THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-OO-CV-CS-0557-2004

KIGA LANE HOTEL LIMITED ::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

UGANDA ELECTRICITY DISTIRIBUTION::::::::::::::::DEFENDANT COMPANY

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The Plaintiff's case against the defendant is for recovery of special and general damages, interest and costs of the suit. At the conferencing, the parties agreed that:

1. The plaintiff operated Hotel business at the material time at Kawala. One Rhoda Wanyana is Director and Shareholder in the company.

2. Rhoda applied for connection for commercial purposes.

3. There was disconnection of power on 16/10/2003 and reconnection made subsequently.

Issues:

1. Whether the disconnection of power was justified.

2. Whether the plaintiff was a customer of the defendant.

3. Whether the plaintiff suffered loss and damage as a result.

4. Whether the defendant is liable for any or all of the damages.

5. Remedies.

I took up the matter half way the hearing, at the stage of the defence evidence. Both learned Counsel preferred to file written submissions. Their analysis of the evidence does not follow the order in which the issues were framed. I have not faulted their decision to proceed that way. The nature of the claim dictates so.

Accordingly, court shall conveniently re-cast the five issues into three broad ones:
1. Whether a contract existed between the plaintiff and the defendant.
2. Whether the defendant is liable for the plaintiff's alleged loss.
3. Reliefs, if any.

Representations:
Mr. Joseph Luswata for the plaintiff.
Mr. Denis Wamala for the defendant.

Issue No. 1: Whether a contract existed between the plaintiff and the defendant.

From the pleadings and the evidence, the plaintiff is a limited liability company. It was incorporated on 24/03/1997. The Electricity Account in issue, A/C No. 10650234 was opened by a one Rhoda Wanyana with the defendant's predecessor in title on 12/12/1995, before the incorporation of the plaintiff company. Rhoda Wanyana herself became a director of the plaintiff on 20/01/2004, according to Exhibit D3. And as an admitted fact, the power supply to the impugned premises was disconnected on 16/10/2003.

From the above facts, Kiga Lane Hotel Limited did not open the account in question with the defendant. The person who opened the account, long before the plaintiff came into existence, was Rhoda Wanyana.

The plaintiff's evidence on this point is that at the time of the disconnection in 2003, the power was being consumed by Kiga Lane Hotel Ltd. PW1 Wanyana Rhoda testified:

"I work in Kiga Lane Hotel Am a director in it, since 24th March 1997. 1 know UEDCL, Am their customer."

From her own evidence, the defendant's registered customer is Rhoda Wanyana, PW1, and not the plaintiff.

The law is settled that a contract made before a company is formed cannot bind the company formed afterwards nor can a company by adoption or ratification obtain a benefit of a contract purporting to have been made on its behalf before it came into existence. In order to do so, a new contract must be made with it after its incorporation on terms of the old one.

See: ***National Enterprises Corporation & 2 Others vs. Nile Bank Ltd SCCA No. 17/97.***

In the instant case, it is very clear to me that the account in dispute was opened in December, 1995. It was opened in the name of Rhoda Wanyana. Kiga Lane Hotel Ltd came into existence in 1997 according to Exhibit D2. What is in issue is a contract made before the company was formed. This contract cannot bind the company nor could the company by adoption or ratification obtain a benefit from it as long as the contract was concluded before it (the company) came into existence. In order to do that, a new contract had to be made between the said company and the defendant after the company's incorporation in 1997 on the terms of the old one. There is no evidence of any such new contract. In the result, no contract existed between the defendant and the plaintiff Hotel.

In connection with the above is the issue of privity of contract. Privity simply means the relationship in which a person stands in a transaction in which he is a party, or some other party with whom he/she is connected. It is the relationship which exists between the immediate parties to a contract which is necessary to enable one person to sue on it.

It is a fundamental principle of law, and Mr. Wamala could not have put it better than he did in his submissions, that only a person who is a party to a contract can sue upon it. A stranger to a contract can not take advantage of the provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit him. It was so held in ***MIDLAND SILICONES LTD VS SCRUTTONS [1962]A.C. 446*** and it is still good law to-date.

> ***See: Ecumenical Church Loan Fund vs. John Bwiza & Others HCT-00-CS-0614-2004 (Commercial Court — unreported)***

> ***:Francis Xavier Muhoozi t/a Kabale Kobil Station vs. National Bank of Commerce (U) Ltd HCT-00-CC-CS- 0303-2 006 (also Commercial Court - unreported).***

This principle in my view seals the plaintiff's fate herein. The contract was between Rhoda Wanyana and the defendant. It was concluded in 1995, before the plaintiff was incorporated in 1997. The law cannot allow it to benefit from the said contract as long as following its incorporation, no steps were taken to enter into a new relationship with the defendant, be it on the terms of the old one or fresh terms. For this reason alone, the plaintiff lacks a sustainable cause of action against the defendant.

