THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[*CORAM: ARACH-AMOKO, MWANGUSYA, OPIO-AWERI, MWONDHA, TIBATEMWA-EKIRIKUBINZA*]

CIVIL APPEAL NO 03 OF 2017

UGANDA TELECOM LTD:: APPELLANT

VERSUS

ZTE CORPORATION:: RESPONDENT

[***Appeal from the judgment of the Court of Appeal (Kasule, Egonda – Ntende, Cheborion Barishaki, JJA) in Civil Appeal No. 0197 of 2015 dated on the 1st December, 2016]***

JUDGMENT OF M.S.ARACH-AMOKO , JSC

This is a second appeal to this Court from the decision of the Court of Appeal in which the court upheld the Ruling of the High Court and dismissed the appellant's appeal with costs.

The relevant facts that have given rise to this appeal are as follows:

The appellant and respondent were defendant and plaintiff, respectively, in the High Court. The respondent filed HCCS No. 169 of 2013 at the Commercial Division against the appellant claiming USD 6, 738, 272. 38 for breach of contract.

The appellant denied the claim in its written statement of defence and raised a preliminary objection that the respondent's plaint did not disclose a cause of action because the respondent did not have any contractual relationship with the appellant. Therefore, the respondent had no *locus standi* to bring the suit. The appellant prayed that the plaint be struck out with costs for that reason.

Counsel for the respondent opposed the preliminary objection and contended that the plaint disclosed a cause of action against the appellant.

The learned High Court Judge heard the arguments on the said preliminary objection and ruled that it could not be resolved on the basis of the pleadings alone because it required more factual matters to be clarified. As a result, he stayed the decision on the preliminary objection until after he had heard evidence in the matter.

The appellant's appeal to the Court of Appeal against that decision was unsuccessful. The Court of Appeal held that the plaint disclosed a cause of action and ordered that the file be remitted to the High Court for hearing.

Grounds of Appeal

The appellant was dissatisfied with the decision of the Court of Appeal and appeals against part of the decision and judgment of the Court of Appeal on the following grounds:

The learned Justices of the Court of Appeal erred in law and in fact by holding that:

(a) The learned trial judge had discretion to defer the Ruling on whether the plaint disclosed a cause of action under Order 7 Rule 11 of the Civil Procedure Rules until after hearing more evidence.

(b) By holding that the authority of Attorney General vs. Major General David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997 was applicable.

The appellant prayed that:

a) **e appeal be allowed.**
b) **The judgment of the Court of Appeal be set aside.**
c) **The judgment of the High Court be set aside and substituted with an order directing that the trial judge makes a ruling on the preliminary objection on the basis of the plaint and its annextures only.**
d) **The appellant be awarded the costs of this appeal and in both the courts below.**

Representation

The appellant was represented by Mr. Kibuuka Rashid and Mr. Terence Kavuma represented the respondent. They adopted the written submissions that they had filed in court and made brief oral clarifications when they appeared before court.

Submissions of Counsel

Ground (a):

Counsel for the appellant referred to the judgment of the Court of Appeal where the learned Justices made the following finding:

"The learned trial judge was attacked for not deciding the objection raised by the appellant forthwith and putting it off until the hearing or partial hearing was done. We are satisfied on review of the available authorities that this was a matter for the judge's discretion. It is possible that another judge may have ruled on the matter immediately rather than defer the decision on the point raised. It is a matter for the discretion of the trial court. This was the holding in Attorney General Vs. Major General David Tinyefuza (supra). We are unable in the circumstances to fault the learned trial judge."

He submitted that the learned trial judge as well as the Justices of the Court of Appeal misconstrued the law when they held that the trial judge had absolute discretion to stay a preliminary objection. His contention is that the trial judge does not have absolute discretion. He has discretion but it must be exercised judiciously based on reasons that have a basis in law and not any other reason.

Learned counsel argued that once the judge takes a decision that he will hear the preliminary objection and determine it along with the other points in the case and he gives reasons for doing that, then that reason must have a basis in law.

