

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL COURT DIVISION)  
CIVIL SUIT NO 735 OF 2006**

**AMERICAN PROCUREMENT COMPANY :::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**1. ATTORNEY GENERAL**

**2. INSPECTORATE OF GOVERNMENT:::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE**

**JUDGMENT:**

The Plaintiff originally filed a suit against the Attorney General of Uganda (hereinafter referred to as “AG”) for the sum of Ug.Shs.4,163,593,613/-. The case for the Plaintiff is that some time in January 2006 it entered into a contract with the Government of Uganda (represented by the Ministry of Works Housing and Communication hereinafter referred to as the “*The Ministry*”) to provide an ex-post - facto auditing of all the works, goods and services procured by that ministry and The Roads Agency. It is the case for the plaintiff company that it diligently carried out the audits and performed all other obligations under the contract. The plaintiff then billed the ministry for the work which promised to pay the principal amount of Ug.Shs.3,244,229,123/ and contractual delayed payment interest payment of Ug.Sh.919,364,490/= bringing the total Ug.Shs.4,163,593,613/-. The second defendant The Inspectorate of Government (hereinafter referred to as “*The IGG*”) applied to Court to be joined as a defendant in the case; which application was accepted as none of the original parties objected to the said application. The court then gave leave to all the parties to amend their pleadings to reflect the addition of the IGG as the second defendant. The plaintiff chose not to amend their pleading. Having the IGG and the AG both as defendants in a matter such as this was a de novo experience for the courts. While both the IGG and the AG sought to represent the interests of the Government both offices did not completely agree on the

defence that should be put forward. The main thrust of the defence came from the second defendant The IGG. It is the case for the second defendant that it received a complaint that the plaintiff had allegedly received a fraudulent payment of Ug.Shs.5,000,000,000/= based on a fraudulent contract with the Ministry. As a result of the said complaint, the IGG had commenced an investigation into the said allegations and consequently used its powers under Articles 230 and 225 of The Constitution of the Republic of Uganda 1995 to halt payments by the Ministry to the plaintiff until the said investigations are completed. It was therefore the position of the IGG that the suit of the plaintiff was premature and improperly before the courts as it did not disclose any cause of action. On the other hand the AG in his defence para. 4 avers that at all material times Government was willing to honour its obligations to the plaintiff and therefore has in effect not refused to pay. However in the alternative the AG agrees with the position of the defence of the IGG that the plaintiff's suit is premature, an abuse of court process and therefore should be dismissed. At the per trial scheduling conference the parties agreed to four issues for trial namely;

1. Whether or not the matter was properly before court and was therefore premature?
2. Whether the conduct of the investigations by the second defendant is a defence to the Plaintiffs claim which entitles the Court to dismiss the suit?
3. Whether receipt of a complaint alleging fraud disentitles the plaintiff of judgment against the first defendant?
4. Remedies available.

While reviewing the issues with the parties, court took the view that the issues as framed were mostly in the nature of what are popularly referred to as "*preliminary objections*" No issue was framed regarding the actual contract itself. It was even an agreed fact that the plaintiff did the work and invoiced Government. The parties however agreed that the issues