It has been contended by the plaintiff that the contract was assigned by Rhoda Wanyana to the plaintiff.

Apart from pleading assignment in paragraph (a) of the plaint, no evidence of assignment of the contract from Rhoda Wanyana to the plaintiff was led. The two plaintiff's witnesses, PW1 Wanyana and PW2 Waiswa Moses provided no evidence of the alleged assignment of the contract from PW1 Wanyana to the plaintiff.

I have addressed my mind to the law on assignment of contract. The general rule is that liabilities under a contract cannot be assigned. But they may be assigned with the consent of the other party to the contract, as in Novation, and the parties may make them assignable, either expressly or impliedly.

See: *A Concise Law Dictionary by P. G Osborn, 5th Edition, p. 34.*

Rights or benefits under a contract may be assigned by legal assignment, equitable assignment, or operation of law (as in the case of the defendant and its successor in title, Uganda Electricity Board). In the instant case, the plaintiff has adduced no evidence of a legal assignment. I believe there was none. The possibility of an assignment by operation of law is out. The only remote possibility is that of an equitable assignment.

It is trite that the benefit of a contract can be transferred to a third party by a process known as assignment. This is a transaction between the person entitled to the benefit of the contract (called the creditor or assignor, in our case Rhoda Wanyana) and the third party (called the assignee, in our case Kiga Lane Hotel Ltd) as a result of which the assignee becomes entitled to sue the person liable under the contract (called the debtor, in our case the defendant). The debtor is not a party to the transaction and his consent is not necessary for its validity.

(See: Law of Contract in Uganda by David J. Bakibinga at p. 307).

No particular form is necessary: it need not even be in writing. All that is necessary is that the debtor (in our case the defendant) should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril (a Concise Law Dictionary, ibid, p. 122).

In the instant case, there is no evidence of any such notice to the defendant. All bills continued coming in the name of Rhoda Wanyana and the disconnection notice was issued to

her. Learned Counsel for the defendant has submitted that if the contract was ever assigned by PW1 Wanyama to the plaintiff, then the plaintiff's claim against the defendant can only be founded on a legal chose in action, that is, a right that can only be enforced by an action at law. I agree.

However, the law as I understand it is that an equitable assignee of a legal chose in action cannot enforce the right assigned by action, unless the action is in the name of the assignor, or he is joined as a plaintiff, if he consents, or if he does not, as a defendant. To succeed in action based on breach of contract, the plaintiff ought to have joined Rhoda Wanyana as a party, if she consented or as a defendant (if she did not consent). Failure to do so rendered the action founded on contract incompetent. In all these circumstances, I find that no contract existed between the plaintiff and the defendant.

I would answer the first issue in the negative and I do so.

Issue No. 2: <u>Whether the defendant is liable for the plaintiff's alleged loss.</u>

This leg of the plaintiff's claim is founded not in contract but in negligence. The plaintiff avers in paragraph 3 (c) of the plaint that ***<u>on the 16th day of October 2003, the defendant's agents acting in the course of their employment negligently and without any justification disconnected the meter No. E1 76873 accusing the user thereof of by-passing the meter and thus consuming power illegally.</u>***

Learned Counsel for the defendant has attacked this leg of the plaintiff's claim as welt. He has argued that it should fail because the particulars of the alleged negligence are neither pleaded nor proved. That there is no iota of evidence led by the plaintiff's witnesses showing in what manner the disconnection of power supply to the premises was negligent. That disconnection alone is not evidence of negligence and the plaintiff had to prove that the said disconnection was negligently carried out by the defendant's agents.

It is further submitted by learned Counsel that since no contract existed between the plaintiff and the defendant, the defendant did not owe a duty of care to the plaintiff and cannot therefore be held liable in negligence. Counsel did not cite any authority to support this rather novel alleged legal principle. I will start with the tatter argument.