In this case, learned counsel contended the reason given by the trial judge was that he wanted to hear evidence in respect of the issue whether the plaint discloses a cause of action under Order 7 Rule 11 of the Civil Procedure Rules. This was prohibited by not only the chain of authorities he cited but the Rules as well. Counsel insisted that in order to determine whether a plaint discloses a cause of action under Order 7 Rule 11, only the plaint and its annextures must be considered. He relied on **N.A.S Airport Ltd versus Attorney General of Kenya [1959] EA 53 and Wycliffe Kiggundu vs. Attorney General, Civil Appeal No. 27 of 1992 (SC)** that was quoted with approval by Twinomujuni JA, in **Mulindwa Birimumaso vs. Government Central Purchasing Corporation , CA Civil Appeal No. 03 of 2002.)**

Ground (b)

Regarding the second ground, Counsel submitted that, whereas he was in agreement with the holding in **Attorney General Vs. Major General David Tinyefuza , Constitutional Appeal No. 1 of 1997** that it is a judge's discretion to defer a ruling on a preliminary objection raised, however, that discretion must be exercised judiciously, that is, on

fixed principles. Otherwise the appellate court has power to interfere with the exercise of discretion by a trial judge. He relied on the statement by Newbold, P. in **Mbogo vs. Shah [1968] EA 93** that was quoted with approval in **Uganda Development Bank vs. National Insurance Corporation & Anor, SCCA No. 28 of 1995** to the effect that:

"… a Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."

Counsel for the respondent on the other hand supported the decision of the trial Judge as well as that of the Court of Appeal. He submitted that the learned Justices of the Court of Appeal had made a specific finding in their judgment that the plaint in High Court Civil Suit No. 169 of 2013 disclosed a cause of action. That the said finding effectively disposed of the preliminary objection on whether the suit disclosed a cause of action.

With respect to the first ground, counsel maintained his argument that the trial judge's decision to defer the ruling on the preliminary objection was within his discretion under Order 6 Rule 28 of the Civil Procedure Rules that gives court discretion to dispose of a point of law at or after the hearing.

On the second ground, counsel contended that the authority of **Attorney General Vs. Major General David Tinyefuza (supra)** is applicable because the ground of appeal that was determined by the Supreme Court was similar to the one in the instant case. The learned Justices of Appeal

could not for that reason be faulted for relying on it when they determined the appeal before them.

His prayer was that the appeal should be dismissed with costs here and in the courts below and the matter be referred to the High Court to be heard on its merit.

In his brief rejoinder and oral highlight in court, counsel for the appellant reiterated his arguments and asserted that the appellant was aggrieved because the reasons that the trial judge gave which were accepted by the learned Justices of the Court of Appeal when he stayed the preliminary objection under Order 7 Rule 11 in order to hear more evidence before determining the point of law had no basis in the law. He prayed that the decision of the learned trial judge be set aside and the appeal be allowed.

Consideration of the Grounds by Court

Ground 1(a)

The complaint under this ground is that the learned Justices of the Court of Appeal erred in law and in fact by holding that the learned trial judge had discretion to defer the Ruling on whether the plaint disclosed a cause of action under Order 7 Rule 11 of the Civil Procedure Rules until after hearing more evidence.

Order 7 rule 11 reads as follows:

"11. ***Rejection of plaint***

The plaint shall be rejected in the following cases:

(a) Where it does not disclose a cause of action;"

The law is settled. According to Order 7 Rule 11, the court looks at the plaint and any annextures only to determine whether a plaint discloses a

cause of action or not and the learned Justices of the Court of Appeal rightly pronounced themselves on this point in the following very clear statement:

" We agree with Mr. Kibuuka that in determining whether or not a plaint discloses a cause of action under Order 7 Rule 11 of the Civil Procedure Rules, one need not go beyond the plaint and its annextures. One has only to look at those documents to determine whether or not a cause of action arises or not.(sic). We are in agreement with the decision of this court in Mulindwa Birimumaso v Government Central Purchasing Corporation (supra).

Learned counsel for the appellant has supported this position in the authorities he has cited above.

It is also common ground that a trial judge has discretion to dispose of a point of law including the one that the plaint does not disclose a cause of action at any time at or after the hearing. The bone of contention is the stage at which the judge should make the ruling and the reason or reasons for such a ruling.

