

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISC. APPLICATION NO. 798 OF 2017

(ARISING FROM CIVIL SUIT NO. 650 OF 2016)

UGANDA NATIONAL ROADS AUTHORITY:.....

APPLICANT

VERSUS

DOTT SERVICES

LIMITED:.....RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

Uganda National Roads Authority the Applicant in these proceedings brought this Application against Dott Services Limited, the Respondent for orders that;

1. The UGX. 7,894,582,297/= owed to the Respondent by the Applicant be deposited in court pending the determination of Civil Suit No. 650 of 2016
2. Secondly, that once the money is deposited in court all obligations arising out of the payment certificate be extinguished as against the Applicant.

The background to this Application is to be found in Civil Suit 650 of 2016. In that suit the Applicant and Respondent entered into a contract by which the Respondent was to do road construction works on Mbale-Soroti and Tororo-Mbale Roads.

The contract document provided for compensation for delayed works. The Respondent contending that there was delayed commencement, which led to costs arising from idle equipment, personnel and other costs, put in a claim for compensation. The claims in the contract were to be verified by a consultant engineer appointed by the Applicant.

The Applicant referred the claim to the consultant. The consultant verified the claim, found reasonable and advised the Applicant to pay UGX 29,858,532,071/=.

It is the Applicant's contention in Civil Suit No. 650 of 2016 that the consultant did so out of fraud and in collusion with the Respondent.

It is for that reason that the Applicant seeks a deferment of payment of the UGX 7,894,582,297/= a sum of money which is now due to the Respondent under a Final Payment Certificate of the road works aforementioned.

From submissions it is clear that the money the Applicant seeks to deposit in court is due to the Respondent. It is however the Applicant's submission that if the UGX 7,894,582,297/= is handed over to the Respondent, they would not be able to recover any money from the Respondent.

In paragraph 7 of the Affidavit in Rejoinder Esther Kusiima attempts to justify the Applicant's claim in these words;

“The Respondent is not a reputable company. I know that it has not performed its obligations under the contracts with the Applicant and this has left the Applicant in a susceptible position all to the detriment of the Government of Uganda and the tax payer. Further that the Respondent will not be in position to refund the money that was obtained.”

In reply the Respondent in an affidavit by Maheswara Reddy contended that there was no reason why the money should not be paid to them. That there was no fraud or collusion and that in any case the Respondent submitted a claim of UGX. 45,556,811,500/= which the Applicant reduced to UGX. 29,858,532,071/= after being reviewed by several engineers. He deposed;

“The Respondent’s claim for prolongation costs was received, reviewed and approved by the Applicant’s employees to wit the Resident Engineer, Eng. Remegie Girukwishaka, the Contract Eng. Godfrey Mukasa- Kaaya, the Director of operations, Eng Justine Ongom, the Finance Director, Mr. John Mpanga, and the Ag Executive Director and the Respondent played no role in the review and approval of the prolongation costs.”

From the pleadings and submissions, it is clear that the Applicant seeks court to direct the deposit of the money into court until the suit 650 of 2026 is disposed.

In a civil proceeding such as this one court can only stay another act in favour of the Applicant, if he or she shows that the suit would be handled expeditiously. Going by the record, the suit was filed on 30th

August 2016. A defence was filed on 14th September 2016 for the 1st Defendant and for the 2nd Defendant on 9th September 2016.

Mediation commenced on 30th September 2016 but was adjourned to enable the parties handle some interlocutory applications. Scheduling was fixed for 17th October 2016 and on 13th October the Applicant was served with a draft Joint Scheduling Memorandum of the Defendants.

The Applicant was to incorporate the Plaintiff's case and return the same for confirmation and fixing.

I have combed the case file and have not found anything to show participation of the Applicant in that regard.

The length the file would have remained under mediation if it was again referred their by court would be 30th November 2016. It is now a year and the Applicant has made no steps towards filing a scheduling memorandum. At this rate it would be wrong to believe that the case would end soon.

Furthermore, the Applicant prayed that she be absolved of interest once money is deposited in court, this would occasion injustice to a Respondent who has earned her money more so the interest is a provision in the contract.

That aside, the Applicant seems to have already incurred loss through income tax over the same money before he receives it.

In paragraph 14 of Maheswara Reddy's affidavit, he deposed that upon invoicing the Applicant over retention of money and others arising from the Final Certificate of Payment, the Respondent became liable to pay Income Tax which loss they incurred yet they had not yet been paid.

One of the grounds forwarded by the Applicant is that the Respondent will not be able to refund the money claimed in Civil Suit No. 650 of 2016 should this Application be denied. In paragraph 9 of the Notice of Motion the Applicant contended that;

“If the above money is paid to the Respondent without any security, the Applicant will be left with no security to enforce against it in case the main suit is decided in its favour.”

In paragraph 7 Esther Kusiima of the Applicant’s Directorate of Legal Services deposed;

“The Respondent is not a responsible company. I know that it has not performed its obligations under the contracts with the Applicant and this has left the Applicant in a susceptible position all to the detriment of the Government of Uganda and the tax payer. Further, the Respondent will not be in a position to refund the money that was obtained from the Applicant.”

In her reply the Respondent contended that they still had a lot of work and that there should be no fear that they would fail to pay should they lose Civil Suit 650 of 2016. She referred the court to Annexure E which was a list of the contracts being undertaken by the Respondent.

They included; works of housing/factory for banana processing plant, hostels, quality assurance laboratory block in which the Employer was the Presidential Initiative on Banana Industrial Development, Construction of Nakivubo & Kinawataka main sewers in partnership with Sogea- Satom in which the Employer was National Water and Sewerage Corporation, Arua Water Supply and Sanitation Project

where the employer was again National Water and Sewerage Corporation, Farm Income enhancement and forestry conservation Programme, and Doho Irrigation Scheme Infrastructure and facilities in Butaleja in which the employer was Ministry of Water and Environment, Construction of Rwengaaju Model village Infrastructure Scheme in Kabarole District, still employed by the Ministry of Water and Environment, Construction of Rural Electrification Kamuli and Buyende under Rural Electrification Agency, Construction of Hydro Power Project 4.8 MW on River WAKI Bulisa employed by Hydromax Limited and construction of Hydropower Project 5.5 MW at Nyagak III- Paida employed UEGCL/Hydromax Limited.

All these contracts were valued at UGX 269,586,384,342/= the Respondent claimed. These contracts which were clearly stated in paragraph 16 of Reddy's affidavit were not disputed in the rejoinder of Esther Kusiima. The Respondent's evidence not challenged remained on record and certainly led to the conclusion that even if this Application was denied, the Applicant would still be able to recover.

On the allegation by the Applicant that the Respondent has not performed its obligations, the Applicant has not provided proof. On the contrary, the fact that the Applicant did not dispute the Final Certificate of Payment indicated that the Respondent fulfilled her obligations.

The sum total is that having considered that the Applicant has not shown sufficient speed in disposing off Civil Suit No. 650 of 2016 and that the several works that the Respondent has, amounts to far more money than the subject of dispute in Civil Suit No. 650 of 2016, I find no reason to stop payment to the Respondent of what the Applicant

declared through the Certificate of Final Payment as legitimately earned.

The Application is therefore dismissed with costs to abide the main suit.

Dated at Kampala this 7th day of December 2017.

**HON. JUSTICE DAVID WANGUTUSI
JUDGE**