

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION 1043 OF 2014**

5 **(ARISING OUT OF CIVIL SUIT 480 OF 2013)**

**RONALD NDAWULA ----- APPLICANT**

**VS**

**AFROQUE TECHNICAL SERVICES LTD ----- RESPONDENT**

10 **BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

This application was made under S.98 of the Civil Procedure Act and O. 6 rr.19 & 31 of the Civil Procedure Rules; seeking leave to be granted to the Applicant to amend his written statement of defence and counter claim. Costs of the Application were also applied for.

15 The application was supported by the affidavit of the Applicant. The grounds are that the application was made promptly before the hearing of the suit and the proposed amendments will enable the court to determine the real issues in controversy between the parties. The matters of fact to be amended should be considered by the court in the interest of justice so as to avoid prejudicing any of the party's interests. That the Respondent shall not be prejudiced  
20 or injured in any way by the amendment and it is accordingly in the interests of justice that the amendment be allowed.

There is an affidavit in reply of the Respondent deposed by one Henry Musisi.

The parties filed written submissions.

25 It was contended that there was a controversy between the parties arising out of breach of contract by which the Applicant was subcontracted by the Respondent to construct a section of Nalulungo-Lwabyata road in Nakasongola District, but this fact was omitted in the written

statement of defence and counter claim; and yet it is necessary for proper determination of all the issues in the case. And if the amendment is not allowed to include this fact, the Applicant's case will be prejudiced.

The case of **Motorcare (U) Ltd Vs Attorney General, HCCS 638/2005** where the case of  
5 **Gas Transport Services Ltd Vs Martin Adale Obene SCCA 04/1994** was relied upon was relied upon for the principles court should take into account when exercising its discretion to allow amendments.

It was stated that the affidavit in support indicates that the purpose of the amendment sought is not to introduce a new cause of action but is mean to answer matters raised in the Plaintiff;  
10 and enable the questions in controversy to be determined. The case of **Lea Association Ltd Vs Bunga Hill House Ltd HCMA 348/2008** was cited in support.

Further that Court is enjoined to administer substantive justice without undue regard to technicalities—Article 126(2) (e) of the Constitution.

Counsel for the Respondent opposed the application on the ground the proposed draft written  
15 statement of defence is an overhaul of the original defence, exhibits dishonesty and thereby prejudices the Plaintiff's case. He referred to paragraph 3 of the affidavit in reply, which shows that in the original defence the Applicant and in the counter claim, the Applicant claimed to have done 90% of the work but that in the intended amendment he now claims to have to have executed the works in full, thereby evading the Plaintiff's reply that the defence  
20 would be treated as an admission.

Commenting on the issue of introducing a new cause of action, Counsel argued that the Applicant did not address himself to the fact that the term "**cause of action**" can be extended to a written statement of defence. He relied upon the case of **Laitu Advani Vs AAR Hegit Services Ltd and Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol.37 P.24** where cause of  
25 action was defined.

It was also asserted that parties are bound by their pleadings except if amended by leave of court and the amendment to show that the Applicant completed the work but was not paid should not be allowed as it amounts to abuse of court process.

The issue for court to determine is **whether the proposed amendments should be allowed.**

Under O. 6 r. 19 CPR, court is empowered **“to allow amendments at any stage of the proceedings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for determining the real question in controversy between the parties”**.

5 As submitted by Counsel for the Applicant, decided cases have set out principles recognized as governing the exercise of discretion in allowing amendments. These are:

- The amendment should not cause injustice to the other side. An injury that can be compensated for by award of costs is not treated as an injustice.
- Multiplicity of proceedings should be avoided as far as possible and all amendments  
10 to avoid such multiplicity should be allowed.
- An application made malafide should not be granted.
- No amendment should be allowed where it is expressly or impliedly prohibited by law. For example limitation of actions.
- An oral application to amend at the trial may be allowed.
- 15 ▪ An amendment may be allowed at a very late stage where it necessitates solely for drafting an error and there is no element of surprise

In the present case the Applicant seeks to make the amendments to his defence and counter claim and sets out in paragraphs 7 -15 and 1- 3 respectively, particulars he claims are necessary for the court to arrive at a just decision. He contends that he gave the information  
20 to his former Advocates but they omitted it but the new Lawyers advised him that the facts are necessary for effective determination of all issues in the case.

