

Busoga Agro Limited v Rutaisire and 6 Others (Miscellaneous Application 16 of 2023) [2024] UGHC 469 (21 June 2024)
[2024] UGHC 469

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- (c) That the Applicant intends to withdraw the suit against the 4th Respondent, **Nuulu Nakayiza** and that is one of the amendments the Applicant seeks to move court to grant.
- (d) That the amendment will enable court to decide all the issues related to the whole suit property based on the survey report by **M/s S. M Cathan Property Consult** and avoid multiplicity of suits.
- (e) That it is in the interest of justice that the application for leave to amend by the Applicant be allowed as the amendment of the plaint and pleadings generally will not prejudice the Respondents in any way whatsoever.
- [3] The **1st, 2nd, 3rd & 4th Respondents** opposed the application on the following grounds:
 - (a) That the Applicant's application is an abuse of court process, brought in bad faith and an after sought as it has been filed after the Respondents have filed their written statement of defence (WSD) to the Applicant's amended plaint and therefore should be dismissed with costs.
 - (b) That the amended plaint is likely to defeat their filed defence as it changes the subject matter of the suit and this is likely to occasion a miscarriage of justice.

Counsel legal representation:

- [4] The Applicant was represented by **Mr. Henry Rweganika of Ms. Rwaganika, Baku & Co. Advocates, Kampala** while the 1st – 4th Respondents were represented by **Mr. Bukiya Gilbert of Ms Volens Advocates, Kampala** and the 5th -7th Respondents were represented by **Mr. Musinguzi Lordrick of Ms. Maldes Advocates, Kampala**. Whereas both Counsel for the Applicant and the 1st – 4th Respondents filed submission for consideration in the determination of this application, Counsel for 5th – 7th Respondents did not file any submissions despite having been duly served with time schedules to file the same.

Background:

- [5] The Applicant filed **Civil Suit No. 111 of 2022** (formerly MSD C. S. No. 077 of 2022) and in the amended plaint sought inter alia, for cancellation of Certificates of land title of land comprised in FRV MAS 87 Folio 12 Bugahya 9 plot 166 at Kihomboza II Cell; FRV MAS 13 Folio 19 Bugahya 15 Plot 1003 land at Kihomboza II Cell; FRV MAS 151 Folio 20 Bugahya 9 Plot 214 land at Kyesiiga; FRV 151 Folio 21 Bugahya 9 Plot 215 land at Kyesiiga; FRV MAS 87 Folio 11 Bugahya 9 Plot 165 land at Kihomboza II Cell; and FRV HQT 931 Folio 13 Bugahya 9 Plot 216 land at Kyesiiga, all in Hoima District on grounds of fraud.
- [6] It is the contention of the Applicant that after instituting the suit, the Applicants discovered that the surveyor's opinion to be used in evidence was missing and yet it was necessary in order for court to be able to determine issues before it properly and avoid a multiplicity of suits. The missing evidence could only be brought by amending the pleadings, hence this application for amendment of the plaint. The amendment of the

Applicant seeks to introduce in the plaint a survey report by the firm of surveyors called **M/s S. M Catham Property Consult.**

- [7] Counsel for the Applicant while relying majorly on the Supreme Court authority of **Gasol Transport Services (bus) Ltd Vs Obene [1990-94] E. A 88** which laid down principles that govern the exercise of discretion in allowing amendments, submitted that the 1st Respondent's affidavit in reply (which is similar in content as that of 2nd – 4th Respondents) does not raise any of the recognized grounds for granting or rejecting an application for amendment of a pleading. That the affidavit instead goes far into the merits of the main suit which cannot be determined in this application.
- [8] On the other hand, Counsel for the 1st 4th Respondents submitted that the Applicant seeks to amend the claim based on **256 hectares** of the suit land offered to it by the Kingdom to **353.6133 hectares** and yet there is no evidence to show the size the Applicant claims that was earlier allocated to her in order to make **353.6133 hectares**.
- [9] That the Application is an abuse of court process because the proposed amendment changes the Applicant's case into a different character entirely by changing the subject matter and that the said survey report was carried out without a court order and when the Respondents were not involved. He relied on the case of **Master Managers & Traders Ltd & Anor Vs Madda Tally Allibhai Popat HCMA No. 580 of 2021**, where Applicants sought to amend the plaint and bring out particulars of fraud against the Respondent but the application was rejected on the grounds that;

"*there is no power to enable one distinct cause of action to be substituted for another nor to change by means of amendment the subject matter of the suit."*

- [10] Counsel concluded that the proposed amendments changed the subject matter of the suit entirely and do prejudice the rights of the Respondents who have since filed their joint written statement of defence.

Determination of the Application:

- [11] Under **0.6 r. 19 CPR**, the High Court is given wide discretionary power to permit amendment of pleadings to be made at any stage of the proceedings 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. As was held in **Gasol Transport Service Vs Obene** (Supra), the rationale behind this is that courts generally give leave to amend a defect in a pleading rather than give judgment in ignorance of facts which ought to be known before rights are definitely decided. It follows therefore, the fact the

Respondents had filed a defence is not a bar for an application for amendment of the pleadings.

