# THE REPUBLIC OF UGANDA

# IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

*[CORAM: Kasule, Egonda-Ntende, Cheborion Barishaki, JJA]*

Civil Appeal No. 0197 of 2015

(Arising from HCCS No. 169 of 2013 before the Honourable Mr Justice Christopher Madrama Izama of the High Court of Uganda (Commercial Court Division on 8th May 2015))

UGANDA TELECOM==================================APPELLANT

VERSUS

ZTE CORPORATION=================================RESPONDENT

## JUDGMENT OF THE COURT

### Introduction

1. The respondent is the plaintiff in the court below. It filed a plaint seeking to recover US$6,738,272.38, as well as general damages, interest and costs for breach of contract from the defendant now the appellant. The appellant opposed the claim, inter alia, contending that the plaint did not disclose a cause of action against the defendant. This point was heard by the trial judge who decided that he will decide the point after he had heard some evidence in the matter. The appellant was not satisfied and appealed to this court against the said ruling.

2. The appellant sets forth three grounds of appeal as follows:

   '(1) The learned trial judge erred in law when he failed to resolve a preliminary objection whether the plaint disclosed a cause of action.
   (2) The learned trial judge wrongly exercised his discretion by requiring the parties to prove facts not in dispute.
   (3) The learned trial judge erred in law and fact when he failed to apply the law that a stranger to a contract cannot sue on it.'

3. The appellant seeks to set aside the ruling of the High Court and substitute it with an order of this court striking out the plaint for failure to disclose a cause of action together with costs of this appeal.

4. The respondent opposed the appeal and cross appealed too. On the cross appeal it set forth one ground of appeal:

'That the learned trial judge erred in law when he failed to find that HCCS No. 169 of 2013 disclosed a cause of action against the appellant.'

**Submissions of Counsel**

5. At the hearing of this appeal Mr Rashid Kibuuka appeared for the appellant. Mr Kavuma Terrence appeared for the respondent.

6. Mr Kibuuka for the appellant submitted that in the High Court he made a submission under Order 7 Rule 11 of the Civil Procedure Rules contending that the plaint does not disclose a cause of action and ought to be rejected. The plaintiff was not privy to the contract referred to in the plaint as annexure A. The plaintiff could not sue upon a contract to which it was a stranger. Instead of rejecting the plaint, in accordance with the Order 7 Rule 11 of the Civil Procedure Rules, the learned trial judge declined to reject the plaint holding that evidence should be adduced to clarify the relationship between the plaintiff and the first party in annexure A to the plaint. The trial judge reserved a ruling on whether or not a cause of action was established by the plaint until such time as evidence was adduced on the identity of the plaintiff and the first party.

7. Mr Kibuuka submitted that the learned trial judge erred in law not to have held that no cause of action had been established by the plaint and the plaint rejected. He prayed that this court should find that the plaint did not disclose a cause of action and ought to be rejected. Mr Kibuuka referred this court to the cases of Mulindwa <u>Birimumaso v Government Central Purchasing Corporation Court of Appeal Civil Appeal No. 03 of 2002</u> [unreported] and <u>National Social Security Fund and Anor v Alcon International Limited, Supreme Court Civil Appeal No.15 of 2009</u> [unreported]to support his submissions.

8. With regard to the cross appeal Mr Kibuuka submitted that it was incompetent as leave to appeal had not been sought and granted. The cross appeal is emanating from an order that is not appealable as of right. The cross appellant ought to have applied for leave to appeal prior to filing of the cross appeal. He referred to the case of <u>Asiimwe Francis v Tumwongyeire Aflod, Court of Appeal Miscellaneous Application No. 103 of 2011</u> [unreported] in support of his submission.

9. Mr Kavuma, learned counsel for the respondent, submitted that in spite of the poor drafting of the plaint it did disclose a cause of action in so far as it asserts that orders were made to the plaintiff by the defendant to supply goods and services and those goods and services were supplied. When the defendant defaulted on payment, an agreement was made with regard to payment of the outstanding sums of money, annexure 3. He therefore prayed that this court finds that there was a cause of action.

