THE RUBLIC OF UGANDA

IN TH HIGH COURT OF UGANDA AT KM1PALA

CIVIL SUIT NO. 93 OF 1997

UGANDA POSTS & TELECOMMUNICATIONS CO:::::::::::::::::::::::: PLAINTIFF

- versus -

INTERNATIONAL TELEVISION :::::::::::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE:- HON. THE PRINCIPAL JUDGE - MR. JUSTICE J.H. NTABGOBA RULING

This is an application by Counsel for the defendants/applicants that the suit pending in this Court be dismissed for the reasons I will give in the background to the oral application.

The background facts are that the International Television Network (herein to be referred to as the first respondent) signed an Agreement with the Uganda Posts and Telecommunications corporation (to be referred herein as the plaintiff). The Agreement termed "AGREEMENT FOR UPLINK SATELLITE SERVICES" provided that the plaintiff would facilitate the first defendant to lint up with the International Satellite (INTELSAT) for purposes of accessing Satellite Services in respect of which the defendant bad received a licence from the Ministry of Information "for provision of Television Services" in Uganda using the INTELSAT linkup under a (15) year lease.

It is said that after obtaining the licence from the Ministry of Information the first defendant, on the advice of the Ministry of Works and Telecommunications, applied for the access to INTAT facilities to the plaintiff. It is not in dispute that the plaintiff is the sole provider in Uganda of Telecommunications Services. In the preamble of t Agreement, it is stated that, in addition, the plaintiff had express permission of the Government of the Republic of Uganda to sign a Protocol with the INTELSAT and that the plaintiff had signed such Protocol 'to represent the Government in all dealings with the INTELSAT'.

In consideration of the plaintiff accessing the first defendant to the INTELSAT telecommunications facilities, the first defendant would pay an agreed sum of money in an agreed mode. The contract is that the facilities to be accessed to the defendant would be over the area provided in the licence. Actually, according to the pleadings, the defendant was to be

facilitated with the Capacity on the space segment covering Uganda, East and Central Africa known as ‘footprint IS 702 at 359 E’; but according to paragraph 4(b)iii) of the Amended W.S.D. only Uganda at footprint IS 707 at was accessed. Mr. Paulo Sebalu learned Counsel for the defendants had requested to have a view of the footprint as well as the Protocol which the plaintiff alleged it had signed with INTELSAT, as well as evidence that the plaintiff had authorised the plaintiff to deal on behalf of the Government in all dealings with the INTELSAT. It is said that Mr. Sebalu was able to view the footprints and as for the authority, it is to be gathered from the two letters written by Minister Nasasira of the Ministry of Works, Housing and Communications, addressed to the Attorney General on 28.7.98 and to the Chief registrar on 19.2.98. In brief, Mr. Nasasira said to the Chief Registrar: -

> “This is to confirm that Uganda Posts and Telecommunications Corporation is the authorised signatory to the INTELSAT Agreement in Uganda and has been attending all meetings of signatories and meets other obligations on behalf of the Country.

> “The second defendant approached both Government and INTELSAT and was advised to route his application through UTC which he did and their application was granted and. services provided by Intelsat. As such it is very surprising if the defendants are denying the authority of UPC in processing their application”.

Admittedly Minister Nasasira’s letters were not produced or tendered under cross-examination on oath, but they are official communications, and any doubt as to their truth would lead to him being summoned to Court to be cross-examined. It is important to point out that the second defendant is Thomas Kato, the Managing Director of the first defendant who therefore signed the Agreement on behalf of the first defendant after also making the applications for the facilities on behalf of the first defendant.

What Mr. Sebalu still wants is the Protocol recited in the Agreement and averred in the plaint to the effect that the plaintiff signed it with INTSA. When, on Mr. Sebalu’s application, this Court ordered the plaintiff to produce the Protocol, Counsel for the plaintiff kept on applying for adjournments allegedly that he was trying to contact the INTELSAT for a copy of the

Protocol. After several such applications for adjournment, I gave what I ordered would be a final adjournment. I did not say that failure to bring copy of the protocol would lead to dismissal of the suit. What I had in mind was that at the next hearing I would proceed without the Protocol as if the same was non-existent.

On the next hearing a new lawyer, not belonging to the firm that had hitherto represented the plaintiff, appeared Mr. Paul Byaruhanga, learned the new Counsel for the plaintiff, applied for an adjournment for the reasons that he had been just engaged, that he had not interviewed his client, the plaintiff; that he had not studied the case file and that, after studying it he might contemplate making amendments to the plaint. It was at that juncture that Mr. Sebalu learned Counsel for the defendants, made an oral application that the suit be dismissed.

I overruled him and granted the adjournment ordering the plaintiff to compensate the defendants with costs. It is against this ruling that Mr. Sebalu, there and then, applied for leave to appeal against my ruling. He then orally applied for adjournment to a date when he would address the Court on the grounds on which he based his application to appeal. I granted him the adjournment. When Court resumed hearing after the adjournment, Counsel advanced two grounds upon which he wished to appeal. I will set them down hereafter. After hearing both Counsel, I adjourned the case for this ruling. But the grounds advanced by Mr. Sebalu are two as follows: —

(1) “That for no good reason the learned Judge refused to allow my preliminary objection”.

