THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.743/94/

EQUATORIAL AGENCIES LTD.
THAMES MERCANTILE SERVICES:: PLAINTIFFS

-versus-

ATTORNEY GENERAL :: DEFENDANT

BEFORE:- HON. THE PRINCIPAL JUDGE - MR. JUSTICE J.H. NTABGOBA

RULING

This is an application by notice of motion brought under Orders 3(1), and 48(1) and (3) of the Civil Procedure Rules, and Sections 6 and 101 of the Civil Procedure Act. It was filed by Katureebe, Twinomukunzi & Co. Advocates on behalf of M/S. Equatorial Agencies Ltd. (herein to be referred to as the applicant), against the Attorney General of Uganda and M/S. Thames Mercantile Services, Ltd (herein to be referred to, respectively, as the first and second respondents).

The application seeks orders that:-

1. High Court Civil suit No. 743/94 is time-barred by virtue of the Limitation Act, Cap.70 of the Laws of Uganda.

2. The consent judgment entered into in that suit between the two respondents is a nullity and should be set aside.

3. The Decree signed consequent upon the consent judgment is also a nullity and should be set aside.

4. Therefore HCCS.No.743/94 should be struck out with costs.

5. In the alternative, but without prejudice to the foregoing, HCCS. No.743/94 should be stayed pending the disposal of HCCS. No. 47/89 which is the earlier suit in terms of S.6 of the Civil Procedure Act.

6. A consent judgment be entered in HCCS. No. 47 of 1989 instead in the same terms and a decree extracted and signed accordingly.

7. Costs of this application be provided for.

In prayer 6, the application, I understand, to be saying that the consent judgment be entered in HCCS. No.47 of 1989 which is between the applicant and the first respondent.

To understand these prayers, it is necessary to set forth the facts of the case. On 12.3.86 the applicant entered into a shipping agreement with the first respondent (per the Government of Uganda) whereby the applicants were to ship to Kampala from Bombay 20 drilling rigs for payment of the sum of US $ 1,826,200.00 payable to the applicant or to its principals upon presentation of the relevant documents stipulated in Clause 3 of the Agreement. The second respondent duly shipped the rigs in accordance with the terms of the agreement and the Government of Uganda, through its Ministry of Minerals & Water Development, acknowledged satisfaction with the contract's performance. It signed for the receipt but only paid one invoice of US $ 219,300.00 instead of the total contract sum of US $ 1,826,200.00 as aforementioned. On 20.1.89, the applicant filed an action in this Court to recover the balance of the debt in the sum of US $ 1,260,598.00 (which should be a sum of US $ 1,127,993 according to the 'three unpaid invoices). HCCS. No. 47/89 was being conducted by M/S. Ariko & Co. Advocates. Because Mr. Stephen Omoding Ariko, the sole partner of the firm died, the conduct of the suit stalled and has never been concluded to date.

According to one Charania Noordin Muhamed who deponed on an affidavit that he is a Director and shareholder, as well as Mr. Atul Sumant Patel who also deponed that he is a Director of the second Respondent Company, when HCCS. No.47 of 1989 stalled, they decided to institute HCCS. No. 743 of 1994 through M/S. Mwesigwa, Rukutana & Co. Advocates who joined as a Co-plaintiff the second respondent suing the first respondent. In consequence therewith the second respondent and first respondent came to an out of court settlement and on 11.5.95. A consent judgment was signed by this Court and a Decree was accordingly extracted.

Now the present application is attacking HCCS. No. 743 of 1994 and the consent judgment and Decree arrived at, on the grounds that:-

(a) HCCS. No. 743/94 was not supposed to be heard during the pendency of HCCS. No. 47/89 and that the disposal of the former was null and void by virtue of S.6 of the C.P.A. which provides that no Court shall try a subsequent suit during the pendency of an earlier suit if the two suits are similar in the sense that the subject matter is the same and that the parties to either suit are the same or are suing in the names of the same persons. Hence all the above prayers that are being sought.

On 29.9.95 while ruling on an interlocutory application I framed the following issues to be argued by counsel on both sides, at the resumption of the hearing of this application:

(a). that proof should be made of principal/agent relationship between the second respondent and the applicant.

(b). evidence to be adduced why after contracting with the applicant, the first respondent employed the second respondent which it has now agreed to pay the contract money ignoring the applicant.

(c). to decide, in light of the provisions of S. 6 of the C.P.A. whether the consent judgment and decree of 11.5.95 were a nullity.

(d). to decide whether or not HCCS. No. 743 of 1994 was barred by the provisions of the Limitation Act, Cap.70 of the Laws of Uganda.

(e). the parties to be free to frame any and/or further issues for determination.

