

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)**

**MISC.APPLICATION NO.239 OF 2019  
(ARISING FROM CIVIL SUIT NO.002 OF 2019)**

**DR. PETER MUSOKE GUKIINA:.....APPLICANT  
VERSES**

**1. SPEKE HOTEL LIMITED  
2. SUDHIR RUPARELIA  
3. ERIEZA LUBOJJE KAGGWA  
4. EPHRAIM NTAGANDA:.....RESPONDENTS**

**BEFORE: HON. MR. JUSTICE HENRY I. KAWESA**

**RULING**

This is an application brought by Chamber Summons for leave to amend the plaint. It was brought under Order 6 rule 19 and 31 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act.

The application is supported by the affidavit sworn by Dr. Peter Musoke Gukiina the Applicant herein and briefly;-

- i. After filing the plaint in HCCS No. 002 of 2019, official information obtained by the Applicant from the commissioner land registration revealed that the land comprised in Busiro Block 443 plots 49, 52, 74, 75 and 76 at

- Kongero in Wakiso District over which the Applicant claims an interest is registered in the names of the 1<sup>st</sup> Respondent.
- ii. That the Applicant has come a cross copies of the certificates of title which show that the suit is registered in the names of Speke Hotel (1996) Ltd which is not a party to the main suit.
  - iii. That it is necessary to amend the plaint by removing the 1<sup>st</sup> Respondent/1<sup>st</sup> Defendant and substituting it with Speke Hotel (1996) Ltd.
  - iv. That the 1<sup>st</sup> Respondent/1<sup>st</sup> Defendant will not be prejudiced in any way since it did not file a written statement of defence.
  - v. That it is in the interest of justice that the Applicant is granted leave to amend the plaint.

The Applicant attached the following pieces of evidence to justify his application; - copies of search reports *as Annexures A1-A5*, copies of certificates of title *as annexures B1-B4*, a copy of the intended amended plaint *as annexure C*.

I have not seen an affidavit in reply for the 2<sup>nd</sup> Respondent (Sudhir Ruparelia) on file, however, there is an affidavit of Rajiv Ruparelia a director of Speke Hotel (1996) Ltd and a business associate of the 2<sup>nd</sup> Respondent who affirmed in opposition of the application.

In an affidavit in rejoinder to the 2<sup>nd</sup> Respondent's affidavit in reply, the Applicant averred that Rajiv Ruparelia is not a party both to the

instant application and the head suit. That he has not demonstrated that he was authorized to depone the affidavit on behalf of the 2<sup>nd</sup> Respondent. That even Speke Hotel (1996) Ltd in which the affirmant claims to be a director is not a party to the instant application not the head suit. That the affirmant has abused Court process by filing an affidavit in reply in a matter where he is a total stranger and that the affidavit in reply of the 2<sup>nd</sup> Respondent should be expunged from the Court record.

Issue.

Whether the affidavit of Rajiv Ruparelia is valid as far as this application is concerned?

The affirmant is not a party to both the main suit and the application but he clearly states in paragraph 1 of his affidavit in reply that he is a business associate with the 2<sup>nd</sup> Respondent. Being a business associate does not give one authority to swear an affidavit in palace of the latter,

In *Taremwa K. Thomas versus Attorney General & 2 Ors HMA 83/2012*, Justice Bashaija noted that;

*“It is trite law that where a party swears an affidavit without the authority of the party to the suit, the affidavit is defective for want of authority”.*

Therefore, much as the affirmant claims to be a business associate of the 2<sup>nd</sup> Respondent, he should have gotten express authority from the

2<sup>nd</sup> Respondent; (Sudhir Ruparelia) to depone the affidavit and hence his affidavit is incompetent.

In **DFCU Bank Ltd versus Muwanga Geoffrey, M. A No. 240/2018**, this Court noted that;

*“An affidavit in support or in reply is therefore part of pleadings. The effect of not filing an affidavit where the law requires one was held to be a fatal omission in **Agro Supplier Ltd versus Uganda Development Bank HC CS NO. 379/2005**”.*

Therefore in this case, the absence of an affidavit in reply implies that there is no rebuttal to this application. Also **in Hon. Remmy Kasule versus Jack Sabiti & Others HCCS No. 230 of 2006** Court gave the position that by the Applicant failing to file an affidavit in reply it is deemed that the facts stated therein are admitted.

I therefore expunge the affidavit of Rajiv Ruparelia from the record, this leaves the 2<sup>nd</sup> Respondent with no locus to file submissions.

The 2<sup>nd</sup> Respondent went ahead and filed a surrejoinder in reply to the Applicant's affidavit in rejoinder, it is my view that a Respondent's surrejoinder is only allowed with leave of Court. The same cannot be relied upon in this ruling.

Now, Court has to determine whether or not to grant the application.  
The background of the facts.

The Applicant filed Civil Suit No. 002/2019 against the Respondents jointly and severally for orders that, the Applicant be declared a lawful/bonafide owner of the suit Kibanja, the 1<sup>st</sup> and 2<sup>nd</sup>

Defendants/Respondents unlawfully evicted the Applicant, that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents unlawfully transferred their proprietary interest in the suit land to the 1<sup>st</sup> Defendant without regard to the Plaintiff/Applicant's legal interest, declaration that the 1<sup>st</sup> Respondent and his agents are trespassers, an eviction order against the against the 1<sup>st</sup> Respondent, permanent injunction, special damages, punitive damages, general, interest and costs of the suit.

