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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT No. 159 OF 2018

1. IDDI OUMA

10 **2. SSEMBAJJWE PAUL ::::::::::::::::::::::::::::::::::::::: PLAINTIFFS**

VERSUS

1. UGANDA NATIONAL ROADS AUTHORITY

2. DOTT SERVICES LIMITED

3. ATTORNEY GENERAL OF UGANDA ::::::::::::::::::::::: DEFENDANTS

15 **BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW**

RULING:

At the commencement of the hearing of the suit, Mr. Tumusiime Enos Counsel for the 2nd Defendant raised a number of preliminary objections to the suit.

20 The first one is that the 2nd Plaintiff has never appeared in court. Counsel sought to move court under order 6 rule 30 CPR to strike out the suit mainly that it discloses no reasonable cause of action. Counsel submitted that the plaint alleges fraud against the

5 Defendants but lacks the particulars of fraud. That no particulars of fraud are pleaded or particularized and for that reason should be struck out.

The second objection is that the subject of the contract for the rehabilitation of Nakalama-Tirinyi Road has already been reinstated,
10 extended and was granted to the 2nd Defendant. That as such the plaint is overtaken by events and serves no useful purposes and should be struck off.

The third objection is that the Plaintiffs seek general damages. That the Plaintiffs have not pleaded anywhere that they are tax payers,
15 yet they claim damages on behalf of all Ugandans. That as such they have not disclosed a cause of action and their case fits in the category of futile and useless cases. That for that reason the plaint be struck out with costs.

In Reply, Mr. E. Kayondo holding brief for Mr. Sserwanga Counsel
20 for the Plaintiffs subsequently filed written submission in reply. He argued (on the first preliminary objection) that the case was coming for mention for the first time and that the 2nd Plaintiff has previously attended court/mediation but that outlines date he was

5 out of the country. That in any case under Order 3 vi CPR a party
to the suit may appear in person or through a recognized agent or
an Advocate duly appointed. That this objection should be
overruled since the presence of the 2nd Plaintiff's Advocate in court
is deemed appearance on behalf of the 2nd Plaintiff.

10 On the objection that no particulars of fraud are pleaded, Counsel
submitted that in paragraph 6 (b) of the plaint and 13 (b) thereof, a
cause of action and prayer is made to the Court to declare that the
said agreement was executed "illegally" and "fraudulently." That the
particulars of illegality are of the said fraud and irregularities are
15 pleaded even though headed as particulars of illegalities in the
procedure to reinstate the contract that was initially terminated."

That fraud is an illegality for this proposition counsel relied on the
case of ***Fredrick J.K. Zaabwe Vs Orient Bank and Others***
S.C.C.A No. 04 of 2006. Counsel opined that having pleaded
20 illegalities, fraud is consequently pleaded as an illegality in the
plaint.

On the issue of particulars of fraud Counsel argued that the word
"Fraud" was omitted in the heading of subparagraphs (ii), (iii), (iv)

5 and(v) but that particulars of fraud are disclosed and the omission
to head them with the word “fraud” is a mere technicality that does
not go to the root of the matter. For these propositions, counsel
cited **Okello vs. UNEB Civil Appeal No. 12 of 1982 (SC)**
(unreported), and **Tororo Cement Co. Ltd vs. Fronkina**
10 **International Ltd SCCA No. 2 of 2001.**

On the point that the contract has been reinstated and granted to
the 2nd Defendant Counsel replied that whether or not a suit is
overtaken by events depends on whether there is a live dispute
between the parties. That the Plaintiffs see declarations that the
15 tripartite agreement entered into by the defendants on the 23rd day
of March 2018 was null and void and executed fraudulently. That
Court is being called upon to consider various transactions set out
in pleadings and make the declaration as prayed for. That it is
immaterial whether the contract was eventually awarded or even
20 that the road the subject of the contract was eventually worked
upon. That in any case a preliminary objection where evidence is
required cannot dispose of a suit. Counsel cited **Mukisa Biscuit**

5 ***Manufacturing Company vs. West End Distributors LTD, (1969)***
EA 696.

Counsel argued that whether or not the suit is overtaken by events is a matter of evidence which shall be heard and determined during trial.

10 Regarding issue of damages Counsel submitted that these can only be determined after the trial. Counsel again relied on the case of ***Mukisa Biscuit Manufacturing Company vs. West End Distributors Ltd*** (supra).

Counsel maintained that the suit discloses a cause of action against
15 Defendants in so far as it is filed under Article 50 of the Constitution and pleaded under paragraph 5 of the plaint.

Opinion:

The first objection is that the 2nd Plaintiff has never appeared in court. As to who may appear in court in a suit, order 3 r1 CPR
20 provides that a party may appear in court in a suit in person, or by his or her recognized agent, or by an Advocate duly appointed to act on his or her behalf. Counsel E. Kayondo holding brief for Mr. Sserwanga have been appearing for the 2nd Plaintiff. They are Advocates of the High Court and Court subordinate thereto and

5 there is no contrary evidence to that position. They are therefore
deemed to represent and appear for the 2nd Plaintiff as his duly
appointed Advocates. The objection in that regard is overruled.