10. With regard to whether or not the learned trial judge could have deferred his ruling on the preliminary objection, Mr Kavuma submitted that it was entirely in the discretion of trial judge to either determine the objection and issue a ruling on the matter or defer the same to a later date. He submitted that this very question arose in Attorney General v Major General Tinyefunza Supreme Court Constitutional Appeal No. 1 of 1997 and the Supreme Court held that it was in the discretion of the trial judge to determine whether he made the decision and provided reasons immediately following the hearing of the objection or may defer the same up to the time of delivery of judgment.

11. Mr Kavuma then went on to the cross appeal, taking a contrary view to his arguments against the appeal, in which he argued that the learned trial judge had erred in law not to have found that the plaint disclosed a cause of action.

**Analysis**

**12.** Had counsel for the plaintiff / respondent who drew the plaint in this matter exercised more care perhaps this case would not have taken the turn it has, with 3 years down the road since filing and pre-trial issues not resolved. It is obvious from the annexure A to the plaint which is the first agreement referred to by the parties that the corporation named as the plaintiff is not the corporation that was a party to Annexure A to the plaint. That however does not dispose of this case for reasons that we shall presently show.

**13.** We agree with Mr Kibuuka that in determining whether or not a plaint discloses a cause of action under Order 7 Rule 11 of the Civil Procedure Rules, one need not go beyond the plaint itself and its annexures. One only has to look at those documents to determine whether or not a cause of action arises or not. We are in agreement with the decision of this court in Mulindwa Birimumaso v Government Central Purchasing Corporation (supra).

**14.** We shall begin by setting out the relevant parts of the plaint.

> '1. The plaintiff is a company incorporated in and under the laws of Hong Kong China with a branch in Uganda whose address for purposes of this suit is c/o Messers Muwema and Mugerwa Advocates, 1st floor Rwenzori Courts, Plot 2 & 4 Nakasero Road, Po Box 6074 Kampala.
> 2. The defendant is a body corporate with capacity to sue and be sued on whom advocate for the plaintiff undertakes to effect court process on.
> 3. The plaintiffs claim is for US$ 6, 738,272.38 (six million seven hundred thirty eight thousand, two hundred seventy two United States Dollars and thirty eight cents only), general damages, Interest arising thereon and costs of the suit arising from breach of contract.
> 4. The plaintiff's cause of action arose as follows:
> (a) On the 29th October 2007, the plaintiff executed a contract for designing, planning, installation, integration, operation and maintenance of the Microwave backbone Link Project with the defendant. The contract was in the value of USD 3, 436,369 (three million four hundred thirty six

thousand three hundred sixty nine United States Dollars only.) A copy of the Project Contract is attached hereto and marked annexure "A".
(b) The plaintiff's obligations under the said contract were supplying and installing specific components and hardware. Subsequently the said agreement was by conduct varied by the parties as the local purchase orders exceeded the contract sum. Copies of the Local Purchase Orders are attached hereto and marked annexures "B, B2, B3, B4, B5 and B6".
(c) The defendant defaulted on the payments towards the contract price as payments were intermittent and inconsistent and by reason thereof the parties executed a repayment programme specifically to agree on the mode of payment. See attached hereto and marked annexure "C".
(d) The sum due to the plaintiff as stated in the Repayment Agreement was / is USD 6, 738,272.38 (six million seven hundred thirty eight thousand, two hundred seventy two United States Dollars and thirty eight cents only), and the parties agreed to have the said sum paid over a period of time with the last instalment falling due on 30th April 2012.
(e) That to date, despite numerous demands from the Plaintiff, the defendant has failed /refused to settle the said amount constituting a breach of contract. Copies of the demand letters are attached hereto and marked annexures "D, D2, D3, and D4".
(f) In response to the said demand letter, the defendant admitted that the Repayment agreement was signed for and behalf of Uganda Telecom limited by its officers but denied the officers capacity to bind the defendant. A copy of the letter of objection is attached hereto and marked "E".
5. At the trial the plaintiff shall aver and contend that it discharged all its obligations and the Defendant does not have any justification for withholding the payments due to the plaintiff.
6. The plaintiff shall further aver and contend that by reason of the defendant's conduct, it has suffered great loss and inconvenience and shall by reason thereof seek general damages.'

