IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO DCJ, ODER JSC AND KAROKORA JSC)

CIVIL APPEAL NO. 19 OF 1995

BETWEEN

LUWERO GREEN ACRES LTD…… APPELLANT

AND

MARUBENI CORPORATION ……RESPONDENT

(Appeal from the Judgment of High Court of Uganda at Kampala (Mr. Justice W.K.M. Kityo) dated

9/8/94

in

Civil Appeal No. 14/95)

JUDGMENT OF KAROKORA JSC

This is an Appeal against an Exparte Judgment and Decree on appeal of the High Court of Uganda at Kampala dated 9th August, 1994 in which he allowed the appeal and set aside the Judgment and Decree of the Chief Magistrate.

The brief facts as can be gathered from the record were that by an oral agreement between the parties, the appellant supplied poles to the respondent on various dates at a cost of Uganda shs. 20,000/= per pole and upon each delivery, the respondent paid 85% of the value of the pole retaining 15%.

By the end of the contract, the appellant had supplied a total of 2525 poles valued at shs. 50,500,000/= of which 85%; that is shs. 42,925,000/= had been paid and 15%; that is shs. 7,575,000/— had been retained as agreed between the parties to be paid at the end of the contract.

At the end of the contract, out of the shs. 7,575,000/— retention, the respondent paid shs. 3,075,000/= leaving unpaid balance of shs. 4,500,000/=.

The appellant demanded for the unpaid balance of shs. 4,500,000/= but the respondent refused to pay it as a result of which the appellant filed a suit for the recovery of that amount under Summary Procedure Order 33 of the Civil Procedure Rules.

The respondent successfully applied for leave to appear and defend. In the written Statement of Defence, the respondent denied interalia paragraphs 3 — 7 of the Plaint and in the alternative the respondent claimed that the 15% retention was to be paid to the appellant after the said poles had passed the final test and that 225 green poles were found short of the specifications and were therefore rejected, hence shs. 4,500,000/— being 15% retention thereof could not be paid.

After full hearing, the Learned Chief Magistrate found for appellant and the respondent appealed to the High Court. When the appeal came up for hearing, the appellant and his Counsel were absent and the respondent was permitted to proceed ex—parte. The Learned Judge allowed the appeal with costs in the High Court and in the Chief Magistrate's Court, hence this appeal. Six grounds of Appeal were framed, to wit:

(1) That the Learned Trial Judge erred in law and failed in his bounden duty as the first appellate Court when he merely read the lower Court record without re—appraising it and reaching his own conclusions;

(2) That the Learned Judge erred in law when he imported into his judgment the contents of an affidavit accompanying an application for leave to appear and defend and relied on the same;

(3) That the Learned Trial Judge erred in law and fact when he held that there was a written agreement between the parties;

(4) The Learned Judge erred in law when he accepted submissions on the fourth ground of appeal and considered the same submissions in his judgment when the ground of appeal offended Order 39 r (1) (2) of Civil Procedure Rules;

(5) That the Learned Judge erred in Law when he held that Section 90 of the Evidence Act applied to the contract between parties;

(6) The Learned Judge misdirected himself on the burden of proof in Civil cases.
I wish to point out from the start that both parties or their Counsel relied solely on written submission and therefore in deciding this appeal I shall rely on the record of appeal and written submission of both Counsel.

Dealing with the 1st ground of Appeal, I must state that it is now settled that the duty of the first appellate Court is to reconsider and evaluate the evidence and come to its own conclusions bearing in mind, however, the fact that it never saw the witnesses as they testified. See R v Pandya (1957) EA 336, Selle V Associated Motor Boat Co (1968) EA 123, James Nsibambi v Lovinsa Nankya (1980) HCB 81, Ephraim Ongom Odong and Anor v Francis Binega Donge C.A. No. 10/1987 (U/SC) unreported.

In the instant case it is noted throughout the judgment on pages 148, 149 & 150 that the Learned Judge based his judgment and conclusion on the affidavit sworn by Inagaki on behalf of Respondent in support of an application seeking leave of the Court to appear and defend the suit brought under Summary Procedure Order 33 of Civil Procedure Rules (CPR), where there was an affidavit and the Annexture to that Affidavit. Throughout his judgment he is referring to the affidavit and the annexture to that affidavit, but then the law is that if the court grants leave to the

defendant to defend the suit, the affidavit forms part of the record but it is never evidence in support of the defence which has to be adduced before the Court in the ordinary manner.

