

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 415 OF 2018

HJK TRADING COMPANY LIMITED:..... PLAINTIFF
VERSUS
AHMED ZZIWA:..... DEFENDANT

BEFORE: HON. JUSTICE JOHN EUDES KEITIRIMA

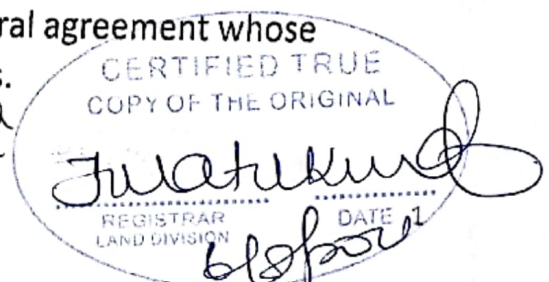
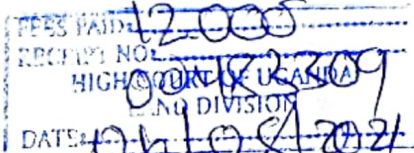
RULING

On the 5th June 2018 the Plaintiff filed **Civil Suit No. 425 of 2018** against the defendant. The Plaintiff's cause of action is for breach of the sublease assignment agreement between the Plaintiff and the defendant. The Plaintiff seeks for court orders of specific performance of the sublease assignment agreement, vacant possession, a permanent injunction, general damages, interest and costs of the suit.

Preliminary point of law by the defendant.

The defendant raised a preliminary objection to the effect that the suit is incompetent, bad in law and unmaintainable in law for seeking to enforce a contract that offends the express provisions of **Section 10(5) of the Contracts Act, 2010** which provides that all contracts whose subject matter exceeds twenty five currency points shall be in writing.

Counsel submitted that according to paragraph 4(a) of the plaint, the subject matter of the contract, the subject matter of this suit was **United States Dollars one million, five hundred thousand (\$1,500,000/=)** and the contract the subject of this sum was an oral contract. Counsel contended that the suit was barred by statute as it seeks to enforce such oral agreement whose subject matter exceeds twenty five currency points.



Counsel for the defendant cited the case of *Karangwa Joseph versus Kulanju Willy-H.C.C.A No. 03 of 2016 (Commercial Division)* to buttress his submissions.

Counsel for the defendant further submitted that he was alive to the provisions of Section 10(2) of the Contracts Act 2010 and Section 10(5) of the Contracts Act 2010 when read together under the harmonization rule of statutory interpretation mean that only contracts whose subject matter is below twenty five currency points can be oral or in writing. Counsel cited the said decision and other authorities to buttress his submissions.

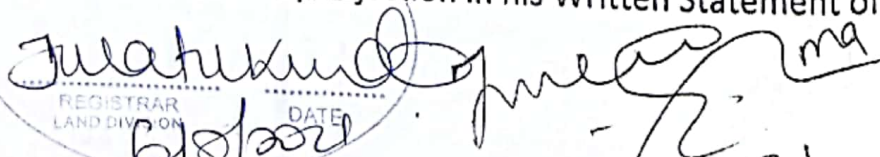
Counsel for the defendant further submitted that the Plaintiff didn't attach the sublease agreement allegedly entered into between the Plaintiff and the defendant which contravenes Order 7 Rule 14(1) of the Civil Procedure Rules and hence this forms part of the grounds of the dismissal. Counsel cited the case of *Ugafin Limited versus Beatrice Kiwanuka-H.C.M.A 682 OF 2014* to buttress his submissions.

Counsel for the defendant prayed that this court be pleased to dismiss the suit for being statute barred as the oral contract in this case is unenforceable in law, illegal, null and void.

In reply counsel for the Plaintiff submitted that the preliminary point of law was not properly raised by counsel for the defendant because the preliminary point of law which is being raised by the defendant was totally different from the point of law indicated by the defendant he would raise in his Written Statement of Defence. That by not raising the preliminary point of law in his written statement of defence but at the conferencing took the Plaintiff by surprise and has further raised the issue of fact not arising out of the preceding pleadings.

