

UGANDA / JUDGMENT

Kumaraki v Kumaraki

(HCT-01-CV-MA-0092-2024)

[2025] UGHC 274 (25 April 2025)

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COURT

High Court of Uganda

BEFORE

Wagona, J

CASE / FILE NUMBER

HCT-01-CV-MA-0092-2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-MA-0092-2024

(ARISING OUT OF HCT-01-LD-CS-0080-2023)

KUMARAKI RWATOORO STEPHEN ::::::::::::::::::::::::::: APPLICANT

VERSUS

ANNET MAKUNE KUMARAKI ::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

1. The Applicants brought this Application under Section 98 of the Civil Procedure Act, Order 6 Rule 19, 23, and 31 CPR, and Order 1 Rule 13 of the Civil Procedure Rules seeking Orders that; -
2. An Order for amendment in HCT-01-CV-CS-LD-No. 80 of 2023
3. The costs of this Application be provided for.

Background:

1. On 11th December 2023, the Applicant who is the Respondent's husband filed Civil Suit No. 080 of 2023 against the Respondent for a declaration that he jointly owns the suit property comprised in Volume 3549 Folio 11 Plot 18, land at Kyenjojo with her, general damages, interest thereon and costs of the suit. He contended in the Complaint that he jointly developed the property with a commercial building in form of a guest house. That the Defendant had transferred the suit property into her name and that in 2014, the Defendant made an effort to transfer the suit property into the particulars of the Plaintiff since it was joint property. That after a misunderstanding, the Defendant stopped the process of transferring the said land into the Plaintiff's particulars and turned the property to be personal.
2. In her Written Statement of Defence dated 24th January 2024, the Defendant contended the suit property is personal property and that she has been a registered proprietor of the same since 2006. That she has never made any efforts to transfer the property into the Plaintiff's name as there is no reason whatsoever for the defendant to consider transferring the property to the Plaintiff.
3. The Applicant filed the instant Application for an amendment order. In his Affidavit in Support of the Application, the Applicant averred that at the time of filing the above suit, there is some information that was not available to him, that he also intends to add a party to the suit and to make certain clarifications in his own name. He stated that the information he intends to add, the party he wishes to add to the suit and the clarification he wishes to make in his own name are very important for the determination of Civil Suit No. 80 of 2023. In conclusion, the Applicant stated that if this Application is not allowed, it shall cause a miscarriage of justice at the determination of the matter and that it is fair, just and equitable that this Application is allowed for the ends of justice to be met.
4. In the Application and the Affidavit in Support thereof, the Applicant did not specify the information which is sought to be added or the party that he wishes to add as well as the specific clarification that the Applicant seeks to make in his own name. However, under Paragraph 2 of the Affidavit in Support of the Application, the Applicant attached a draft amended plaint as Annexure A.
5. The draft amended Complaint reveals that the Applicant wishes to add the Commissioner Land Registration as a Defendant to the suit and to change his own name from "**KUMARAKI STEPHEN**" to "**KUMARAKI RWATOORO STEPHEN a.k.a KUMARAKI STEPHEN**". It also revealed that the facts constituting the Plaintiff's cause of action have all changed. In the proposed amended Complaint, in brief, the Plaintiff now states that in around 2000, he unilaterally bought unregistered land measuring 80ft by 50ft and another piece behind the suit land. That in 2003-2004 he started developing the suit land as a customary owner for his own benefit and for the benefit of his children and wives. That while based in Kampala, he instructed the Respondent to process the title and that to his surprise, the Respondent processed the title in her name. That being a couple and without ill-will, the Plaintiff did not

mind since the certificate of title was in his wife's name and that over the years, both the Applicant and the Respondent have been using it as collateral several loans as co-owners of the property though the Applicant was not registered on the certificate of title. That in 2014, the Applicant and the Respondent borrowed money from KCB (U) LTD for the Respondent's building projects which loan went bad, and when they failed to repay it, the Respondent requested the Applicant to sell off his property in Nansana to redeem the suit land on condition that once the property is recovered from the bank, it would be transferred into the Applicant's name. that however, after the Applicant had sold off his Nansana property and had the certificate of title from the suit land redeemed and retrieved from the Bank, the Respondent reneged from what they had agreed and refused to transfer the land into the Applicant's name.

