

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

CIVIL SUIT NO. 979 OF 2016

**SALINI COSTRUTTORI SPA:.....PLAINTIFF
VERSUS**

1. THE ATTORNEY GENERAL

2. UGANDA NATIONAL ROADS AUTHORITY:.....DEFENDANTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

Salini Costruttori Spa the Plaintiff herein sued the Attorney General and Uganda National Roads Authority herein after called the Defendants jointly and severally seeking payment of UGX. 11,338,362,079/= and Euros 2,268,587.45, interest, general damages for breach of contract and costs of the suit.

The background to this claim as discerned from the pleadings is that the Plaintiff and the 1st Defendant executed a contract dated 30th April 2004 for the construction of the Kampala Northern Bypass. Under this contract the 2nd Defendant's predecessor The Road and Agency Formation Unit (RAFU) of the Ministry of Works and Housing was the supervisor of the contract.

During the progress of the works, disputes that arose between the parties were settled by way of amicable settlement as provided under Article 68 of the General Conditions of the Contract.

One of the disputes was Referral No. 26 the "Asphalt Claim" which was referred to Arbitration and an Arbitral award was delivered on the same. The Arbitrator observed that both the Plaintiff and the 1st Defendant caused delays in the project. He however found that the Plaintiff was entitled to an extension though without additional payment. An extension to 1st October 2009 was granted.

According to the Plaintiff she completed the contracted works on 30th September 2009 and a Certificate of Acceptance was issued in accordance with the contract by the 2nd Defendant. That

the maintenance period for the works to be carried out expired on 30th September 2010 and she proceeded to complete rectification of defects on 2nd August 2011. Because she had carried out her part of the bargain, issuance of the final acceptance certificate was due.

On 2nd June 2015 the Plaintiff and the Government of Uganda represented by the National Authorising Officer of the European Development Fund in the Ministry of Finance, Planning and Economic Development executed a Settlement Deed and Release. By this deed, each party was to be released and completely discharged of all/ any rights, duties, and obligations whatsoever arising out of the contract. Furthermore, the deed represented a full and final settlement of any actions, claims, rights, demands and set-offs.

According to the Plaintiff it was not until 19th June 2015 that the Final Acceptance Certificate was issued. That she prepared a Draft Final Settlement of Account according to the contract however the 2nd Defendant delayed to respond to her request for final payment which caused her to maintain bank performance bonds/ guarantees and pay interest on the same.

Because of the failure to issue the Final Statement of Account within 90 days from the submission and receipt of the Draft Final Settlement Account and the 1st Defendant's delay to release the Plaintiff's bond/guarantees she incurred additional expenses in maintaining the bonds/guarantees. She therefore filed this suit against the Defendants jointly and severally seeking a declaration that the Defendants breached their obligation under the Contract and the Settlement Deed, payment of UGX. 11,338,362,079/= and Euros 2,268,587.45 and accruing interest at contractual rate, general damages, interest at a commercial rate and costs of the suit.

Before the matter could proceed to Scheduling the 2nd Defendant raised a preliminary objection contending that the Amended Complaint dated 13th April 2017 did not disclose a cause of action against her.

Counsel for the 2nd Defendant premised the objection under two heads namely;

- a) That the 2nd Defendant was not privy to the construction contract between the Plaintiff and the 1st Defendant.
- b) That the 2nd Defendant as a Supervisor was an agent of the disclosed Principal, the 1st Defendant.

He submitted that in construction contracts, Resident Engineers or Engineers or Project Managers or Supervisors act as Supervisors of works on behalf of the employer which is the Contracting authority. That the Resident Engineer is indeed appointed by the Contracting authority, therefore there is no privity of contract between the Plaintiff and the 2nd Defendant as Supervisor.

He further submitted that the Plaintiff clearly showed that the Principal was the Contracting Authority namely the Government of Uganda represented by the National Authorizing Officer of the European Development Fund, the Ministry of Finance, Planning and Economic Development.

Furthermore that for those reasons a breach of contract under the existing relationship could not give rise to an action by the Plaintiff against the 2nd Defendant who was an Agent of a disclosed Principal.

