THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0414 OF 2022

(Arising from Civil Suit No. 198 of 2020)

SIMBAMANYO ESTATES LIMITED …… APPLICANT

VERSUS

1. EQUITY BANK UGANDA LIMITED }
2. EQUITY BANK } …… RESPONDENTS
3. BANKONE LIMITED }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants sued the respondents jointly and severally seeking, *inter alia*, a declaration that the 2nd and 3rd defendant are not licensed to conduct financial institution business in Uganda; that the tripartite agreement executed between the plaintiff, the 1st and 2nd defendants on 20th August, 2012 is accordingly unenforceable, illegal, null and void; that the mortgage over the plaintiff's property comprised in LHR Vol. 2220 Plot 2 Folio 3 Lumumba Avenue too is unenforceable, illegal, null and void; a declaration that the appointment by the 2nd defendant of the 1st defendant as an agent bank is illegal, null and void, and so on. These reliefs are premised on averments that the 2nd and 3rd defendants are financial institutions incorporated and carrying on banking business in Kenya and Mauritius respectively. Through the 1st defendant, the two defendants illegally engaged in financial institutions business in Uganda when they extended credit facilities to the plaintiff. The subsequent refinancing arrangement between the plaintiff and the defendants was executed under undue influence and fraudulent misrepresentation on the part of the defendants.

b. The application;

The application is made under the provisions of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*, sections 98 and 100 of *The Civil Procedure Act*, and Order 6 rules 13, 19 and 23 of *The Civil Procedure Rules* seeking leave to amend the plaint. The ground advanced

is that the proposed amendments are necessary to enable the court determine the real matters in controversy. The need to amend became apparent as a new team of advocates instructed by the applicant prepared for the trial. The proposed amendments are indicated in a draft amended plaint attached to the applicant's supplementary affidavit in support of the application.

c. Affidavit in reply;

In their joint affidavit in reply the 1st and 2nd respondents contend that the application is brought in bad faith as it seeks to re-introduce matters in respect of which the Court had already pronounced itself in separate proceedings. The applicant further seeks to introduce facts of events that had not occurred at the time the suit was filed and on that basis seek relief, to the prejudice of the respondents. The application does not raise any new issue in controversy since all matters adverted to in the proposed amendment have been in the applicant's knowledge at all material time.

d. Submissions of counsel for the applicants.

M/s Byenkya, Kihika and Co. Advocates on behalf of the applicant submitted that the amendments seek to clarify what was pleaded. They do not introduce a new cause of action. They do not change the character of the case. In paragraph 3 to 6 of the affidavit in reply the respondents say there are no new issues in controversy raised. What they are submitting in court contradicts what they have averred. The respondents have taken a narrow view of the general nature of the illegality pleaded. The proposed amendment to paragraph 10 (xxv) of the plaint seeks to provide particulars of the contention that it was a "fictitious loan." This is because Facility II was stated to be s future loan. An amendment can be introduced at any time. In *Mulowooza and Brothers Limited v. N. Shah and Co. Limited. C. A. Civil Appeal No. 26 of 2010* it was held that the purpose of the amendment should be introduce more particulars and information about facts already pleaded, if it not prejudicial to the defence. Prejudice is limited to matters that will take away a legal defence such as limitation. The challenge to the legality of the mortgage has already been pleaded in paragraph 10 in Roma (xiii), (xiv), (xv) etc. The suit is essentially about challenge to the validity of the mortgage. The events sought to be pleaded all occurred before the sale. The validity of the power to sell has always been part of the plaintiff; case. The applicant is not introducing a new claim.

e. Submissions of counsel for the respondents.

M/s AF Mpanga Advocates, together with M/s Katende, Ssempebwa and Co. Advocates on behalf of the 1st and 2nd respondents submitted that the suit was filed in March, 2020, before the sale. The sale occurred in October 2020 and the applicant filed different suit in that regard. Although the legality of the mortgage was challenged in the original plaint, the proposed amendments change the character of the suit. The original plaint in paragraph 9 – 10 show that the 2nd and 3rd defendants are sued for being foreign entities conducting financial institutions business in Uganda without a licence. The 1st defendant is sued for facilitating the business of the other two in Uganda. Particulars of illegality and unethical conduct are pleaded. Breach of a fiduciary duty is pleaded too under the Bank of Uganda Regulations. None of the averments therein relate to the validity of the mortgages as is the case with the proposed amendments. Page 10 letter E (I) of the proposed amendment relates to the effectiveness of the mortgage. Effectives and illegality of the mortgage are two different matters. That changes the character of the suit. At page 9 para 25 – 10 (d) of the proposed amendments regard validity of the loan agreement. Questions of validity of the loan agreement and mortgage were not raised in the original suit. If introduced they will alter the character of the suit. *Mulowooza and Brothers Limited v. N. Shah and Co. Limited. C. A. Civil Appeal No. 26 of 2010* is to the effect that an amendment will be allowed if it seeks to elaborate the matter in the original plaint not if it seeks to alter or introduce a distinct cause of action. The application seeks to alter the character of what is in the original suit.

