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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 69 OF 2005**

*(Appeal arising from the Judgment, Decrees and Orders of the High Court Commercial Division at
Kampala in Civil Suit No. 029 of 2002 before Hon. Justice James Ogoola, J)*

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A.S VIRDEE T/A PLANNING AND DESIGN ASSOCIATES ::::::::::::::::::::APPELLANT

VERSUS

MADA HOLDINGS (U) LTD ::::::::::::::::::::RESPONDENT

(Coram: Alfonse Owiny-Dollo, DCJ, F.M.S Egonda-Ntende & Hellen Obura, JJA)

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JUDGMENT OF HELLEN OBURA

This appeal arises from the decision of His Lordship James Ogoola, J delivered on 25th April 2005 where he entered judgment against the appellant with costs for failure to prove his claim of the existence and terms of a supervision contract with the respondent and its termination.

20 Background Facts

The brief facts giving rise to this appeal are that the appellant, an architect trading as an architectural firm which deals in preparing sketch plans, drawing final plans, making detailed drawings, submitting plans for local authority's approval and supervising construction, entered into a contract with the respondent to render architectural services. The appellant claimed
25 that he provided services, which included drawing the architectural plan and supervision of the actual construction and issued a fee note of USD 56,800 but the respondent paid only Ushs. 10,000,000/= (equivalent to USD 6,628).

5 However, the respondent contended that the agreement was limited to the drawing of the architectural plans valued at USD 6,628 only and did not include supervising the construction work at Nile Resort Hotel in Jinja. Further, that upon drawing the architectural plan the appellant was fully paid the agreed fee and his contractual relationship with the respondent ended there.

10 The appellant sued the respondent for the balance of USD 50,172 in *HCCS No. 29 of 2002* and judgment was entered for the respondent. Being aggrieved by the decision of the High Court, the appellant appealed to this Court on the following grounds;

- 15 1. *The learned trial Judge erred in law and fact when he framed a single issue; i.e "whether the Plaintiff was retained to supervise the construction works of the Nile Resort Hotel, Jinja and if so, whether the plaintiff performed that component of the contract", as the central issue between the parties whereas the pleadings and evidence disclosed other key issues such as (without limitation), whether the plaintiff performed any other services for the defendant and if so whether he was fully paid for such services.*
- 20 2. *The learned trial Judge erred in law and fact and occasioned a miscarriage of justice by permitting the defendant's witnesses to tender witness statements whereas the plaintiff's witnesses gave their evidence orally.*
- 25 3. *The learned trial Judge erred in law and fact when he failed to evaluate the evidence given by the plaintiff's witnesses. In particular, he misdirected himself in disbelieving the plaintiff's witnesses with regard to whether there was a contract of supervision and other architectural services and whether the plaintiff carried out any supervision and other architectural services.*
4. *The learned trial judge erred in law and fact and misdirected himself by believing the defendant's witnesses without due regard to the contradictions, falsehoods, cogency and inconsistencies of the evidence of the said defendant's witnesses and without regard to their credibility.*

5 5 *The learned trial Judge erred in law and fact when he held that there was no supervision contract between the parties.*

Representations

At the hearing of this appeal, Mr. Nicholas Mwasami holding brief for Doctor Allan Shonubi appeared for the appellant while Ms. Amujong Kevin holding brief for Mr. Okalang appeared
10 for the respondent. Both counsel informed this Court that they had filed written submissions and the list of authorities to be relied upon which they prayed should be adopted as the parties' arguments. Their prayer was granted and the submissions so adopted.

Appellant's Case

Counsel for the appellant argued grounds 1 & 2 separately but combined grounds 3, 4 & 5
15 and argued them together. On ground 1, it was submitted for the appellant that the learned trial Judge erroneously concluded that the only issue for determination was *'whether the plaintiff was retained for supervision of construction works of the Nile Resort Hotel, and if so, whether he performed that component of the contract.'* He argued that the trial Judge was duty bound to raise issues that address the points of contention raised in the pleadings and
20 the evidence adduced. Counsel added that the learned trial Judge implicitly and erroneously assumed that if no supervision was made, then the appellant was not entitled to award of the fees for the rest of the work admitted as done, on quantum meruit basis. Counsel also submitted that the appellant was entitled to recover a proportion of the contract price commensurate to the ratio of the contract so far completed not necessarily by virtue of the
25 original contract but by reason of the implied promise arising from acceptance of the services so delivered.

