

5

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION No. 368 OF 2019

(ARISING OUT OF CIVIL SUIT NO. 201 OF 2019)

10 **INTERNATIONAL TIN ASSOCIATION LIMITED ::::::::::: APPLICANT**

VERSUS

KERILEE INVESTMENTS LIMITED ::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING:

15 International Tin Association Limited (*hereinafter referred to as the*
“Applicant”) brought this application against Kerilee Investments
Limited (*hereinafter referred to as the “Respondent”*) under Order 9
Rule 3 (1) (2) and (3) of the Civil Procedure Rules S.I 71 -1(CPR);
seeking the dismissal of HCCS No.0201 of 2019 filed by the
20 Respondent, for want of jurisdiction by this court; and that costs of
this application be provided for. The grounds of the application are
contained in the background below.

The Applicant was represented by Mr. Oundo Bernard jointly with
Ms. Shamir Lwanga, while the Respondent was represented by Mr.

5 Wilfred Nuwagaba. Counsel for the parties made oral submissions which court has taken into consideration in this ruling.

Background:

On 14/5/2019 the Respondent filed HCCS No. 0201 of 2019 against the Applicant. Subsequently, on 20/5/2019 the Respondent
10 sought and obtained orders to serve summons on the Applicant out of jurisdiction. The summons was duly served on to the Applicant/defendant who filed a notice of intention to defend the proceedings and the instant application putting the Respondent and court on notice that that this court lacks jurisdiction over the
15 defendant and/or the subject matter of the suit. The defendant proceeded and filed the instant application under Order 9 r.3 CPR seeking for a declaration that this court lacks the jurisdiction in the matter.

The grounds of the application for disputing the jurisdiction are
20 that the suit was filed in this court in a jurisdiction where the Applicant does not reside and/or from where the cause of action did not arise. That both the Applicant and Respondent are not residents of Uganda but rather in the United Kingdom (UK). That

5 the alleged cause of action, which is defamation, arose in the UK as
it was by the e-mails sent out to current members of the
International Tin Association. Further, that the agreement between
the two parties specifically states that in case of any dispute arising
between them from operation of the agreement, it would be
10 exclusively handled by courts in the UK. That by the Applicant
objecting to jurisdiction of this court does not seek to defeat justice
by having the matter heard in the UK as similar legal regime exist
in the UK as that in Uganda. That it is more convenient for the
matter to be heard in the UK as witnesses from both reside in the
15 UK. That the Applicant has not voluntarily submitted to jurisdiction
of the Uganda High Court as to defeat the jurisdiction clause in the
contract.

The Respondent filed an affidavit in reply sworn by John Wambi the
Respondent's General Manager in Uganda opposing the application.
20 He essentially states that this being a claim in defamation, the law
applicable is Section 14 of Civil Procedure Act Cap 71, in respect of
suits for compensation of wrongs done to persons; and that
jurisdiction is a choice by the plaintiff especially if the wrong was

5 done within the local jurisdiction of court and the defendant works
and or resides in another jurisdiction. That the critical issue for
consideration is compensation and where the defendant resides or
carries on business or works for gain. That in this case the
Applicant focuses its business in four countries in the Great Lakes
10 Region including Uganda.

That from the pleadings, the Respondent's business is to maintain
supply chain of minerals and the basis of the suit was focused on
minerals coming from Uganda in a place called Nyamuliro in the
Rubanda County. That two containers were shipped from Uganda
15 destined for the consignee, and the Applicant which does its
business in Uganda, made reports regarding alleged incidences in
Uganda. That, therefore, within the term of Section 14 CPA (supra)
the wrongs complained of emanate from Uganda and the defendant
carries on business in Uganda.

20 Further, that whereas the alleged defamation took place in the UK
and the IP address used in the alleged defamation is in the UK, the
information disseminated was as a result of the Respondent
conducting of business in Uganda and in the Great Lakes Region.

