

UGANDA / JUDGMENT

Kasaija and 254 Others v Kabakumba and 2 Others (Miscellaneous Application 164 of 2022) [2023] UGHC 165 (22 December 2023)

[2023] UGHC 165

COURT

High Court of Uganda

BEFORE

Serunkuma, J

CASE / FILE NUMBER

Miscellaneous Application 164 of 2022

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**10 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT
MASINDI MISCELLANEOUS APPLICATION NO. 0164 OF 2022 (ARISING OUT OF
CIVIL SUIT NO. 0062 OF 2017)**

15 JESSE KASAIJJA & 254 Ors
APPLICANTS

VERSUS

1. KABAKUMBA LABWONI MASIKO

- 20 2. DEPARTED ASIANS' PROPERTIES CUSTODIAN BOARD

- 3. REGISTRAR OF TITLES
RESPONDENTS

BEFORE: HON JUSTICE ISAH SERUNKUMA.

25 RULING

This application is brought through chamber summons under Order 6 rules 19 and 31 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act seeking to be granted leave to amend their counter claim in Civil Suit No. 0062 of 2017.

Background

- The back ground of this application is that the 1st 30 respondent filed the main suit against the applicants, the parties filed trial bundles, witness statements and scheduling memorandum. That when the matter was scheduled for hearing, the applicants filed Misc. Applications No. 0061 and 0062 of 2021 which were determined and dismissed thus the instant application.
- 35 The main grounds of the application in addition to the background of this application were laid out in the affidavit in support of the application deponed by Buhanga Paddy one of the applicants stating;
- 1. That he was informed by their new lawyers M/S Ngobi & Co. Advocates that since \$10\$ their former lawyer particularized fraud in the written statement of defense, the same ought to be reproduced in the counter claim as they constitute part of the illegalities complained about by the applicants against the \$1^{st}\$ and \$2^{nd}\$ respondents and that these errors are curable through an amendment.
- 2. That the amendment also seeks to organize the numbering of the counterclaim, 15 correct spelling mistakes and also abandoning paragraphs 18 (i) and (L) because they contain facts which can be brought forth in evidence and submissions and to all equally add a prayer of general damages.
- 3. That since the \$2^{nd}\$ respondent was granted leave to file a defence which was filed, it is necessary to plead some other silent or material facts pertaining to fraud and to equally abandon some facts which do not agree with the applicant's interest in the land as stated in their written statement of defense so as to assist court's investigation of the same.
- 4. That the amendment is necessary to deal with the real controversies amongst the parties to this suit.
- 5. That it is just and equitable that this application is granted.
- 6. That the amendment is being brought at the earliest stage before trial thus it won't prejudice the respondents whatsoever.

In their reply, the respondents filed an affidavit in reply deponed by Hon. Kabakumba Labwoni Masiko stating; 30

- 1. That he she has been advised by her lawyers which advice she believes to be true that the whole affidavit in support of the application is barred by time, defective, it is vexatious aimed at frustrating the hearing of the main suit.

- 2. That in reply to paragraph 2 and 3 of the affidavits in support of the application, she averred that after a glimpse of evidence in the witness statement on court record and having served the applicants with the same, the applicants intend to introduce a new cause of action at the detriment of the respondents guising under the mistake of their former lawyers.

\$25\$

\$20\$

- 3. In reply to paragraph 4 of the affidavit in support of the application, she contends \$10\$ that the application is an afterthought brought to defeat the respondent's preliminary objections and that if this application is granted the respondents will be required to recall, examine and file other witness statements which is costly since the majority of the respondents are far.
- 4. That the applicants in reply to the counter claim raise no cause of action against the 15 \$1st\$ and the \$2nd\$ respondents and notified the applicants that she shall raise a *preliminary point of law.*

Representation

\$25\$

At the hearing, the Applicants were represented by Counsel Waiswa John Ceaser of M/S \$20\$ Ngobi & Co. Advocates and the Respondents were represented by Counsel Kasozi Ronald of M/S Nabukenya, Mulalira & Co. Advocates.

Applicants' Submissions

Counsel submitted for the applicants that the law relating to applications of this nature under Order 6 rule 19 are to the effect that court can any stage hearing allow either party to amend his pleadings and that all amendments shall be for dealing with controversies between parties. He referred to the locus classicus of **Eastern Bakery Vs Castelina (1958) EA, 461** where the Court of Appeal of East Africa held that amendments sought before the hearing should be freely allowed if no injustice is occasioned to either party and it is not an injustice if it can be compensated in costs.

\$30\$ He contends that the applicants seek to amend the counterclaim because initially they engaged Ms. Waibale & Co. Advocates who filed a defense and counterclaim by stating that the \$2nd\$ respondent did not have legal basis to take over the suit land to be capable of disposing off the same to the \$1\$ st respondent and that the transaction was illegal.

