Contract The Hon. J. Tsekooko JSC.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

COR: ODOKI, AG. D.C.J., ODER, J.S.C., & TSEKOOKO, J.S.C.)

1 ~~Disclosed~~ Agent assists in drawing forms

CIVIL APPEAL 12/1994

BIRUMI WILSON..... APPELLANT

2. Contract with Principal - direct

3. Payment direct to Principal

4 Arrival of goods delayed

VERSUS

AKAMBA (UGANDA) LTD ..who is responsible, RESPONDENT

(Appeal from the judgment and order of the High Court at Kampala (G. OKELLO J.) dated 5th November, 1993 in Civil Suit No. 152 of 1991.)

REASONS FOR JUDGEMENT OF THE COURT:

We heard this appeal and dismissed it. We promised to give our reasons later which we now give.

The facts of this case are simple. The appellant Birumi Wilson is a farmer of Sugar Jaggery. The respondent is a limited liability company and deals in Massey Ferguson Tractors and their accessories and also acts as the local agent in Uganda for Massey Ferguson (United Kingdom) Ltd, the manufactures of tractors popularly known as Massey Ferguson and their accessories. We shall refer to them as "the manufacturers".

During 1987, the appellant desired to acquire a new Massey Ferguson tractor together with its accessories i.e., a disc plough Tiller and one Allman Crop Guard Sprayer and a Farrow. He had a loan from Uganda Commercial Bank (UCB) to enable him purchase such a tractor. The bank appears to have advised the appellant to obtain a proforma invoice in which necessary information about the make and cost of the tractor should be inserted. He sought assistance from the Respondents to whom he was a customer before. During 1988 he visited Joseph Katuuwa Byekwaso (DW1) a Sales Marketing Manager of the respondent who

after advising the appellant how to go about the importation of the desired tractor handed to the appellant the proforma invoice dated 15th June, 1988 together with General Terms of Business. The latter contains detailed information about placing orders, prices, delivery, shipment, shortage, delays payments and various other conditions relevant to the proposed purchase. By 29/8/1988, the appellant had established irrevocable letters of credit through UCB for pound sterling 14,735 in favour of the manufacturers payable at National Westminster Bank, London. UCB relayed this information to the manufactures by 29/8/1988 as evidence by Exh.D.1. Although the appellant claimed in his evidence that DW1 had promised that the tractor and its accessories would be received by the appellant within three months after payment, Exh.P.1. shows that delivery would take between three to six months or even longer. After irrevocable letters of credit had been established, the manufactures shipped the tractor. The tractor's arrival delayed. Meantime the respondents had received in their stores a consignment of tractors. Out of sympathy to the appellant who is their old customer the respondent allowed the appellant to take one of these tractors which would be replaced by that of the appellant as and when it is received. It appears the appellant's tractor and the till were messed up by shippers in Mombasa. The tractor itself arrived after four months while the tiller arrived after nine months. The appellant was not happy with this belated delivery. He therefore filed action in the High Court claiming for, inter alia, special damages amounting to Shs. 6,480,000/= from the respondents allegedly for breach of contract. The learned trial Judge dismissed the suit because in his view there was no contractual relationship between the appellant and the respondent. Hence this appeal.

The appeal contained three grounds originally. At the hearing the third ground was abandoned by Mr. Matovu, learned counsel for the appellant.

The first ground states that:-

> "The learned Judge erred in law and fact by finding that the defendant was not party to the contract in issue."

Mr. Matovu criticised the learned trial Judge for the latter's reliance on the decision of the High Court of Kenya in Parkers Music & Sports House Vs. Motorex Ltd 1959 EA 534. According to the learned Counsel that case was decided on the basis of the Indian contract Act, 1872 which had force in Kenya but which no longer represents the correct law to the effect that a local agent representing a foreign principal cannot be sued. Counsel submitted that by its decision in Uganda Motors Ltd. Vs. Wavah Holding Ltd. Supreme Court Civil Appeal No. 19 of 1991 (unreported) this Court in effect decided that under the common law a local agent acting for a foreign principal can be sued in place of the foreign principal. Counsel contended that in that regard Parker's case was over ruled. Counsel also cited Chitty on contract (22nd Ed.) p. 78. Learned Counsel was however constrained to admit that the contract was really between the appellant and the manufacturers. He further admitted that the respondent did not sell the tractor to the appellant and that we think is the truth. In that case Chitty is unhelpful.

Learned Counsel further submitted in effect that the respondent assumed some responsibility when it eventually released their own tractor to the appellant.

