

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL SUIT NO 2351 OF 2016

INFRASTRUCTURE PROJECTS LTD:..... PLAINTIFF

VERSUS

MEJA PROJECTS LTD :.....DEFENDANT

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

The plaintiff filed this suit against the defendant for: Us Dollars 266,711.00, and costs. Its case is that it was contracted by the defendant to do consultancy service in relation to a project for construction of proposed Ethel Apartments on plot 21 Faraday Road, Bugolobi Kampala. The plaintiff was to be paid the suit sum upon the completion of pre-construction services. The plaintiff was not paid the said sum when this phase of the work was done. It is the plaintiff's case that the defendant breached its contract with it by failing to pay the suit sum of money.

It was alleged in the plaint that the defendant hired the services of the plaintiff to do consultancy services pertaining to a project for construction of the proposed Ethel Apartments on Plot 21 Faraday Road, Bugolobi Kampala. For this the plaintiff would be paid USD 254,011 on completion of pre-construction services and it had indeed completed them.

The plaintiff further pleaded that for the work it had done thus far it was entitled to USD 266,711 being pre-construction services and additional work during the construction process.

The defendant in its defence contended that: it does not know the plaintiff, have never had any contract with the plaintiff and thus all documents purporting to found the contract are not its documents. Alternatively, the alleged agreement upon which this suit is based is forged and was done in collusion between the defendant's director with a third party to defraud the defendant, because on the 2nd day of January 2007 when the agreement was purportedly made, the defendant did not own the land which was the subject of the agreement. Lastly the defendant submitted to the jurisdiction of court.

The plaintiff was represented by *Mr. Nyote Innocent* whereas the defendant was represented by *Mr Kwemara Kafuuzi*.

The following issues were formulated for court's determination.

1. *Whether there was a contract.*
2. *Whether the contract was performed.*
3. *What remedies are available to either party.*

The parties were ordered to file written submissions; and accordingly filed the same. This Court has considered the same in writing this Judgment.

DETERMINATION OF ISSUES

Issue 1

Whether there was a contract.

The plaintiff's counsel submitted that the question now before court is whose version facts in the present case is more probable, between that of the plaintiff and the defendant. The plaintiff avers that there is a contract between the parties while the defendant says there is none and if there is

any, it is forged and or entered in collusion between a director of the defendant and a third party to defraud the defendant.

During the hearing the plaintiff's witness PW1 a one Mugume Samuel in states that there was an agreement between the plaintiff and the defendant by which as the plaintiff was to do consultancy work. The agreement is exhibited as 3. A one Abigail Nyambiro Mugume who testified in paragraph 1 of her witness statement that she was a former shareholder and director of the defendant company, confirms that there was such an agreement and it is exhibited a 3, as per paragraph 6 of her witness statement. That she signed on behalf of the defendant while Mugume Sam signed on behalf of the plaintiff. She further testified in cross examination that the agreement was in existence at the time Grace Kavuya bought shares in the defendant company.

This evidence juxtaposed with that of the defendant is more probable. Whereas the defendant claims in the pleadings that the agreement is forged, it does not adduce evidence of such forgery and does not show who forged what. Whereas it says that it does not know the plaintiff and has never entered any agreement with the plaintiff, the evidence on court record in form of document 3 shows that there is such a contract and as a matter of fact the former director of the defendant acknowledges the existence of such a contract. Whereas the defendant pleads that there was collusion between a director of the defendant and a third party in making the contract to defraud the defendant, the collusion is not proved.

The defence counsel submitted that, a contract was purportedly entered by the plaintiff through Mugume Samuel as a director and the defendant through Abigail Mugume as a director for the plaintiff to perform certain activities **in regard to the land of the defendant said categorically expressly to be Plot 21 Faraday Road, Bugolobi.** Document No. 3 on the witness statement of Mugume Samuel PW1 refers.

The said document No. 3 defined the defendant as the client and the plaintiff as a consultant.