15. The first agreement is between the appellant as first party and a company called ZTE (H.K.) Limited, described as incorporated in Hong Kong, China as second party. It is partly provided in the preamble that

> 'And whereas it is the intention of the parties to enter into a contract for the microwave transmission project, all purchase orders issued to the second party by the First Party during the term of this contract shall be governed only by the terms and conditions of this contract.'

16. The nominated account under the agreement for payment of moneys by the first party to the second party was in the names of the plaintiff, ZTE Corporation.

17. It is not in dispute that the plaintiff is not the second party. The second party is another company ZTE (H.K.) Ltd. The first party contracted with the second party and it was to the second party that it agreed it will direct the local purchase orders for the supply of goods and services under the contract. However it is evident from the local purchase orders, annexed to the plaint that they were not issued to the second party but were issued to the plaintiff by the defendant. It is clear from paragraph 4(b) of the plaint that the defendant made

an order for the supply of goods and services from the plaintiff even though the contract required an order to be placed with the second party and not the plaintiff.

18. Secondly there is the agreement for repayment of the whole outstanding amount which was signed between the plaintiff and the defendant. This is averred in paragraph 4 (c) and (d) of the plaint and the repayment agreement is annexed to the plaint. Under this agreement the defendant agrees in writing that the sum claimed in the plaint is due and owing to the plaintiff for goods and services supplied which the defendant undertook to pay for. In our view these facts on the plaint are sufficient to found a cause of action against the plaintiff for this action to proceed to trial. Whether in the end it can succeed or not, taking into account both the evidence adduced and the law applicable, is a matter for the trial judge.

19. In spite of the sloppy and indisputably careless drafting of the plaint a cause of action is made out upon which this action can be fought. The respondent / plaintiff cannot rely on the agreement to which it was not a party, at least not as presently shown on the plaint and annexures but there are other facts disclosed which assert an agreement and a relationship between the appellant and the respondent. The appellant ordered goods and services from the respondent. Those goods and services were supplied by the respondent. The appellant undertook in writing to pay for those goods and services. He defaulted on that repayment agreement. The other party to that agreement, the plaintiff / respondent has sued on it for payment. We are satisfied that this matter can go to trial. It may be necessary for the plaintiff to amend his plaint in order to ensure that all matters in controversy between the parties are fully heard and determined.

20. The trial may have to consider whether or not there was one or two or more contracts or if there was one contract whether or not it was varied and in what manner. These are issues for the trial court.

21. Mr. Kibuuka had claimed this case is on all fours with National Social Security Fund and Anor v Alcon International Limited Supreme Court Civil Appeal No.15 of 2009. We do not agree. The instant case is distinguishable from the Alcon case. National Social Security Fund did not know that the party that was performing the contract was not the party that had signed the contract. This was hidden from National Social Security Fund. In the instant case the defendant itself addressed local purchase orders to the plaintiff, well knowing, this was not the company that signed the contract, annexure A. The defendant knew the person it was dealing with and ordering goods and services from. Contrary to the annexure A, the defendant ordered goods not from ZTE (H.K.) Limited, the party that signed annexure A, but from the plaintiff.

22. Secondly there is the repayment agreement entered into between the plaintiff and the defendant in writing. Whether this agreement created legal relations between the parties is a matter that would have to be tried. The plaintiff has alleged that there is a written agreement that it will be paid by the defendant. And that in breach of that agreement the defendant has not paid it, hence this action. This was not the case with the Alcon case.

23. It is contended by Mr Kibuuka that the plaintiff had no authority to enter into the repayment agreement, annexure C. That is a matter for the trial court to determine. At this stage we can only look at the plaint and its annexures and are not to resolve factual or legal issues arising from the case.

24. The learned trial judge was attacked for not deciding the objection raised by the appellant forthwith and putting it off until hearing or a partial hearing was done. We are satisfied on a review of the available authorities that this was a matter that was for the judge's discretion. It is possible another judge may have ruled on the matter immediately rather than defer the decision on the point raised. It is a matter of discretion of the trial court. This was the holding of the Supreme Court in Attorney General v Major General Tinyefunza (supra). We are unable in the circumstances to fault the learned trial judge.