- [12] In **Gasol Transport Service Vs Obene**, the following principles were laid out for court before it allows an amendment as:

- *1. The amendment should not work out injustice to the other side. An injury which can be compensated by the award of costs is not treated as an injustice.*
- *2. Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.*
- *3. An application which is made malafide should not be granted.*
- *4. No amendment should be allowed where it is expressly or impliedly prohibited by any law (for example limitation actions)."

Injustice to the other side and avoidance of multiplicity of proceedings:

- [13] Counsel for the Applicant submitted that the intended cause of action relating to introducing surveyor's opinion arises out of the same facts and substantially the same facts as the cause of action in respect of which relief had already been claimed in the main suit by the Applicant.
- [14] In agreement with the above proposition, by Counsel for the Applicant, the survey report (annexure "X", to the affidavit in support of the application) sought to be included by the amendment clearly show that the sought for amendment is not inconsistent with the pleadings. The report refers to the following;
- *(a) Establish extents and acreage on ground of the land (leased) and handed over to Busoga Agro limited/in Kyesiiga and Kihomboza II Cell.*
- *(b) Open boundaries of plot 165 & 166 Bugaya Block 9, Kihomboza II Cell, plot 1003, Bugahya Block 15 Kihomboza*

II Cell and plot 214, 215 & 216 Bugahya Block 9, Kyesiiga on ground, and

- *(c) Establish whether plot 165 & 166, Bugahya Block 9, Kihomboza II Cell, Plot 1003 Bugahya, Block 15, Kihomboza II Cell and Plot 214, 215 & 216 Bugahya, Block 9, Kyesiiga fall within the same extents of the land (leased and handed over to Busoga Agro Limited) in Kyesiiga and Kihomboza II Cell."
- [15] Clearly, the surveyor's report relates to the same facts or substantially the same facts as the cause of action in respect of the relief claimed in the main suit i.e. the impugned suit certificates of title. I do find that allowing the amendment to have the survey report in the pleadings is not in any way prejudicial to the Respondents. The amendment will on the contrary enable this court determine the real question in controversy between the parties and thus avoid multiplicity proceedings. The Applicant will be relieved of the necessity to file a separate suit to assert its rights under these very facts since it will be convenient for this court to dispose them off at once as they refer to the same and related cause of action, see **Uganda Development Bank Ltd Vs Two Ways Import & Export Ltd & 2 Ors H. C. M. A. No. 1053 of 2014 (Commercial Division)**.

- [16] It is now trite that if a Plaintiff applies for leave to amend his pleadings, courts should in the interest of promoting justice, freely allow him to do so unless this would cause an injustice to the opposite party which cannot be compensated for by an award of costs. Amendment to pleadings should therefore always be granted where it seeks to have the matters in controversy resolved and to avoid multiplicity of suits, in **Eastern Bakerly Vs Castelino** [1958] E. A 461, Sir Kenneth O'conner states that:

"Amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and..... there is no injustice if the other side can be represented by costs.... The court will not refuse to allow an amendment simply because it introduces a new case....but

there is no power to enable one distinct cause of action to be substituted for another.... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character..... or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment by depriving him of a defence of limitation".

- [17] In the instant case, it has not been shown by the Respondents that if the application is allowed to amend the plaint, what injustice they are likely to suffer or that in the event of their suffering any injury, this cannot be compensated by an award of costs. I find that the amendment would not change the action into one of a substantially different character i.e. new distinct cause of action, the sought amendment is consistent with the Applicant's pleadings on record. The Respondents will not suffer any injustice since they will have an opportunity to respond to the Applicant's amended plaint.

Whether the application is malafide and/or expressly or impliedly prohibited by any law:

- [18] The present application has been filed before the hearing of the main suit. In **Wamingo Vs Central Bank of Kenya** [2002] 1 E. A 319 (CPK), it was held that;

> *"Amendment to pleadings brought/made before hearing should be freely allowed if no injustice is caused to the other party. It has been not shown by the Respondents how and that this application for amendment of the plaint is made malafide or that it is expressly or impliedly prohibited by any law."*

- [19] The claim by the Respondent that the Applicant is seeking to amend its claim based on **256 hectares to 353.6133 hectares**, yet there is no evidence to show the size the Applicant was earlier allocated and that the survey report was carried out without a court order and it was without participation of the Respondents

are matters of evidence relating to the merits of the main suit. This court cannot delve into these claims in the present application.

[20] This application is found to have merits. The application is granted. The Applicant is allowed to generally amend the plaint and reflect the proper size of the suit land reflected in the survey report and the relevant parties. Costs shall abide the outcome of the main suit.

Dated at Hoima this 21st day of June, 2024.

..... Byaruhanga Jesse Rugyema JUDGE

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