

UGANDA / JUDGMENT

Dynamic Consortium Limited v Uganda Nurse, NSG & Another (Civil Suit 32 of 2017) [2024] UGHC 574 (1 July 2024)

[2024] UGHC 574

COURT
High Court of Uganda

BEFORE
Acellam, J

CASE / FILE NUMBER
Civil Suit 32 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGDANDA AT ARUA

(CIVIL REGISTRY)

CIVIL SUIT NO. 0032 OF 2017

1. DYNAMIC CONSORTIUM LTD:.....

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VERSUS

1. UGANDA NURSE. MIDWIVES / NSG 2. UGANDA NURSES AND
MIDWIVES' COUNCIL

JUDGMENMT

BEFORE HON. JUSTICE COLLINS ACELLAM

15 Background

The Plaintiff filed a suit against the 1st Defendant on the 16th August 2017. The suit proceeded ex parte against the first defendant for breach of Contract and the plaintiff obtained judgment against the 1st defendant for the purported breach of contract for supply of food ration to Health Centres in West Nile for one year at UGX.

2,239,000,000/= (Two Billion Two Hundred Thirty-Nine

20 Million Shillings)

> The Plaintiff thereafter commenced execution proceedings and obtained a Garnishee Order Nisi and subsequently obtained an Order Absolute that the Judgment Debt of Ugx. 2, 339,000,000/=, taxed costs of Garnishee Proceedings of UGX. 37,844,500/= be paid directly to the Judgment Creditor by the Garnishee from the Judgment Debtor's account held with

Garnishee under the name of Uganda Nurs. Midwives / NSG on Account No. 9030005852950 25 held with Forest Mall Branch.

On 30th August 2017, the 1st defendant filed in this honourable High Court Miscellaneous Application No. 0058 of 2017 (arising out of Civil Suit No. 0032 of 2017) to set aside the Garnishee Proceedings and an Order that the Garnishee releases Judgment debtors' monies attached in satisfaction of the decree. On 8th September 2017, the 1st and 2nd Defendants filed another Miscellaneous Application No. 058 of 2017 (also arising out Civil Suit No. 0032) to set aside execution orders and the Objector's property attached be released from execution.

All the orders made thereunder were set aside by Hon. Justice Mubiru who ordered that all interested parties appear before any decision could be made. The defendants were allowed to file their defence with the inclusion of the second defendant who contends that the 1st defendant 35 was its abbreviated Account Name without legal capacity to transact and that neither the 2nd Defendant nor the 1st Defendant has ever entered into agreement with the plaintiff nor authorized agents, workers, managers, officers to transact for and on its behalf.

The 2nd defendant alleged that the plaintiff sued the 1st defendant who is a non-existent party with no capacity to transact and has never entered into an Agreement nor indebted to the 40 plaintiff and the suit has affected its operations, image and remains a threat to its financial and day to day operations for which it seeks for costs and damages from the plaintiff.

$\mathcal{S}$ Representation

During Trial, the Plaintiff was represented by *M/S Alaka & Co. Advocates* whereas defendants was represented by Attorney General's Chambers.

I have had the privilege to peruse through the file and all documents pursuant to the pleadings. Parties filed their submissions and rejoinders as per the directives. I shall now proceed to determine the issues in contention.

Issues

- Whether the suit discloses cause of action against the Parties. *1.*
- Whether the Plaintiff entered into Agreement with the 1st Defendant. \$2.\$
- Whether the 1st Defendant breached the Agreement. $\mathcal{J}$.
- 4. What remedies are available to the Parties.

Determination

Whether the suit discloses a Cause of Action against the Parties.

Submission of the Plaintiff.

Counsel for the Plaintiff submitted that this suit discloses a cause of action against the 1st defendant as they did not file a suit against the 2nd Defendant but it was the second defendant who after the 1st defendant was sued voluntarily applied vide *Miscellaneous Application No.* 0067 of 2009 to join this suit and the Application was allowed by court. Counsel adds that the 2nd defendant is a stranger and third party who is not privy to the Agreement entered into between the Plaintiff and the 1st Defendant.

Counsel further contends that the plaint clearly discloses that the Plaintiff enjoyed a right against 25 the 1st Defendant based on the Agreement as the Plaintiff entered into an Agreement with the 1st Defendant for supply of food rations to health centres in West Nile for 1 year at a consideration of UGX. 2,239,000,000/= only. That the Plaint discloses that the right of the Plaintiff has been violated by the 1st defendant who failed to pay the Plaintiff after supplying the 30

food Rations to health centres as agreed thus in breach of the contract.