On ground 2, counsel submitted that the learned trial Judge erred in allowing the respondent's witnesses to tender written statements instead of adducing oral evidence. He argued that the

- 5 procedure adopted by the trial court is not provided for in the law and this occasioned injustice to the appellant since the learned trial Judge could not properly assess the temperaments and antecedents of the witnesses in a case which was based mainly on the credibility of the witnesses. He buttressed his argument with the decision in ***Gachingi vs Kamau (2003)1EA 69.***
- 10 On grounds 3, 4 and 5, counsel submitted that the learned trial Judge failed to properly evaluate the evidence and misdirected himself in disbelieving the appellant's witnesses and believing the evidence of the respondent which had several inconsistencies, falsehoods and contradictions, thus holding that there was no contract for supervision and hence no amount was due to the appellant yet services were rendered. Counsel contended that the learned trial
- 15 Judge ignored blatant defects, falsehoods, dishonesty, contradictions and inconsistencies in the testimonies of the respondent's witnesses. He argued that the lies and contradictions could not be taken lightly in analyzing credibility and cogence of the evidence as they were material. He relied on the case of ***Gachingi vs Kamau (supra).***
- 20 Counsel further contended that the learned Judge was biased from the start when he failed to assess the facts as brought out in the evidence and depended on assumptions rather than evidence adduced in court contrary to the principles of a fair trial. He added that court can only base its judgment on pleadings and evidence given in court pursuant to the Evidence Act and not on assumptions and reading between the lines as the learned trial Judge did in
- 25 this case. He relied on the decision in ***Uganda Breweries Limited vs Uganda Railways Corporation, (2002) 2 EA 627 at 640*** to support his arguments.

Respondent's Case

30 In reply to ground 1, counsel for the respondent submitted that the learned trial Judge rightly concluded that there was only one issue for determination. It was contended that the

5 agreement was limited to drawing of the architectural plans valued at US \$ 6.628 and argued
that the appellant was not retained to supervise the construction work at the Nile Resort Hotel
in Jinja as claimed by him. Counsel relied on the case of **Prince J. D.C Mpuga Rukidi vs**
Prince Solomon Iguru & others, SCCA 18/94 where it was held that Order 13 rule 3 of the
Civil Procedure Rules, CPR (currently Order 15 rule 3) gives discretion to court to frame
10 issues from among or all the allegations made on oath, allegations made in the pleadings and
contents of documents from the parties. Counsel submitted that a Judge is not bound by the
manner in which either party to a suit wants his or her issues to be framed and, in any case,
the dispute in this case was in respect of supervision. It was his view that the trial Judge did
not err but rightly found that there was no supervision work carried out by the appellant and
15 therefore he was not entitled to award of fees beyond the amount paid for the drawings.

Counsel further argued that the appellant's argument on the quantum meruit principle was an
afterthought which, in any event, is not applicable in the instant case since it applies to
contracts where contractual amount has not been agreed upon as was held in **Base**
Electronics Center vs Energo Project, HCCS No. 697/90.

20 On ground 2 counsel submitted that the trial court did not err in allowing the respondent's
witnesses to tender in witness statements since it did not stop them from being cross-
examined by the appellant's counsel. Counsel further argued that before putting the
statements of the respondent's witnesses on record, they were first sworn and later on cross-
examined and thus, the defense evidence was *viva voce* and in accordance with Order 18
25 rule 4 of the Civil Procedure Rules. She added that the strength, truthfulness, temperaments
and antecedents of the witnesses were properly tested and assessed during cross-
examination and their credibility determined.

On Grounds 3, 4, and 5, counsel submitted that the learned trial Judge properly evaluated
the evidence adduced by the plaintiff and was therefore right in finding that the appellant's

5 witnesses were incredible and that the evidence of the respondent was credible. She argued that the learned trial Judge properly analyzed the evidence of Bobby Singh (PW3) and found that he was dishonest with matters before court. She added that the trial Judge rightly based his judgment on pleadings and evidence given in court under the Evidence Act and not on assumptions and readings between lines as Bobby Singh was found to be dishonest. She
10 relied on ***Shokaatali Abdulla Dhalla vs Sadrudin Meralli, SCCA No. 32 of 1994.***

In rejoinder, counsel for the appellant submitted that the money paid by the respondent, that is, US\$ 6,628 did not even cover the costs for provision of sketch plans, drawing final plans, making detailed drawings, submitting plans for local authority's approval. He added that supervision of the actual construction was an additional and minor component of the contract.

