

UGANDA / JUDGMENT

Mbambu & 6 Others v Kaija & Another (Miscellaneous Application 14 of 2024) [2025] UGHC 30 (9 January 2025) [2025] UGHC 30

COURT

High Court of Uganda

BEFORE

David S.L. Makumbi, J

CASE / FILE NUMBER

Miscellaneous Application 14 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KASESE

HCT-25-LD-MA-0014-2024

(Arising from HCT-25-LD-CS-0004-2024)

1. MBAMBU ALICE
2. KABUGHO BIKOBA
3. BWAMBALE MOSES
4. KATHE MOSES BIKOBA
5. SIMON BIKOBA
6. MAKULE BIKOBA=====APPLICANTS/DEFENDANTS

VERSUS

1. KAIJA CHRISTOPHER BIKOBA
2. MUSOKI IRENE=====RESPONDENTS/PLAINTIFFS

BEFORE JUSTICE DAVID S. L. MAKUMBI

RULING

REPRESENTATION:

Applicants represented by Sibendire, Tayebwa and Co. Advocates.

Respondents represented by Bagyenda and Co. Advocates.

BACKGROUND:

This application is brought by way of Chamber Summons under Order 6 Rules 19 and 31 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act seeking orders that:

1. The Applicants be granted leave to amend their Written Statement of Defence by giving proper account if the facts constituting the Applicants' defence to the suit and introducing a counterclaim to challenge the marriage between the Respondents on ground of illegality and the Certificate of Customary Ownership on the ground of fraud.
2. Costs of the application be in the cause.

The grounds of the Application are outlined in the Affidavit of Mbambu Alice wherein she states that the amendment is necessary for determining the real question in controversy between the parties. Furthermore, she states that the facts giving rise to the Applicants' defence were not properly brought out in the Written Statement of Defence especially as regards the 1st Applicant's marriage status and the acquisition of the suit land given that the pleadings were prepared by the Applicants themselves. The Deponent went on to state that the real controversy could only be determined when the facts related to the acquisition of the suit land and the marriages of the 1st Applicant and 2nd Respondent as well as between the Respondents are properly outlined in the counterclaim. The Deponent concluded by praying for Court to allow the amendment in order to address the real issue in controversy.

The Respondents filed affidavits in reply to the application sworn by the 1st and 2nd Respondents. In his affidavit the 1st Respondent stated that the 1st Applicant was formerly cohabiting with him and that the cohabitation had ended in 2016. He had then subsequently entered a lawful marriage with the 2nd Respondent. He went on to contend that the Applicants had initially pleaded that they are the wrong parties to the suit are not fit to be granted leave to amend as they will be introducing new facts and cause of action. Furthermore, the applicants had failed to file their counterclaim within the time specified which had long lapsed. Furthermore, the issue of the validity of marriage was a new issue and ought to have been handled as a petition for nullity of marriage. He stated on the whole that the application for amendment was nothing more than a fishing expedition and waste of Court's time. The 2nd Respondent also swore an affidavit along the same lines as the 2nd Respondent opposing the application.

In rejoinder to the above, the 1st Applicant swore an affidavit reiterating her application and further explained that her counterclaim with regard to the certificate of customary ownership only arose when she realized it had been included in the Plaintiffs' trial bundle.

Applicant's Submissions:

Counsel for the Applicant submitted that this Court was empowered under Order 6 Rule 19 of the Civil Procedure Rules to amend pleadings at any stage of the proceedings provided the following guiding principles established from case law are followed:

1. The amendment is to enable the court determine the real matter in controversy between the parties and substantive justice is done without undue regard to technicalities.
2. The amendment should not cause an injustice to the other side and where it is evident that injury from amendment may be resolved by costs it should be allowed.
3. Multiplicity of proceedings should be avoided as much as possible.
4. The amendment should not be done mal fides.
5. The amendment should not be expressly or impliedly prohibited by law.
6. The amendment should not have the effect of substituting one cause of action for another.

In light of the above Counsel submitted that the amendment was necessary to determine two main points of controversy being the Certificate of Customary holding of land and the validity of the marriage between the Respondents. It was further argued that the amendment would put the controversial issues in better context and also cited the decision in **Okello Wilbert v Obel Ronald – HCMA No. 97 of 2020** to support the argument that the amendment was not mal fides. Counsel further argued that it was in the interests of justice and fairness that the amendment be allowed.

Respondent's Submissions:

Counsel for the Respondent argued that the application should not be allowed on the following grounds:

1. The amendment being sought is limited by law.
2. The application is made in bad faith with undue delay.
3. The amendment introduces a new and inconsistent cause of action.
4. The amendment will occasion injustice to the respondents.
5. The amendment is unnecessary with respect to the 1st Applicant as the issue between her and the 1st Respondent is already evident in the original written statement of defence.
6. The amendment does not disclose any controversy between the 2nd, 3rd, 4th, and 5th applicants and the respondents.
7. The applicants failed on their burden of proof.

