

UGANDA / JUDGMENT

Hiire Mudanye Mike and Others v Okumu Sarah Kitasle and Others (MSC APPLICATION NO 009 OF 2022) [2025] UGHC 189 (7 February 2025) [2025] UGHC 189

COURT

High Court of Uganda

BEFORE

Kawesa, J

CASE / FILE NUMBER

MSC APPLICATION NO 009 OF 2022

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT TORORO MSC
APPLICATION NO 009 OF 2022 [ARISING FROM CS NO 78 OF 2022]**

**HIIRE MUDANYE MIKE AND OTHERS.....APPLICANTS VERSUS OKUMU
SARAH KITASLE AND ORS.....RESPONDENTS RULING**

BEFORE: HON. DR. JUSTICE HENRY I KAWESA

This is an application brought under Order 1 Rule 10 (2), Order 6 Rules 19 and 31 of the Civil Procedure Rules, seeking for an Order to substitute the 1 st Defendant who is the Respondent with Butaleja District Land Board; and an order for leave to amend the plaint in civil suit number 017 of 2019 and costs.

The application is supported by affidavits in support and in rejoinder and both parties filed submissions for and against the application.

In the application the applicants raised a Preliminary Objection praying for the court to strike out the affidavit of the 2 nd Respondent sworn by Were Samuel Hibinga on the grounds that it is tainted with falsehoods that are Central as regards the capacity under which he swore the affidavit. It was argued that he was the chairperson of the 2 nd R since 2018 and deponed the affidavit in that capacity; a fact that counsel disputed for not being the case. Counsel then made arguments to explain the circumstances in support of his assertions and referred to annexure 1 on the affidavit in rejoinder.

And in response to this objection, it was contended by Counsel for the Respondent that it is true that Were Samuel was the chairperson Board of Governors of the 2 nd R since 2018 as stated. It was argued that it is trite law that an offensive affidavit does not necessitate the entire affidavit being struck out. Reference was made to the case *of col (Rtd)Kiiza Besigye Museveni and Another Election Petition Number 1 or 2201.*

It was pointed out that the reference to annexures **RJ1', RJ2', RJ3'** is not tenable because the objections are based on documents which are authored by the 1 st R and the defendant who filed the affidavit in rejoinder Hiire Mudanye Mike, who also attached the said documents, did not adduce any evidence in the affidavit in rejoinder to establish how he came to get the information and or the documents referred to in the affidavit. The documents were neither authored by the defendant nor were they addressed to him and therefore he is a complete stranger to the documents.

He argued that the objection raised was in relation to the admissibility of the affidavit in rejoinder and the attached documents therein because they offend Order 19 Rule 3 (1) of the CPR and is there for defective and should be struck out.

I have dully examined the above arguments and also looked at the Order 19 R 31 of the PCR, which provides that "affidavits shall be confined to such facts as the deponent is able of his own or her own knowledge to prove except in interlocutory applications on which statements of his or her own belief may be admitted provided the grounds thereof are stated". This position of the law is buttressed in a number of cases including,

Chebrot Stephen Chemoiko v Soyekwo Kenneth and Anor CA Election Petition Appeal No 56 of 2016 which stipulates that one of the issues to be considered by Court was whether certain documents whose authors were not called as Witnesses were hearsay and thus could not be considered in evidence.

The Respondents in answer said that they accepted the submissions of Counsel for the appellant that "where a statement is made to a witness by a person who is not called as a witness such evidence is inadmissible particularly where the object of the evidence is to establish the truthfulness of what is contained in the statement"

I do resolve this objection by affirming that the affidavit that was sworn by Were Samuel Hibinga in reply, is not offensive for reasons that there is no evidence on record to convince this court that Were Samuel Hibinga was not the chairperson of the Board of Governors of the 2 ndR since 2018 as deponed by him. This is so because the affidavit that was sworn by Hiire Mudanye Mike has attachments to it which amount to information that was not offered by himself or addressed to him and him being a stranger to those documents, his affidavit cannot be relied on to rebut the affidavit sworn in reply.

Guided by the provisions of O19 R 31CPR, and the stated case law I reiterate the law that an affidavit should be confined only to facts that the deponent is able of his own or her own knowledge to prove except interlocutory applications on which statements of his or her own belief maybe admitted provided the grounds thereof are stated. In the circumstances of the facts before me this is not the position. In the result as argued by the Respondent this objection is not sustainable and is rejected.