The ***Oxford Dictionary of Law,*** sixth edition (Edited by Elizabeth A. Martin and Jonathan Law) defines ***'negligence'*** (at p. 353) thus:

> ***"2. A tort consisting of the breach of a duty of care resulting in damage to the claimant. Negligence in the sense of carelessness does not give rise to civil liability unless the defendant's failure to conform to the standards of the reasonable man was a breach of a duty of care owed to the claimant, which has caused damage to him. Negligence can be used to bring a civil action when there is no contract under which proceedings can be brought. Normally it is easier to sue for breach of a contract, but this is only possible when a contract exists."***

I take this to be the correct position of law. This being so, the mere fact that the plaintiff has failed to demonstrate existence of a contract between itself and the defendant would not ipso facts be a ground to deny it a remedy in tort, if any is deserved. Negligence can found a tortuous civil action in the absence of a contractual relationship between the parties. Having said so, I now turn to the pleadings.

I would agree with learned Counsel for the defendant that particulars must always be given of any alleged negligence, showing in what respects the defendant was negligent. The statement of claim should state the facts on which the supposed duty is founded, the duty to the plaintiff with the breach of which the defendant is charged, the precise breach of that duty of which the plaintiff complains, and, lastly, particulars of injury and damage sustained.

Relating the above principles to the instant case, the plaintiff avers in paragraph 3 (c) of the plaint that the defendant's servants, acting in the scope of their employment, negligently and

without any justification disconnected the meter accusing the user thereof of by passing the meter and thus consuming the power illegally: As fate would have it, the person using the meter was the plaintiff at the material time.

In paragraph 3 (f), the plaintiff pleaded that the defendant's agents did the disconnection recklessly and acted irresponsibly after the disconnection. That there were no reasons for disconnection and the defendant's investigations exonerated the plaintiff. The plaintiff then sets out the particulars of the loss suffered in terms of its declining business attributed to the disconnection. It then avers in paragraph 5 that at the trial of the suit, the plaintiff would aver that the actions of the agents of the defendant were the direct cause of the loss [particularized in paragraph 4] were reckless, negligent, arbitrary, defamatory and unreasonable and the plaintiff would pray for general damages.

Learned Counsel for the plaintiff indeed submitted that particulars of negligence were pleaded in paragraphs 3 (c), (f) and 5. Upon directing my mind to the law on this point, I accept the submission. The particulars of negligence were in my view sufficiently pleaded much as the plaintiff could have done more. Failure to do more than it should have done would not vitiate his claim. I would therefore think that since equity looks to the intent rather than the form, and it (equity) will not suffer a wrong to be without a remedy, the point raised by learned Counsel for the defendant, very respectfully, lacks merit. It ought to be rejected and I do so. In any case, it appears to me that even Article 126 (2) (e) of the Constitution would appropriately be invoked in a situation of this kind. Substantive justice must be administered without undue regard to technicalities.

I have addressed my mind to the defendant's alleged negligence in the matter.

Almost every one, of course, has some idea that being negligent means being careless, not doing something properly and making a mess of a job. The necessary objective attitude of the courts to this tort is made clear in what Baron Alderson said in ***Blvth vs. Birmingham Water Works (1856) 11 EX. 781:***

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

A plaintiff who alleges negligence has to prove that:
(i). the defendant owed him a duty of care;
(ii). the defendant broke that duty; and
(iii). the plaintiff suffered a loss.

It is an admitted fact that the plaintiff operated Hotel business at the material time at Kawala, in the building for which Rhoda Wanyana opened an electricity account with the defendant in 1995. The said Wanyana is a director and shareholder in the company. She (Rhoda Wanyana) actually applied for electricity connection for commercial purposes, implying knowledge as to user of the suit premises on the part of the defendant.

There is evidence that at the time of disconnection there was an outstanding bill. However, it was not the reason for the disconnection. The reason was suspicion of a meter by-pass and therefore illegal consumption of power. The suspicion was investigated by the defendant's technicians who found no evidence of any meter by-pass. Power was re-connected after 35 days according to the uncontroverted evidence of PW1 Rhoda Wanyana.

At the hearing, DW1 Esther Mulyagonja, the defendant's company Secretary, testified that the only reason the company was not ready to compensate the plaintiff was because it (the plaintiff) had no contractual relationship with the defendant. According to her, even if the plaintiff was their customer, they would still not pay any compensation to them because disconnection is routine procedure.

That they disconnect people every day for various reasons, or for no reason at all.

