# THE REPUBLIC OF UGANDA

## IN THE HIGH COURT OF UGANDA AT KAMPALA

## (COMMERCIAL DIVISION)

**HCT - 00 - CC - MA - 2 - 2014**
(Arising out of Civil Suit No. 274 of 2012)

**PRIME CONCEPTS INVESTMENTS LTD ::::::::::::::::::::::::**
**APPLICANTS**

**VERSUS**

**STANBIC BANK (U) LTD ::::::::::::::::::::::::::::::::::::::::::::**
**RESPONDENT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**R U L I N G:**

Prime Concepts Investment Ltd, the Applicant in this case applies for leave to amend the Plaint in CS 274/2012 filed against Stanbic Bank (U) Ltd, the Respondent. This application is grounded on the following:

- That the applicant has come across more pertinent facts which were not within its knowledge at the time CS 274/12 was filed.
- That the amendment is necessary in determining the finality of the questions in controversy.
- That the amendments do not change the cause of action nor depart from the original claim.
- That these amendments will not prejudice the Respondent.

The Applicant relied on an affidavit sworn by Massey Muwanga, the Managing Director. In her Paragraph 3 she deposed that new material

facts had arisen since the filing of the suit and therefore if this suit was to be determined in finality, the amendment was necessary. That since the mediation, a reconciliation of figures led to the adjustment of the figures in the claim which made it necessary to file this application. She further deposed that the amendment would not change the Cause of Action nor depart from the original claim that the Applicant substantially alleges from the Respondent and also that the Respondent would not be prejudiced.

The Application was countered by the Respondent through the affidavit of Brenda Nabatanzi Mpanga who gave an elaborate background to the whole suit. She deposed that the report upon which the Applicant based their proposed amendment was available all the time and therefore they could not claim that the amendment was necessitated by the coming across of new matters. She further deposed that the particulars upon which the Applicant based the claim of special damages in the proposed amendment were completely new to the claim and intended to substitute the claims in the original suit which had been settled after reconciliation. More so, that the information on which they based their claim was obtained from the mediation proceedings and that to allow such an application would be a complete breach of the the principles that govern mediation.

She further deposed that the issue of VAT was always known to the Applicant and so to introduce it now when they had every opportunity in the past to do so was not tenable. In any case, the Respondent had always paid the VAT directly to URA.

Lastly, the inclusion of interest calculated at commercial interest rate had no legal basis; would only serve to prejudice the Respondent's case and that because the Respondent had handed over the securities it held when the Applicant paid Ushs 5,339,314,231/=, it would be prejudiced since it was no longer a secured creditor.

Counsel for the Applicant submitted that the cause of action that had been brought originally was breach of contract, taking an account, money had and received for the benefit of the Plaintiff/Applicant, negligence of duty and breach of fiduciary duty, permanent injunction, general and special damages; that these had not changed in the intended amendment. He further submitted that this amendment was necessary because the Applicant had obtained new material facts in relation to its claim. These were facts related to special damages, legal fees wrongfully billed which had earlier been referred to as ledger fees; That the issue of VAT could not be avoided because it came out of the same loan transaction and since the figures had changed from the reconciliation, they had to be properly claimed in the amended plaint. That this was clearly seen in the change of figures from Ushs 1,611,183,788/= to Ushs. 767,720,680/=.

He submitted that these were the intended amendments resulting from the reconciliation. He further submitted that the objective of an amendment was to enable an Applicant ensure that litigation between the parties is conducted not on a false hypothesis of facts but on facts that are truthful. He concluded that the Respondent would not suffer any prejudice. In this, he relied on **Samalie Katumba V Stanbic Bank & Ors MA 379/2013** and **Buffalo Tungsten Inc V SGS (U) Ltd MA 6/2012**

Opposing the Application, the Respondent's counsel submitted that court should never allow an amendment which would work injustice to the other side. Furthermore, that multiplicity of proceedings should be avoided as much as possible. That no application made mala fide should be granted and that any amendment which is expressly or impliedly prohibited by law should not be allowed. He relied on **Gaso Transport Services (Bus) Ltd V Obene [1990 - 1994] EA 88**

He further submitted that since the adjusted figures were obtained in the course of mediation, it was a breach of the confidentiality rule 18 of the Judicature (Mediation) Rules 2013. He submitted that the Applicant had originally contested that they owed Shs 5.4 billion but that after the reconciliation, they accepted and paid so they could not come up and say the Respondent owed them money. He contended that no one would walk to the bank and pay all that money unless it was clear to them that they owed the money.

Counsel for the Respondent also faulted the claim for VAT stating that VAT was not in the original suit and this had come to their notice during mediation therefore it could not be the subject of an amendment. For those reasons, Counsel for the Respondent submitted that the Applicant be denied leave to amend their pleadings.