At page 11 the original WSD of the 1st and 2nd defendant paragraph 29 the defence is that he plaintiff had declined to renew the facility of the 3rd respondent. In the reply in para 6 and 7 (a) they stated the reasons why they did not renew the facility. The proposed amendment para B. and the sub-paragraphs they introduce new arguments. The defendant can plead in the alternative. Para 5.3 of the 3rd defendant's WSD they outline the process but the plaintiff did not put in any reply. The defence is prejudiced by the amendment. The new lawyers are not coming in now, they have already taken steps in the trial. It is a delaying tactic. The amendment should not bellowed. In the *Bright Chicks Uganda Limited v. Dan Bahingire, H. C. Misc. Application No. 254 of 2011*, at page 4 it was held that amendment should not be allowed when they will cause undue delay. This application is irrelevant or useless. The loan document has all the information. The applicant's

reference to the letter of 30th ay, 2019 is already on record. The entire facility letter is attached to our affidavit in reply since that attached to the plaint is incomplete. In *Gaso Transport Services (Bus) Limited v. Martin Adala Obene, S. C. Civil Appeal No. 4 of 1994*, at page14 it was held that an amendment which is mala fide should not be allowed. The applicants had the opportunity to file a reply to the WSD but failed and now wants to introduce new matters when it is out of time.

The decision.

The object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. Pleadings focus the issues, narrow the evidence admissible at trial, and apprise the adverse party and the court of the matter in dispute. Pleadings are therefore required to contain a brief statement of the material facts, without unnecessary repetition, on which the party pleading relies for a claim or defence, as the case may be, but not the evidence or argument by which they are to be proved (see Order 6 rules 1 (2) of *The Civil Procedure Rules*. The averments must be simple, concise, and direct. Prolix narrative of the facts relied on by-the party should be avoided. Prolix pleadings obscure the issues in dispute rather than disclose and clarify. A pleading though does not contain the material facts required if it only refers to them for the sake of brevity (see *Macharia v. Wanyoike and others [1972] 1 EA 264*).

It can be said that following are the fundamental or basic rules of pleadings: - (i) pleadings should state facts and not law; (ii) the facts stated in pleadings should be material facts; (iii) pleadings should not state the evidence or argument; and (iv) the facts in pleadings should be stated in a concise form. Material facts are statements of an event, occurrence or state of affairs known to have happened, which must be proved at the trial by a party to establish the existence of a cause of action or the defendant's defence in the written statement. These must be distinguished from opinion, argument or law. They include a positive statement of facts or a positive averment of a negative fact, if necessary. A pleading may raise a point of law, but, generally speaking questions of law or legal conclusions should not be pleaded. The prohibition on pleading matters of law is

designed to stop parties pleading legal conclusions without also pleading the facts that give rise to those conclusions.

What statement of an event, occurrence or state of affairs known to have happened will qualify as a "material fact" depends upon the circumstances of each case and no rule of universal application can be laid down. Generally though, every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his or her right to the judgment of the court, will be considered a material fact. A fact is material if it is essential to the cause of action or defence, which a party is bound to prove at the trial, unless admitted by the other party, before he or she can succeed in his or her claim or defence.

There is no need to allege all details of required facts for every element of a claim or defence, only a basic understanding of the claim or defence needs to be communicated. It follows that the more complex the matter is the greater would be the demands for conciseness, lucidity, logic, clarity and precision. Unnecessary facts should be omitted from the pleadings. These include; (i) matters of law (save those to be raised as preliminary objections where one is permitted to raise a point of law if the material facts to support it are pleaded), (ii) matters of evidence and argument, (iii) matters presumed by law, (iv) the performance of condition precedent, (v) words contained in documents to be relied on (save for libel), (vi) matters affecting costs only, (vii) matters not material to the case, (viii) the defendant need not plead to the prayer of the plaintiff, (ix) the defendant need not plead to the damages claimed or their amount. Pleas of law, argument, reasons, theories, conclusions, and evidence have no place in pleadings.