25. The appeal is dismissed with costs.

26. Before we take leave of the appeal the appellant's counsel annexed to his list of authorities the Supreme Court decision in NSSF and Anor V Alcon International Limited (supra). What was in effect annexed were only 10 pages of the Judgment of Odoki, CJ., intermittently picked, instead of all the 50 pages of the judgment of the said judge. He did not bother to attach the judgments of the other members of the panel. This is reprehensible. If counsel cites an authority and makes it available to this court, or any court for that matter, counsel ought to supply the full decision.

**Cross Appeal**

27. The content of the cross appeal is really the subject of the appeal and in dealing with the appeal we have answered what is raised in the cross appeal. It is therefore unnecessary to consider whether it was incompetent or not as that would be an exercise in futility.

28. Nevertheless in passing we wish to observe that the appellant having obtained leave to appeal the decision of the learned trial judge and filed an appeal it was unnecessary for the respondent to seek leave too to file a cross appeal. Once there was a proper appeal before the Court of Appeal the respondent was entitled to file a cross appeal in accordance with Rule 91 of the Court of Appeal Rules, without reverting back to the Civil Procedure Rules. This is evident from the rule which states,

91. **Notice of cross-appeal.**
**(1)** A respondent who desires to contend at the hearing of the appeal in the court that the decision of the High Court or any part of it should be varied or reversed, either in any event or on the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his or her contention and the nature of the order which he or she proposes to ask the court to make, or to make in that event, as the case may be.
**(2)** A notice given by a respondent under this rule shall state the names and the addresses of any persons intended to be served with copies of the notice and shall be lodged in four copies in the registry not more than thirty days after the service on the respondent of the memorandum of the appeal and the record of the appeal.
**(3)** A notice of cross-appeal shall be substantially in Form G in the First Schedule to these Rules and shall be signed by or on behalf of the respondent.'

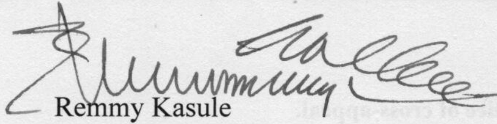
## Civil Application No.10 of 2016

29. Prior to hearing the above appeal we had heard the above application brought by the respondent in the appeal, ZTE Corporation, applying that Civil Appeal No. 197 of 2015 be struck out on the ground that it was not filed in time and some essential step in the proceedings was not taken within the time prescribed by the law. This application was dismissed and we offered to give our reasons later with the judgment in the main appeal. We now do so.

30. The facts of this case are not in dispute. The decision of the trial judge was made on 8th May 2015. The appellant did not file a notice of appeal within 14 days of that date. It did so on the 6th July 2015, 3 days after obtaining leave from the High Court to appeal against the decision of the High Court. The respondent contends that the appeal was out of time, relying on rule 76(3) of the Court of Appeal Rules, which provides, that notwithstanding a requirement for leave or certificate of general importance it would not be necessary to wait for leave or a certificate to be granted before a notice of appeal was filed.

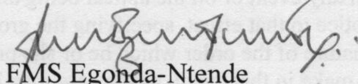
31. In our view the ends of justice required that the central matter in controversy between the parties which was holding up the hearing of this case in the court of first instance be dealt with as soon as possible by this court so that the matter can revert back to the trial court for a hearing on its merits. We chose therefore to allow the appeal proceed, in spite of the late compliance with rule 76 in light of the powers of this court under rule 2 of the Court of Appeal Rules. The respondent had not shown it would suffer any prejudice if the appeal was heard. In our view it served the ends of justice for all the parties in this case to deal with the appeal rather than to torpedo the same, on account of that misdemeanour.

Dated, signed and delivered at Kampala this 1st day of December 2016



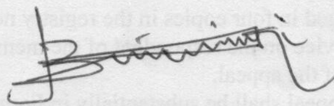
Remmy Kasule

**Justice of Appeal**



FMS Egonda-Ntende

**Justice of Appeal**



Cheborion Barishaki

**Justice of Appeal**