as framed though in the nature of preliminary objections was all there was to try and would dispose of the matter as they largely involved the interpretation of the law. The parties further agreed not call any witnesses and that to dispose of the matter they would simply submit on the law. The Court agreed to try the matter as presented to it by the parties. Mr. Wandera Ogalo appeared for the plaintiff while, Mrs. R. Rwakoojo appeared for the first defendant (AG) Mr. V. Kasujja and Mr. H. Lwanga appeared for the second defendant (I GG). Looking at the issues as framed I am of the view that they can be summarised into one namely “*whether the investigation by the IGG constitutes a defence to the suit?*” Mr. Kasujja counsel submitted that the IGG had commenced an Investigation into the plaintiffs contract. He further submitted that the IGG in carrying out the investigation was doing so pursuant to its constitutional functions under Article 225 (1) of the Constitution. He submitted that it would be improper for court to proceed with the case before the conclusion of the investigations. He submitted that if court proceeded with the suit then it would stifle and or circumvent the Constitutional powers of the IGG as envisaged in Articles 225, 226, and 230 of the Constitution and Sections 10 and 14 of The Inspectorate of Government Act (No. 5 of 2002). He further submitted that what was at stake here was the independence of The IGG as provided for in Article 227 of The Constitution. Counsel for the second defendant submitted that the correct procedure or thing for the plaintiff to do was for it to await the report of the investigation when it was completed. If the plaintiff was unhappy with the report of the investigation and its decisions/recommendations, then at that point in time the plaintiff would be at liberty to apply for judicial review. Counsel for the second defendant also faulted the plaintiff for failing to file an amended Plaint to reflect the case against the second defendant and in particular to point out to court that payment had been stopped pending the investigation of the said contract. Counsel for the second defendant in conclusion submitted that the plaintiff’s suit could not be sustained and therefore should be dismissed under Order 7 rule 11 and order 6 rule 30 (1) of the Civil Procedure Rules. Counsel for the first defendant Mrs. Rwakoojo associated herself with the submissions of counsel for the second defendant. She however clarified that as the AG they were ready to pay but that payment was halted by the IGG.

Mr. Ogalo counsel for the plaintiff submitted that the preliminary objections were misconceived and were an abuse of court process. He submitted that the defence had failed to show what the objection as to the point of law was. Instead the second defendant had

concentrated on what their defence was. Counsel for the plaintiff submitted that if a point of law is raised as a preliminary objection then if it is successful it should be able to dispose the whole suit. In this regard he cited the following case;

**Mukisa Biscuits Co V West End Distributors [1969] EA 696**

Counsel for the plaintiff further submitted that it had been argued that the suit was premature and therefore was incompetent. He disagreed with this position and submitted that the defence was unable to show where the incompetence lay. He submitted that counsel for the second defendant had not shown court where the suit had failed in terms of rules of procedure and or pleadings. Counsel for the plaintiff submitted that for a suit to be premature means in his view that the suit had been filed before its time. He gave the example where a suit is filed against the AG before the statutory notice of 45 days given to the AG had lapsed.

Counsel for the plaintiff further submitted that if the objection is upheld then it means a plaintiff could only file a suit subject to the consent of the IGG which was not acceptable. He submitted that all parties were equal before the law. He pointed out that one of the constitutional functions of the IGG was to promote the rule of law. However, in this case the IGG stopped payment by a letter dated 11th April, 2006 because they were investigating the matter. He further submitted that two years down the road the IGG is still investigating the matter while at the same time saying that the plaintiff cannot go to Court for a remedy because its suit is premature. Counsel for the plaintiff submitted that none of the provisions of the law cited by the defence expressly prohibited the plaintiff from filing a suit as it did. He said that his client had no knowledge why the IGG was blocking his payment, all he knew was that under his contract he was to be paid. He further submitted that filing a suit against the IGG could not be construed as encroaching on the independence of the IGG. Counsel for the plaintiff submitted that the IGG wanted the Plaintiff to first await their decision but that no period had been given and in any event there was no decision. He submitted that judicial review was not the only remedy open to the Plaintiff as stated by counsel for the second defendant. With regard to amending the plaint counsel for the Plaintiff submitted that the civil procedure rules where clear that where pleadings are not amended then the party is deemed to

rely on their original pleadings as filed.

I have heard the submissions of counsel for both sides and have perused the pleadings on file. For the onset I must say that this is a de novo case. If there is a need to have clarity in these matters. The plaintiff seeks the determination of the rights of a party who is the subject of an investigation by the IGG the one hand and that of the IGG and Government on the other hand. There also appears to be some question as to the relationship between the IGG and AG in such circumstances where the AG advises payment and the IGG stops payment.