(2) That for no good reasons the ruling, instead of confining itself to the narrow issues of the preliminary objection, it went all over the case including matters over which we had not called evidence; and which were not intended to be part of the preliminary objection.”

One needs to look again at the preliminary objections raised by Mr. Sebalu and the ruling I made dismissing them.

Mr. Sebalu objected to Mr. Byaruhanga's application for adjournment for the reasons I have already recorded. Apparently, Mr. Sebalu could not see how, after I had given a final adjournment, I could grant a further adjournment.

This is why he said:-

> " I object to the application for adjournment when this Court gave its order on 30.6.98 for a final adjournment, it was to enable the plaintiff to produce a document they claimed they had executed, and that had been about the third time to adjourn the hearing to enable the plaintiff to produce the document".

In his submission in support of the application for adjournment, Mr. Byaruhanga had intimated that he was talking into the possibilities of amending the plaint so as to join the Attorney General as Co-plaintiff.

> Mr. Sebalu reacted to this by saying among others: —
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> "The document is the Protocol referred to in the plaint. It was not a question of requiring the Attorney General to be joined in order to produce the document alleged to have been conducted between the plaintiff and the defendant. If, as is said in the preamble to the agreement, the government had expressly allowed UPTO to represent it, where is that express permission? You do not have to join the Attorney General if you were expressly permitted by the Government to represent it. Why do you have to bring in a person who gave you express permission to represent him? It is the authority we want. If the plaintiff is trying to cover up the permission, it is not permissible. My submission is that such document (i.e. the Protocol) does not exist. Three times we have had to adjourn to get that document, and today they have not

> even alluded to it. When you made the order that that was the last adjournment it was not against counsel.
>
> It was against UPTC, and therefore, even the new advocate should have produced the document. I do not see why a new Counsel should have been appointed. You fixed this hearing during the Court vacation because it was the view of this Court that the case had been dilatorily handled. The Court's valuable time is also wasted. I submit that the grounds given by learned friend are just sufficient to allow him because he is new to the case but not for you to set aside your order. I object very strongly to this application for adjournment. But since costs have been conceded, I renew my application that the costs should be paid before the next hearing".

In the first place, even though I granted an order that the hearing be fixed, I was not aware that the plaintiff was going to drop its Counsel and engage a new one who would certainly require time to study the case, consult the client and even make any amendment to the plaint. I cannot compel the plaintiff to stick to its old Counsel. I cannot prevent him from making any amendment, if such amendment will assist the plaintiff or the Court to effectively and finally dispose of the matter in controversy in the suit between the parties. Rule 18 of order 6 of the Civil Procedure Rules clearly provides that a party is entitled to make any amendments to the proceedings at any stage of the proceedings. The plaintiff would effectively propose meaningful amendments only with professional advice.

If the plaintiff has decided to drop its Counsel and engage another one, Court cannot deny it that right of legal representation which is a constitutional right. After all, the award of adjournment is a discretionary decision and the Court would be doing injustice if it refused to grant an adjournment for good cause. As f or the anticipated amendments, the plaintiff would first make a chamber summons application pursuant to order 6 rules 18 and 30 of the Civil Procedure Rules. Counsel for the defendant would be given opportunity to challenge the application and then Court would make a decision whether or not to allow the application. It would therefore be premature for Counsel for the defendant to begin anticipating the grounds upon which an application for amendment would be based. In my Ruling in which I agreed with Mr. Sebalu that it would be unnecessary to join the Attorney General as Co-plaintiff, I did that by looking at the plaint and assessing its short comings as I am entitled to do. Section

103 of the Civil Procedure Act gives me that wide discretion when it provides that: —

> " The Court may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding".

That this provision gives wide discretion to the Courts was underscored by the Court of Appeal for Eastern Africa in the case of LAKYANI –vs- BHEJANI (1950) 17 E.AC.A. 29 when it held that "appeals against the exercise of its discretion by the Superior Court will only be entertained where they are based on some embarrassment or other injustice of substance". I think that I would be acting within the purview of the general power of the Courts to amend pleadings under S. 103 of the Civil Procedure Act which I have already cited. I am, indeed, entitled to order, as I did, that upon the nature of the application and the case as a whole, the plaintiff was guilty of imprecision. I did employ my inherent powers had the discretion widely given by 6.103 of the Act and Rule 17 of order 6 of the Civil Procedure Rules. I do think that when it is clear there are issues in a case for determination the parties should not be denied their right to be heard on those issue. In. this regard, I derive great encouragement from the words of Sir Charles Newbold when he was the President of the Court of Appeal in the case of Manoji –vs- Arusha General Store [1970] E.A. 137 at p. 138, that:-

> "It is however, in my view, completely immaterial whether the procedure was precisely what should have been. We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that <u>once</u> the parties are brought before the Courts in such way that no possible injustice is caused to either, then a mere irregularity in relation to the Rules of Procedure would not result in vitiation of the proceedings-------., Non-compliance with the rules of procedure of the Court which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties".

