

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

MISCELLANEOUS APPLICATION NO 642 OF 2011

**[ARISING OUT OF FORMER LAND DIVISION CIVIL SUIT NO 517 OF 2007 NOW
REDESIGNATED COMMERCIAL COURT DIVISION CIVIL SUIT NO 432 OF 2009]**

HAJJ SEMAKULA HARUNA}..... APPLICANT

VERSUS

STANBIC BANK UGANDA LIMITED}..... RESPONDENT

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

RULING

The Applicant's application invokes section 98 of the Civil Procedure Act, section 35 of the Judicature Act and order 7 rules 19 and 31 of the Civil Procedure Rules and is for orders that leave of court be granted to the applicant to amend the plaint in High Court Civil Suit No 423/2009 (formerly Land Division Civil Suit No 417/2007) and for costs of the application to be provided for.

The gist of the grounds of the application are that formerly HCCS 432/2009 was originally instituted against five defendants and the applicant/plaintiff withdraw the suit against the 4 of the defendants leaving the suit subsist against the respondent/defendant herein only. Consequently it is necessary to amend the plaint to reflect the withdrawal of the suit against the other defendants and expunge unnecessary averments contained in the plaint as earlier filed. The applicant's case is that it is also necessary for the court to allow the applicant further amend the plaint to include necessary and relevant averments against the respondent/defendant which are necessary for determination of the real issues between the parties; that there are vital documents which are not pleaded and attached to the plaint which are now necessary to determine the real issues in

controversy between the parties; the respondent/defendant shall not be prejudiced in anyway if this application is allowed and it is in the interest of justice that the application is allowed.

The application is supported by the affidavit of Hajj Haruna Semakula affirmed on 7 November 2011. The affidavit repeats the grounds of the application and adds that is necessary to amend the plaint to reflect the withdrawal of the other parties to the suit, as well as maintain such averments as are relevant to the suit against the respondent/defendant. The deponent further avers that it is also necessary that the court grants leave to the applicant/plaintiff to amend the plaint so as:

- a) To reflect the further averments that were not originally pleaded and yet are necessary for the determination of the issues between the parties and ensure that justice is done.
- b) To reflect documents that were not earlier pleaded and yet are necessary for determination of the issues between the parties and ensure justice is done

The Deponent further avers that the intended amendments would put the plaintiff's case against the defendant/respondent in a proper perspective and assist the court in trying the actual matters in controversy and also enable it reach a just decision. The applicant avers that the respondent/defendant shall not be prejudiced in anyway if his application is allowed and that it would be in the interest of justice that the court allows his application.

The deposition in opposition to the application is contained in the affidavit of the Head Legal/Company Secretary of the respondent/defendant, Mrs Gertrude Wamala Karugaba. In it the Company Secretary agrees that pursuant to the applicant's application in Miscellaneous Application No. 542 of 2011 between **Semakula Haruna versus Josephine Nagadya and 4 Others**, the plaintiff's suit survived against the current sole respondent. In that application the court had ruled that the plaint was to be amended to maintain only averments made against the defendant/respondent and drop averments made against the rest of

the defendants against whom this suit had been withdrawn. She avers that the titles comprised in block 208 plot 279 and 280 Kawempe where registered in the names of **Pearl Oils Uganda Ltd** which had mortgaged the suit property to the respondent and upon the cancellation of the name of the said company from the said titles, the registered proprietorship remained in the names of Josephine Nagadya the predecessor in title of Messrs Pearl Oils (U) Ltd. The memorial of the respondent's mortgage registered on the said title deeds of the suit property was deregistered and the respondent no longer has interest in the said titles. She avers on ground of her knowledge of law and by virtue of her training as a lawyer that:

1. It is no longer useful for this honourable court to make an enquiry into the question of whether the mortgage of the said titles to the respondent by Pearl Oils Uganda limited was lawful or whether the said mortgage could be cancelled; and
2. Since the respondent is not the registered proprietor of the suit land or empowered under any law to cause reinstatement of the applicant onto the suit land, it is not useful for this honourable court to make an enquiry as against the respondent as to whether the applicant is entitled to be reinstated on the titles in respect of the suit land.

Consequently the respondent maintains that the prayers for reinstatement of the applicant on the said titles and an order that the mortgaging of the said land to the respondent Messrs Pearl Oils Uganda limited was unlawful will only serve to waste courts time and is an abuse of court process.

