THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 955 OF 2016

(ARISING FROM HCCS NO 55 OF 2003)

SHELL UGANDA LTD}.....APPLICANT

VS

C & A TOURS AND TRAVEL OPERATORS UGANDA LTD} .....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant commenced this application seeking leave to amend its written statement of defence and counterclaim in HCCS No. 55 of 2003 in the terms proposed in the draft amended written statement of defence and counterclaim attached to the affidavit in support of the Application and for costs of the application to be provided for.

In the affidavit in support of the application Mr. Stephen Chomi, Head of Legal of the Applicant Company deposed as follows: The counterclaim in Civil Suit No. 55 of 2003 was filed in 2004 whereby the counterclaimant claimed the sum of Uganda shillings 140,696,513 on the basis of the Plaintiff's pleadings and the reconciliation report. However, the correct counterclaim amount should have been Uganda shillings 153,132,853/- and the difference between the amount in the counterclaim sought to be amended and that stated in the previous counterclaim being Uganda shillings 12,436,340/= was caused by the omission to include the right amount of invoice 3180509 which is Uganda shillings 21,290,300.

Stephen Chomi further deposed that he was advised by Christine Busingye of the Applicant Company that the invoice had been misplaced at the time of filing the counterclaim. Secondly, the amount due to the counterclaimant not included in the claim is Uganda shillings 3,441,340/= being utility payments for Shell Nakivubo and Shell Kawempe which was settled by the counterclaimant after the filing of the counterclaim. Thirdly, he was advised by his lawyers that the proposed amendment is necessary for an effectual determination of the dispute between the parties at once. He further deposed that the Application had been filed before the trial or adducing evidence in support of counterclaim. Fourthly the consent of the counter Defendant to the proposed amendment of the counterclaim was sought but it declined to consent. Lastly, the

Respondent to the application will suffer no prejudice if the application for amendment is allowed.

In reply the Respondent opposed the application and filed an affidavit in reply. The affidavit in reply is that of Counsel David Semakula Mukiibi of MMAKS Advocates. He deposed as follows: He is an Advocate of the High Court practicing with MMAKS Advocates clothed with authority to make the reply. Secondly, the Respondent filed a suit against the Applicant seeking various remedies in relation to the Applicant's termination of the Respondent's dealership agreements. Thirdly, the pleadings in the suit were duly served on the Applicant who filed a defence with a counterclaim seeking damages in the sum of Uganda shillings 140,696,513/=. This is the value of unsettled invoices for fuel products, select shop products and rental for the select shop. Fourthly, the defence and counterclaim have been previously amended twice by the Applicant. Fifthly, the amendment is statute barred and prejudicial to the Respondent because it has already closed its case. Moreover, the amendment sought to be introduced relates to a claim in respect of an invoice dated 24th January, 2003 which invoice relates to supplies made to the Respondent in 2003 that were allegedly not paid for then. In claiming Uganda shillings 8,395,000/= the Applicant seeks to recover the value in the invoice that arises out of unsettled contractual dealings between the Applicant and the Respondent. The claim is time barred under Section 3 (1) of the Limitation Act, Cap. 80. The Applicant cannot bring amendments to introduce claims that are time barred. It is 12 years since the cause of action arose which is expressly barred by law as the said invoice has been part of the court record since 2003 and Applicant was aware of it therefore it was not lost as alleged and the application ought to be dismissed with costs.

The Applicant is represented by Counsel Joseph Luswata while the Respondent is represented by Counsel Isaac Walukagga. The Applicant and the Respondent addressed the court in written arguments.

The Applicant's Counsel submitted that the effect of the proposed amendment is to increase the counterclaim amount from UGX. 140,693,296/= to Uganda shillings 153,132,853/= the difference in which amount was caused by the omission by the counterclaim to claim the full value of Uganda shillings 21,290,260 instead of which they had claimed UGX. 12,280,000/= and also to claim UGX. 3, 441340/= being utility bills paid by the counter claimant after termination of the dealership.

He also submitted that this application is brought under Rule 19 of order 6 of the Civil Procedure Rules which allows a party to amend his pleadings at any stage of the trial and as such this application fits in that principle. Counsel submitted that in the instant case the amendment relates to the counterclaim whose hearing has not commenced and does not introduce a new cause of action as it is for an unpaid debt comprised in unpaid invoices and will not be affected by limitation. Supplying the full value of P Exhibit 21 (b) by way of amendment is a mere

elaboration of the particulars of the claim and fits in with what was allowed in the Supreme court case of **Mulowooza & Brothers Limited vs. N. Shah & Co. Ltd, SCCA 26 of 2010.** He thus prayed that the amendments relating to P E 21 (b) be allowed and also abandoned the claim for unpaid utility bills of Uganda shillings 3,441,340 as they conceded that its time barred.

