THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 0089 OF 2010

(Arising from the Judgment of the High Court (civil division) in HCCS NO.664 OF 2006 dated 14th July 2010 delivered by the Hon. Justice Mr. Yorokamu Bamwine)

ALZAHIR A WISSANJI::: APPELLANT

VS

CONGO TRADING CORPORATION LTD:: RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

<u>JUDGMENT OF KIRYABWIRE JA</u>

This is a first Appeal from the Judgment and orders of the Hon. Mr. Justice Yorokamu Bamwine delivered in the High Court at Kampala on the 28th day of June 2010 in HCCS No. 664 of 2006. The trial court in that matter entered Judgment in favour of the Appellant and awarded him a sum of **USD $ 100,000** (One hundred thousand United States dollars).The Appellant being dissatisfied with the Judgment filed this Appeal.

INTRODUCTION

The Appellant instituted a suit against the Respondent Company in the High Court of Uganda for special damages of **US $ 293,806.02** arising out of breach and

wrongful termination of his contract of employment, failure to pay salary arrears and other employment and terminal benefits.

The Respondent Company is the proprietor of property known as **Raja Chambers** Plot No. 3 Parliament Avenue which was managed and maintained by the Appellant and his late father. The Appellant worked alongside his father for the period of 1992-1997 without any salary though his father would gave him an allowance and a house to stay in. The Appellant's father died on 25th June, 1997. On 29th August, 1997 minutes of a meeting were taken between the Appellant and the trustee of the Respondent Company where the trustee agreed to pay the Appellant forty thousand United States Dollars (US$40,000) per year and also granted him the privileges of an expatriate on contract.

On 17th October, 1998 a meeting was held and it was resolved that the Appellant would be formerly appointed as general manager of the company and would also have his shares in the company increased to thirty five shares. His contract of employment was however terminated on 16th May 2006 and he was paid three months in lieu of notice a sum of United States Dollars four thousand five hundred (US $4500). The plaintiff's (Appellant) case at the trial court was that the defendant company breached and unlawfully terminated his contract of the employment. Furthermore the defendant company neglected to pay his salary arrears and other employment and terminal benefits. Judgment was entered in favour of the Plaintiff (Appellant) who was awarded general damages of One Hundred Thousand United States Dollars (US$100,000) or its equivalent in Uganda shillings) at the current conversion rate and interest rate of 10% per annum or 25% per annum after conversion into local currency from the date of conversion.

The Appellant appealed against the Judgment. The respondent also lodged a Cross Appeal.

Grounds of Appeal

1. **The learned trial Judge erred in law and fact when he failed to fairly; justly and properly evaluate all the evidence on record thereby coming to a wrong finding and decision that occasioned a miscarriage of justice.**
2. **The learned trial Judge erred in law and in fact when he found and decided that the appellant was a non-salaried representative of the family.**
3. **The learned trial Judge erred in law and fact when he contradicted himself in regard to the employment of the Appellant.**
4. **The learned trial Judge erred in law and fact when he failed to interpret and give effect to exhibit P2 in context of the Appellant's claim.**
5. **The learned trial Judge erred in law and fact when he failed to award salary arrears as special damages.**
6. **The learned trial Judge erred in law and in fact when he failed to find and hold that there was acknowledgment of US $ 1000,000 thereby reviving the Appellant's claim.**

The Respondent also lodged Cross Appeal under Rule 91 of the Judicature (Court of Appeal Rules) Direction S I 13-10 (hereinafter referred to as the Rules of this Court) that the above mentioned decision ought to be varied and or reversed on the following grounds;

1. **The learned trial Judge erred in law when he ignored the illegality committed by the Appellant and failed to dismiss the suit.**

2. **The learned trial Judge erred in law and wrongly exercised his discretion when he awarded the appellant general damages.**

The following prayers were made;

a) **The award of damages be set aside.**

b) **The decision of the learned trial Judge be varied to the extent that the suit stand (sic) dismissed with costs.**

c) **The Appellant do pay to the Respondent /Cross Appellant the costs of his Cross Appeal.**

It is however important to note that at the hearing of this appeal, counsel for the Respondent submitted that they would adopt their conferencing notes as written submissions filed on the 6th June, 2018. In those notes, the Counsel for the Respondent does not argue the grounds of the cross appeal and neither did he allude to the cross appeal during the oral highlight of his arguments before the Court. Counsel for the Appellant equally did not refer to the Cross Appeal or file submission in answer to it. It is therefore our finding that the Respondent abandoned his Cross Appeal and it stands struck out with no order as to costs.