I gave an order that until the hearing and final determination of this application the first respondent should withhold disbursement of the decretal amount under the consent judgment.

I will start with issue number (d) whether or not HCCS. No. 743/94 is barred by the Limitation Act. The sum of US $ 1,127,993 being a debt the two suits were for the recovery of a debt and a suit for the recovery of a debt is not subject to the provisions of the Limitation Act. Straight away therefore I would answer issue number (d) in the negative. I will then treat issues numbers (a) and (b) together. After much probing of the documents filed on both sides, in particular on the sides of the applicant and the 2nd respondent, I have come to the conclusion that the applicant contracted with the first respondent as an agent of the second respondent and that therefore, in fact, the second respondent was a disclosed principal of the applicant, and the first respondent understood the shipment agreement as involving the applicant as the agent of the second respondent.

There is a lot of evidence to show that a principal/agent, relationship between the second respondent and the applicant existed. In the first place the 12.3.89 shipping agreement stipulates that the first respondent would pay to the applicant or its principals. Later on, in the affidavit of Mr. H.L. Chohan who deponed that he is a Deputy Government Cost Agent at Mombasa, Kenya, it is deponed that he was verbally instructed by S.M. Charania “who is personally known to me on behalf of M/S. Transroad to clear various containers of, among others, drilling rigs.” “That our office carried out the clearing after which we handed the

goods to M/S. Transroad in Mornbasa."

"That M/S. Transroad passed on the original Bills of lading for the containers and vehicles to our office upon which we prepared the Mombasa Port Release orders (MPRO) documents." "That after carrying out their instructions we invoiced M/S. Transroad who fully paid for the services."

Mr. Charania, in his affidavit of 25.9.95, depones, in paragraph 6 that;

> "That pursuant to the agreement (of 12.3.86) the first respondent Company (i.e. the second respondent in this application) exclusively and without any participation by the applicant Company took over the contractual obligations, financed and handled the transportation, insurance clearance, forwarding and delivery of the goods to the Government of Uganda. The clearing was done by M/S. Coastal clearing Agency, Ltd. on the instructions of my own Company MIS. Transroad, while the forwarding and delivery done by my said Company itself". Whereas Chohan and Charania prove that it was the second respondent which handled the shipment under the agreement with the Government concluded with the applicant, Charania goes on in his affidavit to explain why the second respondent decided to perform the obligations instead of the applicant, which had contracted with the agreement.

In this regard I reproduce paragraphs in Charania's affidavit:

> "7. That on delivery, the first respondent Company would prepare and serve invoices on the Permanent Secretary, Ministry of Water & Mineral Development. The said invoices and the accompanying documents, viz: original bills of lading and dully signed Delivery Notes are attached hereto and marked annexture").

> "8. That the Government of Uganda only effected payment in respect of our first invoice and defaulted in effecting payment in respect of the other three, thus the basis

of this Suit."

Proof that the first invoice was paid for to the second respondent, not the applicant, is contained in the letter of Sharma of the applicant Company which he addressed on 1.7.86, to the Permanent Secretary, Ministry of Water & Mineral Development, in which he (Sharama) acknowledged that the applicant company had its principal in the United Kingdom, which was the second respondent, Mr. Sharama stated in paragraph 2 of his said letter addressed for the attention of Mrs. Opio:-

> "As per our to-days discussion, we have noted that we ought to regularise the discrepancy between the names of the officially appointed Contractors-Equatorial Agencies, Ltd, and Thames Mercantile Services, ltd, your principals who have submitted the invoices for the work done. As required by
> you, we herewith authorise you to issue the payment of the first invoice No. TMS/99/85 in the names of Thames Mercantile Services, Ltd. Further similar letters authorising payment will be ready as to be remitted, to keep matters in correct order."

And in a letter by Mrs. Wanyama addressed to the applicant on 18.7.86 she stated:-

> "DRAFT No. 10-00-00TF PAYMENT FOR TRANSPORTATION OF RIGS.
>
> "Enclosed herein please find Draft No. 10.-00-00TF for £143,445.83 in the names of THAMES MERCANTILE SERVICES for the transportation of rigs."

A final piece of evidence -bowing that the second respondent was the principal of the applicant in the transaction is in the letter of Ince & Co, Solicitors which they wrote to the Permanent Secretary that:-

> "We are instructed by Equatorial Agencies, Ltd, a company incorporated in Uganda with a registered office at P.O. Box 2202 Kampala and its overseas principals, Thames

Mercantile Services, Ltd, of London."

This letter written as early as 28.5.88 was clear proof that M/S. Thames Mercantile Services, Ltd were foreign principals to M/S. Equatorial Agencies Ltd.