In reply, the Respondent's Counsel submitted that the Applicant seeks to introduce claims in the sum of Uganda shillings 8,395,000 being alleged payments for supplies made in 2003 and 3,441,340/= being a demand for an alleged refund of monies paid by the Applicant to settle utility bills on behalf of the Respondent.

He further submitted that the application is brought under Order 6 rule 14 and arises out of a suit filed by the Respondent against the Applicant and the law governing amendment of pleadings is Order 6, rule 19 which provides that court may allow amendments at any stage of the hearing and that amendments which occasion prejudice to the other party or circumvent limitation shall not be allowed.

He also submitted that in this application the Applicant intends to introduce claims that were available in 2003 yet such claims can only be made before the expiry of 6 years under the **Limitation Act, Cap.80** and also as was held in the case of **Nzirane vs. Lukwago (1975) HCB 75** where it was held that where an amendment sought would have the effect of creating or proceeding upon a fresh cause of action which is time barred under the Limitation Act, then it would not be allowed unless owing to some disability or other sufficient cause, the fresh cause of action could not have been brought within the statutory time limit.

Counsel further submitted that no disability has been pleaded yet the claims were available to the Applicant in 2003 and the authority relied upon by the Applicant is distinguishable from this application as an application was allowed in that case to amend a pleading so as to give better particulars yet in this case what is sought is not giving better particulars but additional claims to enhance the original claim as these claims should have been made before the expiry of 6 years from 2003 and thus prayed that the Application be dismissed with costs.

Ruling

I have carefully considered the application together with submissions of Counsel. Amendment to pleadings is governed primarily by Order 6 rule 19 of the Civil Procedure Rules which provides that:

> "19. Amendment of pleadings
>
> The court may at any stage of the proceedings, allow either party to alter or amend his or her pleading in such manner and on such terms as may be just or all such amendments

shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The rule gives the court power to order all necessary amendments to pleadings for the purpose of determining the real question in controversy between the parties. The principles for amendment of pleadings were considered by the Court of Appeal of East Africa in the case of **Eastern Bakery vs. Castelino [1958] EA 461** where Sir Kenneth O'Connor after considering previous precedents on the issue summarised the principles as follows:

1. 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.

2. The court will not refuse to allow an amendment simply because it introduces a new case. 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:

3. *The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: 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:*

4. The main principle is that an amendment should not be allowed if it causes injustice to the other side.

5. The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence."

The question to be considered is whether this amendment is before the hearing and secondly whether the amendment sought would deprive the Defendant of a defence of limitation accrued since the issuance of the summons to file a defence or since the filing of a counterclaim. In other words the period of limitation to bring a new claim could have expired after the first counterclaim was filed. That is the crux of the defence to the application for amendment for consideration in this matter. The issue of amendments vis a vis the law of limitation was also considered in **Gaso Transport Services (Bus) Ltd vs. Obene [1990-94] EA 88** by Tsekooko JSC where he considered earlier authorities and held inter alia that that no amendment should be allowed where it is expressly or impliedly barred by law such as by the law of limitation of actions. Furthermore applications for amendment ought to be made at the earliest opportunity:

"...However, it is now trite law (or rather a well established practice) that courts are more flexible in allowing amendments whenever application for amendments are made

promptly at the earliest stage in the litigation. The more advanced the progress of litigation the more ... the Applicant to satisfy Court that leave for amendment ought to be granted."

Two other authorities of the East African Court of Appeal raise the same principle that an amendment should not be allowed where it would defeat a defence of limitation or statute bar. In the case of **Auto Garage and others v Motokov (No 3) [1971] 1 EA 514 at 520** Spry V.P. said:

> "There is a long line of East African cases to the effect that discretionary powers should not be exercised so as to defeat limitation. This has arisen particularly in relation to the exercise of the inherent powers of the court, Mehta v. Shah, [1965] E.A. 321; Adonia v. Mutekanga, [1970] E.A. 429, but I think exactly the same principles apply whenever the court has a judicial discretion. As I understand the position, there is no absolute rule preventing the exercise of a discretionary power so as to defeat limitation, but this will be done only in exceptional circumstances."

In **Iga v Makerere University [1972] 1 EA 65** Court of Appeal at Kampala, Law Ag V-P, Lutta and Mustafa JJA at page 66: Mustafa JA held that a suit barred by limitation has to be rejected for disclosing no cause of action. They considered Order 7 rule 11 (1) (d) of the Civil Procedure Rules which provides that:

> "The plaint shall be rejected in the following cases:
>
> > '... (d) Where the suit appears from the statement in the plaint to be barred by law."