REPRESENTATION

Mr. Raymond Ndyagambaki represented the Appellant while Mr. Davis Wesley Tusingwire represented the Respondent.

DUTY OF THE COURT

This is a first Appeal and this court is charged with the duty of reappraising the evidence and drawing inferences of fact as provided for in **Rule 30(1) (a)** of the Rules of this Court. This court also has the duty to caution itself that it has not

seen the witnesses who gave the testimony first hand. On the basis of its evaluation, this court must decide whether to support the decision of the High Court or not as illustrated in **Pandya v R [1957] EA 336 and Kifamunte Henry v Uganda Supreme Court Criminal Appeal No.10 of 1997.**

Ground One: Whether the learned trial Judge failed to fairly; justly and properly evaluate all the evidence on record?

Submissions of counsel for the Appellant

Counsel for the Appellant submitted that the trial Judge did not properly evaluate the evidence and raised three arguments in support of this proposition.

First, counsel submitted that the trial Judge ought to have relied on an email dated 7th July 2009 from a one Rose Tharani (the sister to the Appellant) wherein she stated that the Appellant was receiving United States one hundred thousand (US $ 100,000) which was acceptable by the family.

Secondly, counsel submitted that the trial Judge did not properly evaluate the evidence of defence witness one (AL-Karim Abdulaziz Wissanji) a brother to the Appellant) who testified that the Appellant was a representative of the family working at Raja Chambers.

Thirdly, counsel for the Appellant further submitted that the learned trial Judge did not evaluate the evidence of the contract of employment in which the Appellant was appointed as the general manager of the Respondent Company.

Counsel further relied on the case of **Mutamboh Matthew vs Mayusi Yusufu** Election Petition Appeal No. 45 of 2011 to where it was held that the trial Judge

has to failed to fairly, justly and properly evaluate evidence on record by referring to the correct documentation on record.

Respondent's submissions

Counsel for the Respondent opposed the Appeal. He submitted that the trial Judge had properly evaluated the evidence before him and made a correct finding of fact; hence came to a correct final Judgment.

He submitted that this ground was too vague and general because it contravened Rule 66(2) of the Court of Appeal Rules.

Learned counsel then submitted that the trial Judge properly evaluated evidence before him when he came to the conclusion that the Appellant's claims were time barred. He argued that it was time barred because the Appellant's first claim was a claim from the years 1992-1997 and the second claim was from the years 1998-2000 yet the suit was filed in 2006.

He submitted that the Appellant could not rely on the email dated 29th July 2009 to show an acknowledgement of debt because the pleadings had been filed in 2006. He submitted that the suit was therefore time barred and thus an illegality.

In regard to evidence of defence witness Al-Karim Abdulaziz Wissanji (DW1) a shareholder in the Respondent Company and brother to the Appellant, who testified that the Appellant was merely a representative of the family, counsel submitted that the witness also maintained his testimony on this matter even during his cross examination. He argued that the trial Judge was therefore right to regard Appellant as a non – salaried representative of the family before 1997.

Counsel submitted that trial Judge correctly considered the evidence of the contract of employment when he concluded that that the Appellant was

appointed a general manager of the Respondent Company in 1998 and therefore had not been an employee in the Respondent Company before that date.

Court's findings and decision

I have perused the record and taken into consideration the arguments of both counsels together with the authorities provided for which I am grateful.

From the onset it is clear to us that this is a family dispute involving the running of a family business. At the core of this dispute is the informality with which the Respondent Company was run and its weak corporate governance structures characterised by a dominant shareholder who then unfortunately passed away. Corporate governance according to the Cadbury code (1992) means the system by which companies are directed and controlled. In this case the informal nature of the running of the Respondent Company led to difficulty in knowing how the said company was directed and controlled as I shall show as I consider these grounds of Appeal.

The first ground as framed, apart from the issue of remuneration, is largely general and therefore does not clearly point out what the Appellant is complaining about.

On remuneration the Appellant submits that he was entitled to US$ 100,000 for working for his father for the period of 1992 -1997. A perusal of the record, shows that the trial Judge did not award him this sum for two reasons.

First, he found that the Appellant had filed the suit outside the six years prescribed by the law to file actions founded on contract.