In the 3rd paragraph of the preamble therein (pg 1) it is said -

“... client has considered and approved the general proposals contained in the contract data and the bills of quantities submitted by the consultant and intends to proceed with the **construction of the proposed Ethel Apartments on Plot 21 Faraday Road Bugolobi Kampala** ... and has requested the consultant”

According to defendant’s counsel, his understanding of document No. 3 - which is actually the contract which was sued upon by the plaintiff is that **the defendant had land described as Plot 21 at Faraday Road in Bugolobi, Kampala and that it desired to construct apartments on this land.**

The defendant therefore contracted the plaintiff to produce designs on which the construction would be based and that would bring the building into existence.

For the work the consultant (plaintiff) would do, the client (defendant) undertook to pay USD 317,514 of which USD 254,011 was for the said designs while USD 63,503 would be for supervision of the construction.

The evidence which later emerged, My Lord, showed that document No. 3 was a false document; it was telling a lie about itself and was not a contract that court could enforce to the extent that **the defendant owned the land in Plot 21, Faraday Road. Yet the said land at Plot 21, Faraday Road as of 2/1/2007 belonged to Mugume Samuel.**

In the instant case the primary requirement has to be that the defendant had to be the owner of Plot 21 Faraday Road, which was the land the subject of the suit. Without it the contract was an empty shell and therefore a sham.

In further proof that the defendant had no land and this was a sham contract, we refer to exhibit D.Exh.1 which is a copy of the certificate of title of the said land showing that it was registered in the name of Mugume Samuel on 3rd March 2006 and only left his name on 17th June 2008, this means in the intervening period including 2nd January 2007, it was still his land.

Both Mugume Samuel and his wife Abigail Mugume Anyambiro, were cross examined on this matter of ownership of land and their answers were abjectly dishonest. Mugume said

“... Plot 21 refers to a registered piece of land. Yes it was the land of Meja Projects Ltd by 2nd January 2007. Half of it had already been given to Meja but not yet registered. This is the land referred to in Document 2. Meja was not a joint registered proprietor as to this half of the land as of 2nd January 2007. This agreement is not telling a lie about itself. The land was in my personal name until 17th June 2008. I sold half of the land to Grace Kavuya in March 2008. The land was transferred to Meja on 17th June 2008.

Abigail on her part said,

“.... I know Plot 21 Faraday Road, Bugolobi. As at 2nd January 2007, the land was in the name of Sam Mugume but he had given half of it to Meja Project in 2005. There is evidence of this. We have no written document saying so. Sam gave it to the company orally.”

We beg court to note at this point that not only was there no evidence that the defendant had any interest in Plot 21 by 2nd January 2007, Abigail Mugume lied seriously when she said that the so-called half of this land, was orally given to the defendant in 2005 yet even Mugume himself only acquired it in March 2006.

The defence counsel further submitted that there is evidence to reach a reasonable conclusion that the purpose of the agreement in document No.3 was to defraud the defendant or its majority shareholder and was actually **manufactured** by Mugume Samuel and his wife Abigail Mugume **and backdated** for this purpose. An agreement entered for a fraudulent purpose ought not to be enforced.

The fact that the defendant was a mere brief case company was known to both Mugume Samuel and Abigail because they were joint shareholders therein with 60:40 shares respectively yet they sat together and held out to be seriously and honestly contracting on behalf of the plaintiff with the defendant respectively.

For the record *s.200 of the Companies Act Cap 110* which was in force at the time the contract in issue was made required a director to disclose interest in a contract that his company was entering at a material time. This was to guard against the dangers of conflict of interest and to ensure corporate responsibility so that individuals do not abuse the corporate veil. In this case Mugume Samuel did not disclose in the suit contract that he had shares in the company his other company was contracting with and therefor did not comply with this requirement of the law and this renders document No.3 unenforceable.

