THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - MA - 528 – 2010

(Arising from High Court Civil Suit 454 of 2005)

1. **MUDDU AWULIRA ENTERPRISES LTD**
2. **SENTONGO PRODUCE & COFFEE FARMERS LTD** **:::::: APPLICANTS/PLAINTIFFS**
3. **GODFREY SENTONGO**

VERSUS

STANBIC BANK UGANDA LTD :::::::::::::::::: DEFENDANT/RESPONDENT

BEFORE: THE HON JUSTICE GEOFFREY KIRYABWIRE

Ruling

This is an application by way of chambers summons under Order 6 rules 18 and 31 of the Civil Procedure Rules (CPR) for leave to amend the plaint in High Court Civil Suit 454 of 2005.

The application is supported by the affidavits of Mr. Godfrey Sentongo who is also the Managing Director of the first and second applicants. It is further supported by the affidavits of Mr. Joseph Balikudembe co-counsel for the applicants in the main suit.

Mr. Godfrey Lule (sc) appeared for the applicants while Mr. Masembe Kanyerezi appeared for the Respondent bank.

The grounds of the application are that following the filing of the suit there have been new events that have necessitated the amendment of the plaint. Furthermore the applicants have discovered new facts that were previously unknown to them. Further grounds are that the amendments are necessary to enable court decide the real issues in the suit and that they will not prejudice the Respondent.

Counsel for the Applicants submitted that; during the trial an issue relating to interest charged arose which the Applicants claimed was over charged by the Respondent bank. It is the case for Applicants that they were overcharged interest for which they suffered loss and should be compensated in damages. Counsel submitted that at the advise of court, an independent auditor (M/S FCK Accountants) was jointly appointed by the parties as an expert to establish whether the bank had indeed overcharged interest. It is the case for the applicants that the findings of M/S FCK Accountants in their report was that; interest had been overcharged by the bank and therefore an amendment of the plaint is necessary to reflect the adverse effects of the said findings.

Counsel for the Respondents opposed the application. He noted that this was already an old case of 6 years and therefore had already delayed. He further submitted that events complained of transpired prior to August 2004 and were therefore time barred and could not be introduced by way of further amendments of the plaint. He submitted that the effect of the proposed amendments was in effect a new pleading altogether with a plaint of 47 pages and 37 new claims.
In this regard counsel for Respondent submitted that court should refuse leave to amend where the amendment would change the action into one substantially different in character. For this proposition I was referred to the case of

Eastern Bakery V Castelino [1958] EA 462 (CAU) at 462.

Counsel for the Respondent submitted that the Applicants could have made the amendments sought under Order 6 rule 20 of the CPR without leave of court within 21 days from the date of issue of the summons or 14 days from filing the written statement of defence.
The Applicant however did not do so and therefore had lost the opportunity to so amend at this stage. Counsel for the Respondent bank concedes that the independent expert report found that interest of about Shs.100,000,000/= had been overcharged but that this was already part of the pleaded case.

I have perused the chamber summons before me and the affidavits for and against it. I have also addressed my mind the submission of both counsel.

To start off, this is indeed an old matter as counsel for the Respondent submitted. It arises from a protracted dispute between Respondent and the Applicants. It has a similar background to other companies belonging to the third Applicant and other banks in High Court Civil Suits 4 of 2009 and 159 of 2009. In all three cases the banks called in their loans for non payment and exercised their securities leaving the third Applicant in a position where he lost most of his assets. The Applicants fault the actions of bank. Attempts by the parties to resolve this matter out of court have failed and hence this case and others have been litigated with many an interlocutory application as well.

The purpose of amendment of pleadings has been reviewed in many cases. In the words of **Bowen L.J** in the case of **Copper V Smith** [1883]26 CHD at 71 he stated

> *"… It seems to me that as soon as it appears that the way in which the party had framed his case will not lead to the decision of the real matter in controversy, it is as much as matter of right on this party to have it converted if it can be done without injustice as anything else is a matter of right …"*

Indeed in the case of Eastern Bakery (supra) the Court of Appeal of Uganda as it then at page 462 was found that

> *"… The main principle is that an amendment should not be allowed if causes injustice to the other side …"*

Even though counsel for the Respondent referred court to Order 6 rule 20 the above principles of law relating to amendment are provided for in Order 6 rule 19 which provides

> *"… The court may at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties …"*

This rule to my mind better addresses what is in issue in the main suit. In the main suit it became clear to court and the parties that the issue of calculating interest required independent expert intervention in order to determine whether it was properly calculated and applied. Whereas I agree that interest was part of the pleaded case of the Applicant if the expert's report corrects the position of interest calculation, then that in itself is a good basis to amend if no injustice is occasioned to the other side.

It would appear to me that the Respondent states that the proposed amendment is now very lengthy and introduces up to 37 new claims. Secondly that the suit is now time barred. I have carefully looked at the proposed amendment and find that the claims are mostly special damages arising out of the same cause of action and to my mind that does not substantially change the original claim save for an increase the computation of loss which has to be strictly proved anyway.

What I do see however, is that; the proposed amendment may have gone beyond the requirement under Order 6 rule 1 to contain a brief statement of materials facts on which the Applicant relies and gone into the evidence. To that extent it is possible that some of the averments may be unnecessary and may fall prey to the operation of Order 6 rule 18 (i.e. striking out).

As to the matter of being time barred, indeed that could be a ground for prejudice. I however agree with counsel for the Applicant when he states that this is a matter of *"mathematical science"* and specific reference should be made as to what part of the claim is time barred. A general statement that the claims are time barred is not good enough. In any event I have already found that the amendment substantially deals with the original claim that is not time barred.

All in all I find that the amendment merits acceptance and I do accept it subject to a caution that all averment that are evidence be cleaned up as that can only be accepted by way of testimony on oath.
Amendment allowed and the Applicant has 7 days from this ruling to do so. Costs in the cause.

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Geoffrey Kiryabwire

JUDGE

Date: ……

20/10/2010

09:25 a.m.

Ruling read and signed in open Court in the presence of:

- G.S Lule (sc) and Jimmy Walebeyhi for Applicants
- Masembe Kanyerezi for Respondent
- MD Sentongo for Applicant
- Ruth Naisamula - Court Clerk.

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Geoffrey Kiryabwire

JUDGE

Date: 20/10/2010