The trial Judge (at page 265 of the record of Appeal of Appeal) found as follows;

"... now if it is assumed that the oral agreement was reached by the parties in 1992 then every year of non –payment would give rise to a cause of action in the plaintiff's favour. By necessary implication the last cause of action accrued to him in 1997. By necessary implication also the first cause of action which accrued to the plaintiff in 1992 expired in 1998 and the last one of 1997 in 2003 six years later. However, if it is assumed that the cause of action in respect of the lump sum of US$ 100,00 accrued to him upon the death of his father on 25/06/1997 then the plaintiff had up to 25/06/2003 to file a suit for its recovery in order to beat the six year limitation period. Either way he filed the instant suit on 20-10-2006 outside the period prescribed by law. The filing outside the period prescribed by law affected the claim for recovery of any salary arrears for the period prescribed by law affected the claim for recovery of any salary arrears for the period 1998-20/10/2000."

He consequently, rejected the evidence for payment of US $ 100,000 (which arose about three years after the suit was filed) for the period he worked with his father being 1992-1997 and also found that the salary arrears for the period between 1998 and 20th October, 2000 were also barred by law. According to section 3 (1) of the Limitation Act actions founded on contract shall not be brought after the expiration of six years from the date on which the action arose. We agree with the trial Judge that the claims for salary arrears for the period of 1992-1997 and the period of 1998-2000 were time barred because according to the pleadings as the plaint was filed in the court on 20th October 2006.

Secondly, the trial Judge found that at the hearing the Appellant testified that he was only claiming salary arrears for the period of 2000-2006. He did not ask for

salary arrears for the period before that. The trial Judge made the following findings this on page 270 of the Record of Appeal,

"...at the hearing, perhaps upon realizing that the law of limitation sealed his fate as regards his claim of US$ 100,000, the plaintiff testified that he was claiming salaries for the period 2000-2006. He repeated this under cross-examination when he said that the time period in question is 2000-2006. In view of his own abandonment of the claim at the hearing...."

I concur with the learned trial Judge that the Appellant was not entitled to US$ 100,000 if they were salary arrears of 1992-1997 and the period of 1998 -2000. Therefore this ground must fail.

Ground 2: Whether the learned trial Judge erred in law and in fact when he found and decided that the Appellant was a non-salaried representative of the family?

Submissions of counsel for the Appellant

Counsel for the Appellant submitted that the Appellant was the general manager of the Respondent Company because of the following reasons;

First, the Appellant managed the company affairs by making a statement of income and expenditure to the directors of the company on a monthly basis. Secondly, he was responsible for the completion of the family house at Plot 5 Hanlon Close, Bugolobi which he did. Thirdly, the Appellant had completed three floors on Raja Chambers Plot 3 Parliament Avenue, Kampala. He argued that the Appellant was entitled to wages for the work done for the Respondent Company.

Counsel further submitted that the Appellant's employment was by conduct as there was no written contract. He further submitted that according to Section 2 of the Employment Act 2006 a wage was any remuneration or earnings capable of being expressed in money fixed by mutual agreement and which was payable under an oral or written contract of service for work.

Submissions of counsel for Respondent

Counsel for the Respondent submitted that the trial Judge's conclusion that the Appellant was a non- salaried representative was founded upon the evidence before court and therefore he was not entitled to any claim of salary arrears. Counsel further submitted that the Appellant was merely working alongside his father to rehabilitate the property.

Counsel further supported the trial Judge who evaluated evidence relating to the company resolution of the Respondent company that provided that it was the first time that the Appellant was being appointed as general manager of the said company and therefore he was not being reappointed to the said position.

Court's findings and decision

This ground calls for me to determine in what capacity the Appellant was employed as in the Respondent Company during the different periods when he worked for the Respondent Company. There are three periods for us to consider the first one is the one from 1992 to 1997 while he was working with his father, the second one was the period from 1997 – 2006 before he was terminated. The third period was after he was terminated without notice.

The trial Judge (At page 269 of the Record of Appeal) found that the Appellant worked with and for his late father as a dutiful son who at the same time lived

with his parents and whose expenses and allowances were all catered for as a member of the family. The Appellant was therefore not a contracted employee of the Respondent Company. I agree with this finding because there was no evidence of a company resolution in the past that to showed that the Appellant was entitled to such remuneration as a general manager.