The facts of this dispute are fairly straight forward. It is not denied that the crux of the matter revolves around a stop order regarding payment to the plaintiff under their contract with the Ministry. Exhibit D.1 which is a letter from the Permanent Secretary Ministry of Works and Transport to the Solicitor General dated 31<sup>st</sup> July, 2006 shows that payments to the plaintiff were stopped by the IGG by their letter dated 11<sup>th</sup> April, 2006. The Permanent Secretary makes it clear in his letter that

*"...My Ministry could (sic) and cannot up to now pay the fee notes of Amproc due to the Investigation and blockade by the IGG..."* In the same letter the Permanent secretary further writes *'... Up to now the Investigations have never been completed and as a result M/S Amproc Inc. have never been for paid for the work done. With the payment (which is a life blood of the contract stopped), the Contract has suffered slowing down and suspension of work...'*

Indeed even part of the defence of the AG is that they are willing to pay the plaintiffs but for this stop order. The actual stop order was not produced in court. All that is available to court by way of explanation is what is pleaded in paragraph 4 of the defence of the second defendant that there is a complaint that the payment was premised on a fraudulent contract and that the investigations are ongoing.

Counsel for the second defendant has correctly cited the relevant provisions of the Constitution relating to the IGG. Article 225 (1) (b) gives one of the functions of the IGG as *"... to eliminate and foster the elimination of Corruption, abuse of authority and of Public*

*office...*” there is no doubt that the vice of Corruption is a serious problem in our nation today. The role of the High Court with respect to The Constitution is to enforce its provisions but not to interpret them (Article 137). What court can interpret is the law which details the Powers of the IGG namely The Inspectorate of Government Act (Act 5 of 2002 hereinafter to as “*The IGG Act*”). Section 12 of the said Act provides the IGG with the following power/function.

*“(a) ... to authorise in writing any officer under its charge to conduct an Inquiry or investigation into an allegation of corruption, abuse of office and negligent of duty and any other aspect that the Inspectorate is empowered to investigate into...”*

In this particular case it is pleaded that there is a complaint involving an alleged fraudulent payment. Clearly the IGG has the power to investigate this complaint under Article 225 of the constitution and section 12 of The IGG Act.

Section 14 (1) of the IGG Act provides for the special powers of the IGG as follows;

*“The Inspector General may by order signed by him or her authorise an officer of the inspectorate to investigate... any transaction for purposes of this Act...”*

Considering that the contract in this case involves a Government ministry then the IGG can issue an order to investigate the Contract and it appears that there is no dispute in this case that the IGG did issue such an order.

Section 14 (3) of the same Act provides

*“.. An order made under this section may direct... the Stopping of any transaction subject to such conditions as the Inspector General . . . may specify...”*

Payment under a contract such as this to my mind is a transaction which the IGG may stop, though in this case Court is not aware of any conditions that were specified when the stop order was made.

It would appear to me that based on the evidence before court that the IGG can stop the payment under this contract as she investigates the allegation of a fraudulent payment under it.

The next leg of this issue is whether the suit by the plaintiff by reason of this investigation is therefore premature? The Plaintiff according to paragraph 2 of the plaint is a limited liability company carrying out consultancy services. That being the case it is not one of the officers or leaders referred to under Section 9 of The IGG Act over whom the IGG has jurisdiction. This is in line with Article 226 of The Constitution. To that extent I see no express reason in the Act why the plaintiff cannot sue the AG as it originally did in this case to enforce the performance of their contract. The position in the IGG Act according to my reading, is different when it comes to suing the IGG. Section 22(1) the Act provides;

*“...No proceedings, whether civil or criminal, shall lie against the Inspector General, Deputy Inspector General, an officer or any other person employed or authorised to execute the orders or warrants of the Inspectorate for anything done in good faith and the course of the performance of his or her duties under the Act...”*

Now that the IGG has been added as a defendant it should be understood that they enjoy immunity from a civil suit against them. The only limitation to the Immunity is that of the “*good faith*” test. What amounts to good faith in my view is a question of fact to be determined on a case by case basis. This in itself can constitute a cause of action against the IGG. I therefore respectfully disagree with counsel for the second defendant that the only remedy open to a litigant against the IGG is one of judicial review.

