

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

**MISC. APPLICATION NO. 343 OF 2019
(ARISING FROM HCT-00-CC-CS-650-2016)**

**UGANDA NATIONAL ROADS
AUTHORITY:.....APPLICANT
VERSUS
DOTT SERVICES LTD
PROFESSIONAL ENGINEERING
CONSULTANTS (PEC) LTD :.....RESPONDENTS**

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

Uganda National Roads Authority, the Applicant herein brought this Application against Dott Services Limited and Professional Engineering Consultants (PEC) Limited the Respondents in these proceedings seeking enlargement of time to enable her file an Application before this Court for leave to amend the Plaint in Civil Suit No 650 of 2016, leave to amend her Plaint in the said suit and costs of the Application.

This Application is grounded on the following;

1. That there has been a discovery of new information that was not available to the Plaintiff at the time of the last amendment.
2. That the new information was discovered on or about 24th March, 2019 when the time to seek leave to amend the Plaint after the Scheduling Conference had expired;

3. The new information discovered necessitates that the fact relating to fraud pleaded be particularized through amendment;
4. The amendment is necessary to enable court to determine the real issues in controversy between the parties and;
5. The Application is intended to avoid multiplicity of suits and will not prejudice the Respondents in any way.

The issues in this Application stem from a claim filed by the Applicant against the Respondents in Civil Suit No. 650 of 2016. It is clear from the pleadings that the Applicant had contracted the 1st Respondent to construct a road from Tororo to Soroti in Eastern Uganda. For the better running of this project the Applicant appointed the 2nd Respondent as the Project Consultant. The Project Consultant would do the day to day supervision of the construction and approve certificates for payment. The 2nd Respondent was also supposed to deal with variation in respect of construction costs and ensure that the agreed duration of the contract was achieved.

In the course of the constructions there were delays here and there. The delays were provided for in the contract agreement wherein the Applicant would be liable to compensate the 1st Respondent for delayed commencement and or any other delays that would be occasioned not being the fault of the 1st Respondent.

Pleadings indicate that the constructions were later on varied in respect of construction costs and duration of the contract. The 1st Respondent citing delayed commencement of permanent works lodged a claim of sums of money amounting to UGX. 29, 858,532,071/=. The Applicant was hesitant to pay this money and asked the 2nd Respondent to review the 1st Respondent's claim.

The 2nd Respondent reviewed the figure to UGX.18,332,208,914/= in respect of the Mbale-Soroti road a stretch of 103 kilometers and UGX. 11,526,323,154/= in respect of the Tororo-Mbale road a stretch of 49 kilometers and advised that this would be the compensation for the claim of financial loss for delayed payment of permanent works. Acting on this advise the Applicant paid the 1st Respondent.

The Applicant contends that subsequent to the payment an internal audit into the transaction took place and she discovered that the 2nd Respondent colluded with the 1st Respondent and negligently and fraudulently approved the 1st Respondent's claim.

On the 20th of July 2016 the Applicant wrote to the 1st Respondent to refund the money. A similar letter was written to the 2nd Respondent. The 1st Respondent declined to refund the money which resulted into this suit.

The suit had particulars of fraud alleging that the 1st Respondent made the claim falsely as prolongation costs with the full knowledge that such costs were not due at all. And as against the 2nd Respondent the Applicant alleged that the act of advising, certifying and submitting of the IPC to the Applicant with recommendations to make payments of UGX 29,858,532,069/= as prolongation costs knowing very well that such costs were not due to the 1st Respondent amounted to fraud.

As between the 1st and 2nd Respondents the Applicant particularized fraud as *“colluding and conniving to make a false claim for prolongation costs in the sum of UGX 29,858,532,069/= well aware that such loss was never suffered as claimed or at all.”*

In addition to the foregoing particular, the Applicant alleged that the 1st and 2nd Respondent colluded to raise fictitious invoices and receiving and retaining payments upon them which amounted to unjust enrichment at the expense of the Applicant.

For those reasons the Applicant contended that she was entitled to a refund of the sums paid to the 1st Respondent.

On the 15th November the Applicant filed Misc. Application No. 934 of 2018. In this Application she sought leave to amend its Complaint in CS No. 650 of 2016. The grounds upon which she based this Application were that;

- a) there had been discovery of new information that had not been available to the Applicant at the time CS No. 650 of 2016 was filed.
- b) the amendment was necessary because the discovery had rendered the amount claimed inaccurate since it now had to be reduced.

On the 15th of January 2019 Counsel for the Respondents conceded to the Application subject to the Applicant paying costs. The court granted the Application with costs save that the costs were to be paid in any event after the hearing of the suit. Pursuant to the orders, the Applicant filed an Amended plaint shifting most of the claims from fraud to negligence. The Applicant contended in the Amended plaint that the Applicant's claim of prolongation costs to the amount that was approved was unlawful, unjustified and or illegal.

As to the 2nd Respondent the Applicant attributed negligence to the approving, advising, certifying, submitting of the IPC and recommending to the Applicant to make payments with knowledge that such costs were not due. The amount to be recovered was also reduced to 21,025,279,315/= as the sum over paid to the 1st Respondent.

On 26th of February 2019 a Scheduling Conference was held and a hearing was fixed for 9th May 2019. It was surprising that on 7th May 2019 the Applicant again filed Misc. Application No. 343 of 2019 seeking two things. The first that time for filing a Miscellaneous Application for leave to amend the plaint be enlarged. Secondly, that the Applicant be granted leave to amend the Plaint in CS No. 650 of 2016.