6. In the proposed amended plaint, the Applicant seeks to now further allege fraud against the Respondent and to seek the following reliefs from Court; -
7. *A declaration that the Plaintiff is the sole owner of land comprised in LRV 3549 Folio 11 Plot 81 at Kyenjojo, Kyenjojo District and all developments thereon.*
8. *An Order directing the proposed 2nd Defendant (Commissioner Land Registration) to cancel the name of the Respondent herein from the certificate of title of the suit land and to transfer the same into the names of the Plaintiff.*
9. *An order of permanent injunction restraining the Respondent from evicting the Applicant from the suit property.*
10. *An order for payment of general damages for inconveniences caused to the Applicant by the Respondent.*
11. *Costs of the suit.*
12. The Applicant also intends to seek alternative prayers namely; -
13. *A declaration that the suit property comprised in LRV 3549 Folio 11 Plot 81 at Kyenjojo, Kyenjojo District is co-owned by both the Applicant and Respondent as tenants in common.*
14. *Costs of the suit*
15. *Any other orders this court deems fit.*

Service of the Application and Reply by the Respondent:

1. As per the Affidavit of service on court record filed on 22nd November 2024 deponed by *Aliija Bosco*, a court process server attached to *M/s Ngaruye Ruhindi, Spencer & Co. Advocates*, the Respondent was served with the instant Application together with the Applicant's written submissions on 31st October 2024 through her Advocates of *M/s Bahenzire, Kwikiriza & Co. Advocates*. I have perused the Annexures attached to the Affidavit of service and I am satisfied that the Respondent's said Advocates were duly served with both the Application and Applicant's written submissions.

2. **Order 49 Rule 2 of the Civil Procedure Rules** provides that: -

“All orders, notices and documents required by the Act to be given to or served on any person shall be served in the manner provided for the service of summons.”

1. **Order 49 Rule 2** implies that the rules under **Order 5 of the Civil Procedure Rules** also apply to Applications like the instant one. (See: **The Registered Trustees of Madi West Nile Diocese versus Lucia Eyotaru and 7 others**, HCMA. No.43 of 2021). **Order 5 Rule 10 of the Civil Procedure Rules** is to the effect that service of summons shall be made to the defendant in person or his/her appointed agent. In this case, the Respondent was served through her appointed agent being *M/s Bahenzire, Kwikiriza & Co. Advocates*. However, despite being served, the Respondent did not file an Affidavit in Reply.

Representation and Hearing:

1. The plaintiff was represented by *M/s Ngaruye Ruhindi, Spencer & Co. Advocates* who filed written submissions which I have considered.

Burden and Standard of proof:

1. The burden of proof is in two broad categories that is the legal burden and the evidential burden. **Sections 101 and 102 of the Evidence Act Cap 8** rests the burden of proof on whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts to prove that those facts exist or who would fail if no evidence is adduced at all. Therefore, the Applicant bears the legal burden of proof to prove his case on the balance of probabilities.

2. **Section 103 of the Evidence Act** on the other hand places the evidential burden on any party who alleges the existence of a set facts to prove such facts. It provides thus:

“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

1. Therefore, whereas the legal burden solely lies upon the Applicant and does not shift, the evidential burden keeps shifting depending on the facts alleged by either side. I find the dicta by the Supreme Court of Kenya in **Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017)** eKLR very elaborative on this issue where court observed thus:

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law....."

1. Therefore, even when a suit is not opposed like the one in issue, the legal and evidential burden rests on the Applicant to prove on a balance of probabilities that he should be granted leave to amend the Plaint to plead that the suit property is his sole property, to add the Commissioner Land Registration as a 2nd Defendant and to make clarifications in his own name. Court is duty bound to examine the evidence presented in line with the pleadings to find whether or not the test is satisfied.

Applicant's Submissions:

1. In his 2 page written submissions, learned Counsel for the Applicant submitted that the Application is premised on 5 grounds, then he reiterated the contents of the chamber Summons, and then stated verbatim, as follows; -

"We wish to submit as follows;

The Applicant filed Land suit HCT-01-CV-CS-LD-No 80 of 2023 which is under hearing in this honourable Court in its initial stages. At the time of filing the above mentioned land suit, there is information that was not available to the Applicant. The Applicant also intends to add a party to the suit and also make clarification in his name as the Plaintiff/Applicant. The said information which the Applicant intends to add, the 2nd party which the Applicant intends to add and the clarification in the name that the Applicant intends to make are very much important for the determination of HCT-01-CV-CS-LD-No 80 of 2023 before this Honourable Court. The Applicant has filed this Application without any inordinate delay since the matter is still under hearing in its initial stages. My Lord we pray that this Application be allowed and cost can be in the cause for the ends of justice to be met.

We so pray."

Issues:

1. I find the following issues relevant to the determination of this application:
2. **Whether the applicant should be granted leave to amend the plaint**
3. **What remedies are available?**

Resolution:

1. **Order 6 rule 19** of the Civil Procedure Rules provides thus:

*“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 may be necessary for the purpose of determining the real questions in controversy between the

parties.”*

1. The above provision grants court the discretion to grant leave to the parties to amend their pleadings at any stage of the proceedings. However, courts have overtime developed parameters within which such discretion should be exercised. In **Muwolooza & Brothers v N Shah & Co Ltd (Civil Appeal No. 26 of 2010) [[2011] UGSC 112]**(<https://ulii.org/akn/ug/judgment/ugsc/2011/112>) (14 November 2011), the Supreme Court cited the decision in **Eastern Bakery v. Castelino C. A. C. A No. 30 of 1958 [1958] E. A 461** where Sir Kenneth O'Connor stated:

“Amendments 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 compensated 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 e.g. by depriving him of a defence of limitation.”