As far as the stage at which the court is required to rule on a preliminary objection is concerned, the relevant rules of procedure appear to leave the question to the discretion of the Court. The relevant part is found in Order 6 Rules 27, 28 and 29 which provide that:

"27. Any party shall be entitled to raise by his pleading any point of law, and the point of law so raised shall be disposed of by the Court at or after hearing.

Provided that the consent of the parties or by order of the Court or application of either party, the same may be set down for hearing and disposed of at any time.

28. Any party shall be entitled to raise any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except by consent of the parties , or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.

29. The Court may, upon application, order any application or pleading to be struck out on the ground that it discloses no reasonable cause or answer and in any case , or in case of the suit or defence being shown to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just. All orders made in pursuance to this rule are appealable as of right."

This same issue arose in the **Tinyevuza** case. The first issue was whether the petition disclosed a cause of action. The Constitutional Court did not rule on that objection immediately after hearing the arguments of counsel from both sides. The record of learned Manyindo, D.C.J indicates the decision on the course adopted by the court as follows:

"We will proceed to hear the case on merits and we shall rule on the objection in the judgment."

In their subsequent judgments, each of the learned Justices of the Constitutional Court gave a reasoned ruling on the objection to the effect that the petition as presented disclosed a cause of action.

In their appeal, it was contended before the Supreme Court that the learned Justices of the Constitutional Court erred to have proceeded that way. It was argued that the Constitutional Court ought to have first ruled on the preliminary objection before proceeding to hear the merit of the petition because the objection if upheld and the petition disposed of

at that stage, time and costs would have been disposed. Reliance was placed on what Romer L.J said in **Everet v Ribbands and Another (1952) 2 QB 198 at page 206** that:

" … I think where you have a point of law which , if decided one way, is going to be decisive of litigation, then advantage ought to be taken of facilities afforded by the Rules of Court to have it disposed of at the close of the pleadings".

Kikonyogo J.S.C, as she then was, held that:

"…It is not mandatory for a court of law to make a ruling immediately the objection is made. In my view, the court is at liberty to make it at any stage it finds convenient to it including deferring it to judgment as it was done in this case."

Tsekooko JSC held as follows:

"I think that where a preliminary objection is raised at the beginning of the trial, it is prudent to give reasons for or against the objection before the trial proceeds. The matter is discretionary. Reasons may be given either before the beginning of the case or in the judgment after conclusion of the hearing. <u>Certainly where the trial judge is satisfied that the objection is such that upholding it would conclude the case, it would be an exercise in futility to postpone giving reasons until after hearing the case. That is when the judgment of Romer L.J in Everret vs. Ribbands (1952) 2 QB 198 … becomes relevant</u>

I think that the learned judges did not on the facts err when, instead of making a formal ruling with reasons, they postponed giving of the reasons which they subsequently gave in their judgment." (Underlining is added for emphasis).

Oder JSC after referring to the relevant rules of procedure namely Order 6 rules 27, 28, and 29, held as follows:

"In my view, the effect of the rules under Order 6 referred to appears to be this: the defendant in a petition may raise a preliminary objection before or at the commencement of the hearing of the suit or petition that the plaint or petition discloses no reasonable cause of action. After hearing the arguments (if any) from both parties the Court may make a ruling at that stage, upholding or rejecting the preliminary objection. The Court may also defer its ruling on the objection until after the hearing of the suit or petition. Such a deferment may be made where it is necessary to hear some evidence to enable the court to decide whether a cause of action is disclosed or not. I think that this is a matter of discretion of the Court as regards when to make a ruling on the objection. No hard and fast rule can and should be laid to fetter the Court's discretion. The exercise of the discretion must, in my view depend on the facts and circumstances of each case." (underlining is added for emphasis)

Wambuzi, C.J held that:

"It has not been shown that this course was wrong in law. True, time and costs could have been saved but only if the objections had been upheld and the case did not proceed to trial. Sometimes a decision on a preliminary matter may depend on the evidence. I am unable to find fault with the course adopted by the Constitutional Court particularly, as the objections were overruled."

I respectfully share the same view and in the circumstances of the instant case, I agree with the finding of the learned Justices of the Court of Appeal that the trial judge had the discretion to dispose of the

preliminary point raised by the appellant either at or after the hearing. He chose the latter and gave his reasons.

