contract Act states thus***;

> *(2) A contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties.*

> ***Section 10(5) of the Contracts Act states thus;***
>
> A contract the subject matter of which exceeds twenty five currency points shall be in writing.

[17] In Musoke Kitenda (supra) it was observed 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."*

[18] It is my considered view therefore that there was/ is a contract between the applicant and respondent that satisfies the requirements of Section 10(5) (supra). Further, part performance of an oral contract makes it enforceable in equity and the applicant does not deny taking benefit of the goods supplied by the respondent. See **Face Technologies (PTY) Limited Vs Attorney General & Anor Civil Suit No. 248 of 2008.**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....."

This objection too is unsustainable and should be overruled.

[19] In the case of **Corporate Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998], EA** where the Court of Appeal of Kenya ruled that;

"Leave to appear and defend will not be given merely because there are several allegations of fact or law made in the defendant's affidavit. The allegations are investigated in order to decide whether leave should be given. As a result of the investigation even if a single defense is identified, or found to be bonafide, unconditional leave should be granted to the defendant."

[20] 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.

[21] 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.

[22] In the premises therefore, in the absence of any evidence indicating a plausible defense 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 at Kampala this 3rd Day of September 2021

Duncan Gaswaga

JUDGE