

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0348-2008
(ARISING FROM HCT-00-CC-CS-0292-2007)

LEA ASSOCIATES LIMITED PLAINTIFF

VERSUS

BUNGA HILL HOUSE LIMITED DEFENDANT

BEFORE HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application brought by Chamber Summons under Order 6 rules 19 and 31, Order 52 rule 1 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act. The Applicant, Lea Associates Ltd is seeking leave to amend its pleadings to include Mr. Chirs Wilson, a director in M/S Bunga Hills House Ltd as Co defendant and make other necessary amendments to the plaint. The Applicant is the plaintiff in Civil Suit No HCT-00-CC-0292-2007, where Bunga Hill House Ltd is the defendant.

Amendment of pleadings is provided for under Order 6 rule 19 of the Civil Procedure Rules. It provides.

“The Court may, at any state of the proceedings, allow either party to allow or amend 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.”

In Gasu Transport Services (Bus) Ltd Vs Martin Adala obene SCCA No. 4 of 1994, Tsekoko JSC stated:-

The following principles appear to be recognized as governing the exercise of discretion in allowing amendments:-

1. The amendments should not work injustice to the other side. An injury which can be compensated by the award of costs is not treated as an injustice.
2. Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.
3. An application which is made malafide should not be granted.
4. No amendments should be allowed where its expressly or impliedly prohibited by any law (e.g. limitation of actions) See also Edward Secinde Vs Fred Luiga (1995)iv KALR 149

As a general rule amendment of pleadings should be allowed at any stage of the proceedings where court is satisfied that the amendment will enable the real question in controversy between the parties to be adjudicated upon and no injustice would be occasioned to the opposite party. Amendment will have 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 malafide See Edward Kabugo Sentongo Vs Bank of Baroda HCT 00- CC-MA 0203-2007 (unreported), Coffee Marketing Board ltd Vs Fred Kizito (1992-93) HCB 175.

In this application amendment sought is essentially to add a second defendant. On addition of parties Rule 10 (2) of Order 1 of the civil procedure rules provides: -

“ the court may at any stage of the proceedings either upon or without the application of either party and as 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 a plaintiff or defendant or whose presence before court may be necessary in order to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit, be added.”

As to who may be joined as defendants Order 1 rule 3 of the Civil Procedure states:

“all persons may be joined as defendants against which any right to relief in respect of or arising out of the same act or transaction or service is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against these persons, any common question of law or facts will arise.”

And rule 7 of the same order states:-

“where the plaintiff is in doubt as to the person from whom he or she is entitled to obtain redress, he or she may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.”

I must point out that order 10(2) above court has discretion to order any person to be joined as a plaintiff or defendant or as a person whose presence before court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the matter before it. Such a person may be joined even if the plaintiff has no cause of action against him or her provided that such party's presence is necessary for effectual and complete adjudication and settlement of all the issues involved in the suit before court. See Mullani in the Code Civil Procedures 17th Ed Vol II page 102, DAPCD Vs Jaffer Brother Ltd SCCA No 9 of 1998, Anorl Raphael Vs Tuch & Sons Ltd (1956) All ER 273. the Application to add such a party could be by any of the parties or done by the Court or its own motion. See Kilolo Curing Co Ltd Vs West Mengo Co – op Union Ltd (1991) HCB 60. The application could even be made

by any person whose legal right will be directly affected by the grant of the relief claimed in the action and can show that his presence is necessary to enable court effectively and completely adjudicate all settle the suit before it. See Goholdas Laxirioudas Tana Vs Sorter Rose Munyiza HCCS No 1076 of 1987 (1990 – 99) KALR 21, Inspector General of Government Vs Kihonda Butema Form Ltd & A C.A Constitutional App. No. 13 of 2006 IGG Vs Blessed Constitution Ltd & Anor HCt-00-CC-MA-073 – 2007

The aim is to being an record all persons who are parties relating to the subject matter before Court so that the dispute may be determined in their presence and tat the same time without any prostration, inconvenience and to avoid multiplicity of proceedings. See Ally Route Ltd Vs Uganda Development Bank Ltd HCt-00-CC-MA-459-2007.

Having analysed the law an amendment of pleadings and addition of parties, I now proceed to consider the application in light thereof. The grounds for the application, as set out in the Chamber Summons, are that:-

1. One Mr. Chris Wilson has at all material time been Managing Director of the defendant company.
2. In 2006, Mr. Wilson did in his capacity as the Managing director of the defendant Company applicant eh plaintiff company to be the defendant agent to sell its property at Bunga situate at and know as Plot 31 Block 250 Bunga Hill, West Mengo at an agreed commission of 6% of the sale price.
3. Mr. Wilson gave the Agent, the Plaintiff, the right of access to the company premises so as to take around prospective buyers to inspect the property.
4. The Plaintiff then ran around looking for prospective buyers whom it brought to the premises to inspect the same.