15 Further that, the trial Court was duty bound to exercise its discretion judiciously and frame issues that address all matters in contention at the commencement of the hearing and or exceptionally after the hearing which it failed to do. He relied on the case of ***Prince J.D.C Mpugu Rukidi vs Prince Solomon Guru and ors, (supra)*** to support his submission. He added that by framing a single issue about supervision, the court erred and erroneously pre-
20 supposed that the appellant and the respondent had agreed on US\$ 6,628 as the contract sum for provision of sketch plans, drawing final plans, making detailed drawings, submitting plans for local authority's approval whereas not.

Regarding the quantum meruit principle, counsel submitted that it was not an afterthought as alleged by the respondent because it was canvassed at the lower court but the learned trial
25 Judge ignored it.

On ground 2, counsel submitted in rejoinder that the general rule of law is that all evidence, save the contents of the documents, should be by oral testimony pursuant to section 57 of the Evidence Act and the case of ***Kahwa and anor vs Uganda Transport Company Ltd, (1978) HCB 318.*** He added that the appellant cannot be stopped from raising a point of law

5 merely because it omitted to raise it in the trial court. Further that, the tendering of witness statements was in contravention of Order 18 rule 4 of the CPR and the wrong procedure adopted by the trial court occasioned a miscarriage of justice.

In rejoinder to grounds 3, 4 and 5, counsel submitted that the respondent had the burden to prove that the amount paid was the agreed contractual sum for the appellant's services which
10 it failed.

Court's Consideration

I am alive to the fact that this Court has a duty as the first appellate court under rule 30(1) (a) of the *Judicature (Court of Appeal Rules) Directions SI 13-10* to re-appraise the evidence and come up with its own conclusion. Having perused the record of appeal containing the
15 proceedings, I will now proceed to determine the grounds raised in this appeal.

On ground 1, the appellant faults the learned trial Judge for framing a single issue, namely; "whether the plaintiff was retained to supervise the construction works of the Nile Resort Hotel, Jinja and if so, whether the plaintiff performed that component of the contract" as the central issue between the parties whereas the pleadings and evidence disclosed other key
20 issues such as (without limitation) whether the plaintiff performed any other services for the defendant and if so whether he was fully paid for such services.

The appellant's claim as set out in paragraph 3 of the amended plaint filed on 14th October 2003 was for US\$ 50,172 (United States Dollars Fifty Thousand One Hundred Seventy Two only) being professional fees for services rendered to the respondent, with interest thereon at
25 25% from the date of default until payment in full and general damages for breach of contract from the date of default plus costs of the suit. The said amount was alleged to be the outstanding balance of a contract sum following a verbal agreement between the appellant

5 and the respondent for drawing the architectural plan and supervising of the actual construction which the former performed.

Both parties agreed that there was no written contract between them and it is not in dispute that the appellant drew the architectural plan for the respondent's hotel. What is contested is the contract of supervision of the construction and its performance plus the contract sum.
10 Those disputed facts would form the issues for trial.

My perusal of the record shows that there were no agreed issues as conferencing of the suit was not done although court proceedings of 21st March 2002 indicate that counsel for the appellant had suggested that the matter could be fixed for scheduling and the trial Judge said the matter appeared to be one that the parties could settle. He then adjourned it to 20th June
15 2002 for settlement or scheduling. On the 20th June 2002 and on the subsequent adjourned date the matter did not proceed due to the absence of the respondent's counsel. When the matter came up again on 19th September 2002, counsel for the respondent did not again appear and the matter was stood over briefly to enable him appear. When court resumed he was still absent and the prayer for ex-parte proceeding was granted. The court then heard
20 the appellant's case and judgment was delivered on 10th March 2003 allowing the appellant's claim.

However, the records show that on 10th June 2003, the respondent's application to set aside the ex-parte judgment was heard and allowed conditionally and the ex-parte judgment accordingly set aside. Subsequently the matter was fixed for hearing which then proceeded
25 beginning with amendment of the plaint to include a prayer for general damages and upon acceptance of some documents by counsel for the respondent, hearing of evidence started without agreeing on the issues for trial.

