

UGANDA / JUDGMENT

Twed Consulting Company Ltd v Springwood Capital Partners Ltd (Civil Suit No. 550 of 2014) [2017] UGCommC 1 (10 February 2017)

[2017] UGCommC 1

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 550 of 2014

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 550 OF 2014

TWED CONSULTING COMPANY LTD} PLAINTIFF

VS

SPRINGWOOD CAPITAL PARTNERS LTD} DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiffs action was originally filed as a summary suit under Order 36 of the Civil Procedure Rules for recovery of US\$50,625, interest thereon and costs of the suit. The basis of this suit is an agreement dated 12th of March 2012 executed between the Plaintiff and the Defendant for participating as joint bidders together with one Vishal Patel in a bid for the Uganda police force public private partnership for the design, construction and financing of the Uganda police force institutional and commercial developments. It was agreed that the Plaintiff would loan to the consortium a sum of US\$75,000 out of which the Defendant undertook to refund 67.5% and amounting to US\$50,625. The Plaintiff paid the sum for and on behalf of the consortium. The Plaintiff's action is that the Defendant has failed or neglected to refund the sums due and owing to the Plaintiff in accordance with the agreement. Accordingly the Plaintiff prays for an order for the payment of US\$50,625 together with interest at court rate from the date of filing the suit on 3rd August, 2014 until payment in full as well as costs of the suit.

The Defendant sought for and was granted unconditional leave to file a defence to the summary suit with costs to abide the outcome of the main suit on 9th January 2015. The Defendant filed a written statement of defence denying liability but admitting that there was an agreement with the Plaintiff for purposes of participating as joint bidders as pleaded in the plaint. Secondly it is admitted that the Plaintiff advanced the sum of US\$25,000 to the consortium for the project under an open ended contract as attached to the plaint. Thirdly that the Plaintiff had 32.5% equity stake in the consortium and undertook to fulfil its obligations pro rata his equity. Fourthly the consortium to court a bid bond of US\$350,000 from United bank for Africa for which the Plaintiff had an obligation to pay his pro rata share of the bond totally US\$113,750. The Defendant paid for the bid bond and the Plaintiff undertook to reimburse the Defendant US\$113,500 as his contribution to the bid bond. Furthermore it is averred in the defence that the Plaintiff's obligation as an equity stake order in the consortium to pay the consultant engaged by the consortium on the project and the consortium engaged Mott McDonald as a consultant at the total cost of US\$225,843. The Defendant paid the consultant the full sum of the US\$205,843 and the Plaintiff refused or failed to reimburse the Defendant pro rata his equity stake in the consortium. In the premises the Defendant averred that the Plaintiffs claim for recovery of the sum of US\$50,625 from the Defendant is premature and an abuse of court process because the Plaintiff failed to meet his obligations under the contract and also as disbursements in the project is ongoing and yet to reach a financial close. The Defendant sought the dismissal of the suit on the above grounds.

The Plaintiff is represented by Counsel Jude Byamukama of Messieurs BNB advocates while the Defendant is represented by Counsel Nsubuga Edward Nsubuga of Messieurs Katende, Ssempebwa & Company Advocates & Legal Consultants

Subsequently when the court annexed mediation did not result in resolving the dispute between the parties, on 19th October, 2016 Counsel Nsubuga Ssempebwa represented the Defendant while Counsel Jude Byamukama represented the Plaintiff when the suit came for a scheduling conference. In the joint scheduling memorandum executed by Counsels of the parties the following are the agreed facts:

1. The Plaintiff and the Defendant signed a binding contract dated 12th of March 2012.
2. In the consent agreement dated 15th of December 2012, the Plaintiff was removed from the Ahadi consortium.
3. The parties agreed to work together in accordance with the consortium agreement as of 12th of March 2012.

The agreement between the parties was admitted in evidence and Counsels agreed that the issue to be tried should be rephrased as follows:

"Whether or not the money lent by the Plaintiff to the Defendant is due for repayment?"

Secondly, it was agreed that the court would be addressed in written submissions.