As concerns limitation Counsel argued that the amendment was being applied for out of time contrary to Order 8 Rule 18(4) of the Civil Procedure Rules as pleadings had already been closed.

Counsel further argued that the application was made in bad faith as the applicants had been granted 39 days to get an Advocate to represent them which was done on 16th May 2024 and communicated to court on 24th May 2024. However, it was not until 25th June 2024 that the Applicants communicated their intention to amend the Written Statement of Defence and that an application had been filed in that respect. Counsel argued that the application was made in bad faith as it was done after the Applicants had seen the Respondents' intended evidence. Counsel further argued that the application was filed after the hearing of Summons for Directions contrary to Order XIA Rule 6 of the Civil Procedure Rules.

Counsel went on to argue that the intended amendment was introducing a new and inconsistent cause of action in the form of challenge of the validity of the marriage of the Respondents contrary to the requirements of the Divorce Act. Counsel further argued that it was irregular for a petition for nullity of marriage to be intertwined with a land matter in an ordinary plaint.

It was also argued that the amendment would occasion injustice having been filed after the conclusion of summons for directions and would require re-opening summons for directions. Furthermore, the application was causing unnecessary delay to the Respondents who are deprived of their matrimonial home.

Counsel reiterated the 5th and 6th grounds as presented above.

Counsel argued that the burden of proving the 1st Applicant's ownership of the land and the marriage to the 1st Respondent rested upon the applicants which has not been done in this matter.

Applicant's Submissions in Rejoinder:

By way of rejoinder Counsel for the Applicants argued that Order 8 Rule 18(4) of the Civil Procedure Rules related to closing of pleadings but not amendment.

Counsel further argued that extension of time to file a counterclaim can be applied for only after the leave to amend has been granted and that as such the law does not prohibit amendment of a Written Statement of Defence to introduce a counterclaim after expiry of time within which to file a counterclaim. Counsel then reiterated all previous arguments and prayed that the application be allowed with costs in the cause.

ANALYSIS:

In considering this Application I bear in mind the guiding principles governing Court's discretion as to whether or not to grant leave to amend pleadings as established in the Supreme Court cases of **Gasu Transport Services (Bus) Ltd v Martin Adala Obene – SCCA No. 4 of 1994** and **Mulwooza & Brothers Ltd v Shah & Co Ltd – SCCA No. 26 of 2010** as follows:

1. The amendment should be allowed to enable the real question in controversy between the parties to be determined without undue regard to technicalities.

2. The amendment should not occasion injustice to the other side and any injury which can be compensated by award of costs is not treated as an injustice.
3. Multiplicity of proceedings should be avoided as far as possible and any amendments avoiding multiplicity should be allowed.
4. Applications made mal fides should not be granted.
5. Amendments expressly or impliedly prohibited by law are not allowed.

Furthermore in the case of **Edward Kabugo Sentongo v Bank of Baroda – HCMA No. 203 of 2007** it was held that an amendment will not be allowed where it will substantially change the cause of action into a different one or will deprive the defendant of an accrued right or where it is made mal fides.

As concerns the real question in controversy Counsel for the Applicant argued that the amendment and counterclaim was necessary to address the real question in controversy. To that extent he called into issue the Certificate of Customary Ownership of the suit land which he claimed was obtained by fraud and the invalidity of the marriage between the Respondents. I have carefully studied the pleadings in this matter and also taken into account the fact that at the time the Applicants filed their Written Statement of Defence (WSD) they were did not have an Advocate to represent them. The lack of representation at the time of filing the WSD can form a legitimate basis for amendment but only where the amendment meets the criteria outlined above.

In this matter one of the intended amendments is a counterclaim of fraud concerning the Customary Certificate of ownership of the suit land in the names of the 1st Respondent. The introduction of a question of fraud appears to me to be a marked departure from the original joint WSD filed in this matter. In the original WSD the Applicants commence their pleadings by indicating their intention to raise preliminary objections to the extent that there is no cause of action against them and also that the Respondents had sued the wrong parties. Furthermore the Applicants' WSD does not contest the 1st Respondent's ownership of the suit land as an individual but rather the joint ownership with the 2nd Respondent (See Paragraph 6 of WSD). Additionally the Applicants' WSD also brings out the fact that the 1st Applicant's key contention is that she is validly married to the 1st Respondent and that her ownership of the suit land is premised on the marriage (see Paragraph 11 of the WSD).

By introducing amendments and counterclaims to the effect that the 1st Respondent's Certificate of Customary Ownership is fraudulent the Applicants are not only introducing a new line of argument but are also contradicting themselves. This is because the 1st Applicant's initial pleadings to which she is bound establish her claim as joint ownership with the 1st Respondent. The joint ownership pleading is also still carried through in the intended amended WSD per Paragraphs 9(e) to 9(i). This therefore means that any counterclaim she wished to make with regard to the suit land could only be restricted to her right of ownership alongside the 1st Respondent. By seeking in the counterclaim to entirely nullify the 1st Respondent's ownership of

the suit property, the 1st Applicant creates a contradictory narrative in as much as on the one hand she maintains that the suit property is jointly owned and yet on the other hand she seeks to extinguish the 1st Respondent's legal right to the property. In my view the correct approach would be for the 1st Applicant to seek orders for her name to be added as a joint customary owner of the suit property and not to entirely cancel the Certificate of Customary Ownership. It is also important to note at this point that where leave is sought for an amendment to pleading and the amendment has the effect of introducing a charge of fraud for the first time then leave for such amendment will not be readily granted (see **Ssekaana & Ssekaana - Civil Procedure and Practice in Uganda 2nd Edn, Page 204; David Acar v Alfred Acar Aliro [1982] HCB 60**).