5 At the trial, the appellant called 3 witnesses to prove his case while the respondent called 4 witnesses in defence. PW1 Amerjeet Virdee testified about a previous verbal contract with the respondent for drawing architectural plan for an apartment block at a fee of UShs. 100M (KShs. 2M) which he performed and the respondent fully paid him.

As regards the dispute in this appeal, he testified that at the request of Mr. Mahajan (DW1),
10 he designed a hotel for the respondent in Jinja and provided full architectural services at an agreed fee of US\$56,800 being 50% of the professional fees of 6%. Further that he visited the site and he took photographs before and after the site was cleared. He also took out levels of the site and studied environmental aspects of it, for example, wind direction and soil erosion. In re-examination he clarified further that he took some photographs of the site
15 because he needed information about site conditions like gradients, heights, river positions and etcetera. He then drew the plans, signed the approval forms and submitted them (the plans Exhibits P5-P12) to Jinja Town Council which duly approved them. Furthermore, that construction was by Mr. Mahajan himself and because he (Mahajan) was not a professional contractor, he retained him (Virdee) to supervise the construction while Mr. Mahajan's site
20 supervisor was Mr. Bobby Singh. It was the testimony of PW1 in re-examination that the plans were for 25 rooms and the main building, conference hall, dining room, bar, swimming pool, staff housing and the main gates.

PW1 further testified that he personally visited the site almost weekly (every Saturday) and Alex (PW2) also visited the site with Mr. Mahajan almost every month and on the whole, they
25 supervised the work constantly (weekly) for one year (1998) and thereafter for about 2 years on a periodic basis (once a month or so whenever Bobby called them). He then issued the 1st fee note in 1998 for the supervision which was partly paid by 2 cheques both totaling to a sum of Ushs. 10,000,000/= (US \$ 6.628). Then he issued another fee note (Exhibit P14) on 9/8/2000 for the balance of US \$50,172 which has never been paid.

- 5 PW2 Mr. Alex Muhumuza testified that he prepared drawings for the respondent's hotel in Jinja and participated in submitting it to Jinja Municipal Council with Bobby Singh. Further, that he supervised the site which involved setting up the building and ensuring that it was put up according to the drawings and plan specifications. He added that at the site he interacted with Mahajan Singh and Bobby Singh to whom he delivered the fee note dated 9/08/2000.
- 10 PW3 Mr. Bobby Narinder Singh, testified that PW1 and the architects were present at the site supervising the work. However, Mr. Batcher was the main supervisor/ head of the construction staff on the site. PW3 added that he took the originals of the plans and submitted them himself to Jinja Town Council for approval and also paid the council fees. Further, that he personally delivered 2 cheques to PW1 totaling to Shs. 10 million but he was never told whether or not
- 15 they were final payments.

The respondents called 4 witnesses whose testimonies in summary are as follows:

DW1, Singh Mahajan testified that he agreed with PW1 to make drawings and design a hotel on the lines of the Fig Tree Hotel in Masai Mara on the lake front. He then paid him in full Shs. 10 million in two instalments. He however denied retaining PW1 to supervise the construction

20 or agreeing with him to charge 50% of the scale for the value of the project.

DW2, Dathan Wamuzibira testified that the plans were brought to Jinja Municipal Council by the developer's agents (Bobby Singh and Batcher Lalji) who also paid the inspection fees and not the architect (PW1). Further that, the developer introduced Batcher Lalji as the person to deal with. DW2 also stated that he never saw both PW1 and PW2 at the site but that PW2

25 went to his office only once during the construction to request for a copy of the plan.

DW3, Simon Otim testified that DW1 never introduced PW1 to him as a site supervisor. He also stated that PW3 had nothing to do with the respondent company because he worked with TSMP and dealt in purchase of timber, sales of motor vehicles and making furniture.

5 DW4, Pratap Godhania testified that he was a supervisor whose duty was to distribute jobs and equipment to the other workers whom he supervised. He added that it was him and the site engineer (Batcher) who took the plans to Jinja Municipal Council but they did not take any cheque with them. DW4 also stated that it was PW3 who took them to the council but by then PW3 was working with TSMP. He denied ever seeing PW1 or his representative at the
10 site throughout the entire construction period which according to him was from 1998 to 2002.