Submissions of the Plaintiff's Counsel

Plaintiff's Counsel submitted that the issue of whether or not the money lent by the Plaintiff to the Defendant is due for repayment was settled by the terms of the Consortium Agreement dated 15th December, 2012 which excluded the Plaintiff from the Consortium and introduced new parties to take up its equity while the Defendant enhanced its equity in the consortium. Secondly, the agreement of 12th March, 2012 was executed on the premise that the Plaintiff Company would remain a member of the Ahadi Consortium and it was in that spirit that it loaned some funds to the Consortium subject to the Defendant refunding part of the said funds. Thirdly, once this object of the Plaintiff's participation in the Ahadi Consortium was defeated by the subsequent arrangements executed by the Defendant on 15th December, 2012, the funds loaned to both the Consortium and the Defendant were due for recovery since the Plaintiff would not have anything more to do with the affairs of the Ahadi Consortium contrary to the Agreement of 12th March, 2012.

The Plaintiff's Counsel cited the case of **Atom Outdoor Limited vs. Arrow Centre (U) Limited HCCS No. 448 of 2003** where Justice Stella Arach Amokoheld that: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business sense, it must be made to yield to business common sense."

The Plaintiff's Counsel submitted that the agreement of March 2012 between the Plaintiff and the Defendant must be interpreted in view of the principles of law governing interpretation of ambiguous commercial agreements. He further submitted that the said agreement did not provide for a specific time frame within which the Defendant would refund the sum of USD 50,625. Secondly, the recitals and other provisions of the said agreement especially clause 1 thereof indicate that at the time the sum in question was loaned to the Ahadi Consortium and once the Plaintiff was excluded from the Ahadi Consortium then any monies owed to it from the Defendant and the Consortium became due and recoverable since it would not have any contribution to make to the Consortium going forward. Thirdly, the Defendant's claims were misleading in material particulars as the fact that the Plaintiff was not part of the Ahadi Consortium was concealed when the Defendant sought leave to defend the suit and the expenses regarding the bid bond taken out by the consortium are provided for in clause 6.1 of the agreement yet the Defendant claimed they were to be shared with the Plaintiff. Once the intentions of the parties to work together in the Ahadi Consortium were defeated the monies advanced by the Plaintiff became due. Fourthly the Plaintiff cannot be kept waiting in perpetuity for the Defendant to refund its money. He prayed that judgment be entered in favour of the Plaintiff against the Defendant for the sum of USD 50,625 and costs of the suit be awarded.

Submissions of the Defendant's Counsel in reply

The Defendant's Counsel submitted in reply that strictly speaking, the Plaintiff and Defendant's agreement was reduced into writing and the parties to the agreement are bound by the terms of that contract. Secondly, the parties agreed under clause 7 of the agreement to work together in accordance with the consortium agreement which was not yet in existence but was later on

signed between the sponsors who included the Defendant. Thirdly it was intended for the Plaintiff not to be part of the consortium agreement which is the reason why the financial close was not reduced in writing which makes it wrong to suggest that a month later the Plaintiff was excluded from the consortium agreement.

Counsel relied on sections 91 and 92 of the Evidence Act and the case of **Andes (EAS) Limited vs. Akoong Wat Mulik Systems Ltd and others, Civil Suit No. 184 of 2008** where Lady Justice Hellen Obura cited **Mujuni Ruhemba vs. Skanka Jensen (U) Ltd Civil Appeal No. 56 of 2000** and held that an oral variation leaves the written contract intact and enforceable*.*

The Defendant's Counsel submitted that once the terms of the agreement were reduced into writing the parties to the contract cannot suggest terms which were not part of the original contract except if there is a variation in a contract and as such the Plaintiff's money is due on financial close except if there is a variation in the contract. He further submitted that the case of **Godfrey Magezi and another vs. Sudhir Ruparelia SCCA No. 16 of 2001** as cited by the Plaintiff's Counsel is not applicable in the circumstances of this case.

