

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**MISCELLANEOUS APPLICATION NO.HCT-00-CC-MA- 459 OF 2007**

**(Arising from High Court Civil Suit No. HCT-00-CC-CS- 553 of 2006)**

**ALLEY ROUTE LTD.....APPLICANT**

**VERSUS**

**UGANDA DEVELOPMENT BANK LTD.....RESPONDENT**

**BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA**

**RULING: 1**

This is an application brought by Notice of Motion under Order 1 rules 10 (2) and 13 and Order 52 rule 1 of the Civil Procedure Rules for orders that:-

- (1) The Attorney General be added as a Defendant to Civil suit No. 553 of 2006 for effectual adjudication of all the questions involved.
- (2) Costs of this application be provided for.

The grounds for the application are that:-

1. The Applicant filed Civil Suit No. 553 of 2006 against the Defendant and the Government of Uganda has interests in the management of the affairs of the Defendant.
2. The presence of the Attorney General is necessary for the determination of the real questions of controversy between the parties.

Representation was Mr. Moses Ojakol and Mr. Mulema-Mukasa for the Applicant. Mr. Alex Rexida for the Respondent.

As to who may be joined as Defendants Order 1 rule 3 CPR provides:-

*“All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise.”*

While rule 7 of the same Order states:-

*“Where the Plaintiff is in doubt as to the person from whom he or she is entitled to obtain redress, he or she may join two or more Defendants in order that the question as to which of the Defendants is liable, and to what extent, may be determined as between all parties.”*

As to addition of parties Rule 10(2) of the Order provides:-

*“The court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”*

Mr. Mulema-Mukasa, for the Applicant, stated that the Applicant was seeking orders that the Attorney General be added as a Defendant to the suit for the effectual adjudication of all the questions involved. That court will then be able to determine whether severally one of the Defendants – i.e. Uganda Development Bank Ltd or Attorney General – is liable or jointly liable or in the alternative apportion liability on either party.

Filed together with this application is an affidavit in support deponed to by Samuel Mayanja a shareholder and Managing Director of the Applicant Company. He therein avers that the Main Suit stems from a loan agreement between the Applicant and Uganda

Development Bank, which was established by statute. That subsequent to the signing of the loan agreement, the Defendant, M/s Uganda Development Bank Ltd, was incorporated to take over under the Public Enterprises Reform and Divestiture statute 1997, the proprietary interest of the Government of Uganda in and also all the rights of Uganda Development Bank. The shareholders and subscribers to the Memorandum and Articles of the Respondent/Defendant are:-

- (i) The Minister of Finance, Planning and Economic Development.
- (ii) The Minister of State for Finance, Planning and Economic Development (Privatization).

He therefore contends that consequently the Government of Uganda has interests in the Main Suit. In paragraph 7 he states that the parties to the Main Suit are currently engaged in discussions for out of Court settlement of the suit, in which, he says the Minister of Finance, Planning and Economic Development is involved. He, in the premises, believes that the presence of the Attorney General is necessary for the effectual determination of the real questions between the parties.

The Respondent opposed the application. Two affidavits were filed in reply. One deponed to by Martin Mwambutsya a State Attorney in the Attorney General's Chambers. Mr. Mwambutsya did not say that he was swearing the affidavit on behalf of the Respondent. It appears he was swearing it on behalf the Attorney General who was neither party to the application nor a party to the Main Suit yet. Therefore his affidavit cannot be relied upon.

The second affidavit was sworn by Mrs. Priscilla Mugisha, the Bank Secretary of the Respondent. She therein avers that the Respondent is a limited liability company with a Board of Directors and management that are separate from its owners. She denies that the Respondent has at any time discussed the matters in the suit with any Minister and denies that there are any discussions for an out of court settlement going on any where or at anytime. She contends that

the Attorney General not being privy to the loan agreements, mortgages, default by the Applicant or any business between the parties, is not a necessary party for any issue in the suit.

Mr Rexida, in his submissions argued that Uganda Development Bank Ltd is a limited liability company governed by the laws which govern limited liability companies, particularly the Companies Act. He argued that it negates the very essence of limited liability if a borrower, who borrows money from a Bank which is a limited liability company, signs a loan agreement with and mortgages his property to it, and fails to pay back the loan monies, can turn around and sue the bank's shareholders.

