

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

HCT-00-CC-CS-0580- 2006

NILE BREWERIES LTDAPPLICANT

VERSUS

BRUNO OZUNGA T/A NEBBI BOSS STORESRESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING

When this suit came up for a scheduling conference Mr. Okalang, Counsel for the plaintiff raised two preliminary points of law:-

1. That the Written Statement of Defence contravened the provisions of Order 6 rule 3 of the Civil Procedure Rules.
2. That the Counter-claim offends the provisions of Order 8 rule 8 of the Civil Procedure Rules. He prayed for the same to be struck out.

Order 6 rule 3 provides:-

3. “In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.

In paragraph 6 of the Written Statement of Defence the defendant states:-

“The defendant hereby replies to paragraph 6 specifically that the amount being claimed by the plaintiff as being Ushs205, 258,424/= (two hundred five million two hundred fifty eight thousand four hundred twenty four shillings only) is a misrepresentation by the plaintiff. And the plaintiff shall be put to strict proof thereof.”

Mr. Okalang relied on Newport Drydoch Vs Paynter (1886) 38 Ch 85 and submitted that rule 3 above is mandatory. He argued that the particulars of the misrepresentation must be pleaded to enable the identification of the misrepresentation.

In this reply Mr. Okecha, Counsel for the defendant, relied on Tororo Cement Co Ltd Vs Frokina International Ltd SCCA No. 2 of 2001 and argued that failure to plead the particulars of misrepresentation should not be a ground for striking off the pleadings. He further argued that the defence was not only hinged on misrepresentation so as to warrant the entire defence being struck off. He prayed for leave to amend the Written Statement of defence so as to give the particulars of misrepresentation.

In Bullen & Laake & Jacob's Precedents of Pleadings 14th Ed Vol 2 para 49-10 page 816 it is stated:

“The particulars of claim must show the nature and extent of each alleged misrepresentation (New port (Monmough) Slipway Dry Doch and Engineering Co Ltd Vs Paynter (1886) 34 Ch D 88) and contain particulars showing when, where (if relevant) by whom and to whom it was made, and how it was made, whether orally or in writing, and if in writing identifying the relevant document (Seligmana Vs Young (1884) W.N. 93)”

The essence of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them. The plaintiff was entitled to know the nature and extent of the alleged misrepresentation. The defendant should have shown in paragraph 6 of his Written Statement of defence how the claim for Ushs205, 258,424/= had been misrepresented in the plaint.

However, while referring to the three tests of disclosure of a cause of action set down in Auto Garage & Another Vs Motokov (No. 3) (1971) EA 514, Justice Tsekoko JSC in Tororo Cement Co Ltd Vs Frokina International Ltd S.C.C. A No. 2 of 2001 observed that Spry VP conclusion in the Motokov case clearly showed that where a plaint discloses a cause of action

but is deficient in particulars, the plaint can be amended so as to include particulars, say of negligence.

In the case of *Tororo Cement Vs Frokina case* the particulars of negligence had not been disclosed and the learned Justice stated that the plaintiff could have sought leave to amend the plaint.

To cure the defect the defendant has in his reply sought to amend the Written Statement of Defence. Where pleadings contain irregularities or defects those irregularities can be cured by amendment so that a case is decided on its merits and a party is not kept away from justice on a technicality. Order 6 rule 19 of the Civil Procedure Rules empowers Court at any stage of the proceedings to allow either party to alter or amend his or her pleadings in such a manner as may be just and necessary for the purpose of determining the real questions in controversy between the parties. An application for amendment on pleadings can be made orally. In the premises I hereby allow the defendant to amend his Written Statement of Defence by disclosing the particulars of misrepresentation.

With regard to the counter-claim Order 8 rule 8 of the Civil Procedure Rules states:-

“Where a defendant by his or her defence sets up any counter-claim which raises questions between himself or herself and the plaintiff together with any other persons, he or she shall add to the title of his or her defence a further title similar to the title in a plaint, setting further the names of all the persons who, if the counter-claim were to be enforced by cross action, would be defendants to the cross action and shall deliver to court his or her defence for service on such of them as parties to the action together with his or her defence for service on the plaintiff within the period within which he or she is required to file his or her defence.” (underlining is mine).”

In this case the Written Statement of Defence and counter-claim was drafted in such a way that paragraph 16 was followed with a prayer for judgment in favour of the defendant and

dismissal of the suit. This was followed by a section headed “COUNTER-CLAIM”. Parties to the counter-claim were not indicated in a title.