Counsel cited **Scorpion Holdings Limited vs. Lion Assurance Co. Limited, Civil Suit No. 221 of 2013** where Justice Wangutusi relied on the authority of **Simon Tendo Kabenge vs. Mineral Access Systems Uganda Ltd, HCCS No. 275 of 2011** for the holding that: "if there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and their contracts, when entered into freely and voluntarily shall be held enforceable by the courts of Justice." He submitted that since the contract dated 12th March, 2012 was signed wilfully, freely and voluntarily by adults of sound mind, they intended that the contract binds them and therefore this court should enforce the terms agreed upon by the parties. He prayed that the suit be dismissed with costs and court should not intervene by substituting the written terms reduced into writing with new interpretation to the contract as suggested by Counsel for the Plaintiff which interpretation will be contrary to the agreed terms.

Submissions of the Plaintiff's Counsel in rejoinder

In rejoinder the Plaintiff's Counsel submitted that the recitals in the Consortium Agreement of 12th March, 2012 spell out two material facts that explain what the working together in accordance with the Consortium Agreement was all about. Secondly, Counsel submitted that the parties intended to work together under the Ahadi Consortium and that was the chief reason why they wished their commercial relationship to be governed chiefly by the Consortium Agreement.

He further submitted that once the Plaintiff was removed from the Consortium he no longer had any equity in the same and had no more working relationship with the Defendant. Secondly, by interpreting the Consortium Agreement of March 2012 as a whole one cannot form the conclusion that the parties intended to be governed by the Ahadi Consortium Agreement irrespective of whether they were still members of the Consortium which agreement was executed on the assumption that the parties would remain working together under the Ahadi

Consortium which turned out not to be the case and therefore the question of whether the said consortium Agreement of 15th December, 2012 binds the Plaintiff cannot arise. Thirdly, the Defendant Company should not be allowed to have its cake and eat it as the Defendant wishes the Plaintiff to be bound by an agreement to which it is not a party. Fourthly, the Plaintiff is assuming certain terms that are not reduced in writing hence he should not be heard to bring up odd assumptions. Fifthly, the terms of the agreement of 12th March, 2012 are unequivocal in providing that the Plaintiff was intended to remain a part of the Ahadi Consortium if that was not the case there would be no need to state the Plaintiff's equity stake in the said agreement. Fourthly the letter and spirit of the 12th March, 2012 agreement clearly demonstrates that the consortium agreement would not bind the parties if they were not parties to it. Sixthly, the Defendant's managing director in his affidavit evidence for an application for leave to defend tried to avoid a contractual obligation through deceit and outright bad faith by hiding behind the consortium agreement. On the seventh ground, clause 7 of the agreement of 12th March, 2012 clearly implied that there were dealings between the parties whose governing framework would be the Consortium Agreement because they were all members of the consortium and once the Plaintiff ceased being a member then the consortium agreement is not binding on it with the consequence that the Defendant's obligations to it fell due. The Plaintiff's Counsel prayed that judgment be entered for the Plaintiff against the Defendant for US\$ 50,625 with costs.

Judgment

I have carefully considered the issue as to whether or not the money lent by the Plaintiff to the Defendant is due for payment. In the scheduling conference, it was my understanding that Counsels sought to have the issue resolved on the basis of interpretation of contract rather than on the basis of evidence extraneous to the contract between the parties. That notwithstanding, in the joint scheduling memorandum executed by Counsels of the parties certain facts are agreed facts and may be considered in the interpretation of the contract. These facts are:

1. The Plaintiff and the Defendant signed a binding contract dated 12th of March 2012.
2. In a consent agreement dated 15th of December 2012, the Plaintiff was removed from the Ahadi Consortium.
3. The parties agreed to work together in accordance with the Consortium agreement as of 12th of March 2012.

In the joint scheduling memorandum, the following issues are the agreed issues subsequently rephrased.

1. Whether the Defendant owes the Plaintiff any money?
2. If so, when is the money due for payment?
3. Whether the Plaintiff also owes the Defendant any money?
4. What are the remedies available to the parties?

On 19th October, 2016 when the matter came for further conference between Counsels and the court, Counsel Byamukama submitted that there are two agreements which are essential for determination of the dispute. He prayed that the documents are put in by consent of the parties subsequent to which the court will be addressed without adducing further evidence. Counsel Edward Nsubuga applied to have the consortium agreement exhibited by consent because it was not on the record. The Plaintiff's Counsel agreed that it affects the third issue and secondly informed the court that the Plaintiff did not dispute the second agreement. Accordingly the consortium document was exhibited by consent. It was further agreed that the first two issues in the scheduling memorandum would be tried first and will be rephrased and would read:

"Whether or not the money lent by the Plaintiff to the Defendant is due for repayment?"

