

UGANDA / JUDGMENT

National outdoor advertisement contractors association & 7 ors v Uganda national roads (Miscellaneous Application No. 36 of 2015) [2015] UGHCCD 93 (3 September 2015)

[2015] UGHCCD 93

COURT

HC: Civil Division (Uganda)

CASE / FILE NUMBER

Miscellaneous Application No. 36 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 36 OF 2015

1. NATIONAL OUTDOOR ADVERTISEMENT

CONTRACTORS ASSOCIATION

2. ADMAN SOURCE & CONTRACTORS LTD

3. ATOM OUTDOOR LTD

4. CAPITAL OUTDOOR ADVERTISING LTD : APPLICANTS

5. CONTINENTAL OUTDOOR LTD

6. CONTRACT GRAPHICS LTD

7. REVOLUTION ADS LTD

8. AD CONCEPTS LTD

VERSUS

UGANDA NATIONAL ROADS AUTHORITY ::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING

This application is by Notice of Motion brought under Section 98 of the Civil Procedure Act, Section 36 of the Judicature Act, and Rules 7 (1) & (2) of the Judicature, (Judicial Review) Rules for orders that:

- a) Leave be granted to amend or/hear the amended Judicial Review application vide Miscellaneous Cause No. 157 of 2014 and Miscellaneous Application No. 514 of 2014 filed on 4th day November 2014.
- b) Costs of the application be provided for.

The respondent is the Uganda National Roads Authority.

The grounds of Application are that:

1. The applicant is a company limited by guarantee under the laws of Uganda with subscribers that practice outdoor advertising in Uganda.
2. The 2nd to 8th applicants are private Limited companies duly incorporated under the laws of Uganda and carrying on business of outdoor advertising and are members of the 1st applicant.
3. Some of the applicants participated in the procurement process vide procurement reference No. UNRA/SERVICES/2011-12/000007/01/02 for provision of lighting services along Kampala-Entebbe Highway.
4. That the applicants were dissatisfied with the procurement process vide procurement reference No. UNRA/SERVICES/2011-12/000007/01/02 for the provision of services to which the 1st applicant on behalf of all applicants filed an application for Judicial Review on the 14th day of October 2014.
5. The applicants have since decided to amend the application so as to include the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th parties as applicants to avoid a multiplicity of cases since the decision in the said matter would affect all of them.
6. That the application was amended without seeking leave of court as required by the law on Judicial Review.
7. The applicants seek leave of court to amend the applications and/or leave for the amended applications to be heard.
8. It is in the interest of justice that the application for leave to amend the applications be granted.
9. That since the respondent has not filed an affidavit in reply it shall not suffer any inconvenience.

The application is supported by the affidavit of Sarah Namwanje a Lawyer with Kabuzire, Mbabali & Co. Advocates which echoed the grounds in the Notice of Motion but added that:

1. Unless leave to amend/or hear the amended application is granted to the applicants, the respondent will continue with her illegal acts at the prejudice of the applicants who shall continue to suffer huge financial losses as a result of the loss of business from the clients.
2. The applicants are entitled to enforce their constitutional right to a fair and just treatment as conferred upon them by Article 42 of the Constitution of the Republic of Uganda.
3. The relief sought is necessary for purposes of achieving a fair and a just disposal of the applicants' grievances and innocent third parties stand to lose if the orders sought are not granted. And it is just and equitable that the orders sought be granted.

In its affidavit in reply deponed by one William Tumwine the respondent's acting legal counsel, it is stated that:

1. The application before court is incurably defective, misconceived and barred by law.
2. That the 1st applicant did not and still does not have a *locus standi* to institute Miscellaneous Cause No. 157 of 2014 or any application arising therein or any other in relation to procurement reference No. UNRA/SERVICES/2011-12/000007/01/02 before this court.
3. That neither the 1st applicant nor the "intended" 2nd to the 8th applicants participated in the bidding for the provision of Street lighting services as alleged and no evidence in support thereof has been adduced.
4. If the application is granted, it would cause injustice to the respondent because:
5. The respondent's amendments are an attempt to defeat the defence in Miscellaneous Cause No. 157 of 2014. That the 1st applicant has no cause of action against the respondent.
6. That it is not true that the respondent has not yet filed affidavits in reply, the respondent filed its affidavits in reply as in an annexure "A".
7. An application for Judicial Review (and all applications before this court in connection thereto) does not extend to enable a stranger to a transaction to seek this court to express an opinion in order to help the applicant in other transactions.

Through their respective advocates, the parties to this application filed written submissions in support of the respective cases.

The issues for resolution are as follows:-

1. Whether the 1st applicant has a *locus standi* to bring this application.
2. Whether the applicant has a good and justifiable cause for amending the application.

3. Whether the application is competent.
4. Whether the applicant is entitled to costs.

I will begin with dealing with issue 1; Whether the 1st applicant has a *locus standi* to bring this application.

As rightly submitted by learned counsel for the applicant, it is premature for this court to consider whether the applicant has a *locus standi* to bring this application. To do so at this stage would be to delve into the merits of the main application which is yet to be heard. To avoid prejudicing the applicant, I decline to consider this issue at this stage.

Issue No. 2: Whether the applicant has a good and justifiable cause for amending the application.