Mr. Serwanga for the respondent submitted that the trial Judge was right in dismissing the suit because the appellant sued a wrong party, the respondent, which was not a party to the contract.

We think that the case of Wavah (Supra) is irrelevant because of the provisions of S.2 of the Contract Act (Cap. 75 of the Laws of Uganda) which state that:

> "The Indian Contract Act, 1872, shall cease to extend or apply to Uganda provided that the said Act shall continue to apply to any agreement made or contract entered into before the commencement of this Act."

The contract Act became effective on 1/1/1963. Therefore cases decided before 1/1/1963 and based on contractual concepts contained in the **Indian Contract Act** ceased to apply to Uganda at the beginning of 1963. Section 3(1) of the Contract Act provides that "the common law of England relating to contracts.....shall extend and apply to Uganda."

Accordingly this case falls or stands on whether the decision of the learned trial Judge was based on the common law doctrines relating to contracts in this country. We think that the decision was based on the common law doctrine to the effect that except in certain circumstances, which don't exist here no suit can be entertained against a stranger to a contract: **See Kayanja Vs. New India Assurance Co. (1968) EA 295 at page 297**.

The facts of the case before us do not establish the relationship of principal/agent in the purchase of the tractor by the appellant. And although the trial Judge referred to **Parkers Case** the present case was dismissed basically because of lack of consideration.

Although the learned Judge referred to referred to **Parkers Case** (supra), he clearly decided the case on the basis that there was no contract between the appellant and the respondent. At page 4 of his judgment, the judge stated:

> "In the present case, it is not in dispute that the proforma invoice (Exh. P1) was sent to the plaintiff by Massey Ferguson (U.K.). The proforma invoice spelt out the prices of the items wanted by the plaintiff, mode of payment and the terms of delivery. This constituted an offer. This offer was accepted by the plaintiff when his banker opened irrevocable letter of credit in favour of Massey Furguson (U.K.) for the purpose of these terms. The plaintiff (PW1) himself testified that payment for these machineries was made directly to Ferguson (U.K.) by telex. The question of consideration moving from the plaintiff to Massey Furguson (U.K) and vice versa is obvious. The Plaintiff was parting with his money, the price of the items ordered, while Massey Furguson (U.K.) was parting with the

> machinery. In my opinion, the contract was thus between the Plaintiff and Massey Ferguson (U.K.) There is no evidence to show that the defendant company as the local agent of Massey Furguson (U.K.) contracted with the Plaintiff directly or even on behalf of his agent or that they were in any way a party to the contract."

Thus the judge considered the common law of doctrines of offer, acceptance and consideration and found that there was no contract between the appellant and respondent before the judge referred to **Parkers Case** to support his view. His decision was not influenced by **Parkers Case.**

The contract for the sale of the tractor and its accessories was made between the appellant and the manufacturers and we do not accept the inference which Mr. Matovu sought to make that the respondent's conduct in Volunteering to give a tractor to the appellant from its stock, thereby made the respondent to assume the manufacturer's liability. On the plain facts of this case no such inference can be made.

Apart from the fact that the respondent merely helped the appellant to get in touch with Massey Furguson and provided the appellant with the proforma invoice which bore the address of the manufacturer, there was no dealing between the appellant and the respondent in the shape of contractual relations. The appellant dealt directly with the manufacturers. For example payment was made direct to the manufacturers by the appellant personally through UCB.

In cross examination the appellant testified thus:-

> "I was given some forms to fill. I took those forms to the Bank UCB Headquarters. I did not pay Akamba money. Money was paid through the Bank by telex to Massey Furguson in London. Akamba is the Agent of Massey Furguson the manufacturers of the tractors. I bought the tractor from Furguson."

The appellant had in his possession Exh. P1 and its various annextures. He had Exh. D1, P2 and P3 whose contents show clearly the respective positions of appellant, the manufacturers and the respondent. We must assume that it was because of the contents of those exhibits, that the parties framed the first issue, viz,

"whether there was a contract between the parties".

The Learned trial Judge found no contract existing between the parties. We respectfully agree with him. The first ground must fail.

Ground two states that:-

> "The learned judge erred in law in that he did not exercise his discretion judiciously having refused to grant adjournment to enable counsel for appellant make his submission, and to join a new party, thus denying the Plaintiff a fair trial on all issues before court."