The Appellant relied on exhibit E which are Minutes between himself and one S.M.W Morji (a trustee) of the company (dated 29th August 1997) which merely state (Para B 1) that there were some monies to be paid to the Appellant for the construction and management work done for the Respondent Company from the 08th August, 1992. However the figure is not mentioned therein and in any event this figure would be the subject of further negotiation. In the said Minutes it was proposed that the Appellant would be paid the sum of US$ 25,000 over a 3-5 year period after the completion of Raj Chambers, House on 5 Hanlon Close, All commercial debt owed by Congo Trading Corporation and finally Mr. Abdul's Wissanji' s personal debts to be mutually agreed on. In the pleadings of the Appellant at the trial court he averred that he had completed the family House at 5 Hanlon close, Bugolobi, Kampala, gave his mother upkeep of 4.5 m/= and catered for all her utilities, constructed three floors of the Raja Chambers and also availed the directors with monthly statements of income and expenditure including his own monthly drawings.

Furthermore the trial Judge found (at page 255 of the Record of Appeal) that based on the Appellant's monthly financial accountabilities, the Appellant would withdraw such monies as he pleased. The trial Judge also noted that the Appellant's withdrawals were never less than 10% of the gross monthly rental income. All these duties and responsibilities show that the Appellant was more

than just a salaried employee. This is because the Appellant had access to the company accounts and could withdraw money as he pleased. The Appellant was also responsible for completing the Raja building.

Furthermore there is a company resolution (exhibit P.2) where shares of the late Abdulaziz Wissanji were transmitted to his children it was resolved that the Appellant was to be given more shares compared to the rest of the children of the deceased and I believe this was in recognition of all the work the Appellant had done with his father.

It is apparent therefore that the Appellant after the death of his father became the biggest shareholder of the Respondent Company. He also participated in the day to day running of the company and was also involved in its decision making.

As to whether the Appellant was a salaried employee, I will refer to the case of **Ready Mixed Concrete Southeast Ltd vs. Minister of Pensions and National Insurance [1968] 1 ALLER 433**. In that case, a contract of employment exists, if these three conditions are fulfilled;

(i) The servant agrees that in consideration of a wage or other remuneration, he or she will provide his or her own work or skill in performance of some services for his or her master.

(ii) He or she agrees, expressly or impliedly, that in the performance of that service he or she will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of contract are consistent with it being a contract of service.

A contract of employment therefore is one by which an employee unde rtakes to do work for remuneration under the direction or control of an empl oyer. An agreement may be characterised as a contract of employment when it requires performance of work by the employee, payment of wages by the employer and a relationship of subordination between the parties. The creation of the relationship of subordination also implies acceptance by the employee of the employer's power of direction and control. Control includes the power of deciding the work to be done, the way in which it is to be done, the means to be employed in doing it, the time when and the place where it is to be done. All these aspects of control must be considered in deciding whether there is a sufficient degree to make one party the master and the other his or her servant.

I therefore find that the Appellant was never a salaried employee of the Respondent Company between the periods of 1992-1997. This is brought out clearly through the testimony of Al-Karim Abdulaziz Wissanji (DW 1) who testified that the plaintiff was running the company as a representative of the Wissanji family. The trial Judge took note of all this. He was alive to the fact that the Appellant worked alongside his father in the day today running of the company. The father remunerated the Appellant with an allowance and provided him with a house to stay. The Appellant himself (at page 25 of the Record of Appeal) testified that his father would give him "pocket money".

Furthermore, after his died in 1997, the Appellant used to determine how much he would earn and pay himself depending on the cash flow of the company. The Appellant testified (at page 31 of the Record of Appeal) that some of the expenses of the Respondent Company were actually his salaries which would be different from time to time depending on the cash flow of the month. These amounts

ranged between $ 3,200 and $ 3,300 per month. He for example paid himself $ 9, 556, in April 2006 and $ 4,616,120 in March 2006.

I find that this conduct of work does not in any way support the alleged fact that the Appellant was a salaried employee. He was part and parcel of the family ownership/management and remunerated himself.

Accordingly this ground fails.

Ground 3: Whether the learned trial Judge erred in law when he contradicted himself in regard to the employment of the Appellant?

Submissions of counsel for the Appellant

Counsel for the Appellant argued that the trial Judge referred to the Appellant as a non-salaried employee of the Respondent Company and at the same time held that he was not an employee of the Respondent Company.