I am not sure that her assertions reflect any declared official policy of the defendant. No such written policy was brought to my attention. Even if they did, I would not hesitate to say that such a policy is obnoxious. It lacks logic. True, courts have somehow to decide where to draw the line. On the one hand it is vital not to allow suffering to go uncompensated, yet it would be just as wrong to hold a person responsible for every trivial complaint of the fussy or the malcontent. How far the courts are prepared to extend this ***'duty of care'*** was decided in part, by a decomposing snail in the leading case of ***Donoghue vs. Stevenson (19327 AC 562.*** The facts are not relevant to the instant issue. However, to a large extent the decision in this case represents the basis of the modern law of negligence. Lord Atkin contented himself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care of which the particular cases found in the books are but instances. He went on to lay down the basis of the present law in the doctrine of the 'neighbour' principle in this much quoted passage:

> ***The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or omissions which are called in question.***

The test has proved the foundation upon which countless cases of alleged negligence have been tried and continue to be judged. Applying the same principle to the instant case the defendant knew or had cause to know that their customer, Rhoda Wanyana, operated Hotel business in the suit premises. She had applied for and had been approved for a power line that would further her business interests. The line was for commercial purposes. The defendant was therefore under duty to take reasonable care to avoid acts or omissions which it could reasonably foresee would be likely to injure those interests. Disconnection of power for 35 days had that result. Despite this knowledge of what business was being transacted in the premises, the defendant went ahead and disconnected the power and for a period of 35 days

the building was off the grid. Court cannot in such circumstances draw up its skirts and refuse assistance to the plaintiff, lack of a contractual relationship between the two notwithstanding.

From the pleadings and evidence, it is clear to me that the defendant owed a duty of care to the plaintiff which duty it (the defendant) breached. It is therefore liable for the plaintiff's proved loss.

I would answer the second issue in the affirmative and I do so.

Issue No. 3: Remedies, if any.

The plaintiff's lead prayer is for special damages of Shs.8, 520,000/= itemized as follows:

(a). Profits from Bar, Hotel, Restaurant, Darts Club and Pool Table of Shs.200, 000/= @ day x 35 - 7,000,000/=

(b). Payment for use of the premises as conference by the balokole on every Sunday © at Shs.100, 000/= for 4 Sundays - 400,000/=

(c). Payment for theatre on every Sunday each occasion at Shs.200, 000/= for 4 Sundays - 800,000/=

(d). Payment due to cancelled contract with performers Adatas on the first Saturday following the connection — 200,000/=

(e). Loss of rentals for 1 month due to the departure of Tenants (one Working Saloon and the other a milk shop) — 120,000/=

Total 8,520,000/=

It is trite that special damages must be pleaded and strictly proved. Where documentary proof is not forthcoming, as indeed appears to be the case herein, the claimant should be contented with an award of general damages.

As regards the claim for loss of income from the business, items (a) — (e) above, the plaintiff has not produced evidence relating to the operation of the Hotel, evidence that would show how it was performing to raise inference that it was earning Shs.8,520,000/= per month as alleged in the plaint. Books of account, if any were being kept, would have come in handy in this regard. The plaintiff would have to establish its actual income through a recognized accounting method. It was not enough to say that it was earning so much per week and leave it at that.

From the evidence of PW1 Wanyana and PW2 Waiswa, I'm unable to say that the plaintiff has rendered strict proof of these claims or at all. In these circumstances, I would disallow the entire claim of special damages.

As regards general damages, these are what may be presumed by law to be the necessary result of the defendant's wrongful acts. The plaintiff may not prove that he suffered general damages. It is enough if he shows that the defendant owed him a duty of care which he breached. In the instant case, the plaintiff has shown to the satisfaction of the court that the defendant took the law into its own hands and paralysed the plaintiff's business for over a month. It merits an award of general damages.

Learned Counsel for the plaintiff suggested an award of Shs.5,000,000/= as general damages on top of the Shs.8,520,000/= which the plaintiff had prayed in the plaint or Shs.4,540,000/= in Counsel's submissions. Learned Counsel for the defendant did not suggest any.

Taking into account the high handed conduct of the defendant's agents, the plaintiff's disallowed claims of special damages, and doing the best I can in the circumstances of this case, an award of Shs.5,000,000/= (five million only) would in my view meet the ends of justice. The award would attract interest at the rate of 25% per annum from the date of judgment till payment in full.

The plaintiff shall also have the costs of the suit.

In the result, judgment is entered for the plaintiff against the defendant in the following terms:

(i). General damages: Shs.5, 000,000/= (five million only).

(ii). Interest on (i) above at the rate of 25% per annum from the date of judgment till payment in full.

(iii). Costs of the suit.

Orders accordingly.

Yorokamu Bamwine

JUDGE

17/11/2008

17/11/08:

Mr. Andrew Kabombo for defendant.

Parties absent.

Andrew:

Holding brief for Mr. Denis Wamala.

Court:

Judgment delivered.

Yorokamu Bamwine

JUDGE

17/11 2008