In rejoinder the applicant affirms that the plaint was amended accordance with the ruling of the court after withdrawal of the suit against the 1st, 2nd 3rd and 5th defendants. He maintains that it is a falsehood to state that Josephine Nagadya is the predecessor in title of Messrs Pearl Oils Ltd as Josephine Nagadya does not have any interest in the said property and indeed Pearl Oils Ltd sued Josephine Nagadya for recovery of consideration paid to her, according to High Court Civil Suit Number 87/2009. He maintains that it is true that the respondent's mortgage

was deregistered on the suit titles in respect of Pearl Oils Ltd but this does not address the fact that the applicant was a client of the respondent and has never closed its account with them and was a mortgagee with the respondent in respect of the suit properties. The respondent went ahead and transacted business with Pearl Oils Ltd in respect of the suit property when they used them as security to secure a loan. The applicant contends that the respondent does not address the issue of how this suit property title deed left their possession when it was a mortgage in respect thereof and this is the core of the applicants claim as well as the intended amendment. He contends that it is necessary for this court to make an enquiry as against the respondent as to whether the applicant is entitled to be reinstated on the titles in respect of the suit land since the respondent was given the titles in this suit land as mortgagor by the applicant when the titles were in the names of the applicant. Lastly the applicant contends in rejoinder that the respondent and its agents, employees and any person acting under their authority were in contempt of court order issued in High Court Civil Suit No. 386/1993 and a copy of the court order was attached.

At the hearing of this application, learned Counsel Moses Kugumisiriza represented the Applicant/Plaintiff while John Fisher Kanyemibwa represented the Respondent

Submissions of the Applicants Counsel

The applicants counsel Moses Kugumisiriza submitted that the application for amendment was brought under the laws spelt out in the chamber summons. The application seeks leave of court to amend the Plaintiff in HCCS No. 423 of 2009 between the applicant as plaintiff and the respondent as defendant. The application is supported by the affidavit of Hajj Semakula Haruna affirmed on the 7th of November 2011. The major ground for leave of court to bring the application is that the original suit was against 5 defendants and after withdrawal of the suit against 4 of the defendants the suit now subsists against one defendant the respondent following ruling of this court in which the suit was withdrawn against 4 other defendants. Counsel submitted that the intended amendment of the plaintiff is meant to reflect the withdrawal of the other

defendants. The intended amendment maintains only relevant averments as are necessary against the subsisting defendant. In addition the applicant found it necessary to further amend the plaint to include averments that were not in the original plaint and include documents and subsequent decisions of court between the applicant and respondent which have a bearing on the dispute before the court. The applicants counsel contended that this additional amendment would assist the court to determine the real questions in controversy before court and ensure that justice is done in this matter. The intended amendments are necessary to further put the defendant's case against the defendant in a proper perspective and assist in the trial of the real questions in controversy.

Counsel referred court to the amended draft plaint at pages 22 – 189 of the application. He submitted that the amendment only expounds on the original dispute. He pointed out that the dispute between the parties arises from the fact that the applicant was a mortgagee to the respondent which relationship has never been determined. The applicant seeks special and general damages and declarations that there was breach of contract and the amendment seeks to bring this out.

As far as the law is concerned counsel referred to the case of **Gaso Transport service Ltd vs. Martin Adala Obene SCCA 4 of 1984** which enumerates principles on which courts exercise discretion on whether to allow amendments to pleadings. One principle is that amendments should not work injustice to the either side. Injury which can be compensated by award of costs is not an injustice. He submitted that the intended amendment would not cause any injustice to the respondent. Any injustice can be compensated by an award of damages. The amendment would also avoid multiplicity of suits as it canvasses all aspects of the dispute. Counsel submitted that an application made mala fide should not be granted but in this case the application was made in good faith and in a timely manner.

Finally counsel submitted that no amendment should be allowed where it is expressly or impliedly prohibited by law. He contended that the intended amendment was not prohibited by any law be it the law of limitation or

otherwise. He submitted that in order to do substantial justice and not punish the applicant on technical grounds the applicant's application should be allowed. He prayed that the court takes into account the averments in the applicant's affidavit in rejoinder and for costs of the suit.

Submissions of the Respondent's Counsel

Counsel John Fisher Kanyemibwa opposed the application for amendment. He sought clarification on which amendment should be considered because the applicant filed in court two amended complaints. One being annexure "B" to the affidavit in support and on the 14th of November 2011 and yet another amended complaint attached to the application as annexure SBU2.