Counsel referred us to Section 2 of the Employment Act 2006 that defines an employee as any person who has entered into a contract of service or an apprenticeship contract, including without limitation, any person who is employed by or for the Government of Uganda, public service, a local authority or a parastatal organization or other but excludes a member of the Uganda People's defence force. In this case, counsel submitted that the Appellant was employed as a general manager of the Respondent Company.

Submissions of counsel for the Respondent

Counsel for the Respondent submitted that trial Judge was consistent in his Judgment as regards the Appellant's status in the company. He submitted that

the trial Judge constantly referred to the Appellant as a non-salaried representative before the period of 1998 and not as a non-salaried employee.

Counsel submitted the Judge found (line 4 on page 272 of the Record of Appeal) that since no contract of employment was ever negotiated, the Appellant was a non-salaried representative.

Counsel for the Respondent also supported the Judge's findings that the expenditure patterns of the Appellant were not that of a salaried manager. The trial Judge found that the evidence showed that the Appellant managed the family business as a salaried manager. He therefore argued that those findings of the trial Judge did not reveal any contradictions.

Court's findings and decision.

The crux of this ground is to establish in what capacity the Appellant was doing the work for the company. I find that this ground is similar to the earlier ground and that this has already been resolved on the basis of the characteristics of a contract of employment as espoused in the case of **Ready Mix Concrete Southeast Ltd** (Supra).

From the course of dealings between the Appellant and his father, the trial Judge rightly concluded that the Appellant was his father's right hand man. Thus he was a non-salaried representative of the family business. I cannot agree more.

Accordingly this ground fails.

Ground four: Whether the learned trial Judge erred in law and fact when he failed to interpret and give effect to exhibit P2 in the context of the Appellant's claim?

Submissions of counsel for the Appellant

Counsel for the Appellant argued that the Respondent's Company Resolution (Exhibit P2 page 43 of the Record of Appeal) of the meeting held on 17th October 1998 resolved to appoint the Appellant as the general manager of the Respondent Company. He however argued that the trial Judge failed to interpret and give effect to exhibit P2 in the context of the Appellant's claim.

In this regard counsel referred to the case of **Mutamboh Matthew vs Mayusi Yusufu** Election Petition Appeal No. 45 of 2011 for the proposition that the company resolution could be adduced as evidence to show that the Appellant was appointed as a general manager and therefore was an employee of the company.

Submissions of counsel for the Respondent

Counsel for the Respondent maintained that the trial Judge properly found that the Appellant had been appointed general manager and that this was not a re-appointment.

Counsel further submitted that notwithstanding the fact that he was working in the family business alongside his father he was a manager he was in fact was paying himself for his services.

Court's findings and decision

Exhibit P2 (page 43 of the Record of Appeal) is a Resolution of the company made on 17th October 1998. It was a resolution made after the death of the Appellant's father. In that company resolution, the company among other things:

i) ratified the transmission of shares by the executors,

ii) Appointed Adil Khawaja as an alternative director to Rosemine Nazir Tharani.

iii) Appointed Mrs. Gurshan A Wissanji on contract as managing director and

iv) Appointed Mr. AL Zahir Wissanji as general manager.

This resolution by its very wording was clearly a first appointment and not a renewal of contract. Indeed there is evidence of a formal written contract of services (Exhibit P 8) that was drafted in 1998 (after the Appellant's father had died) detailing the appointment of the Appellant as general Manager of the Respondent Company and his terms of service. It is clear to us that it was after the death of the Appellant's father that the family attempted to put in order how the Respondent Company would be controlled and directed for the first time. The trial Judge (at page 268 of the Record of Appeal) found;

"...it does not say that the plaintiff was being re-appointed as General Manger to raise inference that prior to that he had served in the same capacity..."

I agree with the learned trial Judge that this was the first time the Appellant was being appointed as general manager therefore this ground also fails.

Ground 5: Whether the learned trial Judge erred in law and fact when he failed to award salary arrears as special damages?

Submissions of counsel for the Appellant

Counsel for the Appellant argued that the Appellant had specifically pleaded special damages of salary arrears of US $ 290,806.02 (United States Dollars Two Hundred Ninety thousand eight Hundred six and two cents).

Counsel prayed that the Appeal be allowed and that special damages of salary arrears of US $ 493,806 (four hundred and ninety three thousand dollars eight hundred and six) be awarded to the Appellant for the years of service to the Respondent.

