

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 333 OF 2017
(ARISING OUT OF CIVIL SUIT NO 539 OF 2014)**

TRI – SOME TECHNICAL SERVICES LTD}.....APPLICANT

VERSUS

OLANZICON SERVICES LIMITED}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant applied for leave to amend its defence and counterclaim and for costs of the application to be provided for.

The grounds of the application are firstly that the Applicant filed its defence without pleading the Respondent's misrepresentation.

Secondly, the Applicant filed its defence with a pleading on the Respondent's fraudulent misrepresentation but did not plead the particulars of the Respondents fraudulent misrepresentation owing to the fact that it had not obtained full evidence of the particulars.

Thirdly, the Applicant has since obtained further and better particulars of the Respondent's fraudulent misrepresentation that it now finds necessary to plead by way of amendment of its defence and counterclaim.

Fourthly, it is necessary that the Applicant's defence and counterclaim is amended to plead the Respondents' fraudulent misrepresentation and its particulars and to include in the counterclaim, a prayer for rescission of the subcontract between the Applicant and the Respondent.

Fifthly, the amendments are necessary for the purpose of determining the real questions in controversy between the parties.

On the sixth ground the amendment sought will not prejudice the Respondent.

Finally, the Applicant avers that it is just and equitable if the orders in the application are granted.

The application is supported by the affidavit of Mr Olam Okecho Noah, the Managing Director of the Applicant. He deposed as follows:

At the time of filing the Applicant's defence and counterclaim the Applicant was aware about the Respondent's fraudulent misrepresentation and instructed his advocates and solicitors to plead the misrepresentation in the counterclaim which was done. One the filing of the Applicants defence and counterclaim, the Applicant had not obtained full particulars of the nature of the Respondent's fraudulent misrepresentation and was unable to give such particulars. Subsequent to the filing of the Applicant's pleadings, the Applicant wrote to various District Local Governments, the Respondent fraudulently claimed to have undertaken road construction works for. The local authorities responded disowning the documents that the Respondent had presented to the Applicant to induce it into entering into the subcontract. The letters of inquiry are attached to the affidavit as annexure "A" and the responses are attached as annexure "B".

At the hearing of the application, Counsel Renato Kania represented the Applicants but the Respondents Counsel was absent. By affidavit of service of Noelynn Candiru, the Respondent's advocates were served with the application on 1st June, 2017. The application had been fixed for 8th June, 2017 at 11 o'clock. The application has however been filed on 21st April, 2017 and was issued by the registrar on the 5th of May 2017. It was picked for service on 1st June, 2017. The main suit came for a scheduling conference on 26th April 2017 and the suit was adjourned until after issues of amendment are completed on 8 June 2017 at 11 AM when the application for amendment may be heard. It was adjourned in the presence of Counsel Byarugaba John for the plaintiff.

Accordingly, the court allowed Counsel Renato Kania to proceed ex parte with the hearing of the application.

I have duly considered the submissions of Counsel setting out the facts which have been summarised above and citing the principles for the grant of amendments in the cases of Mulowooza & Brothers Limited versus N. Shah Civil Appeal Number 26 of 2010. In the judgment of Tumwesigye JSC the court considered the import of Order 6 Rule 19 of the Civil Procedure Rules which provides as follows:

“The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings 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.”

One of the principles derived from the above rule is that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and there is no injustice if the other side can be compensated in costs. Amendments are to be allowed by the court so that the real question in controversy between the parties is determined and justice

Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+
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is administered without undue regard to technicalities. Amendments will not be allowed if they introduce a distinct cause of action in place of the original.

In the case *Gasco Transport Services (Bus) Ltd v Obene* [1990–1994] 1 EA 88 (SCU) at page 93 Tsekooko JSC summarised the principles as follows:

“It is true Order VI, rule 18 (revised rule 19) gives the High Court wide discretionary power to permit amendment of pleadings to be made at any stage of the proceedings. Indeed as Mr Musinguzi pointed out, amendments to pleadings may in appropriate cases be permitted as late as during appeal by an appellate court: See *McCoy v Allibhai* (1938) 5 EACA 70, *Jupiter Insurance v Hasham* [1960] EA 562 and *Jami Properties v Dar-es-Salaam* [1966] EA 281 at 285. 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 will be the Applicant to satisfy Court that leave for amendment ought to be granted. See *Eastern Bakery v Castalino* [1958] EA 461, *British Indian General Insurance Company v Parma (GM) and Company* [1966] EA 172 and *Kara v Makam* (1950) 17 EACA 16. According to these cases amendments can be made on appeal”

The application for amendment was made before the hearing. I have accordingly perused the proposed amendment as well as the original defence and counterclaim. Particulars of fraudulent misrepresentation are pleaded in paragraph 6 of the counterclaim. Secondly, in this application the Applicant seeks to introduce further particulars of fraudulent misrepresentation pursuant to information it got from the local governments in question. In annexure "B" attached to the affidavit in support of the application Bushenyi District Local Government in a letter dated 4th of March 2015 addressed to the Applicant indicated that the certificate of completion presented by the Respondent does not belong to the district local government. Secondly, the person who signed the certificate of completion presented by the Respondent was not a staff of theirs. A similar letter was written by the Chief Administrative Officer of Kabale on whether a certain Engineer Kyeyune who signed a certificate of completion of road works was not an employee of Kabale District Local Government. Another letter is from Mityana District Local Government addressed to the Applicant certifying that the Respondent never worked for the district according to a certificate of completion presented to the Applicant.

This information came subsequent to the pleadings of fraudulent misrepresentation. In this application the Applicant seeks to introduce further and better particulars of the fraudulent misrepresentation in the written statement of defence as well as amplify those in the counterclaim. I see no prejudice to the Respondent because the Applicant had already pleaded fraudulent misrepresentation and is only introducing further particulars.

In the premises, the Applicant's application succeeds with costs in the cause. The Applicant shall file an amended written statement of defence and counterclaim as proposed in the application within 15 days from the date of this ruling and serve it on the plaintiff whereupon the plaintiff shall be entitled to file any amended replies to the same.

Ruling delivered on 8th June, 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Renato Kania for the Applicant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

8th June, 2017