The respondent objects to the amendment in annexure "B" majorly because it introduces a new cause of action against it. Counsel for the respondent submitted that it is trite law that amendments seeking to introduce new causes of action cannot be allowed. In the original complaint the cause of action against the respondent was fraud. Yet in the proposed amendment the applicant pleads breach of contract which is a new cause of action. The applicant also introduces a new cause of action for Mesne profits. Counsel contended that the applicant purportedly seeks to maintain a prayer that he is reinstated as the proprietor of suit property. He contended that this is an abuse of court process. Counsel contended that paragraph 7(ii) of the affidavit of Gertrude Wamala Karugaba avers that the respondent is not registered as proprietor of the property in which the applicant seeks reinstatement. Secondly she avers under paragraph 5 of her affidavit that the title deed of the suit property is in the names of Josephine Nagadya against whom the applicant has withdrawn the suit. Annexure "C" and "D" to the original complaint show that Josephine Nagadya is registered at one point on the title deed before she transferred the title to Messrs Pearl Oil Ltd.

The registration of Messrs Pearl Oil Ltd was cancelled and Josephine Nagadya is now again the registered proprietor. Strangely in paragraph 5 of affidavit in rejoinder the applicant says that Josephine Nagadya has never been a predecessor in title. Counsel contended that the said paragraph is patently false.

He submitted that the prayer for reinstatement cannot be maintained and would be a waste of courts time.

Counsel submitted that in the event the court is not satisfied that claim for damages for breach of contract is a new cause of action the respondent alternatively submits that such a claim for damages would be time barred. Claims for breach of contract have to be brought within 6 years and the alleged breaches averred took place in the 1990's. Moreover Uganda Commercial Bank is not even the respondent before court. According to the GASO authority cited by the applicants counsel such an amendment would be unlawful. He prayed that the application for amendment be dismissed with costs.

Rejoinder by the Applicant's Counsel:

In rejoinder counsel reiterated his earlier submissions and added that the issue of who was the registered proprietor are matters to be determined in the main suit. The intended amendment avers that the applicant mortgaged the suit property to the respondent when it was in the applicants names. The title deed has never been returned to the applicant and it should be returned in his names. There was an injunction restraining any dealings in this property and how the property ended up in the names of Josephine Nagadya needs to be established. The intended amendment is meant to capture this and it is part of the original plaint.

As far as the issue of limitation is concerned counsel contended that it was only in 2005 when the applicant realised the anomaly. He contended that his learned friend has not assisted the court to state in his view when the cause of action arose. Referring to page 108 of the intended amendment there was protracted litigation in respect of this property between the same parties and the judgments are attached to the application. Those judgments came as late as 2005. It was until resolution of those suits that the limitation period started running. When the suit was resolved the applicant asked for his title deed from the respondent and this is reflected in the letter from pages 181 – onwards of the application. Counsel reiterated his prayers for the amendment to be allowed.

Ruling

I have carefully considered the submissions of both counsels. The main contention of the respondent is that the applicant is introducing a new cause of action namely the cause of action of breach of contract. In the alternative, if breach of contract can be allowed, it would be time barred. Thirdly the suit property is not in the names of the respondent and an action for cancellation of title against the respondent would be untenable in law.

Before I consider these submissions I need to point out that on the 28th of October 2011 in MA 542 of 2011 which application arose from the same suit I ruled that the plaint should be amended to the extent necessitated by the withdrawal of the suit against the 1st, 2nd, 3rd and 5th Defendants. I further held that any further amendment beyond that dictated by the withdrawal of the suit against other defendants in the original plaint had to be with leave of court. The question of whether the subsequent amended plaint filed in court complied with the order of the court has not been critically considered by the respondent's counsel in raising the question as to which amended plaint was to be considered in this application. I can only hold that leave of court had been granted as stated above for the plaintiff to amend the plaint to reflect the withdrawal of the other defendants from the suit without introducing new matters. This application therefore deals with additional amendment sought beyond that necessitated by the withdrawal of the suit against other defendants.