As already indicated, the Respondent contends that the proposed amendments are an overhaul of the original defence and counter claim which materially prejudices the Plaintiff; and was brought in bad faith.

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In determining whether the proposed amendments should be allowed court bears in mind the provisions of the law under which the application is made, the principles governing the exercise of discretion set out above which were also emphasized by Lord Griffiths in the case of **Kentteman Vs Hansel Properties Ltd [1987] AC 189,200; 2 WLR 312** as follows:  
30 **“whether an amendment should be granted is a matter for the discretion of the trial judge and he/she should be guided in the exercise of the discretion by his/her assessment of**

*where justice lays. Many and diverse factors will bear upon the exercise of this discretion.... Furthermore to allow an amendment before trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.”*

5 While the Applicant in the present case wishes to change his defence to indicate that he completed all the work as opposed to 90% claimed in the original defence, the amounts claimed in the defence and counter claim remain the same. It is therefore not an entirely different defence.

10 The Applicant’s claim that he gave the information to his former Advocate but it was omitted from the pleadings was not challenged. The proposed amendments will give him a chance to include the information that was left out of the defence and counter claim. Courts have established that **“Mistakes or omissions of Counsel should not be visited upon the client. And a party cannot be denied relief merely because of some mistake, negligence, inadvertence or even infraction occurred not out of his will.”**

15 There is nothing to indicate that the proposed amends are being brought malafide or that that they will cause any injury or injustice to the Respondent. The burden will still remain on the Applicant to prove his claims on a balance of probability.

20 The amendment is sought before the trial has begun and the Respondent will also be given a chance to respond to the proposed defence and counter claim. Whereas if the Respondent is denied the opportunity to amend so as to come up with a complete defence and counter claim, he will not have another chance **“to re-open the same subject of litigation in respect of matters that might have been brought forward, only because they have from negligence, inadvertence, or accident , omitted this part of his case”**. See the case of **Henderson Vs Henderson [1843] 3 HARE 100**

25 Although as pointed out by Counsel for the Respondent the proposed amendments are not underlined and cases indicate that **“failure to do so usually misleads court since it is not easy to tell what the deletions or additions are to determine whether the amendment is necessary, and that that was likely to cause injustice to the Respondent”**. Refer to the case of **Plessey (PTY) Ltd Vs Mutoni Construction Ltd Misc. Applcn. 178 of 2011**. However,  
30 this court is aware that other cases have decided that **“while the amended pleading is conclusive as to the issues for determination, the original pleading may be looked at if it**

*contains matter relevant to the issues...*” and that *“logic and common sense require that an amendment should not automatically be treated as if it, and nothing else had ever existed”*.

–Refer to **Dhanji Ramji Vs Malde Timber Company [1970] EA 422**, Newbold J.A, which was relied upon in the case of **Ngege Ltd Vs David Wamala, CACA 30 of 2005**. Applying

5 the holding in the above case to the circumstances of this case and having looked at the original defence and counter together with the proposed amendments, and not finding glaring inconsistencies between them that have not been satisfactorily explained; this court finds that failure to underline the proposed changes or striking out the deletions did not mislead court and cannot in the circumstances of this case cause injustice to the Respondent who have a  
10 chance to respond.

Failure to underline the proposed changes or striking out deletions while a good practice cannot be relied upon to deny the Applicant the right to be heard granted under Article 28 (1) of the Constitution. To do so would amount to administering justice while giving undue regard to technicalities, contrary to Article 126 (2) (e) of the Constitution.

15 For all the reasons set out here in this court finds that the Application should be allowed and it is hereby allowed and the following orders are made:

- The applicant is granted leave to amend the written statement of defence and counter claim with 1 week from the date of this ruling and serve it on the Respondent within 1 week from the date of filing.
- 20 ▪ The Respondent shall file a reply to the defence and counter claim within 15 days from the date of being served with the amended defence and counter claim.
- Costs of the Application shall abide the outcome of the main suit.

25 **FLAVIA SENOGA ANGLIN**

**JUDGE**

**07.03.16**