Defendant's Submission

In reply, by way of Preliminary Objection, the 2nd Defendant contends that the plaintiff has no Cause of Action against the 1st Defendant and that the suit is incompetent, bad in law, misconceived and an Abuse of Court Process. That the Plaintiff claims to have entered into a contract with the 1st Defendant which according to its pleadings was the rightfully intended 35 Defendant which was sued as an Organization under

paragraph 2 of the Plaintiff's Amended Plaintiff wherein the 1st Defendant was described as a duly registered Non-Governmental Organization in Uganda with capacity to sue and be sued in her own names.

Counsel adds that the Plaintiff asserts that the 1st Defendant exists without proving its existence and this burden was not discharged by the Plaintiff in their pleadings and therefore cannot maintain an action against the 1st Defendant. It is the 2nd Defendant's submission that since the plaintiff was filed against a non-existent party incapable of maintaining an action, the plaintiff should be struck out as being bad in law and therefore disclosing no cause of action and since the plaintiff has always been aware of this Position, counsel prays costs be awarded to the 2nd Defendant.

Defendant for the inconveniences extending to its operations since its accounts were frozen as \$ \mathsf{S} well as affecting the institutional image.

Plaintiff's submission in Rejoinder.

In Rejoinder, the Plaintiff contended that the 1st Defendant exists, filed her WSD on record, was represented by *M/S Okecha Baranyanga & Co. Advocates* who later withdrew, and the 10 Attorney General's Chambers later represented the 2nd Defendant. Counsel adds that the Attorney General stated on record that she appears for both the 1st and 2nd Defendants. Counsel adds that the 2nd Defendant has not adduced any evidence on record to prove that it did not instruct the above Law Firm to file their defence. The defence of the 1st Defendant has not been withdrawn till date.

Counsel further adds that the provisions of the law under Section 4 of the Public Finance Act Cap. 193 which commenced on 9th October and Section 33(2) of the Public Finance Management Act, 2015 provides further that a Public Institution cannot open a Bank Account to receive or spend public money without the Written Authority of the Accountant General or Treasury and No Bank shall permit such an account to be opened.

Counsel contends that in the instant matter, the 2nd Defendant is a public institution created under the Uganda Nurses and Midwives Act, Cap 274 which came in force on 8th November 1986. The 2nd Defendant is bound by Sections 4 and 33 of the Public Finance Act Cap 193 which are mandatory.

25 Consideration of court

Position of the law

Administration of Justice is defined as the management and control of the enforcement of laws and dispensation of justice through a Judicial System. As you are aware under Article 126 (1) of the 1995 Constitution of the Republic of Uganda (as amended) as the custodian of the rule of Law and protector of human rights and freedoms. This Article and clause states that.

"Judicial power is derived from the people and shall be exercised by the courts established under this constitution in the name of the people and in conformity with the law and with the values, norms and aspiration of the people."

At the heart of dispensation of justice, Article 126 (2) lays out the principles that the Judiciary should follow when exercising its power, for instance; Justice must be done to all irrespective of their social or economic status; Justice must not be delayed; Adequate compensation must be awarded to victims of wrongs; Reconciliation between parties should be promoted; and, Substantive justice must be administered without undue regard to technicalities. The principle of administering substantive justice without undue regard to technicalities was in fact

underpinned as language, lines and numbering that were questioned not to be in conformity with rules of court could be dispensed with within certain circumstances to effectively deliver substantive justice.

Furthermore, in administering justice, Judicial Officers are duty bound to religiously adhere to the Judicial Oath provided for under Article 149 of the 1995 Constitution (as amended); stating that;

"Every judicial officer shall, before assuming the duties of his or her office, take and subscribe to the oath of allegiance and the judicial oath specified in the Fourth Schedule to this Constitution."

With the above at heart, I shall proceed to examine the legal principles relating to suing a nonexistent Party.

The question here is whether there is a cause of action labelled against the 1st Defendant. 10

Under Order 7 rule 11(a) of the Civil Procedure Rules, a plaint may be rejected by the court if it does not disclose a cause of action. The Court of Appeal in *Kapeka Coffee Works Ltd V NPART CACA No.3/2000* held that in determining whether a plaint discloses a cause of action, the court must look only at the plaint and its annexures if any and nowhere else.