Both counsels are in agreement on the principles governing applications for amendment of pleadings. These principles clearly summarised in the Ugandan Court of Appeal case of **Eastern Bakeries v. Castelino** [1958] EA (CAK) 461 at 462 per Sir Kenneth O'Connor P where he states:

"...amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that 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: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: Ma Shwe

Mya v. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; 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 accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitale p. 1313” (Emphasis added)

Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice Twenty Second Edition D.B. Casson, I.H. Dennis, London Steven and Sons 1981, discusses the general principles followed by English courts in applications for amendment of pleadings and states at page 161:

“Either party is ordinarily given leave to make such amendment as is reasonably necessary for the due presentation of his case and payment of the costs of and occasioned by the amendment, provided that there has been no undue delay on his part, and provided also that the amendment will not injure his opponent or affect his vested rights. Where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a later stage. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment would be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such position that they must be injured, it ought not to be made. Sometimes to correct the error will lead to injustice which cannot be cured, as when the witness who could give evidence cannot be got, or the solvency of one party is doubtful. If the application be made mala fide, or if the proposed amendment will cause undue delay, or will in any way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused.”

I have taken time to read through the original plaint together with attachments thereto in an effort to examine the propriety of the intended amendments. The original plaint was filed on the 20th of June 2007 at the Land Division of the High Court of Uganda at Kampala. As submitted by the parties, the original suit as now is a suit by Hajj Semakula Haruna as sole plaintiff against five Defendants with the current respondent as the 4th Defendant. The fifth defendant was the Registrar of Titles. I would summarise the case of the Applicant against the 4th Defendant as far as the original plaint is concerned. The property in dispute is block 208 plot 279 and plot 280 at Kawempe. The cause of action against the fourth defendant can be found under paragraph 7 (c) and (f) of the plaint. Paragraph 7 provides: "the plaintiff's cause of action against the defendants jointly and/or severally is for: (c) an order that the transfer of the suit land to the third defendant by the first defendant was fraudulent and should be cancelled. (f) An order that the mortgaging of suit land by the third defendant to the fourth defendant was unlawful/improper and it be cancelled (k) an order that the first defendant's title to the suit land was fraudulently acquired and consequently all dealings in respect of the property were null and void. (m) Any other remedy as this Honourable Court may deem fit.

General facts in support of the suit are pleaded between paragraphs 8 and 13 of the plaint that are reproduced for ease of reference:

1. The Plaintiff states that it was/is the registered proprietor of land comprised in block 208 plot 279 and 280 situated at Kawempe, hereinafter called the suit land.
2. The plaintiff states that he mortgaged the suit lands to the then Gold Trust Bank Ltd (now DFCU bank Ltd) for an overdraft by way of deposit of titles, and the said mortgages were duly registered on the said lands.
3. The plaintiff states that sometime in 1991 or thereabouts the plaintiffs titles were returned to him by the then Gold Trust Bank (U) Ltd, and the bank secured the unpaid overdraft by way of block 208 plot 1141 and 1330 which later became the subject of court litigation as per copy of the ruling

attached and marked "A". (The ruling thereof is Civil Suit Number 433/93 in the Supreme Court of Uganda at Kampala "Gold Trust Bank Uganda Limited against Wheels Uganda Limited)

4. The plaintiff further avers that it was duly discharged of its obligations in respect of the suit lands as per annexure "B" attached hereto dated 16th July 1991 and the certificate of title to both lands were duly handed over to the plaintiff.
5. The plaintiff further states that he duly went ahead to use the titles to the suit land secured from the second defendant's predecessor to secure an overdraft from the then Uganda Commercial Bank as per copy of the mortgage and the encumbrance attached hereto and collectively marked "C".
6. The plaintiff states that despite discharging its obligations the second defendant's predecessor went ahead and sold the suit land to the first defendant, an act that constituted fraud on its part.

Paragraph 13 gives further particulars of fraud on the part of the second defendant. The second defendant is DFCU Bank Uganda Limited. Paragraph 21 gives particulars of fraud by the fourth defendant the current respondent to this application.

Paragraph 21 states: "The Plaintiff avers that the subsequent mortgaging of the suit land to the fourth defendant by the third defendant as per copy of the white page attached to and marked "I" was fraudulent, illegal and unlawful and should also be declared null and void as the third defendant did not have good title or lawful interest in the suit land to mortgage, whether legal or equitable." The particulars of fraud by the fourth defendant are as follows:

- (a) The Fourth Defendant verified with the Mailo land Registrar that there was an existing caveat by the plaintiff which it obtained and forwarded to its client Pearl Oils Uganda Limited for an explanation and which Pearl oils

Uganda limited forwarded to the plaintiff through its agent a one Mohamed Mubiru by way of telephone number.0772404826 who delivered it to the plaintiff on 25th of May 2007 at Hajj Mubiru office upon his invitation.