Mr. Okalany, Counsel for the Plaintiff submitted that the requirement under order 8 rule 8 CPR to add a title to a counter-claim is mandatory. Since the title was absent Counsel prayed that the counter-claim be struck off. He cited *Sekiranda Musoke Yakobo Vs China Jie Fang (U) Ltd H.C.C. S. No 33 of 1996*. In that case Counsel for the plaintiff applied for the counter-claim to be struck off for a similar reason that it offended Order 8 rule 8 CPR as it bore no title. Justice P. K. K. Onega upheld the objection. Also in *Nampera Trading Co Vs Yusufu Ssemanye & Another (1973) ULR 171* it was held that a title to the counter claim is mandatory. Mr. Okalang submitted that a counter-claim is an independent suit and must have a title where the parties are described.

Mr. Okecha for the plaintiff argued that the requirement for a title arises where other persons who are not parties to the suit are being introduced by the counter-claim. He relied on the phrase “—the plaintiff together with any other persons —“used in the rule.

Rule 8 must be read in light of the other rules in Order 8 which concern a counter-claim. Rule 2 provides for a defendant in an action to set up by way of counter-claim against the claims of the plaintiff any right or claim and the counter-claim shall have the same effect as a cross-action so as to enable court pronounce judgement on both the original suit and on the counter-claim. Then rule 7 requires the defendant when he or she seeks to rely upon any grounds as supporting a right of counter-claim to state in his/her statement of defence, specifically that he/she does so by way of counter-claim. Then rule 8 covers a situation where the defendant by counter-claim claims against the plaintiff together with another person. There is need for such other person to be clearly named. Thus the specific provisions in rule 8 which requires the defendant where by his defence sets up any counter-claim which raises questions between himself and the plaintiff together with any other persons to add to the title of his defence a further title similar to the title in the plaint. That title should set forth the names of all the persons, who if the counter-claim were to be enforced by cross-action, would be defendant to the cross action. Then rule 9 provides for

the summoning of such added party, if he is not yet a party to the suit and rule 10 for such party to appear as if has been served with summons to appear in the suit. Rules 11 and 12 provide for what course any person added as a party to the counter-claim should take. The above provisions show that the requirement to make a title to the counter claim is mandatory where the claim is against the plaintiff together with another person as co respondents to the counter-claim.

The defendant in paragraph 8 of his Written Statement of Defence clearly indicates in compliance with rule 7, that he will raise a counter-claim to the plaintiff's suit for compensation and punitive damages. From the portion headed "Counter-claim" the defendant sets out his claim against the plaintiff. There is no other party to the defendant's claim named. So the defendant's claim is against the plaintiff solely and not against the plaintiff together with any other person. My opinion is that the requirement for a title in the counter-claim arises where the defendant claims against the plaintiff together with another person. This is necessary so that it is clear who, in addition to the plaintiff, the defendant claims against in the counter-claim and to make such a person a party to the suit. Otherwise, if such person is only named in the body of the counter-claim he would not be a party to the suit. In the premises I differ from the decisions in two cases referred to above.

In the event I am wrong, it is my view that the defect is one of such which can be cured by amendment. To strike out the plaintiff's counter-claim would in the circumstances mean the defendant filing another suit against the plaintiff, periods of limitation observed. To safeguard against multiplicity of suits and to save Court's time and since the defendant, had in the event Court finds the counter-claim defective, sought for an amend I find it safe to order an amendment of the defendant's pleadings to include a title to the counter-claim.

Accordingly, the application to struck out the defendants Written Statement of Defence and counter-claim is rejected. Before I take leave of this matter, I must point out that I have studied the defendants Written Statement of Defence and counter –claim and I agree with counsel for the plaintiff that it shows poor draftsmanship. For example when referring to the defendant/counter-claimant words like "I" "me" "my" are used which makes it appear as if

it was the defendant personally drafting. However negligence of counsel should not be visited on an innocent party.

In the final result it is hereby ordered that the defendant's Written Statement of defence and counter-claim be amended to address the mentioned defects. The Amended Written Statement of Defence and Counter claim to be filed within 7 days from the date of this ruling. Costs shall be in the cause of the main suit.

I so order.

Hon Mr. Justice Lameck N. Mukasa

Judge

14/12/2007