Generally departure from pleadings is not permissible, and except by way of amendment, no party can raise any ground of claim or contain any allegation of fact inconsistent with his or her previous pleadings. Order 6 rules 9, 18 and 31 of *The Civil Procedure Rules* give the Court a wide discretion to allow either party, at any stage of proceedings, to alter or amend his or her pleadings in such a manner and on such terms as may be necessary for the purpose of determining the real question in controversy as between the parties. It is a cardinal principle that the rules of procure should be interpreted liberally to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The paramount guiding principle in the exercise of this discretion

therefore is that the intended amendment should enable court to determine the real questions in controversy between the parties, without causing injustice to the other party.

"It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right" (see *Cropper v. Smith (1883) 26 Ch D 700*). An error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. An injury which can be compensated by the award of costs is not an injustice (see *Gaso Transport Services (Bus) Ltd v. Obene [1990-94] EA 88*). A multiplicity of proceedings should be avoided as far as possible and all amendment which avoid such multiplicity should be allowed.

The proposed amendment should enable justice to be done between the parties since the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. An amendment though will not be allowed if it renders the defendant's defence of limitation useless (see *Nzirane v. Matiya Lukwago [197l] HCB 75* and *Eastern Bakery v. Castelino [1958] EA 641*); or introduces a new cause of action that would change the suit into one of a substantially different character (see *Muwolooza & Brothers v. N. Shah & Co Ltd S.C. Civil Appeal No. 26 of 2010*). Court cannot by way of amendment sanction the altering or substitution of one distinct cause of action for another or change of the subject matter of the suit (see *Nambi v. Bunyoro General Merchants [1974] HCB 12; Biiso v. Tibamwenda [1991] HCB 92*; and *Hill & Grant Ltd v. Hodson [1934] Ch. D 53*). The application for amendment should be made in good faith. An application made *malafide* should not be granted and no amendment should be allowed where it is expressly or impliedly prohibited by law (see *Gaso Transport Services (Bus) Ltd v. Obene [1990-94] EA 88*). Any amendment that allows the ventilation of the issues raised in the original plaint ought to be allowed.

The key considerations are that; (i) 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 by costs; (ii) the court will not refuse to allow an amendment simply because it introduces a new cause of action provided it would not change the suit into one

of a substantially different character; (iii) amendments that enable the court do justice to the controversy between the parties and to effectually and completely adjudicate upon and settle all questions involved in the suit. The additional consideration is that Order 6 rules 9, 18 and 31 of *The Civil Procedure Rules* are intended to minimise proliferation of suits. An amendment will be allowed, if a multiplicity of proceedings will be thus minimised.

Necessarily litigating an additional or alternative cause of action or material fact will require the adducing of evidence not within the confines of the original cause of action and thus it is clear that to some extent an alteration in the nature of the original suit takes place. As long as this alteration does not lead to a substantive change to the character of the original suit, it ought to be permitted by the court. The court will not deny an amendment simply because it introduces a new cause of action but it will do so where the amendment would change the suit into one of a substantially different character, which would more conveniently be the subject of a new suit. While a new cause of action which is not inconsistent with the issues raised in the original plaint will be allowed to be introduced by amendment, an amendment that seeks to introduce into the case a new cause of action totally different to that in the original plaint, or one that is manifestly contradictory to it, will not be allowed.

Paragraphs 10 (xxv), (xxvi), (xxix) and prayers (xvi) and (xvii) of the proposed amendment read as follows;

> (xxv) On the other hand, Facility II was stated to be a future loan which would be utilised by the plaintiff to settle any outstanding balance under Facility I after expiry of 25 months. <u>The plaintiff avers that Facility II (the future loan) never became effective because it lacked the essential characteristics of a valid loan agreement that could be entered into between a financial institution and a borrower under Uganda Law, in particular it lacked the following essential elements</u>;
>
> A. <u>The letter of 30th November, 2017 did not nominate or identify any financial institution as the designated lender for facility II. It merely referred generally to "Financers</u>."
> B. <u>The designated lender for Facility I, was the 2nd defendant. Consequently Facility II could not be issued by the 1st defendant without the plaintiff's agreement and formal assignment of the 2nd defendant's rights and obligations</u>.

C. It did not provide for any information as to what were the essential features of a "post import" loan.

D. It did not spell out any conditions precedent or circumstances that would activate disbursement of the "Facility II" loan.