- (b) Upon Mr Mubiru Mohammed handing over to the plaintiff a copy of the caveat lodged on the property the plaintiff was informed that Pearl Oils Uganda Limited was interested in the property and wanted to use it as security hence they approached the plaintiff to know his interest in the property which interest was furnished to him as narrated in the plaint herein above.
- (c) The plaintiff promised to furnish further explanation after checking with the Ministry of lands, on status of the suit property.
- (d) Upon the plaintiff making a search in the lands office on the suit property, the plaintiff was shown a substitute white page that the original white page was missing yet there was no way the copy of the caveat furnished to the plaintiff by Mr Mubiru of Pearl Oils Uganda Limited could have been got without the original white page where the caveat was registered.
- (e) Before reverting back to Pearl Oils Uganda Limited, the property had already been transferred to Pearl Oils Uganda Limited and the fourth defendant had already registered a mortgage thereon, even before hearing from the plaintiff. A copy of the caveat given to the plaintiff by Mr Mubiru Mohammed on behalf of Pearl Oils Uganda Limited is attached hereto and marked "J".

Lastly is paragraph 23 of the plaint which avers: "the plaintiff has suffered damages because of the fraudulent and illegal and unlawful acts of the defendants jointly and/or severally for which he will seek for damages because:

- (a) He is not in possession of his land.

(b) His land is being unlawfully used by the third defendant for activities he does not have in his plans

(c) His land is encumbered

(d) His land cannot be used as security or collateral.

Finally as far as the prayers paragraph 25 of the plaint is concerned the respondent is mentioned at paragraph 25 (f) where the plaintiff seeks an order "that the mortgaging of the suit land by the third defendant to the fourth defendant was unlawful/improper and it be cancelled". (k) "An order that the first defendant's title on the suit land was fraudulently acquired and consequently all dealings in respect to the property were null and void". The plaintiff also prays for costs of the suit and any other remedy that this Honourable Court may deem fit to grant.

I have carefully considered the proposed amendments. Firstly, paragraph 3 of the proposed amendment pleads the causes of action against the defendant. As far as submissions are concerned the respondent objects to introduction of new causes of action. The original plaint avers that the mortgaging of the suit land to the defendant was null and void and should be declared as such. It further alleges fraud. Paragraph 3 (a) introduces new grounds of breach of obligations under a mortgage. Secondly paragraph 3 (b) introduces breach of a temporary injunction and obligations as a mortgagor. Paragraph 3 (c) introduces a claim for mesne profits.

As far as the breach of obligations are concerned, counsel for the applicant contended that the crux of the matter was to capture the pleading of how the property ended up in the names of Josephine Nagadya when the title was in possession of the defendant. The plaintiff in the original plaint had already sought declarations that the mortgaging of the suit property was null and void. As to whether the mortgaging of the suit property is a nullity or void is to be determined on points of fact or law. The second cause of action was fraud and particulars of fraud were given. To introduce breach of obligations under the

mortgage shifts the cause of action to something different. A mortgage is a contract and I agree with counsel for the respondent that this introduces a cause of action for breach of contract. In theory, it is still possible to argue grounds for nullity of the mortgage. The only question is which mortgage is to be considered. Breach of contract on the other hand is a departure from the pleading that the mortgage was a nullity. It assumes that there was a valid mortgage and the respondent had breached the terms of the mortgage or the duties of the mortgagee. As submitted by the parties Pearl Oils Uganda Limited was de-registered from the suit title deeds. As we noted above paragraph 12 of the original plaint avers that the plaintiff secured an overdraft from the then Uganda Commercial Bank on the basis of security of the same property and the mortgage thereto was attached and marked annexure "C". The basis of the particulars of fraud against the defendant in the original plaint is founded on failure to take into account a caveat and failure to wait for explanations from the caveator who had been given notice. Documents attached to the original plaint show that Uganda Commercial Bank had also lodged a caveat forbidding any dealings on the title of the suit property on the 22nd of August, 1991 under instrument KLA 148924. The annexure also shows that the caveat was removed upon realization of the sale by the first mortgagee with first priority. Annexure "C" attached to the original plaint shows that Gold Trust Bank was the first registered mortgagee to the suit property. According to annexure B to the original plaint the plaintiff's case is that Gold Trust Bank Ltd by the 16th of July, 1991 in a letter written to the manager Uganda Commercial Bank indicated that they had no further interest in the suit property. It is an inference of fact (without a conclusion on the merits of the suit) that on the basis of this that the plaintiff had the freedom to use the suit property as security for an overdraft with Uganda Commercial Bank.