The risks of Mugume's failure to disclose this interest became more apparent when it emerged that a one Grace Kavuya entered into the company and massively invested in it without knowing that the company was "technically heavily indebted" and its directors were individuals with personal interest in the "debt".

Again this amounted to a breach of *s.125* of the same Cap 110 which **required that directors disclose the state of indebtedness** of the company in **annual returns**. In this case, there was nothing on the register of the defendant to warn the said Grace Kavuya or any third party that the defendant was indebted yet from the suit now before court the defendant

was as between Mugume Samuel and his wife Abigail massively indebted!
Can such contract be declared valid by a court of justice?

In her testimony Grace Kavuya states that she first met Mugume Samuel when he came to borrow money from her sometime in 2007. (See paragraph 4-7 of her witness statement) She stated that he interested her into buying his land once he discovered that she wanted land and Mugume sold half of his land (plot 21 Faraday Road) to her in March 2009 (PE 2 refers). Later Grace and Mugume agreed to work together to build apartments on the same land where Mugume still held ½ of the ownership.

Following their said consensus a series of actions were taken which included -

- i. a discussion to incorporate a company and register the land in its name with the two being its shareholders upon which Mugume suggested that Grace joins the defendant company instead
- ii. reaching agreement with a financier called Habitat Housing or Shelter Afrique who put up several demands as contained in their agreement with the defendant (Document No. 18 to the witness statement of Mugume Samuel (PW1) This was entered on 19/6/2008).

As events unfolded, simultaneously or closely in time, Grace bought out Mugume's remaining 30% shares in the defendant company. These shares were agreed to be equivalent to Ush 150,000,000/- which Grace paid or was deemed to have paid because Mugume had borrowed and failed to pay back to her Ush 110,878,000/- and Grace made a cash top up of Ush 30m to Mugume thus getting him out of the defendant company. The sum of Ush 150m was vide D.Exh.8 and D.Exh. 7 now considered to be the value of 0.0468 Ha of the share of land Mugume had let to be registered in the defendant's name.

Thus by virtue of D.Exh 3, 7 and 8 Grace Kavuya became a holder of 80% shares in the defendant. From her testimony Grace took the step to pay Ush

150m to Mugume, and increased her shareholding. She decided to proceed with the apartment idea because she had already invested heavily in the defendant as seen above.

On the basis of this evidence alone, we pray the court finds that there was not contract between the plaintiff and the defendant.

Determination

The plaintiff was owned by a one Mugume Samuel and it purported to have entered into an agreement with the defendant before the majority shareholder had acquired interest in the said company. The defendant witness DW1 stated that; *“On 6-3-2008 was introduced to the defendant company by Mugume who proved that he and his wife, Abigail Anyambiro Mugume, were the only shareholders therein.”*

The defence with witness states that; *The Company had no assets of whatever nature, no liabilities or existing contracts were disclosed by the two directors, had no audited accounts showing profit and loss, no annual returns, no bank account and no active business..”*

The defendant company entered into an agreement with a company called Yot-Kom Engineering Ltd represented by Eng Mugume Samuel. They agreed to pay a total of \$24,000 to the said Mugume Samuel to do the construction on the basis of drawings to be agreed upon.

That when the defendant took over majority shareholding of the defendant company, the said Mugume Samuel who entered into the agreement to construct the building (Apartments) on 22/04/2009 and earlier on had sold the same land to the DW1 and sold all his shares in the defendant company had never intimated that the company owed him money since 2007 until 2009.

It appears that when the DW1 terminated the contract between Yot-Com Engineering and Meja Projects Ltd that is when Plaintiff Company came into the picture and started to demand for a sum of \$266,741 arising out of

the purported agreement dated 2nd January 2007. The said sum created by the plaintiff's two witnesses who are husband and wife was way above the value of the land on which the project was to be setup.

As counsel for the plaintiff stated, it is question of determining between the two parties who is telling a believable story or facts. The defendant's story is more believable that the plaintiff who never demanded for any payments since 2007 until 2009 was fraudulent in executing the purported agreement and indeed it could be backdated for that purpose.