(xxvi) The securities in 10 (iii) above never became effective in respect of the purported Facility II loan for the following reasons;

a) The 1st defendant purported to disburse Facility II several years after security documents had been executed in favour of the 2nd defendant.

b) Facility I having been settled, had the consequence that the registered mortgage security lapsed.

c) Facility II was in effect a new loan that would attract fresh payment of government taxes and this was never done.

d) That the registration of securities in respect of Facility I and II had been done outside the statutory period.

e) The fictitious bi-party loan was secured by the plaintiff's other property comprised in Plot 95 Block 237 and Plots 484, 957 and 958 Kyadondo Block 243 Mutungo, Kampala District which was also registered ad stamped in favour of the 1st defendant as security agent and trustee of the 2nd defendant. (A copy of the mortgage deed was also retained by the 1st defendant and will be sought at the trial).

(xxix) A. By letter dated 10th January, 2020 the 1st defendant advised the plaintiff that Facility I had expired on 6th December, 2019 and declared that the 1st defendant had without notice to the plaintiff, nominated itself to be the lender under the proposed "Facility II" loan and even disbursed the sum of USD 10,000,000 supposedly under the proposed loan. (Copy of the said letter is attached hereto as annexure "D").

B. The plaintiff avers that the conduct of the 1st defendant to unilaterally disburse funds under the proposed "Facility II" loan was manifestly unlawful because of the following additional particulars;

(i) By 20th December, prior to expiry of Facility I, Bank One agreed to renew the Principal for a further term of 24 months. Copies of email correspondences to this effect are attached and marked "E").

(ii) The defendants were aware of Bank One's approval of the renewal of its loan and consequently there were no circumstances to justify payment of Facility I.

(iii) There was no valid loan agreement in existence at the time between the 1st defendant and the plaintiff. The plaintiff was at the time engaged fully in extending the Bank One loan.

(iv) The plaintiff had not been served by any of the defendants with a notice of demand for payment of Facility I to Bank One.

(v) In light of the failure to give notice above mentioned, the plaintiff as denied the opportunity to make alternative arrangements to secure and extend the Bank One loan.

WHEREFORE the plaintiff jointly and severally prays for judgment against the defendants for;

(xvi) A declaration that the mortgages over the plaintiff's properties comprised in LHR Vol. 2220 Plot 2 Folio 3 Lumumba Avenue and Plots 484, 957, and 958 Kyadondo Block 243, Mutungo guarantees and other securities never became effective in respect of the purported Facility II disbursement for reasons of non-registration and non-payment of stamp duty.

(xvii) An order for the release of the plaintiff's properties or in the alternative, payment of the equivalent market value of the properties.

Having perused the applicant's pleadings, the proposed amendments and listened to the submissions of counsel for both parties, I find that the applicant's case as originally pleaded sought to challenge the 2nd and 3rd defendants' capacity to conduct financial institution business in Uganda through the 1st defendant, hence the contention that the tripartite agreement executed between the plaintiff, the 1st and 2nd defendants on 20th August, 2012 is unenforceable, illegal, null and void. In the same vein, that the mortgage over the plaintiff's property is unenforceable, illegal, null and void. In the proposed amendment, the applicant seeks to introduce new perspectives to the case that were not originally pleaded, i.e. that Facility II (the future loan) never became effective for lack of some essential characteristics; its securitisation was ineffective for illegality and for having expired with the previous loan; and that the 1st defendant's unilateral disbursement of funds under the proposed "Facility II" loan was manifestly unlawful.

The power to allow the amendment of pleadings is wide and can be exercised at any stage of the proceedings. A liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. All amendments that may be necessary for determining the real question in controversy before the parties, provided it does not cause injustice or prejudice to

the other side, ought to be allowed. The amendment has to be confined to the question in controversy between the parties. Therefore, the main points to be considered before parties are allowed to amend their pleadings are: firstly, whether the amendment is necessary for the determination of the real question in controversy, and secondly, whether the amendment can be allowed without injustice to the other side. The real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties; if it is, the amendment will be allowed, if it is not the amendment will be refused.

It is trite that all such amendments ought to be made as may be necessary for purposes of determining the real question in controversy between the parties, provided that a party must not plead inconsistent allegations of fact or inconsistent grounds or claims except as alternatives. Leave to amend will be refused if the proposed amendment introduces a totally different, new and inconsistent case or changes the fundamental character of the suit or defence, or where it is merely technical, useless and of no substance, or is intended to re-agitate the same question and lead further evidence.