In order to prove there is a Cause of Action, the plaint must show that the plaintiff enjoyed a 15 right; that the right has been violated; and that the defendant is liable. If the three elements are present, a cause of action is disclosed, and any defect or omission can be put right by amendment. See *Tororo Cement Co Ltd V Frokina International Ltd Civil Appeal No. 2/2001*.

What must be answered is whether a suit can be labelled against a non-existent party.

It is trite that a non-existent person cannot sue and that once Court is made aware that the 20 Plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed but to strike out the suit as the alleged Plaintiff has no existence.

See. V. G Keshwala T/a V. G Keshwala & Sons vs M. M Sheik Dawood, HCMA No. 543 of 2011, Fort Hall Bakery Supply Co. Ltd vs Fredrick Muigai Wangoe [1959] EA 474

\$25\$ Order 1 rule 10 (1) provides as follows;

> "Where a suit has been instituted in the name of the wrong person as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the court thinks fit."

Order 1 rule 10 (2) gives power to court to either upon or upon application of either party and on such terms as may appear to the court to be just order name of a party whether as plaintiff or defendant be added as necessity warrants.

- I have read this provision and while I appreciate that you may substitute a wrong defendant with 35 the one you intended where it is discovered that the person so named as a defendant is not the one who was intended, the rule also makes it clear that the wrong person must be existing. In my view, where the person/party is non-existent, there is no suit filed and where it is filed, the anomaly cannot be cured under Order 1 rule 10.
- This position is well stated by Remmy Kasule J in The Trustees of Rubaga Miracle Centre vs 40 Mulangira Ssimbwa Misc. Application No. 576 of 2006 in these words.

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"The law is settled. A suit in the names of a wrong Plaintiff or Defendant cannot be cured by amendment. The Defendant described as the board of Trustees of Rubaga Miracle Centre Cathedral does not exist in law."

A non-existent Defendant could not be substituted because as in reality there is no valid plaint.

I wish also to point out the issue of Accounts. An Account Name opened in the names of the 1st Defendant does not in itself act as a determinant for the existence of the entity. Any person can wake up and open an account in a name he or she desires. One ought to prove the existence of that Company for it to maintain a cause of action against it.

In this case, the burden to proof so lies on the Plaintiff who at this point has not dispensed with this burden. The 2nd Defendant provided a document marked DX1 which disputes the existence

of the 1st Defendant. The 2nd Defendant contends that the 1st Defendant which is the 2nd Defendant's Account Name is an abbreviated bank name by the bank since it could not accommodate all characters.

In respect of the above analogy, I wish to note that on balance of probabilities, there is no cause of action against the 1st defendant as the 1st Defendant is a non-existent party. No action can be maintained against it.

This issue therefore fails.

\$Issue 2 and 3\$

Whether the Plaintiff entered into agreement with the 1st Defendant and whether there was breach of the same.

25 Submission of the Plaintiff.

Counsel relies on the WSD filed on the 6th August, 2018 but the Defendant did not produce before this honourable court any evidence and witness in court to prove the allegations in her defence. All the Defence Witnesses state they are witnesses of the 2nd Defendant and are its employees. Counsel quotes Paragraph 3 of the 1st Defendant's WSD which he states is on court record and it implies to it being a Body Corporate with Perpetual Succession and Seal.

Counsel adds that the 1st Defendant is bound by her Written Statement of Defence to the suit and she should not be allowed by this Honourable Court to depart from the pleadings. Counsel submitted that the 1st Defendant is therefore estopped from denying that she is not in existence and does not own Bank Account No. 9030005852950 which is in her names at Stanbic Bank.

Counsel further adds that the 1st Defendant by her action made the plaintiff to enter into a 35 written agreement for supply of goods dated 17th March 2022 and marked as PEX1 which are clear in its terms. That the plaintiff acted on the 1st Defendant's declaration by signing that she has capacity to sue and be sued.

Submission of the 2nd Defendant.