Counsel for the Plaintiff cited Order 6 Rule 7 of the Civil Procedure Rules which provides that; *"No pleading shall, not being a petition of application except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."* Counsel also cited the case of *Painento Semalulu versus Nakato Eva Kasule -H.C.C.A No. 04 of 2008* to buttress his submissions.

Counsel contended that the defendant is bound by what he stated in his Written Statement of Defence and since the defendant never raised the instant preliminary objection in his Written Statement of Defence so as to give


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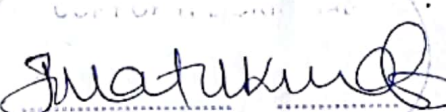
the Plaintiff a chance to answer the same. Counsel cited the case of *Yaya Farajallah versus Obur Ronald and three others -H.C.C.A No. 0081 of 2018* to buttress his submissions.


Counsel for the Plaintiff further submitted that for the defendant to say that the Plaintiff's suit is statute barred is to raise a defence of the Statute which is the Contract's Act and that the cited rule requires that the defendant ought to have specifically pleaded that in his defence. That once it was not pleaded, then the defendant should not be granted the protection of the law since the court ought not to grant the defendant the benefit of the law contrary to the rules of pleadings and the principle of avoidance of surprise.

Counsel for the Plaintiff further submitted that the Preliminary objection was not pleaded and requires evidence of the Plaintiff's facts disputed by the defendant to be led before it could be established. That the only course available to the defendant was to move court by way of a formal application raising the point of law so as to enable the Plaintiff an opportunity to respond to the same.

In the alternative counsel for the Plaintiff submitted that the ruling to the preliminary objection should be deferred until after the hearing of the whole case so that the Plaintiff has the opportunity to adduce its evidence on the facts which have been disputed by the defendant who is seeking to rely on the same to object to the Plaintiff's case without giving the Plaintiff an opportunity to adduce evidence to support its case in relation to the said point of law.

With regard to the submission that the Plaintiff did not attach the sublease agreement entered between the Plaintiff and the defendant, counsel submitted that this was not the first time the defendant was raising this objection. Counsel submitted that during the hearing of *Miscellaneous Application No. 1363 of 2020 (Arising from H.C.C.S No. 415 of 2018) HJK Trading Company Limited versus Ahmed Zziwa*, in an application for a temporary injunction, the defendant raised the same preliminary objections and the Registrar held that the objections had been prematurely raised and ought to have been raised in the main suit. That with specific regard to the attachments, the Registrar held inter alia that *"... From the above, the Applicant clearly is not in possession of the said sublease agreement and could not attach the same to its pleadings. I also see no merit in this objection and overrule the same."*


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Counsel contended that the said preliminary objections had already been dealt with by a court of competent jurisdiction and disposed of it and is therefore res-judicata and barred by **Section 7 of the Civil Procedure Act**.

Counsel further submitted that the above notwithstanding, the Plaintiff did not state anywhere in the Plaint that it was in possession of the sublease assignment agreement.

Counsel prayed that I should find that the preliminary objection to that effect was res-judicata and therefore should be overruled.

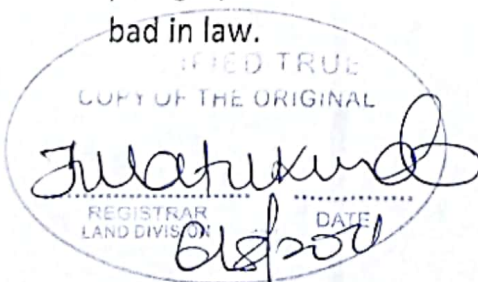
Counsel for the Plaintiff further submitted that the authorities cited by the defendant were distinguishable and went on to explain how distinguishable they were from this case.

Counsel concluded by stating that the defendant's preliminary objection was not properly raised since it was not pleaded by the defendant in his written statement of defence thus ambushing the Plaintiff and which greatly prejudiced the Plaintiff's case. He prayed that the preliminary objections be dismissed with costs.

Counsel submitted in the alternative that since the defendant did not plead its preliminary objection in his Written Statement of defence it denied the Plaintiff an opportunity to adduce evidence in reply or to the defence which would have answered the preliminary objection. That the defendant ought to have filed an application to raise the said objection so as to give the Plaintiff an opportunity to respond to the same and therefore the preliminary objections should be dismissed with costs.