On the issue of the plaint not disclosing a cause of action, indeed it
is observed that no particulars of fraud are pleaded or
10 particularized. Although merely not particularizing fraud would not
render the pleadings bad, the failure to plead fraud would render
the plaint not to disclose of a cause of action where the claim is
founded on fraud. The reading of the plaint in paragraph (q) (i)
shows a subheading titled;

15 **“PARTICULARS OF THE ILLEGALITIES IN THE PROCEDURE TO
RE-INSTEATE THE CONTRACT THAT WAS INITIALLY
TERMINATED:”**

The Plaintiffs then go on to aver facts they allege constitute
illegalities in the procedure to re-instate the contract from (i) – (v).
20 The careful reading of the said averments only shows that the
plaintiffs’ fault the legality of the procedures adopted by the 1st
Defendant in reinstating the 2nd Defendant’s contract that was
initially terminated.

5 Nothing in the averments points to or refers to any fraud in
reinstating the initially terminated contract by the 1st Defendant. It
is not correct for counsel for the Plaintiffs to argue that merely
because procedure adopted by the 1st Defendant is illegal. It is
necessary fraudulent. Counsel relied on ***Nafula Vs Kayanja &***
10 ***Anor Civil Suit No. 136 of 2011*** cited in ***Fredrick J.K. Zaabwe***
Vs Orient Bank and others case (supra) that fraud is an illegality.
Whereas indeed fraud is an illegality, not every illegality is
necessarily fraud. The definition of the term fraud in ***Fredrick J.K.***
Zaabwe case (supra) is very instructive. It means, among others;
15 ***“... the intentional perversion of truth by a person for the***
purpose of inducing another in reliance upon it to part with
some valuable thing belonging to him or to surrender a legal
right.....”

On the other hand Black’s Law Dictionary 8th Edition defined
20 “illegal” to what is contrary to or not authorized by law.

As these definitions apply to the particulars pleaded above, no fraud
was plead let alone particularized. It is not a matter of form but a
substantive requirement that where a cause of action is based on

5 fraud, the alleged fraud must be pleaded and particularized. Merely
pleading and setting out particulars of alleged illegality in procedure
adopted by 1st Defendant in reinstating the contract does not
amount to pleading fraud. Needless to state that the object of
pleadings is to inform each party what is the cause of the opposite
10 part that he/she will meet before and at the trial. As was held by
Supreme Court in ***Interfreight Forwarders (U) Limited vs. East
African Development Bank [1994 - 1995] HCB 54***, pleading
particulars in detail is meant to define with clarity and precision to
issues or questions which are in dispute between the parties and
15 are to be determined by court.

If the pleading fail to clarify the precise facts constituting a cause of
action or prevent either party from knowing the cause of action, the
plaint will not disclose a reasonable cause of action and the defence
will not offer a reasonable defence and they shall be struck off as a
20 result.

Whereas this court agrees with the holding in ***Okello vs. UNEB***
(supra) that failure to specify particulars of fraud under a definite
heading entitled “Particulars of fraud” does not initiate pleadings,

5 this court holds that failure to plead fraud would vitiate a plaint
where the claim is founded on fraud. This is not a mere technicality
in form as submitted by Counsel for the Defendant. It is a
substantive requirement that a cause of action be disclosed by the
plaint and annexures thereto.

10 Besides the above, the Plaintiffs bring this action under Article 50
(supra) and claim to be doing so on behalf of Ugandans and also
claim damages presumably on behalf of Ugandans. This has before
been held to be untenable
in

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That a case cannot be brought on behalf of an unnamed group
called Uganda Peoples' Congress. That the parties have to be
ascertained with clarity and an amorphous group of persons cannot
sue or be sued because it raises issues of costs and damages. If the
20 group on whose behalf the action is brought, on whose behalf the
action is brought loses, it will not be possible for it to pay damages
or costs. On that account, the suit was declared to disclose no

5 reasonable cause of action against the Defendants and was incompetent as the Plaintiffs lack the locus to bring this suit.

On whether the suit is overtaken by events, it is not true that that issue can only be determined after hearing evidence. Pleadings of parties if not controverted, can also bring out facts that show that a
10 suit is overtaken by events.

In paragraph 20 (c) of the written statement of defence of 2nd Defendant, it is averred that;

***“The new Contract signed by the 2nd Defendant with the 1st and 3rd Defendants, Annexure “I” to the Plaint, paragraphs 2 (i), (ii), (iii) and (iv), is for new scope of works, more than the Contract entered into on 2nd February 2015 and the new Contract is UGX.135,371,669,415/= which is less than the Bid price by China Civil Engineering and Construction Corporation of UGX.137,932,201,382/= Ugandan tax payer over
15 UGX.2,000,000,000/= as a result the new contract that is
20 being executed by the 2nd Defendant.”***

5 There is no reply to this defence relating to the fact that the new
contract has been entered into as of the stated day of 2nd February
2015 which predates the filing of the instant suit on 24/4/2018 by
over three years. Therefore the argument that the Plaintiffs see a
declaration that the tripartite agreement is null and void, is
10 unsustainable. A declaration is one such remedy a court can grant
in a suit.

Courts however, grant remedies that will be effective. If the effect of
a remedy is that it will be of no consequence, the court may not
issue such remedy. In the instant case the subject matter of the
15 suit, the tripartite agreement, was entered into reinstating the
earlier terminated agreement to rehabilitate the road in issue.
Declaring it null and void is of no consequence at all. A declaration
for the sake of it is of no effect and issued in vain. This is not to
mention of the order of prohibition also sought in the plaint. Court
20 cannot prohibit what has already been done.

The next effect is that the objections have merit, they are upheld
and the plaint is struck off with costs.

BASHAIJA K. ANDREW

JUDGE

Date:.....