

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)**

MISCELLANEOUS CIVIL APPLICATION No. 0189 OF 2021

(Arising from Civil Suit No. 0723 of 2020)

1. NIGEL J. TILLING }
2. PAUL MOORES } **APPLICANTS**

VERSUS

MEERA INVESTMENTS LIMITED RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The respondent sued the applicants jointly with M/s FBW (U) Limited, a company providing architectural services, in which they are directors. The respondent claims general and special damages for breach of a contract for the provision of architectural services for the extension of “Kabira Country Club Service Apartments.” In their joint written statement of defence, the applicants denied having executed any contract with the respondent and contended that the respondent has no cause of actions against the two of them. They contended further that the contract was between the respondents and M/s FBW (U) Limited and did not comprise the aspects the respondent claims were breached. They averred that M/s FBW (U) Limited duly executed its obligation under the contract and therefore the suit is misconceived.

b. The application.

This application is brought under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil procedure Act*, Order 6 rules 28, 29 and 30; Order 7 rules 1, 11 and 14 and Oder 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicants seek a declaration that the respondent has no cause of action against any of them, hence the suit against them should be dismissed with costs.

By way of the 2nd respondent's affidavit in support of the application, the applicants contend that none of them executed any contract with the respondent. The contract instead was with M/s FBW (U) Limited and it is to that company that the respondent made payments. In the plaint, the respondent does not seek to lift the veil of incorporation and therefore as directors of that company they cannot be held personally responsible for its contractual obligations.

c. Affidavit in reply.

By way of an affidavit sworn by the respondent's General Manager, Mr. Amit Kumar, the respondent opposes the application. The respondent contends that the applicants were jointly sued for breach of professional duty and undertaking, together with the company under which they offer their architectural services, against which they claim a breach of contract. Execution of the contract with M/s FBW (U) Limited was premised on representations made on its behalf by the two applicants regarding their individual professional skill and competencies as licenced architects. Execution of the contract depended on exercise of the applicant's individual professional skill and competencies as licenced architects. That the services are offered under a corporate arrangement did not absolve them of those responsibilities and duties, for which they can be held personally accountable.

20d. Submissions of counsel for the applicants.

M/s MMAKS Advocates submitted that Paragraph 5 (iii) of the plaint alleges breach of duty which duty cannot arise outside a contract. They did not plead sufficiently the contextual circumstances. They pleaded a contract with the 1st defendant. They have no separate contract with the applicants. There must be an underlying contract. In *Valentine Opio v Eliana enterprises, CA No. 2 of 2014 (K)* at page 3 deals with contractual liability. At page 4 without stating the wrongs committed by the applicants, the plaint does not implicate them. In *Victor Mbichi v Natalie CA. No. 247 2005* para 22 at page 11 without disclosing contractual relations with the director someone who has contracted a company cannot sue the directors. The plaint does not plead a contract between the respondent and the applicants

e. Submissions of counsel for the respondent.

M/s Ssemambo and Ssemambo Advocates together with M/s Magna Advocates submitted that professional liability was incurred although there was no independent contractual relations. In
5 paragraph 2 of the plaint it was pleaded that two applicants practice with the 1st defendant. They owe a duty of care to both the company and the clients of the company. Sections 9 and 31 of *The Architects Registration Act*. Reasonable proximity is pleaded in paragraph 6 (iv) of the plaint and the provision of professional services is not amenable to incorporation At common law as well. In
10 *Kigga Lane Hotel Ltd v. UEB, HCT CS No. 0557 2004* and *DFCU Bank Ltd v. Mukiibi, HCCS 195 of 2012* it was held that action could be maintained subject to proof. We have pleaded sufficient particulars that demonstrate the proximity between the applicants, the 1st defendant and the respondents. The policy issue guides common law. The American case *AR Moyer Inc. v Brian S.C Florida 1973 285 so.2d.* at page 6 is to the effect that absence of privity is not a bar to liability

15f. The decision.

Traditionally, the practice of some professions such as law, medicine, accounting and others is through general partnerships or sole practice. These practice formats render all members in the firm personally liable for all obligations of the practice, including one another's professional lapses
20 or misconduct. By convention, corporate practice of these profession is more or less prohibited because regulation of the practice of the practice of these professions currently contemplates practice only by individuals, and as such; (i) corporations are ineligible for a license to practice those professions; (ii) the personal relationship between the professional and client is unsustainable by a corporation; (iii) the prospect of the professional's conflicting duties to corporation and client;
25 and (iv) the lack of professional discipline over the corporation. As a result, shielding of the professional from joint and several malpractice liability is not countenanced.

Providing architectural services under a practice association other than a general partnership, in which partners share unlimited liability, but under a private limited liability company structure, in
30 which members are no longer jointly and severally liable, poses quality control risks to clients. The joint and several liability feature of a general partnership protects clients in two ways. First, it

provides incentives for partners to monitor the quality of services offered. Second, since it operates on an “all for one, one for all” basis, holding partners jointly and severally liable maximises clients' recovery in malpractice suits. The interests of the professionals in limiting their liability potentially conflicts with the interests of the client in unlimited liability of the professionals in the event of a malpractice claim.

The underlying rationale of the ban against limiting malpractice liability is that a member of the profession who handles the affairs of his or her client properly has no need to attempt to limit his or her liability for his or her professional activities and one who does not handle the affairs of his or her client properly should not be permitted to do so. By virtue of that provision, a professional may not attempt to exonerate himself or herself from or limit his or her liability to his or her client for his or her personal malpractice, nor for that of anyone supervised by the professional.