In further alternative, the Plaintiff prayed that this ruling be deferred until the hearing of the whole case so that the Plaintiff has the opportunity to adduce its evidence on the facts which have been disputed by the defendant but who is seeking to rely on the same to object to the Plaintiff's suit without giving the Plaintiff an opportunity to adduce evidence on the facts which have been disputed by the defendant.

In rejoinder, counsel for the defendant submitted that the defendant's preliminary objections were not different from what the defendant pleaded in paragraph 3 of his own written statement of defence to wit that the suit was bad in law.



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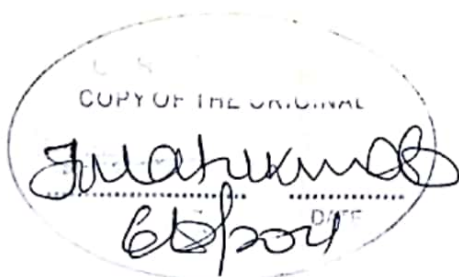
Counsel for the defendant further contended that even if the defendant's preliminary objection were different and not pleaded, being a preliminary objection on a point of law it can be raised at any time before judgment whether pleaded or not. Counsel cited the case of *Tororo Cement Company Limited versus Frokina International Limited-S.C.C.A No. 02 of 2001* to buttress his submissions.

Counsel further submitted in rejoinder that **Orders 6 Rule 6, 7 and 28 of the Civil Procedure Rules** cited by the Plaintiff were cited out of context as well as the cases cited. Counsel contended that no evidence was needed to determine the instant preliminary objection as the **Plaint** was sufficient for that purpose. That it was trite law that when a Court is considering a preliminary objection on a point of law seeking to reject and or dismiss a **plaint/suit**, the Court must only look at the **plaint** and its annexures only. The Court cannot look at the written statement of defence or other extrinsic documents like the Joint Scheduling Memorandum. Counsel cited the case of *Mukisa Biscuit Manufacturing Company Limited versus West End Distribution Limited [1969] E.A 696* and *Uganda Telecom Limited versus ZTE Corporation -S.C.C.A No. 03 of 2017* to buttress his submissions.

Counsel contended that a Joint Scheduling Memorandum is neither a pleading nor a **plaint** and hence it could not be referred to or looked at when considering a preliminary objection on a point of law seeking to strike out and/or dismiss a **plaint**. That a written statement of defence is only referred to or looked at when the court is considering a preliminary objection on a point of law seeking to strike out and/or dismiss a written statement of defence. Counsel further contended that the Plaintiff's reliance on the contents of the Joint Scheduling Memorandum and the written statement of defence in their submissions are erroneous and intended to mislead the court.

Counsel for the defendant further submitted that by the defendant raising a preliminary point of law does not in any way point at objecting to the transaction that happened between the parties but it is to say that notwithstanding the transaction such transaction cannot be and is not enforceable at law.

Counsel for the defendant reiterated his earlier submissions.



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Decision of Court on Preliminary Objections.

Section 10 (5) of The Contracts Act, 2010 provides that "A contract the subject matter of which exceeds twenty five currency points shall be in writing."

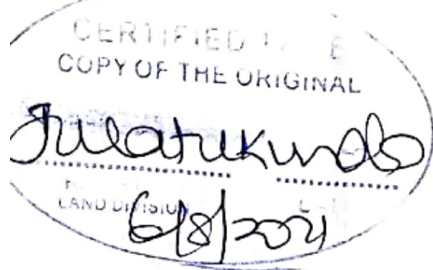
Paragraph 4 (a) of the Plaint states that "By oral agreement made on the 14th day of October 2013, the Plaintiff entered into a sublease assignment agreement with the defendant for ten decimals on part of the land comprised in LRV 3347, Folio 2, Plot 43, Ben Kiwanuka Street in Kampala (referred to as "the suit land") at a total consideration of United States Dollars one million, five hundred thousand (\$1,500,000).

From the Plaintiff's pleadings, the agreement was oral and exceeds the sum of twenty five currency points. Under **Section 2 of The Contracts Act, 2010** a currency point is equivalent to twenty thousand shillings.