Where the claimant does not plead exemption to the law of limitation the plaint shall be rejected. The Court of Appeal per Mustafa J.A held:

> "A plaint which is barred by limitation is a plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court "shall reject" his claim. The appellant was clearly out of time, and despite an opportunity afforded him by the judge, he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief."

Furthermore Law Ag V-P concurred and held that:

> "This is the position here, clearly the plaint should have been rejected. I have no doubt that s. 4 of the Limitation Act and O. 7 of the Civil Procedure Rules must be read together. The effect then is that if a suit is brought after the expiration of the period of

limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected. That is what I think the judge meant when he held that the High Court had no jurisdiction to entertain the suit. His terminology may not have been exact, but he arrived at the right result. For these reasons I agree with Mustafa, J.A. that this appeal fails, and should be dismissed with costs, and it is ordered accordingly."

The main question for consideration depends on how the court treats the issue of the Applicant raising another ground of claim that enhances its suit for special damages or setoff. The Defendant/counterclaimant intends to increase the counterclaim amount from Uganda shillings 140,693,296/- to Uganda shillings 153,132,853/=. The counterclaimant avers that there was an omission to include these additional amounts that found the basis for the application. What are these omissions? Were they mathematical errors or do they amount to a new claim? The counterclaimant claims that exhibit P 21 (b) is an unpaid invoice and its full value was not pleaded specifically. Particularly ground 1 of the application avers that the amount was understated and not cross checked with primary documents and which documents the counterclaimant did not have at the time of filing the counterclaim. This averment is supported by the affidavit of Stephen Chomi the Head of Legal Services of the Applicant and particularly in paragraph 2, 3, 4, 5 and 6 of the affidavit in support. I have carefully considered the evidence that the Applicant relies on in this application and reviewed the previous pleadings to reach my conclusion.

The paragraphs of the affidavit in support are quoted for ease of reference and are as follows:

"2. That the counterclaim in Civil Suit Number 55 of 2003 was filed in 2004 whereby the counterclaimant claims the sum of Uganda shillings 140,696,513/= relied on the Plaintiffs pleadings including P.E. 38 and also on the reconciliation report P E 16. However the page of the P.E. Exhibit 38 and P.E. 16 is attached and marked A and B.

3. That the true counterclaim amount should have been Uganda shillings 153,132,853/= (and in words) as shown in the attached draft amended written statement of defence and counterclaim marked "C".

4. That the difference between the amount stated in paragraph 2 and that stated in paragraph 3 above being the sum of Uganda shillings 12,436,340/=, was caused by the omission to include the right amount of invoice 3180509 marked as P. Ex 21 (b) which is Uganda shillings 21,290,300/=. Copy of the P. Ex 21 (b) is attached and marked "D".

5. That I am advised by Christine Busingye of the Applicant Company that invoice marked P. Ex 21 (b) had been misplaced at the company file at the time of filing the counterclaim.

6. That another amount due to the counterclaim not included in the claim of Uganda shillings 3,441,340/= being utility payments for Shell Nakivubo and Shell Kawempe, which was settled by the counterclaimant after the filing of the counterclaim."

The counterclaimant therefore pleads omission to include the right amount of invoice 318 0509 marked as exhibit P 21 (b) and annexure "D"

On the other hand the Plaintiff's Counsel opposed the application and the affidavit in reply of David Semakula Mukiibi agreed that the counterclaimant was seeking the value of unsettled invoices for fuel and rental for the select shop products and rental for the select shop. The counterclaim had previously been amended twice by the Applicant. The Defendant to the counterclaim raises two objections to the application for amendment. The first one is that the claim is time barred under section 3 (1) of the Limitation Act Cap 80 laws of Uganda. Secondly, that the Plaintiff has already closed its case and would be prejudiced because it would have no chance to rebut evidence on the added claim.

I have carefully considered the submissions and evidence. The counterclaimant's Counsel relies on omission to include a particular amount which is already in the pleadings. It does not indicate that there was an error in the calculations. What does the omission amount to? Does it amount to introducing a new claim under the heading of special damages?

The original amended written statement of defence and counterclaim which was filed on court record on 8th July, 2004 avers as follows:

(1) The Defendant claims the sum of Uganda shillings 140,696,513/= being the value of unsettled invoices for fuel products, select shop product and rentals for the select shop.
(2) The Defendant shall in proof of the claim in paragraph 1 hereof rely on the contents of paragraph 10 of the amended written statement of defence and on paragraph 8 (7) and annexure G to the plaint.