Counsel for the Appellant submitted that the Appellant was entitled to the following reliefs;

a) US $ 100,000 for the period of 1992-1997 when he worked as general manager,
b) Salary for the period of 1997-2006 with US$ 3333.3 as a monthly pay,
c) Pay in lieu of notice US$5499.9,
d) Severance pay US$14,513 for a period of 8.7 years
e) General damages of US$20,000 for working from 1992 -2006 and
f) Interest of 20% per annum.

Counsel relied on the case of **Omunyokol Akol Johnson v Attorney General SCCA No 6 of 2012** where the court held that special damages represent actual losses suffered by the claimant as a result of the wrong committed and must be specifically pleaded and proved, in that case Appellant was awarded special damages for arrears of salary and was also awarded salary in lieu of leave.

Submissions of counsel for the Respondent

Counsel for the Respondent submitted that before the trial Judge can award special damages they must first be pleaded and then strictly proved. For this proposition he relied on the case of **Kampala City Council v Nakaye** [1972] EA 446 **and Jivanji v Sanyo Electrical Co. Ltd** [2003]1 EA 98. In this matter counsel submitted that the said special damages had not been proved.

Court's findings and decision

Special damages are different from general damages. Before they can be awarded by any court they must be specifically pleaded for (See **Kampala City Council v Nakaye** (1972) EA 446). This would mean that the Appellant needed to prove his salary arrears with documentation like payment vouchers of his salary which he has not done. Since the Appellant has failed to provide such proof and special damages could not be awarded. The learned trial Judge rightly concluded that he had failed to prove the salary arrears as special damages.

This ground therefore fails.

Ground six: Whether the learned trial Judge erred in law and in fact when he failed to find and hold that there was acknowledgment of US $ 100,000 thereby reviving the Appellant's claim.

Submissions of counsel for the Appellant

Counsel for the Appellant submitted that there was an e-mail dated 7th July 2009 from Rose Tharani, a sister to the Appellant and director in the Respondent Company, wherein she clearly acknowledged the amount of USD 100,000 (United States Dollars One Hundred Thousand) as being due to the Appellant. This e-mail was proof that the Appellant was entitled to the money and the trial Judge should have used this evidence to support the claim of the Appellant; which he did not.

Submissions of counsel for the Respondent

Counsel for the Respondent supported the trial Judge's findings that the Appellant could not claim the exemption of acknowledgment of a debt and was as such not entitled to the US $ 1000,000.

Court's findings and decision

I have already addressed the evidence of the US $ 100,000 which arose after the suit was filed and which the Appellant wishes to use as an acknowledgement of debt hence an exception to the rule on the suit being time barred in ground one. In law, acknowledgment is an admission which must be clear, distinct unequivocal and intentional – See **Madhvani International V Attorney General** CA No 23 of 2010. Our conclusion is that the said e-mail sent to the Appellant cannot in law act as an acknowledgement on behalf of the company. It was signed off by his sister as "Sis" in appeared to be a private letter. In any event, this acknowledgement was not pleaded and the claim was also barred by the law of limitation.

Final Result

Since the Appellant has not been successful in any of the grounds I hereby dismiss this Appeal and uphold the decision of the trial Court with costs here and below.

I so Order.

Dated at Kampala this.....7th.....day of .....Nov.....2019.

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 89 OF 2010

(Arising from the judgment of the High Court (Civil Division) in HCCS No. 664 of 2006 dated 14th July 2010 delivered the Hon. Justice Mr. Yorokamu Bamwine)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

ALZAHIR A WISSANJI} .....APPELLANT

VERSUS

CONGO TRADING CORPORATION LTD} .....RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Honourable Justice Geoffrey Kiryabwire and I only agree with part of the judgment. I agree with the facts and analysis of the issues but I do not agree that the claim for US$100,000 which forms ground 6 of the appeal was time barred.