Can such an issue be addressed without further evidence? I have carefully considered the written submissions of the Defendants Counsel and the Defendant's contention is that the agreement should be construed as it is because oral evidence cannot be admitted for varying or adding to the construction of the instrument in question. On the other hand the Plaintiff's Counsel submitted that the agreement should be read in a business context and in light of the circumstances of the parties. He was of the view that the agreement was ambiguous and required a contextual interpretation to resolve the ambiguity.

I have carefully considered the above issue and it is my first observation that nobody should be granted any remedy which is not pleaded or claimed in the plaint. Secondly without amendment, parties are bound by their pleadings as prescribed by Order 6 rule 7 of the Civil Procedure Rules. Order 6 rule 1 requires parties to state material facts in the pleadings and provides as follows:

"1. Pleading to state material facts.

- (1) Every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be.
- (2) The pleadings shall, when necessary, be divided into paragraphs, numbered consecutively; and dates, sums and numbers shall be expressed in figures.

Material facts on which a party relies for resolution of the dispute shall be stated in the pleadings. Secondly new facts have to be pleaded by way of amendment of pleadings otherwise a party is bound by the pleading. Order 6 rule 7 of the Civil Procedure Rules provides as follows:

"7. Departure from previous pleadings

No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

While Order 6 rule 7 of the Civil Procedure Rules deals with any subsequent pleading which is inconsistent with a previous pleading and it bars the subsequent pleading from departure from a previous pleading, facts adduced in evidence have to be consistent with the pleadings of the party adducing the evidence or making the submission for the same reason of barring departure from pleadings. Order 6 rule 1 (1) requires the material facts giving the cause of action to be pleaded.

In the premises either the parties want the court to interpret the contract or should adduce evidence of context before a final judgment is given. Two agreements have been adduced in evidence.

Originally the Plaintiff's action was a summary suit giving the facts in support of the cause of action pleaded. No further amendment to the plaint was made after leave was granted for the Defendant to defend the summary suit. Therefore going back to the specially endorsed plaint which remained as it is, the Plaintiffs claim is for recovery of US\$50,625 with interest thereon and costs of the suit founded on an agreement dated 12th of March 2012. It is averred in paragraph 4 (i) that on 12 March 2012 the Plaintiff executed an agreement with the Defendant for purposes of participating as joint bidders. It was further agreed that the Plaintiff would loan to the consortium a sum of US\$75,000 out of which the Defendant undertook to refund 67.5% amounting to US\$50,625. The Plaintiff paid it as agreed but the Defendant failed or neglected to refund.

It is therefore apparent from the pleadings that the Plaintiff relies on an agreement dated 12th of March 2012. While additional facts were agreed upon in terms of the facts referred to above and the admission of the consortium agreement in evidence, the starting point for analysis should be the agreement dated 12th of March 2012 for the Plaintiff to succeed in proving the cause of action. The affidavit in support of the summary suit sworn by Dr Dan Twebaze, the managing director of the Plaintiff and paragraph 3 thereof relies on the agreement dated 12th of March 2012. The Plaintiff paid US\$75,000 on the basis of the agreement of 12th of March 2012. Subsequently, despite demands to refund the sum as agreed, the Defendant refused to refund the Plaintiff's money. The crux of the Plaintiff's suit is therefore that the Defendant undertook in the said agreement to refund 67.5% of the US\$75,000 amounting to US\$50,625. The agreement was attached as annexure "A" to the affidavit in support of the summary suit.