The Application was grounded on the following;

- a) that new information that was not available to the Applicant at the time of the last amendment had been discovered.
- b) that this information was discovered on 24th March 2019 in which the time to seek leave to amend the plaint had expired scheduling conference having been held on the 26th February 2019.
- c) that the new information that had been discovered made it necessary to particularize the facts relating to fraud through amendment.
- d) and also that this amendment would enable court to determine the real controversy between the parties and avoid a multiplicity of suits.

In reply Prasad Reddy a director of the 1st Respondent deponed that the Application was misconceived because all the information referred to as discovered had all along been in possession of the Applicant. He referred to the affidavit in support of the Application deponed by Lydia Katami in which she said that they had been found in their archives after a detailed

search was made. Lydia Katami had deponed that as early as 19th October 2016 they had sought discovery and inspection of documents within the Respondents' possession and the 1st Respondent's lawyers were uncooperative and declined to avail the Applicant the documents sought.

The letter asking for the documents "**Annexure A**" to the Application required the production of several documents comprising an equipment register, confirmation of manufacture date of equipment, logbooks and proof of ownership of equipment, proof of purchase price of the equipment, evidence of insurance of the equipment, maintenance records of the said equipment. Also sought for by the Applicant were site diaries for the alleged prolongation period, pay roll for staff on site, mobilization schedule and evidence in respect of mobilization costs.

The Respondents through their Advocate replied to the foregoing on 4th November 2016 by "**Annexure B**". Referring to the Applicant's inquiry counsel for the Respondents wrote in part;

"Please note that the Plaintiff filed the suit with full knowledge of the facts and evidence it intended to rely on. It is not upon the Defendants to assist the Plaintiff prove its case.

Secondly, all the information that you are asking for has been in your possession for several years now."

Indeed from the affidavit in support there is no doubt that the documents were in possession of the Applicant. But it is clear from paragraphs 12 of the Affidavit in support of the Application that the new information was discovered after the scheduling conference had expired. These documents were discovered in the archives of the Applicant. The reasons given were that at the time when these documents were being looked for there was a reshuffle and a complete overhaul of the human resource and structure of the Applicant and therefore those who knew the location of this or the other document were not available.

It is also not in dispute that Sir Alexander Gibbs who was formerly the consultant had since left which made it more difficult for them to get the documents. Prasad Reddy of the 1st Respondent together with Bonnie Kalanzi Nsambu of the 2nd Respondent all deponed that the seeking of admendments was only intended to delay the hearing of the suit. That in any case the particulars

of fraud had been pleaded in the first plaint and were intentionally removed in the amended plaint. That to seek to reintroduce them again amounted to abuse of court process.

I have listened to both parties and I am convinced that a party who practices and conducts a case with Application after Application especially seeking the same orders commits abuse of court process if no sufficient grounds are shown.

In this particular case at the time the Applicant filed the first plaint they hoped that they would be availed the documents in “**Annexure A**”. These documents were theirs but they did not know where they were. An explanation has been given that the removal of particulars of fraud when they amended the plaint was because they could not find these documents in “**Annexure A**” which were very necessary on matters that dealt with prolongation costs of the permanent works.

The Application to amend because they could not prove their claim without those documents was legally correct. The reason why the Applicant now wants to reinstate those particulars is because they have found the documents in respect of plant, records of rain, site diaries for the alleged prolongation period, records of human resource and their pay roll. These were documents that were in their possession and the Applicant has been truthful about it that the disorganization that followed the overhaul and restructuring laid off many of their human resource and therefore created difficulty in accessing those documents.

That difficulty therefore is a fit and proper ground upon which time would be extended within which the Applicant would seek leave to amend her pleadings.

The same difficulty fits in with the ground that they had removed particulars of fraud from the original plaint and that now they had found them, an amendment was necessary.

Order 6 rule 19 of the Civil Procedure Rules provides;

“The court may at any stage of the proceedings allow either party to alter or amend his or her pleadings in such 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.”

In my view and looking at the first plaint that was filed the real question in controversy between the parties is whether the two Respondents committed fraud one for approving a payment for prolongation and the other for claiming and receiving it.

The amendment sought therefore is to enable the real question in issue between the parties to be raised on the pleadings. Most important point is to ensure that in the course of ordering for amendment no injury should be occasioned on the Respondent and that if such injury occurred the Respondent would be sufficiently compensated for by way of costs or other terms that the court would order.

Normally leave should be granted unless the party applying exhibited malafide or was trying to bring in something that would not help in the settlement of the suit. I have not seen any injustice that would be occasioned by the amendment that would be compensated with costs. All that I see is that this amendment would help avoid multiplicity of proceedings and more so there is nothing express or implied either by law that would prohibit this amendment.

Nowhere does the intended amendment substitute this cause of action for another or of different character.

This Application has, in my view been made bonafide . There is no doubt that on amending the Respondents will again be bogged down by amending their own pleadings and filing fresh trial bundles if need be. These are inconveniences that accompany suits but which as I am about to do herein below can be lessened by atonement of costs.

For those reasons I find this a fit and proper case wherein the leave sought by the Applicant is granted on the following conditions;

- a) That the Applicant shall pay to the Respondents the costs of this Application within 10 days from the date of its taxation.
- b) That the Respondents should file their bills of costs within 10 days from today and have them fixed for taxation.
- c) That the Applicant file the Amended Plaint within five days from the date of this Ruling subject to its being struck off the record in event of default.
- d) That upon filing of the Amended Plaint the Respondents' Written Statement of Defence if any shall be filed within 15 days of being served.

e) And a reply to the Defence if any within 7 days from date of service of the Defence.

Dated at Kampala this 27th day of September 2019

HON. JUSTICE DAVID WANGUTUSI

JUDGE