In our present case, the defendant, by amending the W.S.D. has controverted all that is averred in the plaint. This includes the plaintiff's averments that it obtained authority from the Government to deal with ITELSAT and that it signed a Protocol with the INTELSAT pursuant to the said Government's permission. The defendant has not only challenged the validity of the Agreement on the ground that it was based on misrepresentation. In the Amended W.S.D. the defendants went as far as indicating the particulars of misrepresentation. A look at paragraph 4 of the amended W.S.D. will show the detailed particulars of the challenges to the Agreement on which the plaintiff, in its plaint, bases its claim. I cite paragraphs 4 and 5 of the W.S.D.:-

Paragraph 4 :-

"The defendants shall contend that

(a) The defendants wrote Annexture 'A' to the Amended plaint under a misrepresentation by the plaintiff that the plaintiff had authority to deal with INTELSAT on behalf of the Government of Uganda when infact it did not have such authority.

(b) The Agreement Annexture 'B' is void and unenforceable against the defendants on the following grounds: —

(i) that the plaintiff had no authority to sue the defendants as is alleged in the plaint, and a preliminary objection will be raised at the hearing to this effect.

(ii) it was not made under seal as is provided in the first defendant's Articles of Association.

(iii) Although the defendants applied in Annexture A' for capacity on the space segment covering Uganda, Eastern and Central Africa (Foot-print IS 702 at

359°E) the plaintiff Without specifically notifying the defendants and obtaining their consent, varied the service area to Uganda only (Footprint IS 707 at 359°E). On discovering the mistake, the defendants wrote a letter of protest to the plaintiff on 25th June 1996 which will be produced at the hearing".

Paragraph 5:-

"in the alternative but without prejudice to the averments in paragraph 4 above the defendants shall contend that although the plaintiff agreed to up-link the Defendant with INTSAT, it has never done so and therefore there was total lack of failure of consideration on the part of the plaintiff and payments claimed---would have been gratuitous".

The amended plaint was filed in this Court on 5th March, 1997. The W.S.D. was filed 11th March, 1997 which was subsequent to the filing of the amended plaint. According to Mr. Sebalu, he filed the amended W.S.D. on 1st September 1997 after viewing the footprints. In that amended W.S.D. he controverted the plaintiff's capacity to sue his client. The challenge was based on the plaintiff's failure to produce the authority.

Mr. Ogalo, then representing the plaintiff to look for and produce the authority in Court. In the event, Mr. Ogalo was dropped by the plaintiff who in his place Mr. Byaruhanga was engaged. In those circumstances, what is Mr. Sebalu objecting to? Is it to the fact that Mr. Byaruhanga wishes to apply to amend and therefore he seeks adjournment? Is it that I have refused to strike out the amended plaint? But despite my order that the hearing would continue at the next hearing date, that cannot deny the plaintiff to amend e plaint at any time of the proceeding (see order 6 rule 18). Besides and also, it would be unjust to compel Mr. Byaruhanga to proceed with the conduct of the case he has not studied and whose owner he has not had opportunity to interview. To force him to conduct his client's case in such circumstances would amount to gross injustice, in the same way it would be if I had to pin him to base the conduct of his case on the amended plaint which he would very much like to

amend. The only just decision of the case was to allow the adjournment, compensate the defendant with the costs and wait for the application to amend under order 6 rule 18 of the Civil Procedure Rules. It is at the hearing of the application that the defendants could apply under order 6 rule 17 of the Civil Procedure Rules. This would have to be done after the intended amendments have been admitted, if admitted, since it was not done to the present amended plaint. But it would have to be done by an application by chamber summons pursuant to order 6 rule 30 of the Civil Procedure Rules.

Better still, Mr. Sebalu's application should have come under order 10 rules 21 and 24 which deal with non-compliance with an order for discovery. But again this could not have been brought orally. It must be brought under order 10 rule 24 which provides that applications under order 10 shall be by summons in chambers.
Rule 21 of order 10 of the Rules provides: —

> "Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall, if a plaintiff be liable to have his suit dismissed for want of prosecution and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly".

Mr. Sebalu's oral application for striking out the suit for failure to avail a document alleged in the plaint or for failure to produce information was misconceived as the same should have been brought on a chamber summons application pursuant to order 10 rules 21 and 24 of the Civil Procedure Rules. The same oral application to strike out the plaint that was amended was equally misconceived as the same should have been brought under order 6 rule 17 of the procedure Rules. If wished to apply to strike out the suit on the basis of the intended amendment, then he should wait and proceed under rule 21 of the order. But application under either rule 17 or rule 21 of Rule 6 of the Civil Procedures would have to be by Chamber Summons pursuant to rule 50 of order 6 of the Rules.

Either way, the oral application to either strike out the suit or to proceed without adjournment would deny the plaintiff substantive justice which would be in contravention of Article 126 of

the constitution, 1995. The parties are already in Court with substantive issues, arising out of pleadings. They must be given a hearing.

In the circumstances of this case I dismiss the application from leave to appeal against my Order granting adjournment to the plaintiff. The defendants are ordered to meet the Costs of this dismissal.

J.H.NTABGOBA

PRINCIPAL JUDGE

25/08/98