IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

HCMA NO. 876 OF 2016

ARISING FROM HCMA. NO. 806 OF 2016 ; HCMA NO. 700 OF 2016 AND HCCS. NO. 278 OF 2016)

CHINA ROAD AND BRIDGE CORPORATION.....APPLICANT

V

1. **WELT MACHINEN ENG. LTD**
2. **ATTORNEY GENERAL.....RESPONDNETS**

BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

The applicant through their advocates Omara Atubo & Co, sought the following orders under section 33 of the Judicature Act and sections 5,7 ,8 , 82 and 98 of the CPA and order 46 of the CPR.

1. The designed and code named judgment /order/ sanctioned and/or originated by the registrar of the court dated 7.10.2016 be reviewed and consequently varied and set aside.
2. The review process takes into account the existence of decree in Soroti HCCS. No. 16 of 2014 as well as the pending appeal in the Court of Appeal.
3. An order restraining the respondents from enforcing and/or executing orders in MA. No. 806 of 2016.

Grounds of the application are contained in the affidavit in support of Fan Wei.

The respondents opposed the application in affidavits in reply of Edwards Kato, Denis Bireije , John Kennedy Okewling and Apo-Oroma Felix.

The applicant was represented by Rachel Odoi.

The 1st respondent was represented by Mr. Mujulizi of Mujulizi, Alinaitwe & Byabakama Advocates.

The 2nd respondent was represented by Mr. Madete Senior State Attorney.

All counsel filed written submissions that I have carefully considered.

The applicant's case.

From the affidavit in support, it was the applicant's case that in compliance with the judgment in Soroti HCCS. No. 16 of 2014, Fan Wei submitted an accountability to the Ministry of Energy for advice on royalties in respect of aggregate extracted from Kamusalaba rock but that the Ministry has never advised him.

It was further the applicant's case that in spite of the subsisting judgment between itself and the 1st respondent, the latter sued the 2nd respondent in HCCS. No. 278 of 2016 over the same subject matter and obtained judgment on admission in MA. 700 of 2016 in spite of a pending appeal and cross appeal by both the 1st respondent and the applicant against the judgment in CS 16 of 2014.

The applicant feels aggrieved by the judgment and orders in HCCS. No. 278 of 2016 and subsequent orders in MA 700 and 806 of 2016 because the

respondents seek to appropriate the applicant's money in the hands of UNRA . That furthermore, the said judgment violates the applicant's benefits in HCCS No. 16 of 2014.

In the latter suit, the court ordered inter alia, that

> *The 1st defendant (China Road and Bridge Corporation) shall render an account of the quantity of aggregate procured from Kamusalaba rock to the Attorney General and pay the government its monetary value within reasonable time and not later than 30 days from the date of this order'.*

The applicant complains in the motion and affidavit in support and rejoinder that it was not given an opportunity to be heard in CS. 278 of 2016, yet its money with UNRA was appropriated by the judgment on admission.

My analysis of the applicant's case is that the applicant had no benefit under the judgment in CS 16 of 2014 . On the contrary it was burdened to pay the government the monetary value of the aggregate excavated from Kamusalaba rock for the reason that it did so without a Licence as required by the Mining Act 2003.

The respondents' case.

In HCCS. No. 278 of 2016, the 1st respondent sued the 2nd respondent for unjust enrichment .

This was on the basis of a subsequent inspection carried out by the department of Survey and Mines captured in a report dated 5.6.2016 (annex. WM4) attached

to the plaint . This followed a request by the Solicitor General dated 18.4.2016 to the Permanent Secretary Ministry of Energy and Mineral Development (WM 3) to ascertain whether the rock is in the Government controlled area or in the mining area of the plaintiff Welt Machinen.

The report found that part of Kamusalaba rock was in the mining area of the plaintiff in C.S 278 of 2016 while part was outside that area.

It is on the basis of this report that the 1st respondent sued the 2nd respondent for unjust enrichment and got a judgment on admission entered by the deputy registrar of this court on 15.8.2016.

While the respondents defend the judgment arising from CS 278 of 2016 arguing that it is a separate cause of action different from the cause of action in CS 16 of 2014, the applicant argues that CS 278 of 2016 is caught by the doctrine of res judicata. Counsel for the applicant argued that the 1st respondent was attempting to get what it did not get in CS 16 of 2014 through the back door.

The 1st respondent in para. 29 in the affidavit in reply of Apo-Oroma Felix states that the actions of the 1st and 2nd respondents were taken in execution of the orders in CS. 16 of 2014 and the advice rendered by the Ministry of Energy and Mineral Development. This position was echoed by the affidavit in support of Dennis Bireije who affirms in para 39 of his affidavit in reply that the 2nd respondent was in the process of enforcing its rights under CS. No. 16 of 2014 when it was sued by the 1st respondent. (Letter dated 3.5.2016 addressed to the Executive Director UNRA attached to affidavit of Bireje refers.)