The fundamental character of a suit refers to the foundation on which it is based. An amendment that would change the fundamental character of the suit, will be rejected; for example a plaint cannot be so amended as to convert a claim based on contract into one based on tort. From the pleadings, I perceive the real question in controversy between the parties to be the validity of the tripartite credit arrangement and its securitisation, in light of the fact that two of the participants are alleged not to be licensed to undertake financial institutions business in Uganda. Although counsel for the respondents argued that effectives and illegality of the mortgage are two different matters, the proposed amendment only seeks to introduce a different perspective of the alleged invalidity by focusing on the instruments and processes involved in that transaction. The proposed amendment therefor neither introduces a totally different, new and inconsistent case to that already pleaded, nor does it change the fundamental character of the suit as one that seeks to invalidate a tripartite credit arrangement on basis of legal requirements. It is confined to the question in controversy between the parties. In the circumstances I hold that the proposed amendments would not substantially change the character of the suit, save for one detail.

In paragraph 29 of the written statement of defence of the 1st and 2nd respondents, it is averred that the applicant declined to renew the facility advanced by the 3rd respondent. In the applicant's reply in para 6 and 7 (a) reasons were advanced as to why the applicant did not renew the facility. The proposed amendment paragraph (xxix) B is to the effect that the 3rd respondent "agreed to renew the Principal for a further term of 24 months" and that "the defendants were aware of Bank One's approval of the renewal of its loan…" It was argued by counsel for the respondents that this constitutes approbation and reprobation.

The maxim of "approbate and reprobate" reflects the principle whereby a person cannot both approve and reject an instrument, often more commonly described as blowing hot and cold, or having one's cake and eating it too. It traces its roots to laws of Scotland and is essentially a principle of equity. In English law, the courts readily refer to the principle of approbate and reprobate, although this is generally done under the English doctrine of "election". The term "election" has two distinct categories, as described in *Halsbury's Laws of England*, vol. 16 (2) 4th ed. reissue, 2003, para. 962: firstly, "the common law principle which puts a person to his election between alternative inconsistent courses of conduct," and secondly, "the equitable doctrine of election." It therefore is further based on the rule of estoppel.

The second category, described further in *Codrington v. Codrington [1875] LR 7 HL 854 at 861-862* per Lord Cairns L.C., concerns the situation "where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time confirming to all its provisions, and renouncing every right inconsistent with them." It was held that "he who accepts a benefit under an instrument must adopt the whole of it, confirming to all its provisions and renouncing every right inconsistent with it." The court notes that this follows the "well-settled doctrine… in the Scotch law… of "approbate" and "reprobate." This category of election generally reflects the scope of approbate and reprobate as traditionally applied in England. Where a person knowingly accrues the benefits of an instrument, he or she is estopped from denying the validity or the binding effect of such instrument. The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct; as where a man, having accepted a benefit given him by a judgment, cannot allege the

invalidity of the judgment which conferred the benefit (see *Banques des Marchands de Moscou v. Kindersley [1951] 1 Ch 112*).

The doctrine was considered further in *Lissenden v. CAV Bosh Limited [1940] AC 412* in the House of Lords. In that case the appellant had obtained an award of compensation under *The Workmen's Compensation Act 1925*. He appealed the award on the basis that the compensation was insufficient while at the same time accepting payment of the sum awarded to him. The House of Lords held that the doctrine did not apply to the circumstances of the case. Viscount Maugham explained that the doctrine, emanating from Scotland, was the same as the equitable doctrine of election and that election in equity was concerned with preventing a person from taking a benefit under an instrument such as a will whilst making a claim against it. Lord Atkin though said this about the doctrine at page 429, "In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other. Election between the liability of principal and agent is perhaps the most usual instance in common law." It was decided that the doctrine of election had no place in that case. The applicant was not faced with alternative rights: it was the same right that he claimed but in larger degree.

That notwithstanding, the first category of "election" was developed further, to include situations which involve inconsistent courses of conduct, but without reference to a deed. For example, in *Express Newspapers plc v News (UK) Ltd [1990] 1 WLR 1320* the plaintiff put forward one argument in the claim and a contradictory argument in the counterclaim. They were held unable to do so, through application of the principle of approbate and reprobate in the context of election. The Court held that the claimant's resistance to judgment on the counterclaim was wholly inconsistent with its own claim and that on the basis of the doctrine of approbation and reprobation the claimant was not permitted to put forward two inconsistent cases. When giving judgment, Sir Nicolas Browne-Wilkinson VC put the doctrine in these terms:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must

> elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance. To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case.