I have carefully read through the agreement and in clause 1 of the agreement it is agreed that the Plaintiff's interest in the consortium shall stand at 32.5%. The Defendant's capital equity interest in the consortium was agreed to stand at 37.5%. It is further provided that the parties do not claim a right to alter the equity of Mr Vishal Patel in the consortium, which both parties understood to stand at 30%. Secondly clause 2 provides that all development costs incurred prior to the agreement shall be reviewed and reconciled and rectified by the parties whereupon the parties shall prioritise their payments according to satisfactory deliverables. Thirdly it was agreed that the development costs (outstanding and yet to be incurred) shall be shared in proportion to the parties respective equity interests in the consortium. In any clause 4 it is provided that the parties agreed that the bid bond shall be shared in proportion to the party's equity interests in the consortium. The basis of the suit can be found in clause 5 of the agreement

which is quoted here in below:

"For the sake of urgency and getting consultants to start work immediately, TWED shall loan to the Consortium a sum of US\$75,000 (United States Dollars Seventy Five Thousand Only) to Vivaki Architects immediately, 67.5% of which shall be refunded by Springwood Capital."

The express wording of clause 5 is that the Plaintiff would loan the Consortium a sum of US\$75,000. With reference to the loan, it is apparent that the loan is not part of the consortium agreement or arrangement but a separate arrangement in which the Plaintiff was required by agreement to loan the Consortium a sum of US\$75,000. In the same clause it is expressly provided that 67.5% of the amount shall be refunded by Springwood Capital. The nature of the transaction is therefore that of the loan which is to be refunded. The only part of the amount which is not to be refunded is 32.5% of the amount. I must note that this point that 32.5% is the percentage the Plaintiff was required to contribute to the consortium in proportion to the equity interest of the parties. It would follow that the other parties were obliged to pay their proportional contribution in relation to the Plaintiff's contribution as stipulated in clause 1 of the agreement. These are 37.5% for the Defendant and 30% for Vishal Patel. In terms of clause 5 of the agreement, the matter was urgent and it is the express wording adopted that discloses that the arrangement for the Plaintiff to loan the money was for the sake of urgency and getting consultants to start work immediately. The agreement did not affect the other parts of the agreement such as the equity share in the consortium of the three parties in clause 1 of the agreement. It did not affect the development costs incurred prior to the agreement under clause 2 of the agreement. It did not affect clause 3 of the agreement where the parties agreed that the development costs which were outstanding and yet to be incurred shall be shared in proportion to the parties respective equity interests in the consortium. Thirdly it does not affect the agreement of the parties in clause 4 of the agreement that the bid bond shall be shared in proportion to the equity interests in the consortium of each party.

Clause 5 is a separate agreement in the sense that for the sake of urgency, and for the work to start immediately, it was agreed that the Plaintiff would loan the Consortium US\$ 75,000/= to be paid to particular architects. On the other hand the respective obligations of the parties to the consortium and their rights thereby are provided for under clauses 1, 2, 3, and 4 of the agreement. Other rights and obligations are found under clauses 6, 7 and 8 of the agreement. Clause 6 provides that the equity holders in the Consortium shall have a right or pre-emption in respect of a proposed transfer of equity, and such consent shall not be unreasonably withheld. Where consent is required it shall be given within 7 days. In clause 7 the parties agreed to work together in accordance with the Consortium agreement. Finally clause 8 provides that the agreement reflects the final understanding between the parties and supersedes any and all previous negotiations or agreements concluded between the parties. In other words the agreement overrode any prior term in conflict with its provisions. The agreement could only be superseded by another agreement varying its terms and executed by the parties.

The issue therefore is whether the funds agreed to be refunded by Springwood Capital are now due or overdue. The 32.5% of the loan amount of US\$75,000, and which was not to be refunded, remained part of the Consortium arrangement putting other parties in obligation to pay their proportionate part.

Finally it has to be established whether the above agreement dated 12th of March 2012 was modified in any material respect by any subsequent agreement between the parties. By consent of the parties a subsequent agreement dated 15th of December 2012 with respect to the Ahadi Consortium Agreement also previously referred to as the Consortium agreement was admitted in evidence.

This subsequent agreement is between four parties namely Mota – Engil Africa, Vishal Patel, Humble Group and Springwood Capital Partners Ltd. These four parties were collectively referred to as sponsors. The Defendant and Vishal Patel are parties to the agreement but the Plaintiff is not a party to this subsequent agreement.

Section 67 of the Contracts Act 2010 provides that any right, duty or liability under a contract may be varied by the express agreement of the parties or by the course of dealing, custom or usage. It provides as follows:

67. Variation of contracts.

Where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract.