My analysis of the respondents' case is that CS 16 of 2014 and CS 278 of 2016 are interlinked to the extent that the 2nd respondent was conferred rights in CS 16 of 2014 which it sought to enforce vide one of the orders in MA 700 of 2016 arising from CS. 278 of 2016.

Procedure

I will say a couple of things on the procedure adopted by counsel for the applicant.

Section 33 of the Judicature Act under which this application is brought , empowers the High Court to grant such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim before it so that as far as possible , all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters avoided.

The applicant invoked sections 82 of the CPA and order 46. These provisions provide for the review process. The court that passed the judgment may review it on the grounds of the discovery of new and important evidence which could not be produced at the trial or to correct an error on the face of the record.

The applicant could not have appealed the orders in MA 700 and 806 of 2016 arising from CS 278 of 2016 because it was not party to the suit therefore order 46 is appropriate under the circumstances.

The new evidence the applicant relied on was contained in the affidavit in rejoinder of Fan to the effect that he submitted an accountability as required by

the judgment in CS 16 of 2014 but there was no response from the Ministry of Energy . (Annexture marked B mentioned in para. 2 of that affidavit)

At the scheduling conference, seven issues were framed for determination.

1. Whether the registrar had jurisdiction to hear MA. 700 and 806 arising from CS . No. 278 of 2016.
2. Whether the 1st and 2nd respondents are entitled to remedies in MA. 806 and 700 of 2016.
3. Whether the plaintiff's claim in Cs. 278 of 2016 is res judicata.
4. Whether the applicant was entitled to be heard in CS 278 of 2016.
5. Whether the applicant owes the Attorney General any money.
6. Whether the Attorney general can dispose off this money in any manner it deems fit. Whether the affidavit in rejoinder filed on 7. 12. 2016 by the applicant offends the law on affidavits.
7. Whether the affidavit in rejoinder filed on 7.11.2016 by the applicant offends the law on affidavits.

1. Whether the plaintiff's claim in CS. 278 of 2016 is res judicata.

Both counsel correctly stated the principles under the doctrine of res judicata stipulated in sections 6,7 and 8 of the CPA. The sections prohibit a court from trying a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties

or between parties they or any of them claim , litigating under the same title and the said issue has been finally determined by that prior court.

The principles are well settled so I need not delve into authorities cited by counsel. Suffice it to emphasize that under section 7 of the CPA, a suit is res judicata

- where the matter directly and substantially between parties has been directly and substantially in issue in a former suit between the same parties under whom they or any of them claim; and
- litigating under the same title.

I agree with counsel for the respondents' submission that the issues in civil suit 16 of 2014 were settled as between the applicant and the 1st respondent to the extent that Licence 1194 did not extend to Kamusalaba rock and reasons for the decision were given. This means that issue is res judicata as between the applicant and the 1st respondent.

With respect to the 2nd respondent, the Attorney General did not litigate with the applicant in C.S 16 of 2014 but it was conferred rights to recover the monetary value of the aggregate mined by the applicant without a mining licence.

It is for these rights that the 2nd respondent was sued in CS. 278 of 2016 under the claim of unjust enrichment . Para . 3 of the 2nd respondent's written statement of defence in CS 278 of 2016 is in the following terms:

> *In answer to the statements of fact and claim in para. 4 of the plaint, the defendant avers that in reliance upon , among other facts, the expert*

opinion of the staff of the Department of mines and geological surveys transmitted to the defendant by the Permanent Secretary in the Ministry of Energy and Mineral development, the defendant presents no contest or denials of the facts and claims set out in the plaint'

The applicant had no rights in the aggregate mined from Kamusalaba rock and so cannot be heard to complain if the owner of the aggregate assigns the proceeds from it to the 1st respondent based on a technical report by the line ministry .

The judgment in CS 16 of 2014 did not tie the hands of the 2nd respondent in how it was to dispose of or utilize the proceeds from the aggregate mined from Kamusalaba rock.

The result is that CS 278 of 2016 is not res judicata because the respondents litigated over proceeds from aggregate from Kamusalaba rock in which the applicants had no legal interest and which was decreed to the 2nd respondent by the judgment in CS 16 of 2014 .

2. Whether the applicant owes the Attorney General/Government any money and whether it can dispose of it as it deems fit.