The plaintiff company executed the agreement with Defendant Company as separate entities but both represented by Mugume Samuel (Husband) and Mugume Abigail Anyambiro (wife).

That relationship cannot be wished away by legalese of a corporate veil, that the plaintiff and defendant were separate companies and yet they are husband and wife. The High Court under section 20 of the Companies Act is empowered to lift the veil of incorporation. In the case of *Salim Jamal & 2 others vs Uganda Oxygen Ltd & 2 others [1997] 11 KALR 38*; the Supreme Court held *that corporate personality cannot be used as cloak or mask for fraud. Where this is shown to be the case, the veil of incorporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud.*

The privileges accorded to companies must operate in accordance with the terms upon which they are granted. The doctrine of corporate veil piercing is premised on the basis that such privileges should work hand in glove with responsibility in order to avoid the possibility of abuse or exploitation. When there is a fracture in the proper operating parameters, the court may ascertain the realities of the situation by removing the corporate shield or veil in order to make the controller behind the company personally liable as if the company were not present.

In the present case, the directors of two companies being husband and wife in executing the said agreement, their dealings through the company

reached the threshold where they may rightly be considered opportunistic so as to warrant the removal of the shield of privilege.

The plaintiff witnesses do not give any satisfactory explanation as to why they did not demand for the said money due and owing during the time of acquisition of shares by the DW1-Grace Kavuya. The same agreement was never brought to her attention after two years until when the contract of Yot-Com Engineering was terminated. The plaintiff company through Samuel Mugume issued its invoice to the defendant company through his wife continued to issue invoices through Mugume Abigail Anyambiro who is his wife.

Concealing such vital information (agreement PE3) if at all it existed was fraud on its own and the defendant has every right to conclude that it is a forgery, created purposely to defraud the defendant and specifically Grace Kavuya as the new majority shareholder.

It is also clear from the pleadings-plaint that the plaintiff's case is wholly based on a document PE3 agreement.

The stated contract in its current form contravenes sections 2, 42, and the 1st part of the schedule of the stamp duty Act Cap 342 as amended because the Plaintiff never paid stamp duty on the same hence the Plaintiff is precluded from relying on the same in evidence before this Honorable court because of the stated illegality.

Section 42 provides;

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties or authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer unless the instrument is duly stamped;

The registration of this agreement should have authenticated the document and given it some weight. But as it stands it remained a highly suspicious document executed between husband and wife in their home in order to create liability to the defendant and thus defraud the majority shareholder-Grace Kavuya.

In the case of *Wasukira Fredrick & Others v M/s Harmony Group Ltd HCCS No. 40 of 2009* Justice Musota (as he then was) dismissed a suit based on a document / agreement which had not paid stamp duty.

This court would not rely on such a document to find any liability of the defendant and this would be sanctioning an illegality to the benefit of the plaintiff. In absence of this document PE3, the entire case collapses and becomes unsustainable.

Therefore my finding is that, there was no contract between the plaintiff and defendant. The same was 'manufactured ' or created as an afterthought in order to defraud the defendant-majority shareholder. The contract never existed between the plaintiff and the defendant.

Accordingly issue 1 is answered in the negative.

Whether the contract was performed

Since the first issue was resolved in the negative, then this issue falls by the way side. The plaintiff did not do any work but rather it was done by Yot-Kom Engineering Ltd which was not connected with the plaintiff at all that did the work. If at all the plaintiff wanted to file a suit then it should have been against Yot-Kom Engineering Ltd for using drawings of Infrastructure Projects Ltd in executing work for Meja Projects Ltd. The plaintiff's director was caught in his own fraudulent web and it fell flat in his face.

This suit is dismissed with costs to the defendant.

I so order.

SSEKAANA MUSA

JUDGE

14th April 2020