

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISC. APPLICATION NO. 509 of 2014
(ARISING FROM HCCS NO. 1255 OF 1998)

ALCON INTERNATIONAL LTD:.....:APPLICANT

VERSUS

NATIONAL SOCIAL SECURITY FUND:.....:RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

Alcon International Limited herein referred to as Applicant brought up this Application against National Social Security Fund herein referred to as the Respondent seeking orders; that leave be granted to amend the plaint in HCCS No.1255 of 1998 wherein both parties are Plaintiff and Defendant respectively.

The Application is grounded on the following;

- 1) That since the time of filing the suit a lot of events have transpired which necessitate the amendment of the plaint to enable the issues in this suit to be finally determined.
- 2) Furthermore, that the Respondent would not be prejudiced or inconvenienced.

The Application is supported by the affidavit of Tom Magezi who practices law with the firm of Tumusiime & Kabega Advocates.

The Applicant contends that they intended to include cost of plant, machinery, equipment and materials which was not part of the suit. He further deposed that because of the death of the Managing Director of the Applicant Mr. Kultar Hanspal in 2013 several documents that would have otherwise supported the suit cannot be traced and therefore the suit has to be amended to plead only that which can be proved with the available documents even though it is a lower amount than previously claimed.

He further deposed that the Respondent would not be prejudiced or inconvenienced if the amendment was allowed.

In reply, the Respondent filed an affidavit of Rachel Nsenge who deposed that the suit No. 1255 of 1998 was filed by a private limited liability company carrying on business of construction in Kampala, Uganda and elsewhere and yet the Applicant in this case referred to herself as a limited liability company incorporated and carries out construction business in Uganda. In her view the two are different companies and that therefore the amendment of the suit was being sought by a different company from the original Plaintiff.

She further deposed that the Supreme Court in SCCA No. 15 of 2009 found that the activities of the Applicant in the construction of the building was illegal and ineffective because it was not a party to the contract. That the Applicant was fraudulent in misrepresenting herself as the rightful party to the contract.

The background to this Application which comes out clearly from the judgment of the Supreme Court is that on the 21st July 1994 the Respondent entered into a contract with M/S Alcon International Limited (a company incorporated in the Republic of Kenya) for erection and completion of a partially constructed structure on Plot 1 Pilkington Road. That in 1998 there was a misunderstanding between the Respondent and the Applicant which dispute ended in court and before arbitration resulting into appeals which went as far as the Supreme Court.

It is only during the hearing of this appeal of 2009 that it was realised that the company which had entered into contract with the Respondent was not the one which took possession of the building site and was therefore not the one suing on the contract the Respondent had entered with the Kenyan company.

The Applicant contends that the decision of the Supreme Court has necessitated the amendment of these pleadings. It is partly on the decision of that court that this court intends to use to decide whether the amendments sought can be granted.

The Applicant's claim in the plaint of Civil Suit 1255 of 1998 is found in paragraph 4 as hereunder;

“The Plaintiff's claim against the Defendants jointly and severally is for wrongful termination of contract, damages arising therefrom interest and costs of the suit.”

In Paragraph 5(a) the Applicant stated that;

“On 21st July 1994 the Plaintiff (in this case the Applicant) and the Defendant(in this case the Respondent) entered into a contract whereby the Plaintiff was contracted to erect and complete a partially constructed structure in reinforced concrete on Plot No. 1 Pilkington Road Kampala for the 1st Defendant”

From the start, it was a suit based on a **contract**. On the 4th June 1998 the Applicant filed what they referred to as “Further Amended Plaint”. The claim was still based on breach of contract in these words;

“The Plaintiff's claim against the Defendants jointly and severally is for a declaration of wrongful termination and breach of the contract, breach of co-financing agreement, special and general damages, for costs and expenses, loss of profit and interest arising therefrom and costs of the suit.”

Paragraph 5(a) remains the same and the Applicant relied on the same building contract agreement as it had done in November 1998. The Pleadings were based on a contract where the Plaintiff described herself as being incorporated in Kenya and a signatory to the contract.

What is also evident in the pleadings is that the Applicant never signed a contract with the Respondent. The identity of the person who entered into the contract with the Respondent was and remains M/S Alcon International Limited (a company incorporated in Kenya whose registered office is at Enterprise Road, Industrial Area with a postal number 47160 Nairobi.

It is clear from the Judgment of the Supreme Court that the Plaintiff sued on contract to which they were not a party. The judgment of the Supreme Court in all paints the Applicant's initial claim as a fraud. In the judgment the Learned Justice Katureebe as he then was in SCCA No.15 of 2009 wrote this;

“ It would appear that Alcon international knew that since it was not a party to the contract as its claims of assignment would not stand, it chose to claim as Alcon International Kenya which indeed was the party that signed the agreements that were annexed both to the plaint in court and to the claim in Arbitration.”

In that appeal Justice Dr. Kisaakye found this;

“The Respondent on its own admission was not a party to the contract.”

Hon. Justice Kitumba found that;

“The proceedings in this case were tainted with fraud and illegalities and cannot therefore stand.”

Hon. Justice Odoki C J as he then was wrote in the same subject;

“I am of the view that the cause of action is derived from the contract and therefore it is Alcon International Limited (Kenya) that can make a claim in this regard.”

From the foregoing, the suit was based on a contract, but the Plaintiff (now Applicant) was not a party to the contract. It is the finding of the Supreme Court that under those circumstances the Applicant was not the rightful Plaintiff, and all the Justices found the proceedings were tainted with fraud and illegalities.

To amend these pleadings based on a document which the Plaintiff misrepresented to have been a party, would be against court policy. Such an act would be promotion of the illegality.

The amendment sought can only result into a change of claim. A claim made by a person who was not a party to the contract but who somehow wriggled himself on to the building site. Such a claim would not arise out of an amendment but a separate fresh suit if the provisions of the Limitation Act permit.

The sum total is that having taken into account that the suit was based on a contract to which the Applicant was not a party, in a manner which the Supreme Court has referred to as fraudulent and also because the amendment would change the whole cause of action, I find this Application without merit and it is hereby dismissed with costs.

Dated at Kampala this 27th day of October 2017

HON. JUSTICE DAVID WANGUTUSI
JUDGE