Mr. Matovu submitted that a trial Court has discretion to allow substitution of parties. He attempted to persuade us to accept his view that the trial Court erred in refusing his application for adjournment and to have Massey Furguson joined as a party. Learned Counsel maintained that under O.1 Rule 10(2) of the Civil Procedure Rules, the learned trial Judge could have on his own motion ordered for Massey Furguson to be joined as a co-defendant or to be substituted for the present respondent. Strangely Counsel persisted in this argument even after we pointed out to counsel that under our adversarial system of trial and specially where parties are represented by counsel there must be extremely rare occasions indeed when a trial Judge can, on his own, order for a third person to be made party to proceedings. Counsel referred to Bullen and Leak's Precedents on Pleadings (12th Edition) at Page 167 in support of his submissions. We find nothing in the text quoted by learned Counsel in favour of his view.

Mr. Serwanga submitted in response, and we entirely agree with his submissions, that by virtue of O. 15 R. 1 of C.P. Rules a court can only allow application for an adjournment if sufficient cause is shown. In counsel's view no sufficient cause was shown. He referred us to B. Mohindra Vs. Mohindra (1953) 20 E.A.C.A. 56) to illustrate the exercise of discretion by a trial Court in granting or refusing application for adjournment. He submitted that there was no application before Court to consider the joining of Massey Ferguson.

The record of trial proceedings shows that the case in the Court below first came up on 16/9/1994. Mr. Matovu then applied and was granted leave to amend the plaint in respect of the prayer for special damages. Thereafter 5 issues were framed without alluding to Massey Furguson. The hearing commenced with one witness, the appellant. In the course of his testimony the appellant stated that he paid money direct to Massey Ferguson. The case was adjourned to 28th/10/1993 to enable Mr. Matovu to call his last witness. The witness never turned up, unfortunately. By then the position of the Massey Ferguson and the Respondent was known.

On 2/10/1993, Mr.Matovu closed case for the appellant. The defence called its only witness and closed the defence at 10.30 a.m. The Court adjourned the case to 3.00 p.m. for submissions. In the afternoon Mr. Matovu made the following application.

> "I wish to apply for adjournment. In the course of my research I came across a conflicting question of law which is central in this case and have not been settled over a long time. I need time to reconcile the issues. It might even be necessary to join Massey Ferguson as defendant even at this stage. I concede costs of this adjournment."

Owing to the vaquences of that application, Mr. Buwuule for the defendant (at that time) opposed the application in these terms:-

> "My learned friend has not given us a clue as to the alleged question of law necessitating the application for adjournment. Secondly we came back this afternoon because of the lack of time due to

> the congestion in the Courts diary possibly up to the end of the year.....if my learned friend is considering joining Massey Ferguson as a defendant then, he must drop my client for I do not see how he can join with principal and agent. Otherwise I am ready to deliver my submissions."

The learned Judge made his ruling upholding the objection as follows.

> ".....The alleged important legal question has not been directed (disclosed) for Court to gauge its importance to the case. It is just a blanket reason. Such a blanket reason is not enough to justify adjournment.
>
> Secondly this case was filed in 1991. It is an old case. All this time Counsel ought to have resolved the question of the parties. In any case he need the adjournment merely to decide whether or not to add another party.....This is not good enough reason for adjourning the case."

Clearly the application was vague and half hearted. The learned Judge gave the application due consideration. He gave reasons which with respect we think justified refusal of the application for adjournment.

In Mohindra's case (supra) the former Court of Appeal for Eastern Africa set out principles which have been consistently followed by this Court and its predecessors in determining whether or not to interfere with the exercise of a trial judge to allow or not to allow application for adjournment. These are first that only on rarest occasions will an Appeal Court interfere with the discretion of the trial Judge as to the adjournment of the trial and second that the Court of Appeal will only interfere where the Judge's decision was such that justice did not result from the exercise of his discretion and he failed to see that such would be the effect of his decision.

Having ordered the facts before the learned judge, we are not persuaded that in refusing the application for adjournment the trial Judge exercised his discretion unjudicially.

Regarding the issue of joinder of Massey Ferguson we are equally not persuaded that the Judge had any material before him upon which he could have justifiably made any order of joinder. We think that the reasons given by counsel for the appellant in the Court below for his unpreparedness to submit were petty having regard to the facts, inter alia, that the same counsel had conducted the case from the beginning of the hearing of this case.

Accordingly, the second ground must fail.

For these reasons we have given above we dismissed the appeal with costs to the respondent.

Dated at Mengo this .....21st .....day of ....June.....1995.

B.J. ODOKI
AG. DEPUTY CHIEF JUSTICE

A.H. ODER
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A
TRUE COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA
DEPUTY REGISTRAR, THE SUPREME COURT.