The reluctance in receiving a charge of fraud by way of amendment is in my view founded on the fact that fraud by its very nature would require a slightly stricter standard of proof than with other civil matters. It follows therefore that if the question of fraud has not been expressly established as a cause of action at the very beginning by both the Plaintiff and the Defendant in their respective pleadings, it cannot be introduced by way of amendment without sufficient cause. In this matter the Applicant alluded to the fact that the Certificate of Customary Ownership had only come to their attention when it was included as part of the Respondents' trial bundle. In my view this is not sufficient cause to introduce an issue of fraud in this matter by way of amendment because the Applicant is still free to enforce her right of ownership alongside that of the 1st Respondent without necessarily adding fraud and unnecessarily convoluting the primary suit. To rely on fraud by way of amendment and counterclaim in this matter the Applicants should have been able to demonstrate that their right in the suit land cannot stand unless the 1st Respondent's right to the same is extinguished.

In the case of **Benow v Low (1880) 13 ChD 553**, it was held that a defendant is not allowed to rely for his counterclaim upon matters which have been stated simply as grounds of defence to the plaintiff's claim, and are not specifically referred to in the counterclaim unless he has repeated them or incorporated them by reference in his counterclaim.

By the holding above, what is clear is that whatever the defendant intends to rely upon in their counterclaim must not just be stated in the WSD but must also be specifically referenced in the counterclaim itself. In this matter though, what is stated in the intended amended WSD and counterclaim creates distinct departure and inconsistency with the original WSD as I have already laid out above. While the defendant is free to amend and even discard aspects of the previous defence, the subsequent amendment and counterclaim must not have the effect of raising an entirely new ground of defence or counterclaim (see **Hill and Grant Ltd v Hodson [1934] ChD 53** and **British India General Insurance Co Ltd v GM Pharma and Co Ltd [1966] EA 172**). The fact that the Respondents refer to the disputed Certificate in their evidence does not necessarily defeat the Applicants' interest in the suit land or the claim of marriage through which the Applicants claim their interest. The Respondents' claims will still be subject to the usual rules of evidence and will be weighed against the Applicants' defence.

Furthermore, as concerns the question of the marriage of the 1st and 2nd Respondents, I do agree with Counsel for the Respondents that inclusion of the issue of legality of the said marriage in the amended WSD and counterclaim runs contrary to Section 11 of the Divorce Act which governs dissolution of marriages. The said section restricts the petition for nullity of marriage to a husband or wife. This therefore means that the 1st Applicant can only enforce her rights in the context of her own marriage to the 1st Respondent but cannot seek to nullify the marriage between the 1st and 2nd Respondents.

I disagree with Counsel for the Applicant about the issues in controversy in this matter being the Certificate of Customary Ownership of the suit land and the marriage between the Respondents. In my view the real issues in controversy are whether the Respondents have a valid right to the suit land as claimed in the plaint and secondly whether or not there was a valid marriage between the 1st Applicant and the 1st Respondent. It is for the Respondents to prove their claim in evidence and for the Applicants to rebut the same in evidence by proving inter alia that they have a legal or equitable interest in the land and/or that there was a subsisting marriage between the 1st Applicant and 1st Respondent. It is on this basis that a counterclaim can be made only to the extent of enforcing the Applicants' rights to the suit land by way of seeking declaration of their interests whether legal or equitable over the same.

I therefore find that this Application fails to the extent that the amendment and counterclaim concerning the legality of the marriage of the 1st and 2nd Respondent is expressly contrary to Section 11 of the Divorce Act and that furthermore the amendment and counterclaim related to the question of the legality of the Certificate of Customary Ownership raises an entirely new ground of defence and counterclaim. In both cases I find that the amendment of the WSD and the counterclaim in the terms presented to Court will only serve to unduly convolute the matter. I particularly point out Paragraphs 9(j) and 9(k) of the intended amended WSD and the subsequent counterclaim which is entirely founded on the said objectionable paragraphs.

It is still possible for the Applicants' rights to be determined based on the original WSD and if the Applicants should wish to pursue a counterclaim based on the original WSD they are free to make the relevant prayers to Court.

ORDERS:

The Application is hereby denied and costs in the matter shall be determined in the main cause.

I so order.

Ruling delivered this 9th day of January 2025.

David S. L. Makumbi

JUDGE

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Prepared on 14 October 2026 · Esheria