The Applicant's cause of action in the Main Suit is that the Respondent had breached the loan and mortgage agreements and debenture by failure to execute its obligations under the loan agreement. It is recognised that the Respondent as a corporate entity acts or performs its duties through its officers or managers who are both its brains and hands. However it is trite that on incorporation the company becomes a separate legal entity distinct and separate from its promoters and/or shareholders. In the celebrated case **Salomon =vs.= Salomon Co. Ltd (1897) AD 22 HL, Lord Macnaghter.** noted:-

*“When the memorandum is duly signed and registered, the subscribers are a body corporate. The company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits the company is not in law the agent of the subscribers or trustee for them.”*

The position of the law is still the same today as it was then. In **Sentamu =vs. = Uganda Commercial Bank & Anor [1983] HCB 61** Justice Benjamin Odoki (as he then was) held that a limited liability company is a separate legal entity from its directors, shareholders and other members. That individual member of the company are not liable for the company's debts.

Article 3 (a) of the Respondent's Memorandum of Association states that the Respondent was registered to take over under the Public Enterprises Reform and Divestiture Statute 1993 by

transfer by the Minister responsible for Finance the proprietary interest of the Government of Uganda in and also all rights, assets, properties, obligations and liabilities of Uganda Development Bank which was established under the Uganda Development Bank Decree, 1972. The promoters or subscribers are the Minister of Finance, Planning and Economic Development and Ministers of State for Finance, Planning and Economic Development (Privatisation). They did so in their capacities as Ministers in the Government of the Republic of Uganda. Hence the actual promoter is the Government of the Republic of Uganda. Article 59 of the Respondent's Articles of Association provides for the appointment of directors charged with the management of the business of the Respondent. The Board of directors and the managers of the Respondent Bank are separate from its owners. On incorporation the Respondent Bank became a corporate entity distinct and separate from its promoters or subscribers, in the instant case the Government of Uganda. In the premises there cannot be a cause of action against the Attorney General founded on the Respondent's alleged breach of the loan agreement.

However this application is brought under Order 1 rule 10 (2) of the Civil Procedure Rules seeking the Attorney General to be added as a Defendant. Under the rule court may order any person to be joined as a Plaintiff or Defendant or as a person whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the matter before court. Such a person may be joined even if the Plaintiff has no cause of action against him/her provided that such party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit before it. **Mulla in The Code of Civil Procedure 17<sup>th</sup> Ed. Vol II page 102** states:-

*“A person may be impleaded as a Defendant to a suit though no relief may be claimed against him, provided his presence is necessary for a complete and final decision of the questions involved in the suit. Such a person is called a proper party as distinguished from a necessary party-.”*

See also **DAPCB =VS= Jaffer Brothers Ltd SCCA No. 9 of 1998, Arnold Raphael =vs= Tuck & Sons Ltd [1956] All ER 273.** The aim is to bring on record all persons who are parties relating to the subject matter so that the dispute may be determined in their presence and at the

same time without any protraction, inconvenience and to avoid multiplicity of proceedings. The application to add such a party could be by any of the parties to a suit or done by the court on its own motion. See **Kololo Curing to Ltd =vs= West Mengo Co-op Union Ltd [1991] HCB 60.** The application could even be made by any person whose legal right or who claims that his legal right will be directly affected by the granting of the relief claimed in the action and can show that his presence is necessary to enable court effectually and completely to adjudicate and settle the suit before it. See **Gokoldas Laximidas Tanna =vs= Sorter Rose Munyinza H.C.C.S No. 1076 of 1987 [1990-91] KALR 21, Inspector General of Government =vs= Kikonda Butema Farm Ltd & A.G Court of Appeal Constitutional Application No. 13 of 2006, The Inspectorate of Government Vs Blessed Construction Ltd & Anor. HCT-00-CC-MA-073-2007.**

In the instant case the Applicant need not show that it has a cause of action against the Attorney General but it must show that the Attorney General's presence is necessary for the court's effective and complete adjudication and settlement of the suit. In an effort to show that the presence of the Attorney General is necessary, in the Applicant's affidavit Mr. Samuel Mayanja makes the following averments:-

- “5. *That the development loan, the Kuwait Fund, the basis of the sub-borrowing by the Applicant from UDB was forgiven or written off by the Kuwait Government.*
6. *That in turn the Government of the Republic of Uganda wrote off the debt in respect to the Respondent emanating from the Kuwait Fund and the Uganda Revenue Authority waived all taxes touching the loan.*
7. *That-----*
10. *That the intended Defendant is liable in the Main Suit as it did not disburse the Kuwait funds adequately and promptly to the Respondent for on-lending to the Applicant and as such the contract loan was not provided on time to the Respondent for on lending to the Applicant's benefit.*
11. *That further the intended Defendant interfered in the structure of the Respondent through restructuring and temporarily closed it in the period between 1997 to 2005 years and this negatively impacted on the loan contract and its performance*