Counsel further submitted for the applicants that the amendment does not change the original cause of action into one of a substantially different character and there is no 35 prejudice being occasioned to the \$1^{st}\$ respondent.

- 10 In reply Counsel for the respondent submitted that this application is time barred under Order 49 rule 2 of the Civil Procedure Rules. He submitted for the respondent that Order 5 r 1 (3) of the CPR provides for the time frame within which service of summons should be effected. Counsel submitted that this application was filed on 27th day of October 2022, was endorsed by court on 8th November, 2022 and was served on the respondents on
- lawyers on 20th 15 January 2023 approximately 60 days from the date of issue, and that there is no application for extension of time and referred this Court to the case of Mayanja Alfonso Roy vs Nadduli Abdul; HCCS No. 0077 of 2017.

Counsel further submitted for the respondent that Order 6 rule 19 of the Civil Procedure Rules allows parties to amend pleadings in such a manner and on such terms as may be

20 just. He referred this court to Gaso Transport Services Ltd vs Martin Adala Obene; SCCA 04/1994 that lays down the conditions to be considered before allowing an amendment.

Counsel also cited the case of Edward Kabugo Sentongo vs Bank of Baroda; HCMA 203/2007 for a preposition that an amendment will not be allowed where it will substantially change the cause of action into a different one or will deprive a party to an

25 accrued right.

Courts determination.

Premised on all pleadings of this application, I have carefully perused the submissions of both counsel and the authorities relied on upon which this court's decision will dwell.

As regards time frame with which this application was filed, counsel for the respondents submitted that this application is time barred having been filed on 27 30 th October, 2022, validated or endorsed on 8th November, 2022 and served on the respondents on the 20th of January, 2023 which is approximately 60 days from the date of issue. In response, counsel for the applicant in rejoinder submitted that although court endorsed the said application on 8th November, 2022, the applicants received the same from Court Registry on 22 35 nd December 2022 after failed attempts to be notified about fixing of the said

application and following that time started running from 23rd to 24th December, 2022 and resumed from 8th January 2023 to 20th 10 January 2023 totaling 15 days not 60 days as alleged by the respondents.

Counsel for the applicants in rejoinder also submitted that the respondent upon being served on 20th January 2023, they clearly and without objection filed their reply on 31st January 2023, 2 months before the application could be heard for the 1st time on 15th

15 March, 2023.

Under Order 6 rule 20 of Civil Procedure Rules, the Plaintiff may without leave of Court amend his or her plaint once at any time within twenty-one days from the date of issue of summons to the Defendant, or where a written statement of defense is filed, then within fourteen days from the filing of the written statement of defense.

20 According to Mulla, The Code of Civil Procedure, 17th Edition Volume 2, at 140 pages 333, 334 and 335; as a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. Leave to amend 25 must always be granted unless the party applying was acting mala fide and where it is not necessary for determining the real question in controversy between the parties, the Application to amend must be made bona fide and made in good faith.

Odgers on Pleadings and Practice 20th Edition at page 170 also states where the amendment is necessary to enable justice to be done between the parties, it will be allowed 30 on terms even at a late stage. However, if the application made is mala fide, or if the proposed amendment will cause undue delay, or will in any way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused.

Under Order 6 Rule 19 CPR, the court may at any stage of the pleadings, allow either 35 party to amend in such manner and on such terms as may be just and such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

- 10 In Gaso Transport Services Ltd vs Martin Adala Obene SCCA (supra), the court laid out the following considerations to be taken into account by a court before allowing amendment;
- a) The amendment must not work an injustice to the other side.
- b) Multiplicity of proceedings should be avoided as far as possible and amendments which avoid multiplicity should be allowed.
- 15 c) An application which is made malafide should not be granted.
- d) No amendment should be allowed where it is expressly or impliedly prohibited by the law.

The other consideration is that the amendment sought to be made should not change the cause of action substantially. Ref: Eastern Bakery Vs Castelino (1958) EZ 46. In the case

20 of Lubowa Gyaviira & Ors vs Makerere University; HCMA 471 – 2009, It was held that a court will not exercise its discretion to allow an amendment which constitutes a distinctive cause of action for another or to change by means of amendment, the subject matter of the suit.

In the premise, therefore, I find that the application does not satisfy the requirements of

25 Order 6, rule 19 CPR or the principles governing amendments. The application is dismissed for lack of merit and it is ordered that the hearing of main suit be fixed on the basis of the existing pleadings. Each party will meet their own costs.

I so rule.

30 Dated and delivered on this 22nd day of December 2023.

Isah Serunkuma JUDGE

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