5 That just because the IP address is in the UK, is irrelevant since
information can be disseminated from anywhere. That the
territorial jurisdiction is, therefore, within the jurisdiction of this
court. In addition, that whereas both parties reside in the UK and
are registered as foreign companies in Uganda, the Respondent
10 does its business as a mineral dealer in Uganda. Counsel for the
Respondent maintained that the head suit is, in any case, not
based on contract that but an action in defamation. That even the
alleged contract is not signed by the Respondent and it runs only
for one month having expired on 14/7/2014 and thus cannot now
15 be unenforceable.

Regarding the issue of the witnesses all being based in the UK,
counsel for the Respondent argued that Sections 14 and 15 CPA do
not make the convenience of the parties particularly of the
residence of witnesses one of the grounds of jurisdiction of court.
20 That the Respondent/plaintiff has a choice of where to sue.

Furthermore, on the applicability of English law, that whereas some
aspects apply in defamation in Uganda, it does not qualify as a
condition for determination of jurisdiction under the CPA. That the

5 claim is for doing business in Uganda for which the Respondent
claims violation of is in the Ugandan law and not the UK law. That
in light of the aspects of the Mining Act, Penal Code and considering
Section 14 CPA and all the pleadings, this court has the jurisdiction
to hear the matter and determine the mater. Counsel for the
10 Respondent argued that this application be dismissed with costs.

Opinion:

The application is brought pursuant to Order 9 r.3 (1)(g) which
provides for a party disputing the jurisdiction of court and the
remedy thereof, as follows;

15 ***“3. Dispute as to jurisdiction.***

***(1) A defendant who wishes to dispute the jurisdiction of
the court in the proceedings by reason of any such
irregularity as is mentioned in rule 2 of this Order or on
any other ground, shall give notice of intention to defend
the proceedings and shall, within the time limited for
20 service of a defence, apply to the court for—***

5

(g) a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action;...”

10

The jurisdiction of the High Court is conferred by the Constitution under Article 139 (1) thereof, as follows;

“139. Jurisdiction of the High Court.

15

(1) The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.”

In choosing where to file a suit for compensation for the wrongs to persons, which includes but is not limited to suits in defamation such as in the instant case, the suits are governed by Section 14 CPA which provides as follows;

20

“14.Suits for compensation for wrongs to person or movables.

5 ***Where a suit is for compensation for wrong done to the
person or to movable property, if the wrong was done
within the local limits of the jurisdiction of one court and
the defendant resides, or carries on business, or
personally works for gain within the local limits of the
10 jurisdiction of another court, the suit may be instituted
at the option of the plaintiff in either of the courts.”***

Section 15 CPA further provides that,

***“Other suits to be instituted where defendants reside or
cause of action arises.***

15 ***Subject to the limitations in section 11 to 14, every suit
shall be instituted in a court within the local limits of
whose jurisdiction—***

20 ***(a) the defendant or each of the defendants, where
there are more than one, at the time of the
commencement of the suit, actually and voluntarily
resides, or carries on business, or personally works
for gain;***

5 ***(b) any of the defendants, where there are more than***
one, at the time of the commencement of the suit,
actually and voluntarily resides, or carries on
business, or personally works for gain, if in such
case either the leave of the court is given, or the
10 ***defendants who do not reside or carry on business,***
or personally work for gain, as provided in
paragraph (b), acquiesce in that institution; or

(c)the cause of action, wholly or in part, arises.”