MERITS OF THE APPLICATION

ISSUE 1

On this 1st issue of striking out the 1st defendant/ respondent, the only objection that counsel for the Respondents raised in rebuttal is that they pray for costs.

I have gone through the law on this particular point and I have gone through the provisions of O.1R 10(2) CPR which provides that court can at any stage of the proceedings allow a party to remove a party wrongly joined to a suit on such terms as may appear proper. It is argued for the Respondent that the intended substitution of the Respondent amounts to a total withdraw of the suit against her*. It is therefore their argument that as per O.25. R1CPR: *a plaintiff can withdraw a suit against a defendant*

*and shall pay costs of the same". The same rule should apply to this situation. However, in rejoinder the applicant objects to the payment of costs on grounds that the amendment should be allowed without costs because the 1 st R was a key player in the questioned acts of 2 nd R, if she is not an employee of the intended party to be substituted.

It is trite law that Costs are awarded in the discretion of the Court. Costs are intended to reimburse the expenses that a party is put to in the process of answering a call-in court in a matter that has been instituted by the other party or by themselves as result of a presumed mischief attributable to the other party necessitating court's intervention. In this case it is clear that upon being sued the respondent has already engaged the services of a lawyer and has even filed the defenses to the current matter which is in court.

This means that she has already incurred costs. It is trite that costs always follow the event. Therefore, in the event that this court allows her to be removed from the Plaint and to enable the applicant to substitute her with the party that the applicant intends to bring on board, it naturally follows that costs should be allowed to the Respondent to compensate for the expenses arising from her being dragged to court in this matter.

I therefore agree with Counsel for the Respondent's that since they do not object to the prayer of substitution the same be granted with costs to the 1 st Defendant/ Respondent. I therefore grant this prayer with costs to the 1 st Defendant/Respondent.

ISSUE 2

Whether the applicants have shown grounds entitling them to be granted leave to amend their plaint in the main suit

The applicant relied on O.6. R13 PCR, which empowers the court to grant leave to a party to amend their pleadings. The rule provides that: "*the court May at any stage of the proceedings allow either party to alter or amend his or her pleadings in such Manner and on such terms as may be just and all such amendments shall be made as maybe necessary for the purpose of determining the real questions in controversy between the parties".*

The grounds upon which court May exercise this discretion to grant leave were laid down in the case of *Gasio Transport Services (Bus) limited versus Martin Adala ObeneSCCA 4 of 1994 (1994)* VIKALR 5 include the fact that amendments should not work injustice to the other side.

Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed. The application should not be made Malafide and the amendment should not be expressly or imply prohibited by any law (limitation of action). It was the submission of Counsel for the Applicant that the application has been filed at the time when the court has not commenced hearing of

evidence of the parties in the suit and Respondents have an opportunity for their response to the proposed amendment. He referred to the case of *Namusisi Yozfina Vs David Kikaawa Misc App No 1595 of 2018 from Cs 245 of 2011* where it was stated that "*as a general rule amendment of pleadings should be allowed at any stage of the proceedings where a court is satisfied that the amendment will enable the real question in controversy between the parties to be adjudicated upon and no injustice would be occasioned to the opposite party".*

It was argued further that there is no new cause of action set out in the proposed amendment but rather it is clearly pleading the facts of trespass to land and fraud in processing a freehold Land title over the applicant's land which arise out of the same facts. He referred to the case of

Mulowoza and Brothers limited Vs Shah and Co Limited supreme Court civil appeal NO 26 of 2010 where the judge stated that the test is whether the proposed amendment introduces a distinct new cause of action instead of the original whether and in what way it would prejudice the rights of the appellant if it was allowed, in order for him to have a sound basis for allowing or dismissing the application. Amendments to pleadings sought before the hearing should be freely allowed unless they violate the above stated principles".

It was counsel's argument that the burden of proving an injustice lies on the Respondent. This is the position in the case of *Wind River Logistics Limited and Another VS Mityana Farm Group Enterprises limited and*

2Ors MSCA NO 169 of 2022 which held that "however a great string of authorities postulate that even where there is a likely prejudice an amendment will often be favored over the prejudice as long as the prejudice can sufficiently be compensated for in terms of costs... that the burden

heavily lies on the party opposing the amendment to demonstrate to court's satisfaction that the amendment will occasion such an injustice that it cannot be sufficiently compensated for by costs or that the rights are existing as at the date of the proposed amendment for example depriving him of the defense of limitation.