In reply, the Plaintiff contended that the Amended Plaintiff showed a cause of action against the 2nd Defendant. Counsel for the Plaintiff relied on paragraph 2 of the Amended Plaintiff that states that the 2nd Defendant is the successor in title for the defunct Roads Agency Formation Unit which is under the Ministry of Works, Housing and Communication. He further submitted that the 2nd Defendant as a Supervisor of the contract had roles clearly provided for in the contract. That because of these obligations the 2nd Defendant was privity to the contract.

He submitted that the 2nd Defendant was privity to the contract in terms of her obligations embedded in the contract. That their continuing obligations under the contract made them privity. Furthermore, that this did not necessarily need a signed contract between the 2nd Defendant and the Plaintiff.

The Plaintiff also submitted that the 2nd Defendant's obligations were continuing and accruing obligations as indicated by Article 5 of the Special Conditions of the Contract and Article 62 of the General Conditions of the Contract. Article 5 of the Special Conditions of the Contract provides that;

“The Supervisor’s Representative shall carry out the necessary duties for the supervision and checking of the works and the testing and examination of the materials used and the quality of

construction. The Supervisor's Representative shall have no authority to relieve the Contractor of any of his obligations under the Contract. He shall have authority to issue Administrative orders about the nature or amount of any works within the scope of the day to day management of the Works."

Article 62 of the General Conditions of the Contract stipulates that the 2nd Defendant is responsible for the issuance of the Final Acceptance Certificate. It reads;

"62.1 Upon the expiration of the Maintenance Period, or where there is more than one such period, upon the expiration of the latest period, and when all defects or damage have been rectified, the Supervisor shall issue to the Contractor a Final Acceptance and a copy thereof to the Contracting Authority stating the date on which the Contractor completed his obligations under the Contract to the Supervisor's satisfaction. The Final Acceptance Certificate shall be given by the Supervisor within 30 days after the expiration of the above stated period or as soon thereafter as any Works as instructed pursuant to Article 61, have been completed to the satisfaction of the Supervisor."

That since the Final Acceptance Certificate was issued by the 2nd Defendant her presence is necessary to resolve the contention arising from the Draft Final Statement of account and the work executed by the Plaintiff.

It is a settled position of the law that the question as to whether a plaint discloses a cause of action is determined upon the perusal of the plaint alone and any attachments to it and on the assumption that the averments in the plaint are true; **Attorney General vs Oluoch (1972) EA 392**. Furthermore, the essential elements required to establish a cause of action namely; that the Plaintiff enjoyed a right, secondly, that the right has been violated and that the Defendant is liable should be disclosed; **Auto Garage vs Motokov No. 3 (1971) EA 514 at page 517**.

In the instant case the Plaintiff alleges that the Defendants failed to issue the Final Statement of Account within 90 days from submission and receipt of the Draft Final Statement of Account,

that the 2nd Defendant's interpretation of the Settlement Deed was untenable and that the 1st Defendant delayed to release the Plaintiff's bonds/guarantees thus causing the Plaintiff to incur additional expense in maintaining the bonds/guarantees.

From the foregoing, it would seem that the 2nd Defendant had a part to play in the issuance of the Final Statement of Account upon receipt of the Draft Final Statement of Account from the Plaintiff. This is clearly shown by the provisions of Article 62 of the General Conditions of the Contract.

Furthermore the letter dated 15th March 2016 written by the 2nd Defendant responding to the Plaintiff's request for payment of UGX. 9,475,684,965/= plus EURO 2,226,489.50 paints a picture that the 2nd Defendant was responsible for receiving the Draft Final statement of Account and issuance of the Final Statement of Account.

She wrote;

"We wish to clarify that the contract for the construction of the Kampala Northern Bypass was between the Government of Uganda and SALINI Costruttori Spa, 22 via Della Dataria 00817 Roma Italy and not SALINI Costruttori Spa, Uganda branch, 8km, Kayunga Road, Kikubwamatwe, Jinja, Uganda as you indicated in your communication.

We have considered the request and the following is our response;

"1. It is a requirement under Article 51 that the Contractor submits draft final statement of Account within 90 days of receipt of the final acceptance which you have duly done.