From the foregoing analysis, while it is a fact that the applicant is indebted to the 2nd respondent, the same has not been ascertained by a competent authority.. The affidavit in reply of Okewling makes reference to his inspection report which established that 723,030 tonnes of aggregate were excavated from Kamusalaba rock. Of this 562,976 tons was from Location License area LL1194 while 165,053 tons was from outside that area.

The letter of the Permanent Secretary MOEMD dated 13.6.2016 makes reference to the technical report and addressed to the Solicitor General only shows that the report only established royalties yet the order in CS 16 of 2014 was for the monetary value of the aggregate.

Under these circumstances, the monetary value of the aggregate has not been ascertained.

This finding notwithstanding, the 2nd respondent as representative of government is free to direct how funds under its control, once definitively ascertained, may be appropriated.

4. Whether the applicant was entitled to be heard in CS 278 of 2016.

The 1st respondent in this suit sued the 2nd respondent for unjust enrichment. Unfortunately, the judgment on admission in para. 5 directs that the 1st respondent will be paid directly by UNRA from monies owed to the applicant.

I have found under issue No. 1 that the 2nd respondent was within its authority to dispose of proceeds of aggregate even if it was through an admission to a claim of unjust enrichment by the 1st respondent. To that extent, the applicant was not entitled to be heard .

However, on the issue of enforcement of the judgment in CS 16of 2014, the applicant had a right to be heard on the aspect of enforcement .

In as far as CS 278 of 2016 was between the 1st respondent and 2nd respondent , the latter having been conferred rights in the judgment of CS 16 of 2014, the

applicant was not entitled to be heard when the 2nd respondent was ceding part of those rights to the 1st respondent.

However, the applicant was entitled to be heard on the intention by the 2nd respondent to execute which unfortunately was embodied in the judgment on admission.

Para. 5 of the judgment on admission directs UNRA to pay the plaintiff (1st respondent) or to the Secretary to the Treasury 35, 768,679,999/ out of monies owed to the applicants . The applicants had a right to notice of this apparent execution against them.

The reason for this course of action, I suspect, appears to be the absence of a prescribed procedure for Government to execute its judgments. While the Government Proceedings Act Cap 77 provides for execution against government, it does not provide for the reverse.

The omission to inform the applicants of this intention could have been cured by article 126(2) (e) of the Constitution but because no technical basis was laid for the monetary value of the aggregate, the judgment on admission will be reviewed and I will return to this shortly. The rest of the orders are within the law.

5. **Whether the registrar had jurisdiction to hear MA. 700 and 806 arising from CS . No. 278 of 2016.**

MA 700 of 2016 arose from CS 278 of 2016 which was not contested in the sense that the defendant had no defence and conceded to the claim of unjust enrichment. This means it fell under order 50 of the CPR that confers on registrars powers to handle non-contentious matters.

MA 700 of 2016 was the application on admission under which a judgment on admission was entered.

With respect to MA 806 of 2016, this was an application for review of judgment in MA 700 of 2016 which application was not opposed by the respondent therefore, the deputy registrar had jurisdiction to review his own order .

6. **Whether the respondents were entitled to remedies in MA. 700 and 806 arising from CS . No. 278 of 2016.**

I have found in issue No.4 that in as far as the applicant was not afforded an opportunity to be heard before an order was made to pay out their money held by UNRA, the order was not sustainable. Secondly, the monetary value of the aggregate was not ascertained by a competent authority and therefore the applicant's money could not be paid out. For these two reasons, I struck out para. 5 of the judgment on admission.

7. **Whether the affidavit in rejoinder filed on 7.11.2016 by the applicant offends the law on affidavits.**

The determination of this issue will be obiter because it is not material to the main dispute between the parties and therefore I do not intend to delve into the law on affidavits.

Suffice it to say that the affidavit in rejoinder was properly filed because an applicant has a right to reply to pleadings by the respondent. This means , the applicant has a right to file an affidavit it in rejoinder in place of a reply .

In conclusion, the application to review judgment and orders in MA 700 and 806 of 2016 arising from CS 278 of 2016 succeeds in part.

After determining that para. 5 of the judgment on admission be reviewed, I direct that the Chief Government Valuer ascertains the monetary value of the 723,030 tons of aggregate mined by the applicant bearing in mind the amount of money billed by the applicant for aggregate in the Bill of quantities and other relevant factors . The applicant and 2nd respondent are free to make written representations of their respective positions of not more than two pages to the Valuer .

The valuation report to reach me in one week's time.

This means I will make final orders in this matter after the Chief Government Valuer submits his report.

DATED AT KAMPALA THIS 17TH DAY OF FEBRUARY 2016.

HON. LADY JUSTICE H. WOLAYO