On the other hand, the case of the plaintiff against the other defendants against whom the suit had been withdrawn is based on the transfer of the suit property into the first defendant's names and subsequently into the third defendant's names. The third defendant was Pearl Oils Uganda Ltd. As far as the original plaint is concerned, the plaintiff challenged the mortgaging of the suit property to the fourth defendant who is now the sole surviving defendant. It is logical to infer

that the nullity of the mortgage averred in the original plaint related to the mortgage of the suit property by the third defendant to the fourth defendant as contained in the particulars of fraud. Deregistration of the 3rd former defendant from the title deed signifies that the bank's security under the mortgage agreement did not belong to the mortgagor Messrs Pearl Oils Uganda Ltd as far as the admission of deregistration is concerned. The banks money may also be said not to be secured if the loan is not yet discharged.

Breach of the terms of the mortgage pleaded in the proposed amendment on the other hand necessarily implies that it arises from obligations under the original mortgage by the plaintiff of the suit property to the defendants predecessor in title namely Uganda Commercial Bank. By implication also the proposed amendment assumes that this original relationship ought to have continued because the suit property had not been released to the plaintiff i.e. by the return of the titles and there was a court temporary injunction forbidding any transaction affecting title or interest in the suit property. Last but not least it should be noted that the caveat by the plaintiff attached to the original plaint was lodged on the 19th of April, 2006 and the statutory declaration thereof emphasises the alleged fraudulent acquisition of the land by Josephine Nagadya. It is therefore my conclusion that a breach of contractual obligations under a mortgage agreement assumes obligations between the plaintiff and the defendant in a mortgage agreement which was not the basis of the original action and pleads a new basis of claim not before pleaded. I will however, not rule on this issue before I consider other matters.

I have additionally considered the submissions of the respondent's counsel on the question of whether a suit for cancellation of title can be maintained against the defendant. I hold that this submission touches on the merits of the suit and should abide the hearing of the main suit. In coming to this conclusion, I have taken into account the fact that the original plaint seeks declarations of nullity of all transactions including transactions entered into by the fourth defendant. I will refrain from commenting on allegations of nullity of transactions by parties who are not before the court. The allegation that the title deeds were with the defendant as mortgagee with the plaintiff as mortgagor introduce a complex

matter that should not be determined in an application for amendment on the basis of alleged lack of a cause of action. I must note that the plaintiff in the original plaint attached the mortgage document with the former UCB in paragraph 12 thereof. This put the defendant on notice about the terms of the mortgage which was an agreement between the parties. However the judgments attached also show that the Trust Administrator of NPART was involved at a certain state in matters concerning the titles deeds of land of the applicant as security and in possession of the former Uganda Commercial Bank. Any amendment at this state will not prejudice the defendant from raising points of law relating to suits for cancellation. The defendant will also have an opportunity to respond to the amendment in its amended written statement of defence and the defendant would not be prejudiced. I cannot at this stage hold that such a suit for cancellation as against the defendant is barred by statute or prohibited by law neither should I be taken to have determined the question. I have also carefully refrained from deciding whether such an action discloses a cause of action because the title deeds were in the hands of the defendant's predecessor in title UCB.

As far as breach of the terms of a temporary injunction is concerned, this raises matters of law in that if there was a court order forbidding any transaction on the suit property, the court can take judicial notice of the order and it need not be pleaded specifically. In any case this order was between **General Parts Uganda Ltd and Uganda Commercial Bank in Civil Suit Number 386 of 1993**. The judgments and orders of the court are admissible to support facts and arguments in the original plaint. In any case breach of a temporary injunction is contempt of court. It cannot be said that raising matters of breach of a court order can be prejudicial to the defendant as it is a matter of enforcement. As to whether this can be argued against the successor in title of Uganda Commercial Bank is a question on the merits. However to the extent that the amendment introducing breach of a temporary injunction also introduces a claim for special damages, amendment relating to special damages cannot be allowed at this stage of the suit.