Courts have laid down circumstances which ought to be taken into
15 account in establishing the right forum for parties to institute their
actions. In ***Prof. Egbert De Smet vs. Juliet Nakassanga HCCS***
No. 387 of 2011 (Commercial Court) citing the case of ***CMA CGM***
Uganda Ltd vs. M/S H. Ssekatawa International Limited HCCS
No. 27 of 2013, the issue arose as to whether courts in Uganda
20 had jurisdiction by virtue of the fact that a contract was performed
in Uganda. The court held that the following ought to be taken into
account;

- 5 a. *In what country the evidence on the issue of fact is situated
or more readily available and the effect of that on the relative
convenience and expense of trial between the Uganda Courts
and the French Courts.*
- 10 b. *Whether the law of the foreign courts applies and if so,
whether it differs from the Uganda law in any aspect*
- c. *With what country either party is connected and how closely*
- d. *Whether the defendant genuinely desire trial in the foreign
country or are only seeking procedural advantage.*
- 15 e. *Whether the plaintiffs would be prejudiced by having to sue
in a foreign country.*

In coming to the above particular relevant circumstances, the court was relying also on the case of ***Donohue vs Armico Inc. & Others [2001] 1 Lloyds Rep. 425 at pp. 432-433.***

20 In the instant case, it is not in dispute that both the Applicant and Respondent companies are incorporated in the UK. The Respondent is also registered in Uganda as a foreign company. The perusal of the pleadings shows that the Respondent company after instituting HCCS No. 201 of 2019, had the onus of applying to serve

5 the summons on the Applicant out of jurisdiction. The process server, one Okiria Peter who served the summons, also had to do so on the Applicant/defendant through *DHL Express Uganda*, a shipment company, to transport the court papers for service on the Applicant/defendant to the UK.

10 In paragraph 6 of the affidavit of service, the said process server states that the documents were duly received by one Kren on behalf of the Applicant/defendant in the UK. Therefore, whereas the High Court in Uganda is more readily available to the Respondent/plaintiff in this matter and whereas indeed jurisdiction
15 is choice by the plaintiff pursuant to Section 14 CPA, and the courts in Uganda do possess competent jurisdiction, the circumstances of this particular case do not render the courts in Uganda the appropriate forum for the trial of the matter and for the case to be tried more suitably for the interests of the parties and the
20 ends of justice. The reasons for the this finding are not difficult to find.

The Applicant/defendant is registered in the UK and its address is clearly stated as such in the plaint in paragraph 2 as being

5 exclusively in the UK. Similarly, the Respondent is also registered
in the UK and its address is stated as such in paragraph I of the
plaint, with the slight difference being that for purposes of its
business operations, it is also registered in Uganda as a foreign
company. That meets the first criterion in the ***Donohue vs Armico***
10 ***Inc. & Others*** case (supra) of what country the evidence on the
issue of fact is situated or more readily available and the effect of
that on the relative convenience and expense of trial between the
Uganda courts and the UK courts. Clearly, the most convenient
forum for the trial of this matter would not be the Uganda courts
15 but the UK courts.

The second point relates to the fact that both parties have an
agreement whereby the Respondent is a member, and by
Declaration of Accession to the Membership of the Applicant's
programme, undertook to be bound by the terms of the agreement.
20 The Respondent through its Chairman, Mr. Brian Edwards Becket,
duly endorsed the agreement on 14/01/2014 (*Annexure B1* to the
affidavit in rejoinder). Therefore, Respondent's argument that the

5 agreement is not endorsed or that it lapsed and was never renewed
appears not to be correct; at least from the evidence on record.

The record shows that the agreement provisional period is 1st April
2011 – 30th September 2011, after which parties would be expected
to sign the full and finalized Programme Agreement. The *Declaration*
10 *of Accession to ITSCI Membership Programme* was signed between
the parties on 14/01/2014. Therefore, while the original provisional
clauses may have lapsed, new undertakings were made
subsequently by the parties on basis of the earlier clauses, and the
Respondent became a full member by the terms of the agreement.
15 The agreement is still binding until otherwise agreed and provided
by the parties thereto.

