

UGANDA / JUDGMENT

Abdulrahman Elamin Vs Dhabhi Group (Civil Appeal No. 215 of 2013)

[2017] UGCA 60 (16 November 2017)

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COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Civil Appeal No. 215 of 2013

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 215 OF 2013

ABDULRAHMAN ELAMIN :::::::::::::::::::: S

VERSUS

1. DHABI GROUP

\$15\$

2. WARID TELECOM UGANDA LTD RESPONDENTS

3. WARID UGANDA HOLDINGS LTD

(Appeal from the ruling of Hon. Justice Musalu Musene given at the High \$10\$ *Court of Uganda at Kampala [Commercial Division] on 4th June 2013 in* HCT-00-CC-CS No. 432 of 2012)

CORAM: HON. MR. JUSTICE REMMY KASULE, JA HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA HON. MR. JUSTICE F. M. S EGONDA NTENDE, JA

JUDGMENT

This is an appeal against a preliminary objection upheld by the High Court of Uganda at Kampala [Commercial Division] that HCT-00-CC-CS No. 432 of 2012 does not disclose a cause of action against all the \$20\$ respondents. The appellant had instituted Civil Suit No. 432 of 2012 in the High Court of Uganda against the respondents for breach of contract, general damages and

interest. According to the appellant's plaint dated 24th July 2012 filed in the High Court, the appellant facilitated a high level meeting with Uganda State authorities to discuss diversified \$25\$ business interests of the 1st respondent, a United Arab Emirates based conglomerate and holding company of the 2nd and 3rd respondents. In turn the 1st respondent undertook through electronic mail to allot 3%

shareholding in Warid Telecom Uganda Limited to the appellant, then valued at USD 1,500,000 (One million Five Hundred Thousand dollars).

The appellant was never given the said shares leading the original suit whose plaint was struck out under Order 7 rule 11 of the Civil Procedure Rules hence this appeal.

Representations

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Mr. Edgar Tabaro of M/s Karuhanga Tabaro & Associates appeared for the appellants while Mr. John Bosco Mudde of M/s Katende Ssempebwa & Co. Advocates represented the respondents.

Arguments for the Appellant \$10\$

Counsel for the appellant submitted that the appellant's plaint (paragraphs 5 and 6) discloses a cause of action in breach of contract therefore the Judge was wrong in holding that none was disclosed against all the respondents.

- Counsel further submitted that the summary of evidence brings to the \$15\$ attention of the respondents the claim the appellant had against them. He pointed out that the respondents in their submissions allude to the existence of Dhabi Group and faulted the Judge for ruling that the first respondent does not exist.
- Counsel for the appellant criticized the trial Judge for going ahead to \$20\$ make a finding on the issue of cause of action yet he had over ruled the respondents on the ground that they were bringing in matters of evidence in the preliminary objection to do with existence/ non-existence of the 1st respondent. Counsel contended that the

preliminary objection was not properly raised since the respondents did not introduce it by way of pleadings but through the trial bundle.

Counsel submitted that matters of privity of contract are matters to do with evidence that can only be proven through a trial not at a preliminary stage. He also submitted that there is a contract between the appellant and respondents arising out of conduct of the parties, not necessarily out of a written agreement.

Counsel relied on the case of Kitgum District Administration vs Print Supplied Ltd, Civil Appeal No. 44 of 1988 (COA) where the Court of Appeal invoked its powers under Section 11 of the Judicature Act and \$10\$ struck out the name Kitgum District Administration substituting it with Kitgum District Resistance Council. Counsel invited this Court to do the same and further sought

refuge in the case of *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 which is to the effect that a party may be joined in a suit even though there is no cause of action against it but because that party's presence is necessary in order to enable the Court effectually and completely adjudicate and settle all the questions involved in the cause.

Counsel then prayed that this appeal be upheld with costs and the suit referred to the trial Court for determination on its merits. \$20\$

Arguments for the Respondent

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Counsel for the respondents totally agreed with the ruling of the trial Judge and submitted that the 2nd and 3rd respondents were never privy to the email communication in which the appellant was notified about

the undertaking to allot to him 3% shares in Warid Telecom Uganda Limited.

Counsel further submitted that based on the principle of corporate personality, Warid International LLC, Warid Holdings Uganda Limited and Warid Telecom Uganda Limited are separate and distinct legal entities therefore the 2nd and 3rd respondents cannot be held liable for undertakings made by Warid International LLC.