The material facts which form the basis of my dissent from the majority judgment of this court include the fact that the appellant's suit in the High Court succeeded in part. The appellant was awarded general damages of US$100,000 or its equivalent in Uganda shillings. Secondly, the appellant was awarded interest at 10% per annum on the dollar award or 25% per annum after conversion into local concurrency from the date of judgment till payment in full. Thirdly it was ordered that each party should bear its own costs of the main suit and the counterclaim. The appellant being dissatisfied with the judgment, albeit a judgment in his favour, appealed against the decision and the respondent cross appealed. However, the respondent

apparently abandoned the cross appeal by not filing any submissions in support of it or referring to it at all. I agree with the decision of my learned brother that the cross appeal should be dismissed. There is therefore no appeal against the award of general damages of US$100,000 together with the interest awarded and the order for costs. For that reason I shall not touch the issue of award of general damages. This would comply with Rule 102 (a) of the Rules of this Court which provides that:

> At the hearing of an appeal in the court –
>
> (a) no party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given under rule 93 of these rules;

Ground six of the appeal which forms the basis of my dissent reads as follows:

> The learned trial judge erred in law and fact when he failed to find and hold that there was an acknowledgement of US$100,000 thereby reviving the appellants claim.

The issue arises from the decision of the trial court on issue number one as to whether the plaintiff's claims prior to 18th October, 2000 are time barred. At page 5 of the judgment the learned trial judge indicated that the plaintiff's counsel sought to rely on a copy of an e-mail message sent in July 2009 when the pleadings were filed in 2006 and concluded that the claim was time barred. The learned trial judge held that the salary arrears and the claim for breach of contract as regards payment of US$100,000 for the period the appellant worked with his father between 1992 – 1997 and salary arrears for the period 1998 to 2000 appears from the statement of the plaint to be barred by statute.

The record clearly indicates that evidence of acknowledgement of the claim of, US$100,000 arose after the suit was filed and the appellant wanted to

use it as an exception to the rule that the suit is time barred. I note that there is an admission in an e-mail exhibit P9 and the question was whether it could not found a cause of action since the purported acknowledgement came after the suit had been filed in 2006 as indicated in the judgment but the acknowledgement was in 2009. I agree with the judgment in that respect. However, I do not agree that exemption from the law of limitation ought to have been pleaded for the same reason since the admission was made in 2009 and was not available at the time of the pleading. The appellant's action had been filed in 2006 and was time barred.

The issue is that the admission arose after the cause of action was time barred and the suit was filed in the year 2006. The question for consideration is whether the said admission commenced a fresh cause of action? Section 22 (4) of the Limitation Act provides that:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest in it, and the person liable or accountable thereof acknowledges the claim or makes any payment in respect of the claim, the right shall be deemed to have accrued on and not before the date of acknowledgement or the last payment; but the payment of the part of the rent or interested due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as the payment in respect of the principal debt.

Furthermore, section 23 of the Limitation Act provides that every such acknowledgement shall be in writing and shall be signed by the person making the acknowledgement. Any acknowledgement may also be made by an agent of the person by whom it is required to be made to the person or the agent of the person whose title or claim is being acknowledged or in respect of whose claim the payment is being made.

The record is clear that exhibit P9 was written by Rose Tharani, one of the children of the deceased and a director of the respondent company. She wrote *inter alia* that:

I have taken time to weigh all the options and this is what I have come to: first of all, I feel that you were given more shares than the rest of the siblings because papa felt that you deserved that for your efforts, and we all respected that. Whilst you were there, you lived in the family home, were fed by the family, used family car and expenses were covered by the family, and over and above that, you are being given US$100,000 that was initially decided is also accepted by all.

As far as deserving any more than that, in my opinion, it is unfounded, your feelings of deserving more, does not make any sense. We all in our own way have done things to help the family and nobody is asking for any compensation, so why should you get any more???

It is my opinion that selling the building will set everyone free to do as they wish.

I cannot make a deal with you without the other siblings, I have my principals and whatever deal is worked out has to benefit and be fair to all parties involved.

Sis

The e-mail clearly indicates that there was a pre-existing dispute wherein the appellant was claiming compensation. The appellant received this e-mail from one of the directors after having already filed the suit. It is therefore my considered judgment that the email is an admission as well as an acknowledgement of the sum stated in the e-mail. The issue with regard to acknowledgement arises because the suit had already been filed and the matter was therefore pending in the court. The question is whether a suit that is time barred cannot be revived by acknowledgement? It should be noted that the suit was time barred. Should the appellant whose claim is acknowledged subsequently to filing a suit, file a fresh suit?