Needless to say there was principal/agent relationship between the second respondent and the applicant. According to the law of agency, if an agent had authority to establish privity of contract between the principal and the other contracting parties, as in the case of the applicant, the second respondent and the first respondent, in our instant case, the foreign principal may sue on a contract concluded by a local agent on its behalf. The law actually states: -

> "No foreign principal may sue or be sued on any contract made by a home agent, unless the agent had authority to establish privity of contract between the principal and the other contracting parties and, it clearly appears from the terms of the contract, or from the surrounding circumstances, that it was the intention of the agent and of the other contracting party to establish such privity of contract (see Paterson -vs- Gandasequi (1812) 15 East 62; Smyth -vs- Anderson (1849)18 L.J. C.P . 109; Brumburg -vs- Pollizer (1873) 28 L.T. 470 and Elbinger - vs - Claye (1873) L.R. 8 Q.B. 313).

What this amounts to is that either the applicant or the second respondent could sue in either HCCS. No. 47/89 or HCCS. No. 743/94 to recover the debt of US $ 1,127,993 from the first respondent. And in this case in which it was the second respondent which as principal, had performed the part of the agreement and had actually received from the first respondent payment in respect of the first payment instalment, it was more legitimately suited for suing for the balances. Therefore, had it not been for the HCCS. No. 47/89 filed by the applicant, the HC'1S. No. 743/94 would have had no question about it. The problem is now the provisions of S. 6 of the C.P.A. The question is;- Since Court defied the provisions of this section by entertaining the subsequent suit (HCCS. No.743/94) during the pendency of the former suit (HCCS. No.47/89), are the results of the Courts decision a nullity. It seems to me

that they are not. I have been able to come across the commentary on the Indian S.10 of the Code of Civil Procedure which is in parimateria with our S.6 of the C.P.A. It says:-

> "It has been held that in spite of the provisions of this section, the earlier instituted suit may be stayed and the later one proceeded with in some cases. Thus where the parties have agreed that any suit as to a particular matter must be brought in Court X, the suit in court Y though earlier, may be stayed and the suit in court X may be proceeded with. (see (40) 27 AIR 1940 All 241).
> A similar procedure may also be followed on grounds of convenience and avoidance of the abuse of the process of the Court a part from the question of any agreement between the parties. In 30 AIR 1943 Bombay 206 (208-209) the High Court of Bombay restrained by injunction the defendant from proceeding with the earlier suit filed in Bnda (U.P) on the ground of convenience and to prevent abuse of the process of the Court."

In two more recent cases (Sheopat Rai –vs- Warak Chand (1919) A.L. 294 and Shanti Swaroop -vs- Abdul Rehman 1965 A.M.P. 55, 59) it was held that section 10 of the Indian Code enacts merely a rule of procedure and a decree therefore passed in contravention of it is not a nullity and cannot be disregarded in execution proceedings. It can be waived, although the Section is so worded as not to leave any discretion in the Court where its conditions are satisfied. (See Mulla on the Code of Civil Procedure - Act V of 1908 14th Edition, 1981 at p. 68).

From the above analyses and authorities it would seem to me that S. 6 of the C.P.A. is not so inviolable as to render Court decisions in contravention thereof a nullity. This is therefore to answer issue number (c) in the negative. The proceeding with the subsequent suit while the earlier suit was pending, in the circumstances of this case, can be accepted for reasons of balance of convenience for the following reasons:-

The first respondent and the second respondent have mutually agreed to settle their debt - their debt because facts show that the second respondent is the one which performed the 12.3.86 shipping agreement, that it's the second respondent which received the first

instalment thereby reaping the first fruits of the contract. Secondly, as I have decided, either the applicant or the second respondent is entitled to file a suit to recover the debt of US $ 1,127,993.00. Thirdly, according to Charania and Atul Patel, the conduct of HCCS. No. 47/89 stalled and not knowing that the applicant had filed HCCS. No. 47/89, decided to act for themselves because, in their view, the applicant had failed to recover the debt. And so they filed HCS. No. 743/94 whose outcome is appreciable. Besides, the applicant being agent of the second respondent, the latter sought it fit to join the former as Co-plaintiff in HCCS. No. 743/94, meaning that the second respondent is willing to share with the applicant the fruits of the suit, depending on their agent/principal contractual relationship.

It would not be convenient to have to strike out the Decree in HCCS. No. 743/94 and substitute it with a similar Decree but in HCCS. No. 47/89. If anything it looks, on the face of it, as if HCCS. No. 743/94 is more equitable than HCCS. No. 47/89, in that it enables both principal's and agent's mutuality in the debt recovery.

I do uphold the conduct and results of HCCS. No. 743/94 and dismiss this application with costs.

J.H.NTABGOBA
PRINCIPAL JUDGE
17.10.96