The Court of Appeal for Eastern Africa in Hassanah Issa & Co v Jeraj Produce Stores (1967) EA 555 while dealing with an Affidavit filed in support of an application seeking leave by the defendant to appear and defend a suit brought under Summary Procedure (similar to the instant case) which the Magistrate and the Judge on Appeal had taken into account, had this to say at page 559 (per Sir Charles Newbold, P):

> "Having dealt with this preliminary point of jurisdiction, I turn now to consider the question raised on the appeal. With respect to the Judge of the High Court and the Resident Magistrate, in my view they have both completely misunderstood the legal position in a case where a Plaint is brought upon a bill of exchange They have further misunderstood the law relating to whether the Court hearing a case can refer to any affidavit filed in interlocutory proceedings in that same case. As I have said, the suit was filed under 0.37, it being a suit upon a cheque which was dishonored. Under that Order the Plaintiff is entitled to enter judgment unless the defendant obtains leave to defend; and he must apply to a judge for that leave. In that application the defendant files an affidavit setting out the various matters and if the resident Magistrate or the Judge is of the view that the affidavit raises triable issues, then the resident Magistrate or Judge grants leave to defend, which leave may be granted either unconditionally or conditionally. Having obtained leave to defend, then the affidavit upon which that leave was granted remains, of course, upon the record but is in no circumstances evidence in the case itself. The defendant having obtained leave files his defence and the proceedings then continue in precisely the same way as if the suit had not been filed under that particular Order."

Order 35 of the Tanzania Civil Procedure Rules is similar to our Order 33 of CPR.

In the instant case, there is no doubt that the Learned Judge on appeal heavily relied on the affidavit sworn in support of the application, seeking leave to appear and defend the suit brought under the Summary Procedure and the Annexture "A", when these were not introduced as evidence in the suit itself. In my view, if the defendant wanted to rely on these (affidavit and Annexture A) as his evidence, it ought to have introduced them in evidence when it was testifying before Court to prove its case. It was therefore erroneous on the part of the Learned Judge when he imported and heavily relied on the Affidavit and the Annexture "A" thereto at page 150 of the record/judgment line 9 to 19 when he held:

> "Furthermore, it is noted that in support of appellant's application for leave to appear and defend this suit, that is, i.e. a suit filed under the provisions of
> Order XXXIII of the CPR, as a Summary Proceedings, the appellant continued to supply and receive or acknowledge payment, made in accordance with the stated terms — see the supplied in Annexture 'A — J!• Therefore, the claim for payment of the whole price on the delivery had never been agreed upon among the terms and the Magistrate ought to have held so."

With respect, I think in the above passage the Learned Judge was relying on the affidavit sworn in support of the application for leave to appear and defend the suit, which affidavit and annexture A — J were not part of the defence evidence in the main Suit. In fact, in cross—examination, DWI conceded at page 45 line 30 — 35 that:

> "It is true that the contract between Plaintiff and the defendant was oral. It is true that the contract was oral to our benefit to guard against the time— wastage".

> Then on page 46 line 27 he stated:

> "The poles would not be trimmed unless they complied with our specifications. The cutting is done under the supervision of our staff. It is also true that the plates were fixed after trimming."

Therefore, following the above evidence, if the Learned Judge had reconsidered and evaluated the evidence as the first appellate Court and subjected it to a fresh and exhaustive scrutiny as required of him, see Pandya v R (supra) Selle v Associated Motor Boat Co. (supra) he would not have come to the conclusion he came to that there was written agreement setting out terms of contract. Therefore in view of the above and in view of the admissions by DWI at page *45* lines 30 — 35 of the record of the proceedings of the appeal, that the contract between the appellant and respondent was oral, I think that the Learned Judge was not correct to hold that there was a written contract between the parties. Therefore, in my view, Section 90 of the Evidence Act which excludes Oral evidence from being admitted, if it seeks to vary the contents of the agreement, would not be relevant here, when there was no written agreement governing their transaction.

The provision of Section 90 of the Evidence Act reads in part as follows:

> "When the terms of contract or of grant or other disposition of property, have been reduced to the form of a document, and no evidence save as mentioned in Section 78 of this Act, shall be given in proof of the terms of such contract
> except the document itself or Secondary evidence is admissible…"

Clearly, therefore, from the entire evidence on record, the contract between the parties was not written. It was an Oral Contract and as such, Section 90 of the Evidence Act was wrongly invoked by the Learned Judge. This, therefore, disposes of grounds 1, 3 and 5 which must succeed.