In applications for amendments, court has power to allow all necessary amendments to pleadings at any stage but the grant or refusal of an application for such leave to amend is a matter within the discretion of the trial judge: **Kahn V Roshan (1965) EA 289 at 297**
Thus leave to amend ought not to be refused unless the court is satisfied that the party applying is acting mala fide or that his

application is likely to cause some other injury to the other side which cannot be compensated by the payment of costs: **Mccoy V Allibhai (1939) 5 EACA 70**

Even where such amendment is necessitated by carelessness or negligence of the Applicant but it leads to the settlement of the right questions, it will be allowed as long as the Applicant is not acting mala fide: **Patel V Joshi (1952) 19 EACA 42**

As long as the real substantial question can be raised between the parties and multiplicity of proceedings would be avoided by such amendment, such an amendment ought to be granted: **Karsan V Raghavjee (1943) 10 EACA 10; Manji V Singh (1962) EA 557**

This amendment should not be made where it causes an injustice to the other side: **Eastern Bakery V Castellino (1958) EA 461**

Finally, no amendment should be allowed where it is expressly or impliedly prohibited by the law: **Gaso Transport Services (Bus) Ltd V Obene (supra)**

Counsel for the Respondent submitted that the proposed amendment was prohibited by Rule 18 of the Judicature (Mediation) Rules 2013. The entire rule is reproduced hereunder;

**18. Confidentiality**.

*(1) The mediator and the parties to mediation shall treat as confidential information obtained from or about the parties in mediation and shall not disclose that information unless required by law to disclose or the parties give consent in writing to the mediator to disclose.*

*(2) Subrule (1) does not apply to any information, which would in any case be required to be disclosed in proceedings in the main suit or an application arising out of the suit.*

*(3) A party to mediation under these rules shall not compel the mediator or employee, officer or representative of CADER to appear as a witness, consultant, or expert in any litigation or other proceedings related to the mediation.*

The basis of the mediation was money. After the mediation, the claim was still money. The only change established is that the Applicant went into mediation claiming a lesser sum. This in my opinion is not a breach of confidentiality. Furthermore, the Confidentiality rule does not apply to information which would be required to be disclosed in proceedings or in any application arising out of the suit: Rule 18(2)

Where the Applicant discovered the claim was higher than what it should be, it was his duty and his advocate's duty as an officer of court to inform court that what the Plaintiff/Applicant had originally asked for was in excess of what was due to him. This in my view would not be a breach of Rule 18 of the Judicature (Mediation) Rules 2013.

Counsel for the Respondent submitted that the Applicant in walking to the bank and paying the Shs 5.4bn was to concede that the bank owed them nothing and that this claim in the proposed amendment was just an afterthought.

With due respect to learned counsel of the Respondent, the respondent knew that the Applicant still felt that the Respondent owed it some money. In the letter dated 30/8/12 - Annexture "D" to the Respondent's affidavit in reply, the Applicant brought it out clearly that it was not

satisfied and whatever payments it was making were “without prejudice”

Their advocate, writing to the Respondent’s advocate in part wrote:
“*Our client the Plaintiff in this matter has decided to make this payment without prejudice to its claim in the above captioned matter.”*

Then he proceeded to make it clear that an application for an amendment was imminent encompassing several prayers. He wrote:
“*Please take note that our client intends to amend its pleadings and claim that it paid over and above of what it was supposed to pay. Our client will claim all the sums that will have been paid in excess together with special damages, interest thereon, general damages and costs of the suit. Our client will further claim all the charges it will have paid to Standard Chartered bank on the disputed amount inclusive of arrangement fees, commission, legal fees, default fees and interest thereon.”*

The foregoing statements in the letter cannot be attributed to a party who has abandoned his claim. They strongly point at a party who feels that the other party still owes them. So paying the shs 5.4 billion did not prevent him from seeking an amendment.

With regard to the submission that the proposed amendment introduces a new cause of action; the original cause of action was a claim for special damages due to recklessness and negligence of the Respondent. The proposed amendment is still in respect of claiming special damages, general damages as a result of alleged activities and breaches of the Banker – Customer relationship. The only difference

between the original claim and the proposed amendment is the figures in that those in the proposed amendment are less than those in the plaint on record which is a changed circumstance that might not have been known to the Applicant. There is therefore no change of cause of action that would lead to a denial of the amendment.

The respondent also alleged that VAT was being introduced at this late stage when it had not been claimed in the plaint on record. Claiming VAT at this stage in my view does not prejudice the Respondent because whether VAT is expressly claimed or not doesn't make a difference since VAT is a statutory provision and therefore its payment is mandatory.

Considering all the circumstances of this case, there is nothing on record to show that the Applicant is acting mala fide or intends to delay the proceedings of this case. On the contrary, the amendment of the claim to bring it within what the Plaintiff feels is the appropriate amount, points at the intention of resolving the real substantial questions between the parties thereby avoiding multiplicity of proceedings. The respondent has not proved to this court that the amendment would cause an injustice to them.

Lastly, there is no proof that the proposed amendment breaches an existing law. In the premises, it is this court's finding that the amendments sought embody legally valid claims which would save time and effort of new claims in other proceedings.

The sum total is that I find this a fit and proper case in which the application for amendment can be granted and it is hereby granted. Costs shall follow the main suit.

**.....**

**David K. Wangutusi**

**JUDGE**

**Date: 20/11/2014**