40 Counsel submitted that the 1st defendant is a non-existent entity with no capacity to sue or be sued and therefore incapable of entering a valid contract. Counsel adds that the Plaintiff's witness duly testified that he was not around when the purported agreement was being executed and only joined the company in 2017 way back after the purported supplies. He did not mention any beneficiary / health facility where the said beans were purported to have been supplied nor

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- any one from the said facilities, there were no notes of goods received from the said centres as $\mathbb{S}$ proof that they ever received the goods, and he did not know of any regarding the case. It is surprising how the Directors of a company would fail to come to court to defend a Two Billion Project and only entrust it on an agent who did not clearly identify himself.
- Counsel adds that the 2nd Defendant being a Government Body bound by the Public Procurement and Disposal of Assets Act, 2003 to follow all procurement processes and this being 10 a major procurement ought to have been approved by the Office of the Solicitor General. All this was not provided by the Plaintiff.

Consideration of court.

The standard of proof in civil cases is on a balance of probability.

The law of evidence is that: "He who alleges the existence of facts must prove so." (Section 101 Evidence Act) $\mathbb{S}$.

The plaintiff therefore had the burden to prove the case on a balance of probability.

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Contract.

Under Section 2 of the Contracts Act, a contract is

"An agreement enforceable by law made with free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound".

See also Section 10 of the said Act.

In the case of Greenboat Entertainment Ltd Vs. City Counsel of Kampala H. C. C. S. No. 0580 of 2003 court defined a contract as.

"In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be capacity to contract; intention to contract; consensus ad idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called anything other than a contract".

On the instant facts, there is a document marked PEX1 signed between the Plaintiff, 'DYNAMIC 35 CONSORTIUM LTD' and 'UGANDA NURS. MID WFS NSG' purportedly executed on the 17th day of March 2011. The Agreement is for supply of food rations to hospitals and health centres in West Nile in Uganda. The Agreement was drawn by the Parties, signed by a one 'SEMAKULA BASHIR', a company seal of the Plaintiff was duly affixed on the Agreement, and witnessed by 'MUGAMBA TONY'. Further, on behalf of the 1st Defendant, it is signed

by a one 'BATEGANYA 40 PATRICK', there was no stamp or seal of the entity, and it was witnessed by a one 'OKUMU JOB'. None of the pages were signed by the parties except the last page.

In cross-examination, PW1, ONZIMA ERIC, a marketing Manager of the Company testified that he did not enter into the agreement and neither does he know anything about NSG for he was employed in 2018 and contract was entered into in 2018. PW1 adds that he did not serve the demand notices and he did not know any contact person at any Health Centre. He also 5 testifies that all delivery notes should have both the name of the company and that of the person who delivers.

This was the only witness provided before court to testify and in all his overall testimony, his knowledge of how the contract was acquired, and deliveries made or when it was made was insufficient. I must note that this is a Billion shillings contract which is purported to have been secured and obligations dispensed with, yet none of the company directors or officials conversant with the contract is around to defend their interest.

In my view, I would term this a 'fraudulent intent gone sour'. The purported Agreement itself possess no Seal of the institution, I am not convinced with the defence filed on record because in my opinion, this was a skilled fraudulent ploy made by a section of people with intent to defraud

- the 2nd Defendant as an institution. The question is, how can a 2 billion contract possess NO 15 seal to conclude a transaction. A Company/ Institution stamp, is a corporate seal or company seal, is a physical tool used to emboss or imprint the company's official emblem or logo onto documents. These stamps are typically used to authenticate contracts, agreements, and other legal paperwork. While the use of company stamps is not always mandatory, they add a layer of 20
- authenticity and professionalism to documents, making them more credible in the eyes of the law and business partners.

I also agree with Counsel for the 2nd Defendant that the 2nd Defendant being a government body bound by the Public Procurement and Disposal of Assets Act, 2003 to follow all procurement processes and this being a major procurement ought to have been approved by the office of the Solicitor General. All this was not provided by the Plaintiff.

Court has the power to strictly scrutinize and inspect any document. It is incomprehensible how the overall distinct officials of the company could not come forward to present all documents pertaining to the origin of the Contract right from the Procurement Process neither can they point out specifically where the food rations were delivered. PW1 only made mention of two places that is OGWA Health Centre and Aiivu Health Centre, no delivery notes and contact 30 persons details was within his knowledge.

On balance of probabilities, I am not convinced by the testimony and evidence provided by the Plaintiff to warrant a conclusion that there was a contract in existence, or that any was performed by the Plaintiff or breached.

This issue therefore answered in the negative. This suit is accordingly dismissed with costs. 35

I so order

ACELLAM COLLINS

JUDGE 40 1st July 2024

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Prepared on 12 October 2026 · Esheria