*by the parties thereto especially the disbursement of monies to the Applicant and opening of Letters of Credit to the supplies.”*

In paragraphs 7, 8 and 9 of the same affidavit it is averred that the President’s and Prime Minister’s Offices of the Government of Uganda have shown willingness to have the matter resolved and that the Government, which is the sole shareholder of the Respondent is interested in finding an amicable resolution of the matter to save the Applicant’s local investment by an indigenous in a novel industry. The Applicant in the circumstances contends that the Attorney General is necessary to enable court effectually and conclusively adjudicate upon and settle all questions involved in the suit.

Mr. Mulema Mukasa argued that the Government of Uganda restructured the Respondent Bank, and in the course of doing so interfered with the management and ownership of the Respondent Bank and thereby interfered with the performance of the loan agreement by the respective parties, that is the lending party and the borrowing party. If I understood Mr. Mukasa well his argument is that by its acts or omissions the Government of Uganda caused the Respondent Bank to commit the breaches complained of by the Applicant in the Main Suit. Counsel submitted that if the Attorney General is added as a Defendant court will be able to determine whether by severally the Respondent or Attorney General is liable or whether the two are jointly liable or in the alternative be able to apportion liability on either party.

Mr. Rexida submitted, and I agree with him, that restructuring of the Respondent Bank was an internal matter which was between the company and its shareholders. If the acts or omissions of the shareholders, who in this case is the Government of Uganda, resulted into mismanagement of the company’s affairs thereby resulting into the breach of the contractual arrangements between the company and third parties, it is the company which would suffer the consequences of such poor management. The court would not need the presence of the shareholders of the company to determine whether the company was in breach. My considered view is that if the Respondent had any claim that the acts or omissions of the Government of Uganda had rendered it incapable in execution of its obligations under the loan agreement between it and the Applicant, and felt entitled to indemnity or compensation from the Government of Uganda it would be the

respondent to commence third party proceedings against the Government. Instead it is the Plaintiff seeking to add the Government of Uganda for the wrong allegedly committed by it against the Defendant. In **Wilson Vs Bury (1880) 5 QBD 518 (CA)**, the Defendants were directors of the company. The Plaintiff deposited £1000 with the company upon certain terms. The company went into liquidation and the Plaintiff sued the Defendants to recover the £1000 upon the ground that this sum was lost to him as a result of the negligence of the Defendants. The Court of Appeal held that the Defendants were not liable to the Plaintiff. Brett LJ found that a contract existed between the Plaintiff and the company, but the Defendants could not be held liable as constructive trustees for aiding and abetting in the breach of the trust.

In the above case the claim was against directors but the same principle does apply to shareholders. The shareholders cannot be held personally liable for having made decisions which may affect the company's execution of its obligations towards its clients resulting into breach thereof.

As regards the alleged on going discussions Mr. Mulema Mukasa, submitted that the Government of Uganda has made communications to the effect that the Government is willing to have the matter resolved so that the Applicant is relieved from unfair demands from the Respondent. Counsel argued that the Government had thereby expressed an interest in the matter. He submitted that a party can be added to proceedings even when the party has no legal rights but have an interest for the sake of resolving the controversy between the parties. Annexure C<sub>1</sub> to the affidavit in rejoinder is a letter from State House to the Solicitor General dated 22<sup>nd</sup> August 2007. In it the Solicitor General is directed to conclusively handle and dispose off the Applicant's petition over the loan to H.E The President. Annexure C<sub>2</sub> to the same affidavit is a letter dated 18<sup>th</sup> May 2007 from the Office of the Prime Minister addressed to the Hon. Minister of Finance, Planning & Economic Development. In it the Minister is requested to handle the matter with a view of assisting the Applicant reach an amicable solution to this case.

Mr. Rexida submitted, and I agree with him, that the two letters show pleas by the Applicant to the President's and Prime Minister's Office to prevail upon the Respondent to amicably resolve the dispute between the two, which is now before court. Counsel argued that the addition of the



Attorney General would make a shareholder who is the Government of Uganda, a co-defendant to a claim against a company where it holds shares.