In paragraph 10 of the amended written statement of defence the counterclaimant seeks a set-off in the sum of Uganda shillings 140,696,513/=. In support of the claim for a set-off, the counterclaimant averred that the Plaintiff took fuel products from fuel stations on credit and made no payment thereof. For that assertion the Defendant/counterclaimant seeks to rely on page 6 to annexure "G" of the plaint. I have read page 6 and it is a report by Evert and Company and is annexed to paragraph 8 of the plaint. I have carefully considered pages 6 of the said the report and in paragraph 7 thereof it deals with obligations to Shell Uganda Limited by the Plaintiff/Respondent to this application by 6th February 2003. These obligations relate to paragraph "B" that deals with Shell Kawempe Service Station and "C" which deals with Shell Nakivubo service station. There is also A relating to Shell Jinja Road Service Station. The invoice numbers for the obligations are given. In this application the counterclaimant relies on

invoice number 3180509 which invoice relates to Shell Jinja Road Service Station and the amount there under is Uganda shillings 12,550,633/=.

The counterclaimant also relied on paragraph 8 (7) of the plaint where the Plaintiff indicates that its claim is less the obligations to the Defendant by the Plaintiff amounting to Uganda shillings 140,696,513/=.

In this application the counterclaimant claims that there was an omission to include the amount contained in the particular invoice. The counterclaimant seeks to rely on the Plaintiffs Exhibit 21 (b) marked as annexure "D".

Whereas this invoice is part of the Plaintiff's documents, it is clear from the pleadings in the counterclaim that the counterclaimant relied on the admission of the Plaintiff to being indebted in the sum of Uganda shillings 140,696,513/=. Paragraph 2 of the counterclaim gives the facts in support of the claim.

The pleadings demonstrate that the Counterclaimant claims special damages which have to be specifically pleaded and proved. What the counterclaimant seeks is to include another invoice supposedly contained in the Plaintiff's documents. To amend the pleadings by adding another invoice would amount to adding another particular of a special damage claim outside the limitation period. I agree with the submissions of Counsel for the Respondent to the counterclaim that allowing the application would operate as allowing a claim outside the limitation period. I would like for the consistency with rules of pleading to quote Order 6 rule 7 of the Civil Procedure Rules which provides as follows:

> "No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

The new pleading sought by the counterclaimant contains a new ground of claim. It is not a mere error in the calculation of the figures but introduces a new fact containing a new invoice even if it is genetic with the previous pleadings. It was not admitted by the Plaintiff. In the previous pleadings, the counterclaimant claimed that the obligations are admitted by the Plaintiff in paragraph 8 (7) of the amended plaint a contention borne out by the pleadings. By introducing other facts and claims, the Plaintiff would be entitled to defend the new claim. Moreover, the Plaintiff has already adduced its evidence closed its case on the basis of the pleadings.

Supposing that the High Court has discretion to allow such an amendment contrary to the law of limitation, it would be prejudicial to the Plaintiff who has already led its evidence and closed the case without a right of rebuttal. Particularly it raises a new ground of claim because it purports to rely on a particular document to increase the claim. Every particular of claim is supposed to be specifically pleaded and proved when it is a claim for special damages. It is akin to introducing

another dishonoured cheque with another amount by amendment. Each transaction has to be specifically pleaded and proved because of the requirements or Order 7 rule 2 of the Civil Procedure Rules which requires precise amount of money to be pleaded except in suits for account or reconciliation.

If the money pleaded is pleaded in an aggregate amount, it can be proved on the aggregate by adducing evidence for instance an admission of the amount or an acknowledgement thereof. The previous claim is acknowledged in the pleadings of the Plaintiff according to the facts in support of the counterclaim.

In the premises my conclusion is that the counterclaimant is introducing another claim under the heading of special damages which has to be specifically pleaded and proved as commanded by Order 7 rule 2 of the Civil Procedure Rules. It cannot be specifically pleaded by way of an amendment outside the limitation period.

The suit was filed in 2003 and it is now 2016. The law of limitation prescribes a period of six years for breach of contract or tort within which to lodge the claim from the time the cause of action arose under section 3 (1) of the Limitation Act cap 80 laws of Uganda. The Defendant to the counterclaim would be entitled to raise a defence of limitation to the new precise amount claimed and it would lead to no possible good as Order 7 rule 11 (d) requires that part of the claim to be rejected as barred by statute when included outside the limitation period.

In the premises the amendments sought in the counterclaim is barred by the law of limitation and the application is accordingly dismissed with costs.

Ruling delivered in open court on 25th October 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Alex Ntale Holding brief for Counsel Isaac Walukagga for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

25th October 2016