The Defendants/Respondents were served and they all filed their Written Statements of Defence. Before the suit was set for mention on 25<sup>th</sup> April 2019, the Plaintiff filed MA. No. 239 of 2019 on 22<sup>nd</sup> February 2019 seeking leave of this Court to amend his plaint by substituting the 1<sup>st</sup> Defendant/Respondent with Speke Hotel (1996) Ltd.

The merits of the application;

Order 6 rule 19 of the Civil Procedure Rules states that, *“the Court may at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such a 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”*.

In **Muhammed Kasasa versus Jasper Sirasi Bwogi, Civil Suit No. 42 of 2008** (unreported) the Court of Appeal held that Order 6 rule 19 of the Civil Procedure Rules empowers Court to allow either party to the suit to alter or amend pleadings for the purpose of determining the

real question in controversy between the parties. However, in allowing the amendment, the Court must use its discretion judiciously and must reach the decision based on the right principles.

It has to be noted that an amendment under Order 6 rule 19 of the Civil Procedure Rules is for the purpose of determining questions in controversy between parties, it ought to be allowed if thereby the real and substantial questions can be raised between the parties, and multiplicity of proceedings can be avoided, see *Ntungamo District Local Council versus John Karazarwe (1997) III KALR 52.*

Upon perusal on the record on file, I note that counsel for the Applicant did not cite or discuss **Order 1 rule 10(2)** of the Civil Procedure Rules for substitution of a party which stipulates that;

*“The Court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any party improperly joined whether as Plaintiff or Defendant be struck out and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.*

It was submitted by the 2<sup>nd</sup> respondent’s counsel that the application does not show which part of the plaint is intended to be amended and that the statement of the intended amendment is crucial to guide

Court on whether to accept the amendment or decline, and to also determine whether the intended amendment is not illegal. That the amendment seeks to smuggle in a substitution of parties which is not an amendment. Counsel relied on Article 20 and Article 28 of the Constitution for the act of infringing on its non derogable right to a fair hearing.

In the instant application, the applicant is seeking an amendment alleging that upon conducting a search in the registry, he discovered that the suit land was in the names of SPEKE HOTEL (1996)LTD and that he seeks to amend the plaint by substituting the 1<sup>st</sup> respondent/defendant with SPEKE HOTEL (1996) LTD.

First, I note that the applicant at first sued a non-existent company, which is illegal, and therefore an illegality cannot be rectified by way of amendment or substitution of parties. I also find that a party cannot substitute parties by way of amendment because an amendment deals with the body of pleadings while substitution concerns parties.

The law does not allow substituting a non-existent party with an existent party, in the case of *Mulangira Ssimbwa versus The Board Of Trustees Miracle Center and Anor; M.A No.655/2005*, Justice *Remmy Kasule* as he then was noted that;

*“Where the amendment by way of substitution of parties purports to replace a party that has no legal existence, the plaint must be rejected”.*

Counsel for the applicant argued that the amendment is sought to substitute Speke Hotel (1996) Ltd which appears as the registered proprietor of land on the official records from the Land office, and that suing Speke Hotel Ltd instead of SPEKE HOTEL (1996) LTD was a genuine mistake. That the intended amendment will assist Court in determining the real questions in controversy between the proper parties.

In *V.G Keshwala t/a & sons versus M M. Sheik Dawood HCMA No. 543/2011 Madrama J*, relied on the case of *Banque Internationale De Commerce De Porto grand versus Gaukassaow (3)(1993)2 KB 682* for a position that a non-existent person cannot sue and that once the Court is made aware that the plaintiff is non-existent , and therefore incapable of maintaining an action, it cannot allow the action to proceed and that the order of the Court is that the action must be struck out, as the alleged plaintiff has no existence.

Relating the said cases to the facts before this Court, Speke Hotel Ltd is a non-existent entity and therefore, the plaintiff cannot maintain an action against it as a defendant in the Courts of law and the suit against it is a *nullity abinitio*. And since the applicant sued a non-existent party, there is no cause of action disclosed against it and there is no need of amendment because there is nothing to amend.



In, *Real Gaba Market Property Owner versus Kampala Capital City Authority, CS No. 248/2008*, Justice Bashaija was of the view that;

*“it would follow naturally that the plaint filed by Real Ggaba in HCCS No.248/14 was filed by a non-entity and hence a nullity and could not even be corrected or cured by an amendment to substitute Real Ggaba a non-entity, with Real Gaba an incorporated company, because there was nothing to amend in the first place”.*

The trial judge in that case went on to hold that;

*“Having found as above, it follows logically that there is legally no plaint in existence and no pleadings by the plaint which properly lie before this Court, the plaint is accordingly struck off and dismissed with costs to the defendants”.* I am persuaded by the above reasoning.

In the result, I find that there is no merit in this application and it is accordingly dismissed with costs.

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Henry I. Kawesa

**JUDGE**

06/07/2019

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Kansiime Timothy for the Applicant.

Applicant absent.

Kabubi Andrew for the Respondent.

Respondent present.

Matter for Ruling.

Court:

Ruling delivered to the parties above.

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Henry I. Kawesa

**JUDGE**

06/07/2019