When the defence case was closed counsel for the parties agreed to file written submissions. Counsel for the appellant indicated in his submissions that the issues agreed to were:

1. Whether the plaintiff supervised the work at the defendant's site.
2. What amount is payable to the plaintiff if any.
- 15 3. Remedies.

I note that throughout counsel's submission in the lower court he never mentioned that the verbal contract the appellant entered into with the respondent included supervision of the actual construction. He only contended that the appellant supervised the construction without giving its basis. His submission under the 2nd issue indicates the contract sum which he
20 argued covered both the drawing of the architectural plan and supervision of actual construction.

On his part, counsel for the respondent submitted that from the facts of the case it was clear the central issue is whether the plaintiff was indeed retained to supervise the works and if so, whether he actually did so. He submitted at length on this issue and concluded that the
25 appellant had failed to discharge the burden of proving that he had been retained by the respondent to supervise the actual construction.

The learned trial Judge in his judgment stated that from the facts of the case, the central issue between the parties was clearly one, namely; whether the appellant was retained to supervise

5 the construction of works of Nile Resort Hotel, Jinja; and if so, whether he performed that component of the contract. That issue as framed by the trial Judge was similar to the one framed by counsel for the respondent. The learned trial Judge evaluated the evidence before him and found that the appellant had failed to prove the existence of the alleged supervision contract and its terms as well as the actual supervision of the construction work.

10 I have subjected the evidence on record to a fresh scrutiny and I cannot fault the trial Judge for adopting the issue as framed by counsel for the respondent and answering it in the negative based on the evidence before him. I find that the trial Judge was able to address both the issue of existence of the contract of supervision as well as performance of the supervision and he found that both had not been proved. The in-depth analysis of the
15 evidence on these issues are found on pages 6-9 of the judgment, paragraphs 9, 10 and 11. I am not persuaded that the issue as framed by the respondent's counsel and resolved by the learned Judge prevented him from determining whether the appellant had performed any other services for the respondent and if so, whether he was fully paid for such services.

The trial Judge in determining the issue as framed by the respondent's counsel evaluated all
20 the evidence before him as related to the drawing of the architectural plans (which was not disputed), alleged supervision (which was vehemently denied) and the payments made plus the sum demanded as outstanding and found that the alleged contract of supervision and performance of the same had not been proved.

The learned Judge observed as follows at page 391 of the court record;

25 *"If it true that supervision was done from 1998 to 2000 (i.e. over 3 years), how come the fee note was issued in 1998- not towards the end of the contract in 2000! It is to be noted that this fee note was never produced in court. Instead, only the fourth reminder was produced as Exhibit P14. Therefore the alleged initial fee note remains a mystery. Similarly, the actual end of the supervision contract is equally mysterious. The plaintiff testified on 14/10/2003,*

5 *stated that "I finished the supervision work in 2000". However, the plaintiff also admitted that*
he never issued a Certificate of Completion, nor did he get an occupation permit, I have no
option but to find that the date of completion of the alleged supervision of works is clearly
indeterminate. Accordingly, the Court must conclude that the alleged supervision contract-
10 *having no district commencement date, and having no determinable termination date; and*
having no ascertainable definitive terms-must not be upheld as a contract at all. In light of all
the above, the court hereby enters judgment against the plaintiff; with costs to the defendant."

It is clear from the evidence on record that while the appellant and his 2 other witnesses testified that the appellant and PW2 were at the site supervising the construction work at least once a week for a period of one year and later on a monthly basis, all the respondent's
15 witnesses who were at the construction site denied ever seeing the appellant and PW2 during construction. The trial Judge evaluated all the evidence and believed that of the respondent. He treated the evidence of PW3 with caution given that he was a former employee of DW1's other company who had testified against the respondent in two earlier cases.

Upon my own reappraisal of the evidence on record, I find no reason to fault the trial Judge
20 for finding as he did.

On the complaint that the trial court failed to address the question as to whether the appellant had performed any other services for the respondent and if so, whether he was fully paid for such services, my re-evaluation of the evidence on record did not disclose any other service the appellant performed for the respondent other than the undisputed drawing of architectural
25 plans. There was therefore no basis upon which the trial Judge would make an award following the quantum meirut principle.