Counsel referred to annexure B on paragraph 3 of the affidavit in support of the proposed amended plaintiff which shows that it is not prohibited by any law and it does not in any way work injustice to the Respondent and it is intended to avoid multiplicity of proceedings and as such it should be allowed and it has not been made Malafide since the case has not yet been scheduled for hearing and that the application ought be granted.

It was argued for the respondent in a reply that the plaintiff introduces a new cause of action of fraud that was not pleaded in the original plaintiff. The original plaintiff is for a declaration that the Suitland belongs to the plaintiff and for cancellation of the certificate of Title. No fraud was pleaded and neither was trespass a cause of action.

It was argued that the amended plaintiff suggests that trespass is the main cause of action and pleading fraud to amend "the already bad plaintiff" is highly prejudicial to the respondents. The applicant should instead withdraw the entire suit and file a fresh one".

Counsel agreed with the quoted decided case *of Gaso Transport services ltd (supra)*, where court held that an amendment shall not be allowed if it introduces a new cause of action and also if it prejudices the other party. He argued that the present amendment that introduces a new cause of action and facts that are not pleaded in the original plaintiff is prejudicial to the defendants and as such should not be allowed. It was his prayer that the court disallows the amendment and allows costs to the 1st defendant/respondent.

In further rejoinder it was argued for the applicants that the plaintiff does not introduce a new cause of action and that both trespass and fraud had been pleaded under paragraphs 4(c) of the original plaintiff.

It is my finding that upon reading of the original plaintiff and the proposed amended plaintiff that it shows that in the original plaintiff the cause of action and the proposed remedies that informed the mind of the applicant when they came to court was captured in paragraph 3 of the original plaintiff which states that "*the plaintiff's claim against the defendant is for a permanent injunction, declaration that the plaintiffs*

are the rightful owners of the Suitland, vacant possession, general damages and the costs of the suit".

The plaint in paragraph 4) (a), (b), (c,) (d,) (e), and(f) then states the cause of action and continues in paragraph 5 to state that the plaintiffs shall contend that the defendants are trespassers on the suit land for which they pray for a permanent injunction to issue against the defendants. In paragraph 9 the plaintiffs pray for judgment against the defendants for permanent injunction, declaration that the plaintiffs are the rightful owners of the Suitland, general damages, cancellation of the freehold title and the costs of the suit.

In the proposed amended plaint, it is proposed that the plaintiff's claim against the defendant's jointly or severally is for a declaration that the defendants are trespassers on the Suitland, a permanent injunction against the 1 st Def, a declaration that the plaintiffs are the rightful owners of the suit land, vacant possession, general damages and costs of the suit.

The cause of action as under paragraph 5 pleads that the defendant fraudulently applied for a freehold title and encroached on the plaintiff's land without authorization of the plaintiffs. The particulars of fraud were categorized under the 1 st Df and 2nd Df, under paragraph 6,7,8 pleads trespass.

In the prayers to Court the plaintiff prays for Orders and Declaration that the plaintiffs are the rightful owners of the Suitland, a declaration that the defendants are trespassers to the suit land, a declaration that defendant's titles be cancelled and an Order for vacant possession, Permanent injunction, General damages, Costs of the suit.

The question arising for determination is whether this amended Plaint satisfies the standard that was laid down in the case law that has been referred to in a bid to find out whether the plaint introduces a new cause of action.

A perusal of the record shows that before the proposed amendment, the plaintiffs had filed their defenses to the original plaint. In their defenses their mind was set to defend the allegations contained in paragraph 4 of the original plaint which alluded to trespass. It is a fact that in this plaint there was no reference to fraud at all. However, the new amendment introduces a new party to the plaint and also introduces another element of fraudulent acquisition of the title. What runs in my mind upon reading the two plaints is the fact that they are dealing with two different sets of circumstances and different parties which require a different set of pleadings in rebuttal on the side of the defendants in answer to the specific elements that are now being raised and proposed in this amendment.

The catch word that arises in the cases quoted by the applicant is whether the amendment is prejudicial to the respondents and whether the alleged prejudice can be compensated for by an award of damages. It should be noted here that prejudice is relative. In this particular case the defendants in their reply have rebutted and challenged the allegations alluding to fraud and asserted that the attempt to bring up fraud into the amended pleadings is prejudicial to their case. The respondent in response has pointed out the fact that the original pleadings did not at all refer to fraud.