As far as a claim for Mesne profits is concerned, this too is a new cause of action. In the case of **Bramwell v Bramwell [1942] 1 All ER 137** the Court of Appeal of England Lord Goddard LJ defines Mesne profits at page 138 in the following terms:

“...Then it became a mixed action, in which not only damages but the property itself could be recovered, and it is preserved now in the action brought in the High Court, and, I think, in the county court, because a claim for Mesne profits can be joined with an action for the recovery of the land, and *Mesne profits is only another term for damages for trespass damages which arise from the particular relationship of landlord and tenant.*”
(Emphasis added)

Whereas I agree with the above definition of the term “Mense profits”, two critical issues can be deduced from that definition. The first one is that it is an action in tort. Whereas trespass is a continuing tort, the plaintiff in his application for withdrawal of the suit against the four other defendants against whom the suit has been withdrawn submitted that he was in occupation of the suit premises in which case no question of illegal occupation or trespass by the defendant could arise nor has ever been pleaded. Secondly the original plaint avers that it was the former third defendant who was in possession. Consequently the amendment as such is not tenable. Secondly the amendment introduces a new cause of action.

In conclusion the documents and judgments availed to court in this application show that the plaintiff has had a long and protracted litigation which must be come to a conclusion. The proposed amendments in paragraphs 3 (a) are based on a mortgage agreement between the plaintiff and the defendant. This mortgage had been attached to the original plaint. It is too late in the state of the litigation to introduce an action for special damages for breach of contract without serious prejudice to the defendant who is a successor of the former UCB. Moreover the amendment comes after over 4 years. However the averment of fact that the defendant was a mortgagee when the alleged transactions took place can still support an action for general damages for breach of terms thereof or acting contrary to the rights and obligations of the mortgage agreement which had

already been pleaded. Consequently the proposed amendment in paragraph 3 (a) is disallowed only to the extent of its claim for special damages under paragraph 3 (b) which follows. Paragraph 3 (a) is therefore allowed as having been envisaged by the attachment of the mortgage agreement in the original plaintiff and pleadings facts about the relationship together with a claim for general damages. The limited amendment does not breach the law of limitation.

As far as the proposed paragraph 3 (b) of the amendment is concerned, the claim for special damages only is disallowed. A case for breach of a court order can be argued and will remain without prejudice to any defence on the merits.

The proposed amendment in paragraph 3 (c) being a claim for special damages for mesne profits is disallowed the previous plaintiff having pleaded occupancy of the 3rd defendant and it pleads special damages in a new cause of action.

It follows that facts in support of the disallowed causes of action by way of amendment would be untenable and ought to be disallowed in for far as they relate only to the above causes of action. A careful perusal of the amendments introducing facts in support of the action show that some facts introduced by amendment amplify on the original claim of the plaintiff and give a chronological account of the facts and documents. These amendments are by way of facts pleaded in support of the action introduced by paragraphs 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and are not prejudicial in that they on the face of it not only support the original claim in the plaintiff against the fourth defendant but give a coherent account of what allegedly happened. Moreover some of the facts arises from documents listed in the original plaintiff and amplify the summary of evidence thereof. The above cited paragraphs by way of amendment are allowed. Paragraph 26 of the plaintiff introduces a claim for special damages which has been disallowed. Facts pleaded in paragraph 26 of the proposed amended plaintiff are therefore disallowed.

Paragraphs 27 and 28 of the proposed amended plaintiff support the original plaintiff against all the defendants jointly and severally. This included the fourth defendant who is now the sole surviving defendant. The proposed amendments to paragraph 29 by addition of subparagraphs (a) and (b) are disallowed while the

rest of the paragraph remains as originally pleaded. The plaintiff can argue his case for general damages without those amendments. As far as prayers are concerned the proposed amendments of prayers (b), and (c) are disallowed. As far as (b) is concerned it is to be substituted by a claim for general damages. Prayer (e) should read “An order that the plaintiff is entitled to possession of the Duplicate Certificate of title now in custody of the court.” The final result is that the application for amendment only partially succeeds as set out above. The costs of this application are awarded to the defendant and shall be borne by the applicant.

Dated at Kampala this 13th day of January 2012.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Moses Kugumisiriza for the Applicant

John Fisher Kanyemibwa for the respondent

Applicant in court,

Ojambo Makoha Court Clerk

Hon. Mr. Justice Christopher Madrama

13 January 2012