Normally the management of the company's business is with the directors. However, ultimate control of the company lies with the general meeting; for that matter with the shareholders. The shareholders can through a general meeting direct the management of the company. Resolutions once passed at such meetings are owned by the company and not by the shareholders. The Government of Uganda being the sole shareholder in the Respondent is free to hold discussions with the Applicant and accordingly direct the management of the Respondent as resolved by it. But to exercise its rights of direction as a shareholder, the Government of Uganda does not need to be made a party to the suit first.

The fact that the Government of Uganda, as a shareholder, is not a party to the proceedings in the instant case is not a bar to negotiations between it and the Applicant. Therefore the fact that the Applicant is holding negotiations with the Government of Uganda towards an amicable solution of the dispute between it and the Respondent and the fact that the Government has shown willingness to prevail upon the Respondent to amicably resolve the dispute does not make the Government a proper or necessary party to the suit.

With regard to disbursement of the loan funds Mr. Mulema- Mukasa argued that the Kuwait fund, the basis of the sub-borrowing by the Applicant from the Respondent Bank was forgiven or written off by the Kuwait Government. That in turn the Uganda Government wrote off the debt in respect to the Respondent emanating from the Kuwait fund and the Uganda Revenue Authority waived all taxes touching the loan to the Respondent. Counsel argued that the Respondent was a conduit through which the Government of Uganda lent out the monies from the Kuwait fund to entrepreneurs like the Applicant. That the borrowing or lending was a chain, which has been characterised by waiving off of the loan. That if the Respondent does not obey the order of the chain and seek to enforce its rights under the loan to the Applicant, the Respondent is thereby seeking unfair benefit or enrichment.

In his submission Mr. Rexida stated that assuming it is true the Kuwait fund had been written off, no evidence was adduced to show that it was a condition of the waiver or write off that the

Respondent was in term to write off its debts. No such evidence was adduced by the Applicant. Even if that was the position, there is no evidence to show that the Applicant was privy either to agreement between the Government of Uganda and the Government of Kuwait or between the Respondent and the Government of Uganda. The need for court to make its finding on the conditions and/or effect of the waiver or write off to the loan agreement between the Applicant and the Respondent does not make the Attorney General a proper or necessary party to the proceedings.

Mr. Mulema-Mukasa further argued that the Government of Uganda made periodical disbursement of the Kuwait funds to the Respondent. As a result the Respondent could not promptly disburse the loan funds to the Applicant. This led to delays in opening letters of credit to the suppliers of the machinery and the Applicant's claim is that the loan monies were not wholly disbursed. The contention is that the failure to disburse the loan funds in time was a breach of the loan agreement by the Respondent occasioned in turn by Governments failure to disburse the Kuwait funds to the Respondent promptly. The Consultant's Report, Annexure 'E' to the plaint states that the disbursement of the loan was not adequately handled according to the terms and conditions of the loans, especially the machinery and equipment procurement process. In paragraph 8 of the Plaint it is pleaded that as a result the Applicant experienced various operational problems. In resolving the issues as to disbursement of the loan funds court will have to consider the provisions of the loan agreement between the Applicant and the Respondent. In the Loan Agreement it is provided that the Respondent had "*obtained a loan in foreign currencies from the KUWAIT FUND FOR ARAB ECONOMIC DEVELOPMENT to be utilised by the Lender for the establishment, rehabilitation and development of small and medium scale investment projects in the productive sectors of Uganda's economy.*" Disbursement of the loan funds is provided for by section 2.03 of the Loan Agreement. I have carefully studied the loan documents attached to both the Plaint and the Written Statement of Defence; save for indication of the source of funding; I have failed to trace in any of them the involvement of the Government of Uganda. I do not find the Government of Uganda; the Attorney General for that matter; a necessary party for the effectual adjudication of the issue whether the Respondent had breached any of its obligations as to disbursement of the loan monies as provided in the Loan Agreement. As I have already stated herein above the

Government of Uganda was not privy to the Loan Agreement between the Applicant and the Respondent. Neither was the Applicant privy to the Agreement between the Government of Uganda and the Respondent with regard to the Kuwait fund, if there was any.

Considering all my finds above I find that the Attorney General is not a necessary party for the effectual and complete adjudication and settlement of the questions involved in this suit. The application to join the Attorney General therefore fails. The same is dismissed with costs to the Respondent.

Lameck N. Mukasa

**J U D G E**

30/11/07