Counsel referred to "annexture C" and pointed out that the author of the communication, Manocher A. Jamal the Financial Manager of the 1st respondent disclosed the principal as Warid International LLC on whose behalf he was writing to the appellant about the allotment of shares. He argued that the right party to be sued in this case is Warid International LLC notwithstanding the 1st respondent's non-existence.

Counsel also submitted that there is no misdescription of parties in the instant appeal that would warrant an amendment since the appellant is \$15\$ until now not sure who the right party should be.

Counsel prayed that this appeal be dismissed with costs.

Court's resolution

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We have considered the submissions of both counsel for the appellant \$20\$ and respondents and we find that the contention in this appeal is that HCT-00-CC-CS No. 432 of 2012 does not disclose a cause of action against all three respondents. The argument advanced by counsel for the 2nd and 3rd respondents in this Court as well as in the Court below is

that the \$2^{nd}\$ and \$3^{rd}\$ respondents were never privy to the contract from which the appellant's claim of breach originates.

In this regard, the trial Judge held that:

"... So as far as the \$2^{nd}\$ and \$3^{rd}\$ respondents are concerned, this court finds and holds that the two are distinct legal personalities as stated under paragraphs (3) and (4) of the plaint. And whereas the undertaking to allot 3% share worth US\$ 1,500,000 was between the plaintiff and the \$1^{st}\$ defendant, where does the \$2^{nd}\$ and \$3^{rd}\$ defendant come in as a party to that under taking which the plaintiff alleges under 6(d) that in total breach of the foregoing, that the defendants have refused to make good the undertaking?"

The trial Judge further held that:

"... In the present case, the \$2^{nd}\$ and \$3^{rd}\$ defendants were not privy to the contract under 6(c) of the plaint, and as counsel for the plaintiff has not shown or demonstrated any exceptions in the plaint, I find and hold that the \$2^{nd}\$ and \$3^{rd}\$ respondents cannot be sued for the alleged breach of contract under paragraph 6 (d)..."

We agree with this finding. Indeed, according to paragraph 6 of the plaint outlining the facts giving rise to the alleged cause of action, no mention is made of the \$2^{nd}\$ and \$3^{rd}\$ respondents' involvement in the said contract. Where an action arises from contract, ODGERS ON CIVIL COURT ACTIONS, SWEET & MAXWELL (1996) at page 32, para. 2.09 states that:

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"The law relating to parties depends largely on whether the contract sued on is joint, or several, or joint and several. This is a question which turns primarily on the language of the contract itself. Still, it is a question of the intention of the parties, and the judge will also have regard to all the surrounding circumstances, to the respective interests of the parties and to their conduct..."

The contract (Annexure C) sued on in this case reads in part as follows: \$30\$

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"Further to our conversation dated 22 November 2007 and as instructed by our Group CEO, Mr. Bashir Ahmed Tahir we confirm on behalf of Warid Telecom International LLC that you hold a beneficial interest of 3% shares in Warid Telecom Uganda Limited..."

The same contract goes ahead to state the shareholding structure of Warid Telecom International LLC, Warid Uganda Holdings Inc and Warid Telecom Uganda Limited. It also states the equity interest and terms of holding the shares allotted to the appellant.

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To our mind, the language of the contract makes Warid Telecom \$10\$ International LLC the disclosed principal of Dhabi Group. The correct party to be sued would then be Warid Telecom International LLC as the trial Judge rightly held.

If a party is not a party to the contract we do not see how such party can terminate or breach the contract. Such party may be guilty of a tort, in \$15\$ case that party's actions lead to disruption of the performance of the contract, but the same cannot be responsible, under the contract, for breach of the contract as it is not a party to the contract. Put differently, one who is not a party to the contract, save for certain exceptions of which this case is not one, cannot sue or be sued for breach of contract. \$20\$

[see: *Kayanja v New India Assurance Company Ltd* [1968] E. A 295]

We find that the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ respondents are not parties to the alleged contract so no cause of action is disclosed against them. The 3% shares were to be held in Warid Telecom Uganda Limited, however that alone does not make Warid Telecom Uganda Limited liable for breach of contract when no dealings whatsoever between the appellant and Warid Telecom Uganda Limited are disclosed by the plaint or annexures to it.