In *Clause 14* of the said Agreement, the parties provided for dispute
resolution and jurisdiction. Specifically, under *Clause 14.1*, the
resolution of disputes was provided for in the first instance to be an
20 amicable settlement between the parties. Disputes concerning
matters between the organization (including the Respondent) with
the operational system of the Applicant would be referred to as a
final recourse to the *Ombudsman* as outlined in *Section 6.7* of the

5 agreement. In *Clause 14.2*, the governing law is stated to be exclusively English Law and the jurisdictional venue for the dispute shall be the competent courts of England and Wales.

The position of the law in such circumstances is well established.

In ***Raytheon Aircraft Credit Corporation & Another vs. Air Al-***
10 ***Faraj Limited [2005] 2 EA 259*** which also relied on the ***Donohue vs Armico Inc. & Others*** case(supra) it was held that;

“where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in the non-
15 ***contractual forum discharges the burden cast on him showing strong reasons for suing in that forum.”***

In my view, the existence of the exclusion of jurisdiction clause in the parties’ agreement, coupled with the other factors that both parties are registered in the UK and the Applicant is exclusively
20 domiciled in the UK for its operations makes the UK courts the appropriate forum to hear and determine this matter.

5 This court has also taken into account the fact that the cause of
action, based in defamation, arose outside Uganda and hence the
subject matter of the dispute is outside the jurisdiction of this court.
The two emails in issue as stated in the Respondent's plaint, clearly
were sent to all members of which the Respondent is one such
10 member, and the same were sent from e-mail address whose
Internet Portal Address (IP Address) is also registered in the UK.
Therefore, for all intents and purposes, the alleged cause of action if
any, arose outside the jurisdiction of Uganda courts. Most
importantly, the law in England and Wales applies and it being
15 common law does not differ from Ugandan Law in any material
respect. This too meets the criterion as to whether the law of the
foreign courts applies and if so, whether it differs from the Uganda
law in any aspect. The law in the UK courts applies with no
material difference from the law in Uganda, or at all.

20 The other consideration is with what country either party is
connected, and how closely. From the facts of this case, both
parties are more closely connected to the UK than they are to
Uganda. As already noted, both are registered in the UK and

5 domiciled and ordinarily carry on their business in the UK. The Respondent is only registered in Uganda as a foreign company for purposes of carrying out the business of mining, but the business relationship between both parties strongly lies in the UK where the subject matter of the dispute arose from, and is by agreement of the parties regulated by the English law and courts.

10 It has also not been rebutted or shown otherwise by the Respondent that the Applicant is not genuinely desirous of trial in the UK or that it only seeks procedural advantage in seeking to have the trial in the UK. All factors of this case taken together favour a trial in the UK for both parties. There would be no procedural advantage to be derived in any way by the Applicant in having a trial in the UK forum. Similarly, there is nothing to suggest on the pleadings or otherwise, that any prejudice would be occasioned to the Respondent by having to sue in the UK courts. As already observed, it is advantageous for both parties to have their dispute resolved in the UK courts under the law and forum agreed exclusively in the parties' own agreement. This court can only, at the very best, give effect to the parties' intention in that regard.

5 Apart from the above, this court is also acutely aware alive to the
fact that the source of the dispute concerns the mineral shipments
from Uganda where the Respondent operates its business, among
other countries in the Great Lakes Region. However, it is not the
minerals which are the subject matter of the suite. The subject
10 matter of the suit is the alleged defamation. The tort of defamation
ordinarily concerns the character and reputation of a person. The
objects in which that person ordinarily deals in for business do not
define a person's character or reputation. Therefore, a clear
distinction is must be drawn between the alleged defamation of the
15 Respondent by Applicant which arose from the UK, concerning the
Applicant's business in mineral shipments originating from Uganda.
Although the alleged defamation was disseminated internationally
against the Respondent, the alleged tortious act arose in the UK
where both parties are ordinary resident, carry on business for gain
20 and are duly registered as legal persons. It is their home country.

Therefore, the application is allowed and HCCS No.0201 of 2019 is
dismissed. Each party shall bear its own costs.

BASHAIJA K. ANDREW

JUDGE
29/04/2020.