1. *Tumwesigye JSC* further guided in **Muwolooza & Brothers (supra)** thus:

*“This is I think the correct statement of the law on amendments to

pleadings. Amendments are allowed by courts so that the real question in

controversy between the parties is determined and justice is administered

without undue regard to technicalities in accordance with Article 126(2) (e) of* [*the

Constitution*](<https://ulii.org/akn/ug/act/statute/1995/constitution>)*. Therefore, 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, or unless the

amendment would introduce a distinct cause of action in place of the original cause.”*

1. It therefore follows that an amendment should be granted where it seeks to have the matters in controversy resolved and to avoid multiplicity of suits. However,

where an application for leave is made mala-fide or where it seeks to introduce a new cause of action or where it is prohibited by law, where it is prejudicial to the opposite party or where it is made at advanced stages of the hearing of the case, then such amendments may be denied.

Therefore, this court must determine; -

2. *Whether the proposed amendment seeks to introduce a new cause of action;*
3. *Whether the proposed amendment is prejudicial to the Respondent; and*
4. *Whether the proposed amendment is made at advanced stages of the hearing of the case*.

Introduction of a new cause of action

1. The **Black's Law Dictionary** (8th ed. 2004) at page 664 defines a cause of action as, *a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.* In the case of **Cottar vs. Attorney General for Kenya** (1938), 5 EACA. 18, *Sir Joseph Sheridan, CJ* stated that:

“...what is important in considering a cause of action is revealed by the pleadings is ***the question as to what right has been violated... **”***

*“In addition, of course, the Plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable.

I would summarize the position as I see it by saying that if a plaintiff shows that the plaintiff enjoyed a right, that the right has been violated and that

the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If

on the other hand any of those essentials is missing, no cause of action

has been shown and no amendment is permissible.”*

(See also **Auto Garage & Others vs. Motokov**, No. 3 [1971] EA 514)

1. A cause of action therefore is a right which the claimant was entitled to enjoy but has been violated by the Defendant. It is every fact which is material to be proved to enable the plaintiff succeed on every fact which if denied, the plaintiff must prove in order to obtain a judgment. The ascertainment of a cause of action should consider only the plaintiff and the annexures thereto. (See **Kebirungi vs. Road Trainers Ltd & 2 others** [2008] HCB 72.
2. In the instant case, the Plaintiff's cause of action in the original plaintiff was anchored on joint ownership of property. The Applicant alleged in the original plaintiff that he jointly acquired the suit property with the Respondent and that they jointly developed the same with a commercial building in form of a guest house, but that the Respondent transferred it into her sole name, and consequently, the Applicant sought a declaration from this court that suit

property is jointly owned by both the Applicant and the Respondent. Therefore, it was the plaintiff's case that he enjoyed a right to joint ownership of the suit property with the Respondent, that this right was violated, and that the Respondent is liable.

3. The **Black's Law Dictionary (8th ed. 2004)** at **page 664** defines a new cause of action as, *a claim not arising out of or relating to the conduct, occurrence, or transaction contained in the original pleading*.
4. In the instant Application, the facts constituting the Plaintiff's cause of action in Applicant's proposed Amended Plaintiff are totally different from those in the original Plaintiff. Whereas the Applicant originally stated that the property was jointly acquired and jointly developed, in the proposed amended plaintiff, the Applicant now avers that he unilaterally bought the suit land and that he started developing it as a customary owner operating a guest house for his own benefit and for the benefit of his children and wives. Contrary to what is stated in the original plaintiff, the Applicant avers in the proposed amended plaintiff that, while based in Kampala, he instructed his wife the Respondent to follow up the title processing at the Area Land Committee and the Land Office and that in the process, the Respondent processed the certificate of title in her name without the Applicant's express consent. The Applicant now claims to be the sole owner of the property and his cause of action in the proposed amendment is anchored in sole ownership of property.
5. It is my finding that the cause of action in the proposed amendment is a complete shift from the original cause of action as contained in the original plaintiff and is a claim not arising out of or relating to the conduct, occurrence, or transaction contained in the original plaintiff. The facts which are material to be proved to enable the plaintiff succeed on a case of joint ownership of property are totally different from those that need to be proved for one to succeed on a case of sole ownership of property.
6. I am accordingly satisfied that the proposed amendment by the applicant seeks to introduce a distinct cause of action with a view of changing the face of the case and yet the law prohibits such substitution of a cause of action with a completely different one. Since, the first element of introducing a new cause action is answered in the affirmative; it is immaterial to determine whether the proposed amendment is prejudicial to the Respondent or whether the proposed amendment is made at advanced stages of the hearing of the case.
7. I therefore find no merit in this application and it is hereby dismissed with no orders as to costs since the Respondent never filed an Affidavit in Reply.

It is so ordered

Dated at Fort Portal this 25th day of April 2025

Vincent Wagona

High Court Judge**FORTPORTAL**

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