The question then is whether the parties who were privy to the contract signed by the Plaintiff on the 12th of March 2012 varied the terms of clause 5 thereof. The Plaintiff is trying to enforce a contract to which it is privy and a signatory. It is not a signatory or privy to the subsequent Consortium agreement and there is no evidence that the subsequent agreement was made for the benefit of the Plaintiff. In any case it is the Plaintiff which filed the suit under a contract where it is a party. The Contracts Act deals with the right of third parties to enforce a term of a contract. The Plaintiff is not trying to enforce a term of a contract between the Defendant, Vishal Patel and other parties. The principles for third parties to enforce rights conferred by a contract to which they are not parties is provided for by section 65 of the Contracts Act, 2010 which provides as follows:

65. Right of third party to enforce contractual term.

- (1) Subject to this Act, a person who is not a party to a contract may in his or her own right enforce a term of the contract where—
 - (a) the contract expressly provides that he or she may do so; or
 - (b) subject to subsection (2), a term of the contract confers a benefit on that person.

- (2) Subsection (1) (b) does not apply where on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by a third party.
- (3) A third party shall be expressly identified in a contract by name, as a member of a class or as answering a particular description; but need not be in existence at the time the contract is entered into.
- (4) This section does not confer a right on a third party to enforce a term of a contract except where the term is subject to and in accordance with any other relevant term of the contract.
- (5) For the purpose of exercising the right to enforce a term of a contract, a third party shall have available any remedy that would have been available to him or her in an action for breach of contract, had that third party been a party to the contract, and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly.
- (6) Where a term of a contract excludes or limits liability in relation to any matter, any reference in this Act, to the enforcement of a term of a contract shall be construed as a reference to the third party availing himself or herself of the exclusion or limitation.”

The Defendant’s arguments spring from the contract of 12th December 2012 to which the Plaintiff is not a party. I do not agree with paragraph (e) of the first page of the submissions that under clause 7 of the agreement between the Plaintiff and the Defendant, it was agreed that the parties work together in accordance with the Ahadi Consortium agreement and in paragraph (f) of the submissions that the consortium agreement referred to was signed on the 15th of December 2012.

The Plaintiff cannot sign an agreement on the 12th of March 2012 and purport to work in accordance with a consortium agreement dated 15th of December 2012 executed 9 months later and to which the Plaintiff is not a party. In paragraph (g) of the submissions at page 1 the Defendants Counsel submitted that the consortium agreement binds the Plaintiff and under clause 4.4.2 thereof costs funded by the sponsor, a defaulting party or withdrawing sponsor up to and including financial close in accordance with the agreement shall be reimbursed in accordance with this agreement and the development costs in the loan agreement at the financial close. Counsel for the Defendant further submitted that the dispute before the court is not based on interpretation of the contract between the parties dated 12th March 2012 and 15th December 2012 but on the Plaintiff’s selfish interest.

First of all it was agreed that the suit could be disposed off on the basis of the agreement by interpretation. Secondly, I do not agree with the submissions that the consortium agreement was not yet in existence and the consortium agreement referred to by the parties to this suit in their contract dated 12th March 2012 was that executed on the 15th of December 2012 to which the Plaintiff is not a party. Counsel submitted that there was no clause in the agreement between the parties making the Plaintiff a part of the consortium agreement.

Finally arguments based on the agreement dated 15th December, 2012 are not binding on the Plaintiff because this subsequent contract to which the Plaintiff is not a party is not enforceable against the Plaintiff. Secondly the suit is not a claim by a third party but brought under a binding contract to which the Defendant is a party by a Plaintiff who is also privy to the agreement dated 12th March 2012. Consequently the reliance by the Defendant to clause 4.4.3 or 4.4.2 of the consortium agreement is irrelevant to the Plaintiff's agreement dated 12th March, 2012.

Furthermore reference to exclusion of oral evidence by virtue of a written agreement proved between the parties under section 91 of the Evidence Act, is inapplicable. Section 91 excludes proof of contents of an agreement through other evidence other than the document itself.