Furthermore, the appellant in his claim as contained in the plaint stated that the contract sum for drawing the architectural plans and supervision of the construction work was US\$56,800 out of which he was paid US\$6,628 leaving an outstanding sum of US\$50,172. He claimed

5 to have submitted a fee note to the respondent for the total sum but no copy of the said fee
note was annexed to the plaint. It was also not tendered in evidence as rightly observed by
the trial Judge in his judgment. The only fee note tendered in evidence was the invoice termed
"Fourth Reminder" dated 9th August 2000 for a sum of US\$50,172 after deducting the amount
received of US\$6,628 (Exhibit P.14). No evidence of the initial demand and the 1st, 2nd and
10 3rd reminders were adduced in evidence to enable the trial court evaluate how the appellant's
claim was made to the respondent and consistently followed up.

It should be noted that the respondent had denied the entire claim and pleaded in the
alternative, but without prejudice, that the agreed fees of US\$6,628 for drawing the
architectural plans was fully and duly paid to the appellant by the respondent. Knowledge of
15 the alleged balance of US\$50,172 was denied on the ground that it was never agreed upon
by the parties. It was therefore the duty of the appellant to adduce evidence to prove his case
on a balance of probabilities by tendering all the necessary pieces of evidence including vital
documents that would assist court to evaluate his claim.

The learned trial Judge evaluated the evidence availed to him and found that only the contract
20 of drawing architectural plans, which in any event had not been denied, was executed and
performed. He did not go into details to make a finding on whether that service had been fully
paid for because, in my view, the appellant did not indicate in his pleading and evidence costs
of each of the components of the contract he alleged to have entered into with the respondent
and performed. He could only fault the trial Judge if he had disaggregated his claim to make
25 it easy to assess payments for each component. I therefore cannot fault the trial Judge for
not making a specific finding on whether the services not in dispute was fully paid for.

In the premises, I find no merit in ground 1 of the appeal and it thus fails.

5 On ground 2, the appellant faults the trial Judge for allowing the respondent's witnesses to tender written witness statements instead of adducing oral evidence on oath.

A witness statement is simply a written account of evidence that is to be adduced in court and can be subject to cross-examination. It need not always be commissioned, but on all occasions can only be admitted in evidence after the witness presenting a statement has
10 taken oath, so as to confirm its truth.

Counsel for the appellant argued that the tendering of witness statements was in contravention of Order 18 rule 4 of the CPR and that this being a case mainly based on the credibility of witnesses, the wrong procedure adopted by the trial court occasioned a miscarriage of justice since the learned Judge could not properly assess the temperaments
15 and antecedents of witnesses.

Order 18 rule 4 provides as follows:

"The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge."

I note from the court record that the witness statements in question were filed at the court
20 registry on 25/05/2004 way before the respondent's witnesses were called to testify on 05/07/2004. I further note that after the close of the plaintiff's (appellant's) case (at page 72 of the court record), counsel for the defendant (respondent) informed court that he had already filed witness statements for DW1, DW3 and DW4 whereupon the court directed that each defence witness would be cross-examined by counsel for the plaintiff. It is noteworthy
25 that counsel for the plaintiff did not object to these witness statements. He just went ahead to cross-examine each of the defence witnesses after they had taken oath and confirmed their respective statements.

5 The court also had an opportunity to put questions to the witnesses during cross-examination. It should also be noted that the witness statement of DW4 Pratap Godhania was expunged from the record and he was called to give oral evidence which he was cross-examined on. I am therefore satisfied that the trial Judge had opportunity to observe the demeanor of the respondent's witnesses during cross-examination. I do not agree that Order 4 rule 18 of the
10 Civil Procedure Rules was contravened. In my view that rule should be given a purposive interpretation by looking at the purpose for which it was enacted and determining whether the act complained of prevented that purpose from being achieved.

In my understanding, the purpose of Order 4 rule 18 is to ensure that evidence is adduced in court in a transparent manner in the presence of and under the personal direction and
15 management of the Judge. I believe this is intended to enable the parties understand the nature of each other's claim and make an appropriate response and also to help the trial Judge understand the party's case, observe the demeanor of witnesses and seek clarifications where necessary.

I am convinced that that purpose was served by the witness statements of the respondent's
20 witnesses which were filed in court and served way before the hearing date and confirmed on oath in court before the appellant's counsel proceeded to cross-examine the witnesses on them at length. In the premises I find no reason to fault the trial Judge for allowing use of witness statements as no miscarriage of justice was occasioned to the appellant by the use of those written statements. In the premises, ground 2 also fails.