Therefore it is not disputed that the agreement (contract) the Plaintiff was referring to in his plaint which he entered with the defendant was an oral one. The consideration for the said contract was **one million, five hundred thousand, United States dollars** which exceeds twenty five currency points provided for under **Section 10 (5) of The Contracts Act, 2010** where it is provided that a contract in excess of that amount must be in writing.

Counsel for the Plaintiff submitted that this preliminary objection was not properly raised as it was not pleaded by the defendant and cited Order 6 Rule 6 and Order 6 Rule 28 of the Civil Procedure Rules to buttress his submissions.

It was held in the case of *Tororo Cement Company Limited versus Frokina International Limited* –S.C.C.A No. 02 of 2001 "Whether a plaintiff does or does not disclose a cause of action is a matter of law which can be raised by the defendant as a preliminary point at the commencement of the hearing of the action even if the point had not been pleaded in the written statement of defence. Obviously it is proper and good practice to aver in the opposite party pleadings that the pleadings by the other side are defective and that at the trial a preliminary point of objection would be raised. But failure to so plead does not in my opinion bar a party from raising the point. There is of course, advantage in raising a likely preliminary point in the pleadings. This puts the opposite party on notice so that that party is minded to put its pleadings in order before court hearing. In that way court's time may be saved if the parties can sort out preliminary matters in advance."



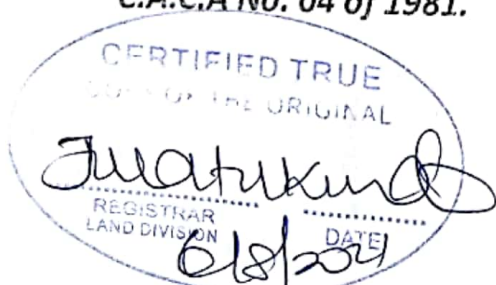
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It is therefore clear from the said decision that a defendant may not plead that they intend to raise a preliminary objection and nothing would bar such a defendant from raising it if the plaint does not disclose a cause of action or is barred by statute. So in this case there was no obligation on part of the defendant to plead the preliminary objection he raised.

The above notwithstanding, the defendant in paragraph three of his written statement of defence stated that ***"The defendant shall at the earliest time raise a preliminary objection that the suit is bad in law and is premised on falsehoods and is also brought in bad faith and shall pray that the suit be dismissed with costs."*** This should have therefore put the Plaintiff on notice that the defendant intended to raise a preliminary point of law. The practice is that when a preliminary point of law is raised the party against whom it is raised is given ample time to respond to it and therefore cannot claim that they were ambushed. In this case the Plaintiff was given two weeks to respond to the preliminary objection that was raised by the defendant which I consider fair and ample time in the circumstances. There was ample time for the Plaintiff to rebut the preliminary objection that was raised by the defendant and the plaintiff cannot be seen to say that they were ambushed.

The defendant's preliminary objection being a preliminary objection on a point of law can be raised at any time before judgment whether pleaded or not. This is because it may dispose of the matter at that stage and save court's time in undergoing a process that is illegal ab initio. The court would rather be informed at an early stage of the illegality of the entire process. The illegality should not wait to be revealed when the court is pronouncing a judgement as the plaintiff had submitted in the alternative. No evidence was needed to prove the preliminary objection raised by the defendant as the provision of the law cited was self-explanatory. The Plaint was sufficient for the defendant to raise the preliminary objection he raised as the plaint clearly stated that the agreement was oral and the consideration was one million, five hundred thousand United States Dollars.

A court of law cannot overlook an illegality once an illegality it brought to the notice of the court. An illegality overrides all matters of pleadings and can be raised at any time whether the matter was pleaded or not, see ***Makula International Limited versus His Eminence Cardinal Nsubuga and another- C.A.C.A No. 04 of 1981.***



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I therefore find that the suit is incompetent, bad in law, barred by law as it is seeking to enforce a contract that offends the provisions of Section 10(5) of the Contracts Act, 2010. The preliminary objection to that effect is upheld and disposes of the entire matter.

The suit will therefore be dismissed with costs to the defendant.



Hon. Justice John Eudes Keitirima

06/08/2021