Section 47 (1) of *The Partnership Act, 2010* allows for the formation of limited liability partnerships. According to section 2 (2) thereof, where a partnership is formed for the purpose of carrying on a profession, the number of professionals, which constitutes the partnership may not exceed fifty. Section 4 (1) of *The Companies Act, 2012* on the other hand provides that;

Any one or more persons may for a lawful purpose, form a company, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.

The implication is that restrictions may only be imposed by provisions concerning professional regulation. However, *The Architects Registration Act* has no provision restricting architects from practicing under a limited liability corporation. On the other hand, *Second Schedule* thereto imposes restrictions related only to persons who may practice under an association as follows;

10. No architect shall share or agree to share fees nor shall he or she enter into partnership in regard to architectural work with any person other than another architect.

It is generally acknowledged that in preventing professionals from attempting to limit personal liability to their own clients, the codes of professional practice do not expressly or implicitly pre-

vent professionals from organising their practice as a limited liability partnership, limited liability company, or professional corporation in order to limit their personal liability for misconduct committed by other professionals in the firm. The limited liability status in that context should be interpreted to allow professionals in professional corporations to limit their vicarious liability for acts and omissions of “associates” in which they had no involvement and over which they have no control. It limits their vicarious liability for an “associate's” malpractice, as opposed to their “personal” or direct liability. A case could also be made out that if the members communicate to clients and prospective clients that all partners will stand behind one another's work product, the members of the company should be estopped from relying on the liability shield.

Absent an express statutory provision dealing with the issue, or any sufficiently related decisions by courts within jurisdiction that definitely indicate which of two contrary reasonable positions presented by the parties should have favourable judgment upon the facts found to be correct, it becomes a policy determination for the court. Policy matters are considerations based upon social or practical or equitable reasons why a court should decide a present controversy in a given manner; as contrasted with purely statute bases or legal arguments based upon the wording of a statute. In situations of this nature not only must the court consider the equities of the present case but also the needs of the community at large. The justice the court attempts to render must be accomplished within the framework of the judicial system and subject to the discipline of the judicial craft, which permits discretionary judicial choice only in the absence of legislative policy or of prior binding precedent or of a clear answer to the present litigation deduced either from legislative provisions or prior precedent or both.

On a conceptual level though, a court may require the client to prove that the conflicting interest inherent in the limitation on vicarious liability prevented the architect from providing competent representation, proximately causing the client's injury. On the other hand, clients could seek to hold all partners personally liable, arguing that the liability arose out of the single engagement agreement. A court could consequently reject the liability shield, concluding that as a matter of professional responsibility, partners in a partnership or limited liability company should remain jointly and severally liable for acts and omissions by firm or company actors. Furthermore, depending on the facts of the case, aggrieved clients could assert constructive fraud claims (the

breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests) and seek the lifting of the veil under section 20 of *The Companies Act, 2012*.

5 The case could as well turn on the consideration of client expectations. Reasonable perceptions of the lay public and the average client may be that all of the tasks associated with architecture will be performed either by the architect or someone acting under the architect's direction. Clients may well expect members of the company, individually, to monitor the work done under the company's auspices. They may expect that, by holding themselves out as a single company, members warrant
10 their belief that company work meets at least minimal professional standards. Thus, clients may expect the members to stand behind the quality of the company's work and to be accountable for lapses in that work's quality. They may expect members of the company, regardless of their choice of organisational form, to have staked their professional reputations on the quality of their fellow professionals' work as well as on the quality of their own individual work. It is may not be evident
15 why incorporation should defeat those expectations. The court could hold all members personally liable where the plaintiffs can convince it that they had reasonably understood that all members would be responsible for acts and omissions of the company representatives.

There is no statutory provision that offers guidance as to precisely when an architect should be
20 held personally liable for the misconduct of other persons in the company. There is no statutory clarification as to whether a supervisor will be held liable for mere supervision without the showing of careless or negligent conduct on the part of the supervisor. Liability may be construed as covering the ultimate responsibility that a senior architect or rainmaker in the company has for "his" client. It may be limited to the mid-level architect who actually does the work or who
25 supervises associates and more junior architects when they do the work. It may also be construed as extending to members of the company who review all formal architectural drawings and opinions before they are released. Liability could be imposed only on those members actively involved in the architectural work. Questions of supervisory liability will ultimately depend on the factual circumstances.

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Although a court may make a policy determination on vicarious liability of architects practicing in limited liability company, the particular controversy between the litigants will probably affect a court's decision. The court's treatment of the liability shield and the outcome of the case may turn on the facts, allegations, and architectural skills in a particular case. Depending on the facts of the case, a member of an architectural practice organised other than as a general partnership may be held vicariously liable for the acts of another member or employee of the practice to the extent provided by law. These are fact-specific questions on which there is no statutory guidance. In attempting to hold members personally liable, a plaintiff could name as defendants all directors or members in management roles, section leaders, and other officers who participated in the representation.

There is always an area not covered by legislation, such as this, in which the court must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration. Courts do not and should not dispense justice simply according to their individual notions of what is fair for the individuals concerned, or of what will in the future provide a sensible rule for the community. Legal rules and procedures are designed to aid the administration of justice, not to exist as abstract theory independent of human beings and social considerations. In the absence of definitive guide by the legislature or of prior judicial decision, an attempt to decide the question without considering the equities and the practical social implications of the decision as elucidated by admissible evidence and argument based thereon, would in my opinion be as irrational as deciding by a throw of the dice.

For all the foregoing reasons, it would not be prudent to decide this in the abstracts as a preliminary point of law as it is fact intensive. This application is accordingly dismissed. The costs of this application shall abide the result of the suit.

Dated this 22nd day of April, 2021

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Stephen Mubiru
Judge,
22nd April, 2021.