After considering the submissions by respective counsel, I am not satisfied that the applicant has a good and justifiable cause for amending the application. The applicant purported to bring the application under Section 98 of the Civil Procedure Act and Section 36 of the Judicature Act. As rightly submitted by learned counsel for the respondent, the applicant ought not to have invoked Section 98 of the Civil Procedure Act and Section 36 of the Judicature Act when the law has specific provisions that deal with addition of parties and/or amendment. The law governing amendments under Judicial Review is spelt out in Rule 7 (2) of the Judicature (Judicial Review) Rules 2009, and provides that whenever an applicant intends to ask court to amend his or her Motion, he or she shall give notice of his/her intention and of any proposed amendment to every other party. The amendment envisaged under this rule is for additional grounds or reliefs or otherwise, not addition of other parties to the application.

An amendment is a pleading that replaces an earlier pleading and that contains matters omitted and not known at the time of the earlier pleading. A pleading refers to the body of the plaint (in this case the Notice of Motion) or written statement of defence and not the parties. In other words a pleading relates to the body of the plaint and not the parties as the question of parties is material as to who are the parties pleading. See **Executive Properties & 12 Ors Vs Akwright Projects Ltd Miscellaneous Application No. 643 of 2012**.

It has not been shown by the applicant that the proposed amendment contains matters omitted and not known at the time of filing the application for Judicial Review. To the contrary, the applicant was fully aware of who its members are and should have advised them to institute proceedings in their own names. The considerations for addition of parties is catered for under a separate rule in the Civil Procedure Rules. It is worth noting that the applicant had already obtained and extracted orders in its own name and for its own benefit arising out of the Judicial Review application which it intends to amend.

According to learned counsel for the applicant the proposed amendments do not prejudice the respondent in any way or in any manner that cannot be compensated in costs since the respondent has not given any evidence on how it will be prejudiced or disadvantaged by the proposed amendment.

I do not agree with this line of argument by learned counsel for the applicant. As I have stated, there are subsisting orders obtained by the applicant in its own names and for its own benefit arising out of the application it intends to amend by **inter alia** adding other parties.

In my view if this court were to grant this application it would occasion a miscarriage of justice in all applications referred to. The applicant indicated that it owned property/billboards along the material road that required intervention and maintenance of the **status quo**. Therefore allowing this application to amend the Motion would create confusion during implementation of the court orders because the prayers and orders that were granted to the applicant were for its and in its own right and not for the benefit of its members.

It also appears that the intended amendment is intended to defeat the respondent's defence that the applicant has no **locus standi**.

It was held by the Supreme Court in ****Muloowoza & Brothers Vs N Shah & Co. Ltd SCCA No. 26 of 2010**** that the test in applications for amendment is whether the proposed amendment introduces a distinct new cause of action instead of the original, or whether and in what way it would prejudice the rights of the respondent if it was allowed. Whereas the original application for Judicial Review only refers to billboards belonging to the applicants, the amendment clearly introduces a new cause of action to the effect that the intended applicants enjoyed the right to be heard which was allegedly not accorded and further that the intended applicants owned Billboards as well. Therefore the intended amendment is contrary to the law as it introduces new parties and distinct causes of action instead of the original one pertaining to the applicant. It also intends to cause a miscarriage of justice as it intends to defeat the defendant's defence of limitation of time, and the plea of lack of capacity/locus to bring the application before court.

Consequently I will find that the applicant has not made out a good case for amendment of the application.

Issue No. 3: Whether there is a competent application before court.

Learned counsel for the respondents submitted that this application is incompetent for being time barred because it would be in effect instituting Judicial Review application for the intended applicants. Therefore the applicants are trying to circumvent the doctrine of laches that is to say filing a Judicial Review application after the time within which it should have been brought has lapsed, i.e. three months from the date when the grounds of the application first arose.

In reply learned counsel for the applicants maintains that the application before court is competent because it is intended to add a party and amend and is not therefore a fresh application.

My reading of the rules as a whole seems to suggest that the general principle is that as long as the application for Judicial Review has been filed in the prescribed time, it can under Rule 7 be amended any time or at the time of hearing and this may be by adding grounds and/or reliefs being sought contrary to the view advanced by learned counsel for the respondent that allowing the amendment would deprive them of the defence of limitation. The respondent can only take

advantage of the Statute of Limitation at the time of filing of the claim, if that filing has been done outside the time of limitation. But as regards amendment, there is nothing in the rules which says that the Notice of Motion must at the time of filing be perfect and free from defects. Once the Notice of Motion is amended then it speaks from the date on which it was originally filed and not from the date of amendment. The defect is thereby cured and the actions brought in time. It will not be barred by statute.

In this case however, I have already held that the intended amendment is contrary to the law as it seeks to introduce new parties and distinct causes of action instead of the original one pertaining to the applicant. It also intends to defeat the defence of limitation of time since the proposed amendment would in effect amount to institution of Judicial Review application by the intended applicants out of time. This not simply an application to amend but rather a move to file an application after the statutory three months. For this reason this application is rendered incompetent.

Regarding the affidavit sworn by Sarah Namwanje, I agree with the submission by learned counsel for the applicants that it is erroneous to raise the issue of its validity in submissions instead of the objection to the said affidavit being expressly raised in their affidavit in rejoinder. Unfortunately this was not done and therefore should not be raised in submissions which would tantamount to trial by ambush which contravenes the right to a fair hearing. Nevertheless on the face of it Sarah Namwanje had authority to swear the affidavit.

Issue No. 4: Whether the applicant is entitled costs.

It is trite law that costs follow the event. It is also true that costs are awarded to a successful party. For the reason I have outlined in this ruling, I will order that this application be dismissed with costs.

Stephen Musota

J U D G E

03.09.2015.

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