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The 3rd respondent, Warid Uganda Holdings Inc is described as a shareholder of the 2nd respondent, Warid Telecom Uganda Limited. Again, no transactions or dealings between the appellant and the 3rd respondent are disclosed. Perhaps both parties being shareholders, one would expect a shareholder's agreement but there is none in the pleadings, let alone on the court record. Given the circumstances, we accordingly find that the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ respondents which are distinct corporate legal entities, are not privy to the said contract. Consequently, based on the plaint on record they cannot be liable for the alleged breach of contract. We find that the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ respondents were erroneously sued since no cause of action lies against them on the said contract. We order that the plaint remains struck out/ rejected under Order 7 rule 11 of the Civil Procedure Rules.

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In as much as counsel for the appellant argued that the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ respondents' involvement would be proved by the evidence they intend \$15\$ to adduce, we find that a party is bound by their pleadings and any evidence to be adduced should not depart from what has been pleaded. see: Order 6 rule 7 Civil Procedure Rules.

We also disagree with counsel for the appellant that the trial Judge erred in entertaining at a preliminary stage, the issue of cause of action \$20\$ which involves matters of evidence.

According to Order 6 rule 28 of the Civil Procedure Rules, court has the discretion to dispose of a point of law at or before the hearing of a suit.

Counsel for the appellant also submitted that the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ respondents were necessary parties to be joined to this suit and relied \$25\$

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on the case of *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55. At pages 67 and 68, Mulenga JSC (deceased) held that:

"For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit one of two things has to be shown. Either it has to be shown that the orders, which the Plaintiff seeks in the suit would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies, (on application of a Defendant) to be joined as a co-Defendant, where it is shown that the Defendant cannot effectually set up a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

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We find that the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ respondents do not meet the above test of \$15\$ being necessary parties to the suit. We believe that any questions of breach of contract can reasonably be settled with the disclosed principal. The appellant has also not shown in the plaint how orders made would legally affect the interests of the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ respondents. The reliefs sought are simply damages and interest for the alleged breach of \$20\$ contract, not specific performance which would affect the 2nd respondents' shareholding or interests of the 3rd respondent at all.

Regarding the legal personality of the 1st respondent, the trial Judge held that Dhabi Group which is described as a United Arab Emirates based conglomerate lies outside the territorial jurisdiction of the Uganda High Court. The Judge further held that Dhabi Group is not registered under the laws of Uganda and so it will be difficult to find it in the event of the case being decided against it. The law is that if a company is not

incorporated in Uganda, as it is alleged to be, then, that means that it does not exist in Uganda as a body corporate.

In the persuasive Kenyan case of *The Fort Hall Bakery Supply Co v Frederick Muigai Wangoe* [1959] 1 EA 474 (SCK), it was held that a non-existent plaintiff is incapable of maintaining an action and therefore the Court would not allow the action to proceed thus striking it out.

The question of whether the 1^{st} respondent exists can be considered from the pleadings and its annexures. However, the 1^{st} respondent's legal existence in Uganda is not shown. We accordingly uphold the trial Judge's finding that the 1^{st} respondent does not exist within the Court's jurisdiction.

Counsel for the appellant submitted that this is a case of misjoinder which can be cured through amendment of the parties. We find that in order to substitute or amend under the provisions of Order 1 rule 10 of

the Civil Procedure Rules, there must be an existing party at law which is sought to be substituted or replaced.

The law is now settled. A suit in the names of a wrong Plaintiff or Defendant cannot be cured by amendment. While Order 1 Rule 10(2) empowers Court to add or strike out a party improperly joined; and Order 1 Rule 10(4) allows amendment of a plaint where the Defendant is added or substituted, such amendments of the plaint can only be made if they are minor matters of form, not affecting the substance of the identity of the parties to the suit where the amendment by way of substitution of a party purports to replace a party that has no legal existence, the plaint, must be rejected as it is no plaint at all.

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In essence, a non-existent entity cannot sue or be sued. Any suit against or on behalf of a non-existent entity is a nullity and so is any judgment arising therefrom.

In actions founded on contract, it is important to state the parties correctly; a false start may well incur the delay and expense of an application to amend the proceedings. see: *Odgers (supra)*, para 2.08

Accordingly, since the 1^{st} respondent does not exist, it cannot be substituted with Warid Telecom International LLC as prayed for by the appellant. We accordingly uphold the decision of the trial Judge and dismiss this appeal with costs to the respondents in this Court and in the Court below.

In spite of the foregoing findings, we note that under Order 7 rule 13 of the Civil Procedure Rules, the rejection of the appellant's plaint shall not of its own force preclude him from presenting a fresh plaint in respect of the same cause of action. It thus remains to the appellant as to whether to pursue this course of action.

We so Order. Dated at Kampala, this

Justice of Appeal

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