2. Clause 3.1 of the settlement Deed requires that a Final Statement of Account will be issued as per the contract.

3. Clause 4 of the settlement deed states in part, "By this Deed each party hereby releases and forever discharges all and/ or any rights... And this deed is in full and final settlement of any actions, claims, rights, demands and set-offs..." In accordance with this

clause, we expect you to submit the draft final statement of account with no cost implications.

In view of the above we consider that your Draft Final Statement of account is erroneous and is not accepted. We require that you re-submit the Draft Final Statement of Account so that this project is concluded.”

In addition to the foregoing, the 2nd Defendant in her own Written Statement of Defence acknowledges her obligations as regards the Final Settlement of Account and the Final Payment. In paragraph 8 of the Written Statement of Defence she states;

“8. In further response to the Paragraphs listed in the foregoing Paragraph,

(i) Clause 3 states that;

“The Final Settlement of Account and Final Payment will be made in accordance with the provisions of the Contract.”

*(ii) **Article 51** of the GCC provides for the Supervisor’s obligation to prepare and issue a final statement of account (hereinafter referred to as “FSA”) within 90 days after receipt of Draft Final Statement of Account (hereinafter referred to as “DFSA”) from the Contractor. **See Clause 51.2.***

*(iii) The import of issuance of an FSA is for the Supervisor to determine the amount finally due (to either Party) under the Contract and further, constitutes a written discharge of the Contracting Authority, confirming that the total in the FSA represents full and final settlement of all monies due to the Contractor under the Contract. **See Clauses 51.3 and 51.4”***

While the 2nd Defendant contended that they were not privy to the contract and the Settlement Deed between the 1st Defendant and the Plaintiff, the Form of Tender as attached to the

Amended Plaintiff shows that as early as 2nd March 2004 the 2nd Defendant's predecessor was involved in the transactions between the Plaintiff and the 1st Defendant.

It is trite that a contract cannot confer rights or impose those obligations arising under it, on any person except the parties; ***Dunlop Pneumatic Tyre Co. Limited vs Selfridge & Co. [1915] AC 847.***

I respectfully agree with the submissions of the 2nd Defendant's Counsel that in a situation where the Principal is disclosed, the agent is not liable.

Going by the obligations of the 2nd Defendant stated in the contract, it appears that the Contractor would submit to the Supervisor a Draft Final Statement of Account with supporting documents showing in detail the value of the work done in accordance with the Contract, together with all further sums which the Contractor considers to be due to him under the contract in order to enable the Supervisor prepare the Final Statement of Account.

Furthermore, Article 51.2 shows that upon receipt of the Draft Final Statement of Account and all information reasonably required for its verification the Supervisor would prepare the Final Statement of Account. The provisions within Article 51 indicate that verification of the amounts due under the contract was a duty to be carried out by the 2nd Defendant, a pre-condition necessary for the 1st Defendant to pay the Plaintiff.

It is my opinion that the construction of the contract provided continuing obligations on the part of the 2nd Defendant. The verification of the amount due under the Contract and the issuance of the Final Statement of Account involved both Defendants.

Under Order 1 Rule 3 of the Civil Procedure Rules all persons will be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transactions or series of acts or transactions is alleged to exist.

This position is buttressed by the decision in ***Amon vs Raphael Tuck and Sons Limited [1956] ALLER 273*** wherein it was held that;

“A party may be joined in a suit not because there is a cause of action against it, but because that party's presence is necessary in

order to enable court effectively and completely adjudicate upon and settle all the questions involved in the cause or matter.”

This implies that if a party would be affected by the decision of the Court, it is only just that they be made party to the suit. In this case if it be true that the 2nd Defendant delayed to respond to the Plaintiff's request for payment, leaving out the 2nd Defendant would make it very difficult for the 1st Defendant to defend herself.

I hold to this position because to prepare and issue a Final Statement of Account within 90 days after receipt of the Draft Final Statement of Account of the Contractor was solely responsibility of the 2nd Defendant.

The sum total is that this being a case wherein the 2nd Defendant's presence is necessary for Court to effectively adjudicate upon and settle issues in contention, this Court finds this preliminary objection unsustainable. It is hereby dismissed. Costs to abide the outcome of the main suit.

Dated at Kampala this 8th day of July 2019.

HON. JUSTICE DAVID WANGUTUSI.

JUDGE