From the submissions by learned counsel for the appellant, he also agrees with this position of the law. His complaint is, however, that the reasons given by the learned trial judge for staying his ruling on the preliminary objection offended Order 7 rule 11 of the Civil Procedure Rules. The judge stated in his ruling that he wanted to hear more evidence. Here, I agree with counsel for the appellants that the learned judge did not have the power to look for evidence other than the plaint and its annextures. This is because, as stated earlier that, in order to determine whether or not a plaint discloses a cause of action, the court must look only at the plaint and its annextures if any, and nowhere else. Where the court considers irrelevant matters in determining a cause of action, it shall be set aside. (See**: Mulindwa Birimumaso vs. Government Central Purchasing Corporation, CA Civil Appeal No. 2 of 2002).** The reason given by the learned judge for staying the ruling on the preliminary objection was accordingly erroneous and cannot stand.

Nonetheless, the learned Justices of the Court of Appeal in their wisdom went ahead and thoroughly examined the plaint and the annextures thereto and came up with the conclusion in their judgment that:

"In spite of the sloppy and indisputable careless drafting of the plaint a cause of action is made out upon which this action can be fought. The respondent/plaintiff cannot rely on the agreement to which it was not a party, at least not as presently shown on the plaint and its annextures but there are other facts disclosed which assert an agreement and a relationship between the appellant and the respondent. The appellant ordered goods and services from the respondent. Those goods and services were supplied by the respondent.

The appellant undertook in writing to pay for those goods and services. He defaulted on that payment agreement. The other party to that agreement, the plaintiff / respondent has sued on it for payment. We are satisfied that the matter goes for trial. It may be necessary for the plaintiff to amend his plaint in order to ensure that all matters in controversy between the parties are fully heard and determined." *(*Underlining was added for emphasis)

I have also examined the plaint and its annextures and I agree with the findings of the learned Justices of the Court of Appeal that the plaint discloses a cause of action especially on the basis of the copies of the Local Purchase Orders and the Repayment Agreement annexed to the plaint indicating that the appellant had actually issued the said LPOs to the respondent in respect of the goods the subject of the suit and had executed the Repayment Agreement with the respondent undertaking to pay for the goods in issue. I am fortified by the guideline given in the unanimous decision of the Supreme Court in **Tororo Cement Co. Ltd. Vs. Frokina International Ltd, SC Civil Appeal No. 2 of 2001** addressing a similar preliminary where Tsekooko JSC, who wrote the lead judgment quoted with approval the following statement by SPRY, V.P. in **Auto Garage & Anor vs. Motokov (No. 3) [1971] EA 514 at page 519:-**

" I would summarise the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that right has been violated and the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment."

In the instant case, the plaint read together with its the annextures clearly alleges that the plaintiff/respondent enjoyed the right to payment as the supplier of the goods and services in question and the

defendant/respondent had violated that right when he failed to pay for the goods even after executing a Repayment Agreement with the plaintiff/respondent. Therefore, the defendant/appellant is liable.

I further share the view expressed by the Court of Appeal that if there are any defects or omission in the pleading by the respondent, these could be cured by amendment before commencing the trial.

I would, in view of the above, not fault the Court of Appeal when it concluded that the learned trial judge had the discretion to stay the ruling on the preliminary objection and when they held that the plaint disclosed a cause of action.

In the result, ground (a) must fail.

Turning to ground (b) where the appellant contended that the learned Justices of the Court of Appeal erred when they relied on the authority of **Attorney General Vs. Major General David Tinyefuza (supra)** since it was inapplicable, I agree with the submission by counsel for the respondent that the learned Justices of the Court of Appeal cannot be faulted for relying on the said authority since the Supreme Court was determining a similar point of law in that case.

In view of the above reason, ground (b) must fail as well.

I would, in the circumstances, uphold the decision of the Court of Appeal and order as follows:

1. This appeal is dismissed with costs here and in the Court of Appeal.

2. The file shall be immediately remitted to the High Court for hearing on merit before another judge.

Dated at Kampala this …….day of October, 2017

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M.S.ARACH-AMOKO,

JUSTICE OF THE SUPREME COURT