The plaintiffs in this case have not specifically alleged or pleaded bad faith on the part of the IGG. Indeed when the IGG was added as the second defendant the plaintiff did not amend their plaint to reflect their specific claim if any against the IGG. That notwithstanding, counsel for the plaintiff has submitted at length on the preliminary objection that the investigations by The IGG had taken more than two years and yet his client did not know what was going on. The plaintiff therefore had no option but to seek redress in the courts of law. Counsel for the plaintiff passionately submitted that to dismiss the Plaintiff's suit in these circumstances would be to make the parties not to be equal before the Courts law. He asked how long could the IGG take on an Investigation? Counsel for the second defendant was unwilling to commit himself on the question of time even though he conceded that the Investigation had indeed taken more than two years. Part 5 of the IGG Act which outlines the procedure for investigations but does not provide any time limit for the said investigations.

Where a statute is silent about a time frame under which anything authorised by it to be done ought to be done, then the law will assume that that thing ought to be done within a reasonable time. What is a reasonable time is a question of fact and inordinate delay in completing an investigation in my view could fail the "*good faith*" test in section 22 (1) of the Act. Whereas from an objective point of view two years can be construed as a long time to complete an investigation court does not have evidence on record to establish the reasons for this delay. It further appears to me however that it is this period of time that has caused frustration to the plaintiff. As the Permanent Secretary of the Ministry of Works and Housing wrote in Exhibit D.1 payments the "*life blood of a contract*" and allegations of Corruption relating to payments should dealt with quickly. I suppose that is why Section 14 (3) of the Act allows The IGG to stop any transactions subject to specified conditions. In such a situation it would advisable that the contested money payments be paid into an escrow account pending the finalisation of the investigation so that it can earn Interest. Should the investigation come out in favour of the plaintiff then that would mitigate its loss. Should corruption be established then the money can be returned to Government.

As it stands now I find that it is a valid defence to the plaintiff's suit that the IGG is investigating the transaction that she stopped (namely payment under the contract) and that subject to the test of "*good faith*" thereof, has immunity from this suit. To the extent



therefore that the plaintiff has not pleaded particulars of bad faith this suit must fail. I agree with Counsel for the plaintiff that under Order 6 rule 24 where a party does not amend its pleading in response to an amendment by the opposite party, then that party is deemed to rely on the original pleadings in reply to that amendment. The wisdom however of the plaintiff not amending their pleadings in this particular case is suspect. That being the case, the plaintiff's claim is solely based on its original pleadings against the AG and does not disclose a cause of action against the IGG. In this regard I do not think it is correct to state that the plaintiff's suit is premature but rather the IGG is immune from suit. With regard to the AG there is a lawful order to stop payment until the IGG's investigations are completed and this in itself constitutes a defence to the case.

I accordingly dismiss the suit. As to costs I need to observe that this was a de novo case where rights of this kind under the IGG Act were being tested for the first time. Since under section 27 of the Civil Procedure Act (cap 71) provides that costs are in the discretion of the Judge, I order that as between the plaintiff and the AG each party bear its own costs as the AG does not in principle contest the payment. However as between the plaintiff and the second defendant I order that the plaintiff pay the costs of the suit. I so order.

**Geoffrey Kiryabwire**

**JUDGE**

**Date. 2/12/08**

02/12/08

9:30am

**Judgment read in open court and signed in the presence of**

- G. Komakech for the Applicant
- V. Kasujja for the 2<sup>nd</sup> Defendant
- C. Bonabana for the 1<sup>st</sup> Defendant

**In Court**

- CEO of Plaintiff
- Rose Emeru - Court Clerk

**Geoffrey Kiryabwire**

**JUDGE**

**02/12/08**