I wish to state that there is an admission on a point of fact which proves that the defendants officials or at least one of them acknowledged that the company or the family of the appellant owed him some money that had been agreed to by all notwithstanding that his suit had been filed after expiry of the limitation period of six years. Section 57 of the Evidence Act Cap 6 laws

of Uganda provides that facts which are admitted need not be proved and provides that:

> 57. Facts admitted need not be proved.
>
> No fact need be proved in any proceedings which the parties to the preceding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, on which by any rule of pleadings in force at the time they are deemed to have been admitted by their pleadings; except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Secondly under Order 13 rule 6 of the Civil Procedure Rules it is provided that:

> Any party may at any stage of the suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make such order, or give such judgment as the court may think just.

The admission as a matter of fact is an admission of part of the claim and therefore the limitation period cannot be applied to it because the admission is made after the expiry of the limitation period. It is an acknowledgement and there is no need for the appellant to file a fresh suit on the basis of the acknowledgement but for the suit before the court to be compromised on the basis of the admission of indebtedness of up to US$100,000. To hold otherwise would be to send the appellant back and to ask him to file another suit when there was already a pending suit that was refreshed by acknowledgement as far as the issue of limitation of actions is concerned. In the circumstances, it would be unjust to dismiss the suit or the appeal because the acknowledgement fell within the limitation period and was not time barred. Further, to send the appellant away would make the acknowledgement time barred when the admission or acknowledgement

was before the court within a time of six years stipulated under the Limitation Act.

Further, it is my humble judgment that to argue on the basis of the original claim that the plaint is time barred, would be a technicality in light of the new evidence that the defendant acknowledged part of the debt "otherwise" than in the pleadings. Paragraph 4 (b) of the written statement of defence at page 11 of the record clearly indicated that the defendant denied that the appellant was entitled to be paid US$ 100,000 for the period claimed. As it transpired later, this claim was later acknowledged obviously after some talks between the parties and after the filing of the suit as can be discerned from exhibit P9. Moreover, as a matter of fact, the learned trial judge at page 15 of the Judgment considered the amount of US$100,000 as being a compensation of the plaintiff which was acknowledged by the company's directors and shareholders. The learned trial judge found it to be a fair assessment of the loss suffered by the plaintiff/appellant and awarded the sum to the plaintiff/appellant as general damages. Notwithstanding the above, the learned trial judge found that the claim was time barred. It follows that the award of US$100,000 to the appellant as general damages did not flow from the claim which was held to be time barred and it is therefore open for consideration on ground 6 of the appeal as to whether the learned trial judge erred to hold that the claim of US$100,000 was time barred.

Additionally, it was stated that the acknowledgement was made by a sister of the appellant and not the respondent through an agent and therefore was not binding on the respondent company. The learned trial judge found as a question of fact that the acknowledgement was made by a director who clearly indicated that she had weighed all the options and I would in the circumstances of this appeal depart from this finding. Moreover, Rose Tharani who make the acknowledgment also talked about the shares of other siblings in the company. The claim was already in court and she was therefore

talking about the dispute in the suit in her own capacity as one of the directors even if the tone of the letter was that of a sister to a brother, she was discussing company matters including sale of a building. This was clearly a company business run by a family and I would find that the acknowledgement of Rose Tharani in exhibit P9 binds the respondent.

Last but not least, the company is barred by the doctrine of estoppels from denying the claim of the appellant for the sum of US$100,000. It is clearly indicated that the sum of US$100,000 was initially decided by the family and was also acceptable to all.

In the premises, I hold that the rest of the claim may be time barred as held but the acknowledged claim of US$100,000 is not time barred and the appeal ought to be partly allowed to the extent that the appellant is entitled to the sum of US$100,000 in addition to the award in the High Court with costs to the Appellant in this Court.

Dated at Kampala the 7th day of November 2019

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 89 OF 2010

ALZAHR A. WISSANJI .....APPELLANT

VERSUS

CONGO TRADING CORPORATION LTD..... RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala by Hon. Mr. Justice Yorokamu Bamwine dated 28th June, 2010 in High Court Civil Suit No. 664 of 2006)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Justice Geoffrey Kiryabwire, JA

I agree with him that this appeal ought to fail for the reasons he has ably set out in his detailed and well reasoned Judgment.

I also agree with the orders he has proposed in respect of costs and I have nothing useful to add.

Accordingly by majority decision this appeal fails and is hereby dismissed with costs here and below.

Dated at **Kampala** this.....7th..... day of .....NOV..... 2019.

.....

Kenneth Kakuru
JUSTICE OF APPEAL