I must, however, deal with whether or not there was evidence to prove that the appellant supplied 2525 poles to the respondent. It was not disputed by DWI that 2525 poles were supplied by the appellant. Respondent conceded through DWI that 2525 poles were supplied to them, but argued that only 2300 poles complied with their specification. It was further argued for respondent that shs. 42,925,000/= paid was 85% down—payment on delivery of the poles.

However, it is noted from Annexture I to the plaint that by 13/3/93 the appellant had delivered a total number of poles amounting to 2525 and the respondent had paid a total amount of shs. 42,925,000/= which was 85% of the total number of poles delivered at shs. 20,000/= per pole, less 15% retention. The 15% retention on 2525 poles at shs. 20,000/= each would leave a balance of shs. 7,575,000/=, unpaid. There was evidence that the poles had been supplied when they were green. They were dried, trimmed and marked with number plates by the respondent, which according to DW1's admission, on page 46 line 27 of the record of the proceedings, meant they had complied with respondent's specifications and therefore had been accepted by the Respondent.

I think that it would not be just and fair to permit the Respondent to say that 225 poles had not met their specification in Annexture A to the affidavit in support of an application for leave to appear and defend the Suit brought under Order 33 of C.P.R., after the poles had been accepted and altered by trimming them to suit their requirement. Once the poles were trimmed, thus accepted, the contract was complete and poles became the property of Respondent. The sum of shs. 42,925,000/= was very well above 85% of 2300 poles each at shs. 20,000/=. In other words 85% of 2300 poles each at shs. 20,000/=, would come to shs. 39, l00, 000/= and 15% retention on those poles would be shs. 6,900,000/=.

There is no where it was indicated that in the number of deliveries that 2300 poles were delivered. Annexture A — I disclosed that 2525 poles were delivered and accepted and that 85% thereof paid, amounting to shs. 42,925,000/=. The balance of 15% on the total number of poles delivered of 2525 would leave a balance of shs. 7,575,000/=. Instead of the balance of shs.

7,575,000/= to the appellant, the Respondent paid shs. 3,075,000/= on 15/4/93 as reflected on the Summary of Wooden Poles supplied, where it is stated that 2300 poles had been supplied, whilst the total number of poles supplied as on 13/3/93 (see Annexture I) was 2525 poles.

There was evidence that all the 2525 poles had been supplied and received, dried, trimmed and marked with respondent's numbers, which meant that the pies had been accepted. It appears from the evidence that the respondent unilaterally decided to retract/revoke the contract by paying shs. 3,075,000/= on allegation that only 2300 poles had been supplied. Appellant demanded the balance of shs. 4,500,000/= from the respondent on the ground that he had supplied 2525 poles but not 2300 poles.

No doubt, the appellant had supplied 2525 poles to respondent and the respondent had received them and accepted them. When he dried, trimmed and marked them with their numbers, the contract was complete and therefore, the respondent could not retract the
Contract on the ground that they had had excess poles. In my considered view since the appellant had supplied the poles and respondent had received them and altered their state, when they trimmed them according to their needs/requirement, they would not be permitted to withdraw or refuse to pay for all the poles supplied.

That disposes of all the remaining grounds of appeal, which also succeed.

In the circumstances, therefore, I would allow this appeal with costs here and in the Courts below. I would set aside the Judgment and Order of the Learned Judge on Appeal and substitute them with an Order dismissing the Appeal and confirming the Judgment and Orders of the Learned Chief Magistrate.

Dated at Mengo this 5th day of Feb l997.

A. N. Karokora

JUSTICE OF SUPREME COURT.

5/2/97. Mr. B. Babigumira for the Appellant

Mr. Ocheng Charles for the Respondent

Mr. Emma Manana Court clerk

Judgment delivered as directed by the Hon. JJSC.

JUDGEMENT OF ODER, J.S.C.

I have had the benefit of reading in draft, the judgment of Karokora, J.S.C. I agree with him that the appeal should succeed.

I have nothing useful to add.

Dated at Mengo this 5th day of Feb 1997.

A.H.O. ODER

JUSTICE OF THE SUPREME COURT.

JUDGMENT OF MANYINDO, D.C.J.

I read the judgment of Karokora, J.S.C. in draft. I agree with it and as Oder, J.S.C also agreed the appeal is allowed the judgment of Kityo, J allowing the appeal set aside and an order dismissing the appeal substituted therefore. The appellant shall have their costs of this appeal and in the courts below.

DATED at Mengo this 5th day of Feb 1997.

S. T. MANYINDO

DEPUTY CHIEF JUSTICE