25 Turning to grounds 3, 4 & 5 of the appeal, I note that the issues raised especially in grounds 3 & 5 are already covered in my discussion of ground 1 and therefore there is no need for me to repeat myself on the same. I shall now only deal with ground 4 which faults the trial Judge for misdirecting himself by believing the defendant's witnesses without due regard to the contradictions, falsehoods, cogency and inconsistencies of the evidence of the said
30 defendant's witnesses and without regard to their credibility.

5 It was contended for the appellant that the trial Judge ignored blatant defects, falsehoods, dishonesty, contradictions and inconsistencies in the testimonies of the respondent's witnesses. According to counsel, the lies and contradictions in the evidence could not be taken lightly in analysing credibility and cogence of the evidence since they were material.

I must observe that apart from contending generally that there were blatant defects, falsehoods, dishonesty, contradictions and inconsistencies in the testimonies of the
10 respondent's witnesses, the appellant did not go a step further to point them out from the evidence to enable this Court assess whether they were indeed material as contended. Nonetheless, I have myself reviewed the evidence of the respondent's 4 witnesses and my finding is that all of them consistently testified that the appellant did not supervise the
15 construction work.

I must point out that it is clear from the evidence of all the witnesses that the photographs that were taken at the site was done before the plans were drawn. In fact the appellant himself testified that he took photographs before and after the site was cleared. Further, that he took out levels of the site and studied environmental aspects of it, for example, wind direction and
20 soil erosion. He clarified during re-examination that he took some photographs of the site because he needed information about site conditions like gradients, heights and river positions among other things. In my view, all those photographs were taken for the purpose of facilitating the drawing of the architectural plan which the appellant had been contracted to do. It had nothing to do with the actual supervision of the construction work and so the
25 evidence of those photographs could not assist the appellant to prove his case as relates to supervision of the construction work at the site.

I accept that the evidence of DW4 contradicted those of PW1, PW2 and PW3 as regards payment of the council fees upon submission of the plan. However, I did not find any defects, falsehood, dishonesty, contradictions and inconsistencies in the material aspect of their
30 respective evidence on the central issue of supervision of the construction work at the site. I

5 therefore find no basis to fault the trial Judge for relying on the evidence of the respondent's witnesses and finding as he did. In the premises, ground 4 also fails as it lacks merit.

On the whole, I find no merit in all the grounds of this appeal and I accordingly dismiss it with costs to the respondent in this court and in the court below.

I so order.

10 **Dated at Kampala** this... 30th ... day of... May ... 2019



Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

15

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ, Egonda-Ntende & Obura, JJA]

Civil Appeal No. 69 of 2005

(Arising from High Court (Commercial Court Division) Civil Suit No. 029 of
2002)

BETWEEN

A.S. Virdee T/A Planning and Design Associates=====Appellant

AND

Mada Holding (U) Ltd=====Respondent

*(On appeal from the Judgment of the High Court (Commercial Court Division)
(Ogoola, J.) delivered on the 25th April 2005)*

Judgment of Fredrick Egonda-Ntende, JA

- [1] I have had the opportunity of reading in draft the judgment of my sister, Obura, JA. I agree that this appeal has no merit.
- [2] I concur in the orders proposed by Obura, JA.

Dated, signed and delivered at Kampala this ^{30th} day of *May*, 2019


Fredrick Egonda-Ntende
Justice of Appeal

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL AT KAMPALA
CIVIL APPEAL NO 69 OF 2005**

*(Appeal from the judgment, decree and orders of Ogoola, J. in High Court
(Commercial Division) Civil Suit No. 029 of 2002)*

BETWEEN

A.S VIRDEE T/A PLANNING AND DESIGN ASSOCIATES } APPELLANT


AND

MADA HOLDING (U) LTD } RESPONDENT

JUDGMENT OF OWINY - DOLLO; DCJ

I have had the opportunity and read the draft judgment of my learned sister, Obura, JA; with which I fully agree that the appeal is devoid of any merit and must be dismissed. Since Egonda-Ntende JA also agrees, orders are hereby made in the terms proposed by Obura JA.

Dated, signed and delivered at Kampala this ^{30th} day of ^{May} 2019



Alfonse C. Owiny - Dollo

Deputy Chief Justice