Secondly section 92 of the Evidence Act excludes oral agreements where the terms of a contract have been proved through production of the agreement document itself. While the Plaintiff's

Counsel prayed that the court looks at the context of the agreement dated 12th March 2012 to reach a conclusion as to whether the money to be refunded by the Defendant to the Plaintiff under clause 5 of the agreement is due, he relied on the premises that clause 5 was ambiguous primarily because it did not stipulate the period for refund of the money. The provision itself is not ambiguous. What it did was to remain silent on the time when the Defendant would refund the money the subject matter of the suit. It only uses imperative language that the Defendant shall refund in the following words: "67.5% of which shall be refunded by Springwood Capital."

In the premises the issue before the court is not modification of the agreement between the parties through oral or other evidence but whether the money under clause 5 of the agreement is due. For that reason the submissions of the Defendants Counsel on exclusion of other evidence and the application of the contract dated 15th of December 2012 are inapplicable to the Plaintiff's suit.

For emphasis section 65 of the Contracts Act 2010 deals with suits by third parties to a contract or by parties who are not privy to the contract and gives exceptions to the fundamental and elementary rule of common law of contract that only a party to a contract can enforce its terms. It is therefore inapplicable to the Plaintiff's suit because this suit was brought by the Plaintiff who is a party to a contract on which the suit depends for a cause of action.

Finally the crux of the dispute is whether the sum claimed in the plaint is due for payment. As noted above mandatory language was used by the parties to stipulate the obligations of the Defendant. I have held above that the US\$ 75,000.00 was paid by the Plaintiff as a loan because of urgency of the matter. The loan was to the consortium and payable to Vivaki Architects immediately. It was written that 67.5% of that amount paid by the Plaintiff shall be refunded by the Defendant. The money was payable immediately on the 12th of March 2012 or soon thereafter i.e. on or after the 17th of March 2012 which is the date of execution of the agreement according to the last page thereof.

In other words due to urgency of the matter the Plaintiff paid immediately by way of a loan otherwise the money would have been raised by the parties under clause 3 of the agreement. Particularly it is noteworthy the Plaintiff's contribution in proportion to its equity under clause three was retained from the amount loaned and amounted to 32.5% of the sum of US\$ 75,000.00.

The Plaintiff is deemed to have paid the contribution of Messrs Springwood Capital to Vivaki Architects and it was agreed that 67.5 percent shall be refunded to the Plaintiff. Such a refund is clearly a refund of the contribution of Springwood Capital to development costs under clause 3 of the agreement and which had been paid by the Plaintiff to Vivaki Architects under clause 3 of the agreement. Such contributions ought to be made when they are due and the parties were under obligation to contribute according to the proportion of their equity shares. It follows that the time of payment is when the costs are to be incurred. In this unique instance when there was need to incur the costs immediately the Plaintiff loaned the money to the consortium and it is an agreed fact that the Plaintiff paid. It follows that the money is refundable within a reasonable time because it ought to have been paid by the Defendant as a contribution when the need for the money arose under clause 3 of the agreement. The parties agreed what amount the Plaintiff would pay as a loan and who will refund it.

From March 2012 up to 5th of June 2014 when the Plaintiff wrote a notice of intention to sue is not a reasonable period within which to refund a loan paying an obligation that arose in March 2012.

In the premises, my only conclusion from an interpretation of the contract is that the Plaintiff is entitled to a refund before June 2015. It is now February 2017. The Defendant in March 2012 undertook to refund 67.5 % of the money loaned by the Plaintiff. It is my holding that the withholding of the Plaintiffs money loaned in March 2012 by the Defendant up to June 2014 a period of over two years was unreasonable and the Plaintiffs suit for refund of money it loaned the consortium is hereby granted.

Judgment is entered for the Plaintiff for a sum of US\$ 50,625. Secondly, the Plaintiff is awarded interest at 10% per annum from the date of filing the suit on the 8th of August 2014 until the date of judgment. Further interest is awarded at 10% per annum on the aggregate amount at the date of judgment till payment in full.

Costs follow the event and the Plaintiff's suit succeeds with costs.

Judgment delivered in open court on the 10th of February 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Jude Byamukama for the Plaintiff

Solomon Sebowo holding brief for Counsel Nsubuga Edward for the Defendant

Julian T. Nabaasa: Research Officer Legal

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

10th February 2017

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