5. Finally in December 2006 the plaintiffs came across one Mr. Lee Sang – Jim and his wife Ms Chun Swum Soke whom they brought to inspect the premises; and they liked the property and made an offer.
6. The plaintiff then introduced the couple to Mr. Chris Wilson, and the two negotiated and agreed on the purchase price of US\$475,000 which was to include US\$25,000/= as agreed amount to be given to the plaintiff by the defendant.
7. Before the Agreement of sale was signed by the two parties, Mr. Chris Wilson left after having given Powers of Attorney to one Mr. Andrew Lumonya a Co-director or Secretary of the Defendant Company to prepare the sale Agreement, sign in and receive the purchase price on behalf of the company.
8. Later the Plaintiff learned that the purchase price reflected in the sale Agreement was US\$450,000 instead of US\$475,000 which had been agreed upon between the seller, Buyer and the Agents. Apparently Mr. Chris Wilson has a separate Agreement with the introduced buyers without the knowledge of the plaintiff and settled for US\$450,000.
9. After receiving the money the defendant refused to pay the plaintiff its Commission.
10. After thorough search and investigations, the plaintiff discovered that Mr. Chris Wilson had acted fraudulently to deny the plaintiff of the agent's Commission it was entitled to.
11. It is in the interest of Justice and to avoid multiplicity of actions in Court to join Mr. Chris Wilson to join as the 2nd Defendant so that the matter is delivered once for all.

Attached as annexure A is the proposed Amended Plaint:-

In support of the application the applicant filed an affidavit dated 7th July 2008 and an affidavit in rejoinder dated 12th August 2008, both deposed to by Mrs Edith Byanyina, one of the directors of the Applicant Company. The Respondent filed two affidavits in reply, one dated 11th July 2008 and second dated 18th August 2008. Both are deposed to by Mr. Chris Wilson, the Managing Director of the Respondent Company and the intended 2nd defendant Mr. Francis Bwengye appeared for the Applicant. The Respondent was represented by Mr. Barnard Namanya.

The Respondent approved the application. In the Respondent's affidavits, Chris Wilson avers that the Respondent is a linked liability company incorporated on 17th December 2003. The property in respect of which the Applicant secured on buyer was owned by the Respondent which was the registered proprietor which was registered proprietor at the material time. The parties to the sale agreement were Ms Chun Sum sook, as buyer, and the Respondent as seller. That Chris Wilson was not personally a party to the agreement. Chris Wilson claims that whatever he did in respect of the sale of the property he did so in capacity as managing Director of the Respondent and not in his personal capacity.

In his submission Mr. Namanya argued that the applicant's main case is a claim for Commission from the sale of property that was owned by the Respondent and not its director Chris Wilson. Counsel submitted that the Applicant can only maintain a suit for claim of Commission against the Respondent but not its director Mr. Chris Wilson. He further submitted that the intended amended plaint did not, in the circumstances disclose a cause of action against the intended 2nd defendant, Chris Wilson.

Both in the Notice of Motion and the affidavit in support, dated 7th July 2008, the Applicant does not concede, its counsel does so concede that Mr. Chris Wilson was at all material time a Managing Director of the Respondent Company and did in that capacity appoint the Applicant to be the Respondent's agent to sell its property at Plot 31 Block 250 Bunga Hill, West Mengo.

It is not disputed that the respondent, Bunga Hill House Ltd was, at all the material times, the Registered proprietor of the property known as LRV 696 Folio 20 Kyadondo Block 250 Plot 31 Bunga Hill. That the Respondent was a limited liability company incorporated on 17th December 2003. That by an agreement dated 21st December 2006 the Respondent sold the property to Ms Chun Sun Sook. It is in respect to this sale that the Applicant claims entitlement to a Commission in the sum of US\$25,000 of the subject of Civil Suit No 292 of 2007. It is also an undisputed fact that at all material times Chris Wilson was the Managing Director of the Respondent Company.

The most outstanding feature of an incorporated company is its corporate personality. The corporation is a legal entity distinct from its members and directors. See Solomon Vs Solomon & Co Ltd (1897) Act 22 JL. In Sentamu Vs Uganda Commercial Bank “ Anor (1983) HCO Justice Benjamin Odoki (as he then was) held that a limited liability company is a separate legal entity from its directors, shareholders and other members. That individual members of the company are not liable for the company’s debt. I therefore agree with Counsel for the Respondent that the Applicant cannot maintain a claim for Commission from the Respondent’s director Mr. Chris Wilson.

However, in the intended Amended Complaint, the Applicant claims that the intended 2nd Defendant, Chris Wilson conspired with the buyers to defraud the Applicants as agent. In paragraph 6(i) of the Applicant alleges fraudulent conduct on the part of the intended 2nd Defendant. In paragraph 6, the applicant pleads:-

“As (result of) a breach of the contract by the Defendant Company and as a result of the fraudulent actions of the 2nd Defendant, the Plaintiff has suffered damages and financial loss for which the Defendants are liable.”

Corporate personality cannot be allowed to blatantly used as a cloak for the fraudulent or improper conduct of the company’s members.

In Auto Garage & Anor Vs Motokov (No 3) (1971) EA 514 it was held that a cause of action is disclosed if the complaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable. The intended Amended complaint the Applicant has shown that it has a right to financial gain and that it has suffered loss thereof due to the fraudulent conduct of the Respondent. In the Respondents affidavit in reply, Chris Wilson denies that it has acted fraudulently in any way. Whether Chris Wilson committed the alleged acts of fraudulent is a matter for courts determination, not at this stage but upon evidence adduced by both parties. Otherwise I find that the intended amended Complaint discloses a cause of action against the intended 2nd Defendant.

The alleged applicants financial loss; whether caused by the Respondent's breach of the Agreement between the Respondent and the Applicant or by the Intended 2nd Defendant's allege fraudulent conduct, arises from the same transaction, that is the sale of the Respondents property. The amendment sought will not cause any injustice to the Respondent. Multiple suits will thereby be avoided.

Considering all the above the application to add Mr. Mr. Chris Wilson as a second defendant and to amend the plaint accordingly is allowed. Costs shall be in the cause of the main suit.

Hon Mr. Justice Lameck N. Mukasa

Judge

7th October 2008