Equally, in *Redworth Construction Ltd v. Brookdale Healthcare Ltd [2006] EWHC 1994 (TCC)*, the claimant attempted to rely on a different case in court to the case put before the adjudicator in the preceding adjudication. It was held that they could not approbate and reprobate their previous argument. The approach in these two cases could be seen as conflicting with the tradition in Scottish court pleadings of averring alternative cases which conflict with each other and do often enable a pleader to '"have one's cake and eat it too," Therefore, in England, the principle of approbate and reprobate appears as an expression of the legal doctrine of election, rather than being a legal doctrine in itself, as it is in Scotland, and it has been treated as a more flexible principle of wider application than has been the tradition in Scots law.

Certain principles arise from the case law taken as a whole: (i) the first is that the approbating party must have elected, that is made his choice, clearly and unequivocally; (ii) the second is that it is usual but not necessary for the electing party to have taken a benefit from his election such as where he has taken a benefit under an instrument such as a will; (iii) thirdly, the electing party's subsequent conduct must be inconsistent with his earlier election or approbation. In essence, the doctrine is about preventing inconsistent conduct and ensuring a just outcome (see *MPB v. LGK [2020] EWHC 90 (TCC*).

Although the doctrine of approbate and reprobate was initially developed in the field of trusts, wills and succession, it is clear that it has been applied much more widely in the context of pleadings. While the courts' extension of the doctrine beyond its traditional reach can be seen as pragmatic, it also appears consistent with logic and fairness. This wider application has thus been extended to pleadings in India (see for example *Hemanta Kumari Devi v. Parasanna Kumar, AIR 1930 Cal 32* and *Nagubai Ammal v. B. Shama Rao, 1956 SCR 451; AIR 1956 SC 593*) and in Uganda as well (see *Car & General Ltd v. AFS Construction (U) Ltd, C.A. Misc. Application No. 371 of 2018; Ken Group of Companies Ltd v. Standard Chartered Bank (U) Ltd and two others,*

H.C. Civil Suit No 486 of 2007 and *Seruwagi Kavuma v. Barclays bank (U) Ltd H.C. Misc. Application No. 634 of 2010*). In this context the principle of approbate and reprobate is based on the maxim "*allegans contraria non est audiendus,*"which means that when one utters statements contradictory to one another the same shall not be heard. If the parties take up a particular stand before the Court at one stage of the litigation it is not open to them to further approbate and reprobate and to rescind from that position.

It follows therefore that the applicant having pleaded that it did not renew the facility, it cannot seek by amendment to depart from that position and introduce facts to show that the facility was renewed. This not only introduces a totally different, new and inconsistent case to that already pleaded, but it also violates the principle of approbation and reprobation within the context of pleadings. For that reason the proposed amendment as stated in paragraph (xxix) B is rejected.

The rest of the proposed amendments are a ventilation of the issues raised in the original plaint, but from a different perspective. They are not setting the ground for a separate claim or one that is better litigated separately. Allowing the rest of the proposed amendments would not convert the plaint into an incomprehensible shotgun pleading, comprising a multitude of claims that make it nearly impossible for the defendants and the Court to determine with any certainty which factual allegations give rise to which claims for relief. It is therefore an amendment that can be allowed without injustice to the defendants, most especially considering the fact that it has been sought before commencement of the trial when the defendants can respond to it by way of amending their respective defences and filing supplementary witness statements. The costs involved can be atoned for by an award of the same against the applicant.

Pleadings are not a place for fine writing but only assertion of hard facts. It is desirable to go straight to the point and state fact, boldly, clearly and concisely and to avoid all paraphrasing and all circumlocutions. The material facts must be stated in a summary form, succinctly and in a strict chronological order. All unnecessary allegations and their details should be omitted in order to attain brevity in pleadings. The rules encourage brevity in pleadings. Particulars are not always required but in some cases they must be given. Particulars are details in support of material facts pleaded by the party. Their purpose is to control the generality of the pleadings and to limit the

scope of the evidence that can be led, not to expand the case. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, clearer and more informative.

Specific pleading is required wherever the failure to plead might take the opposite party by surprise. The rules contain examples of legal issues and supporting facts that must be specifically pleaded. According to Order 6 rule 3 of *The Civil Procedure Rules*, in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all "other cases in which particulars may be necessary," the particulars with dates have to be stated in the pleadings. Particulars are necessary whenever there is a variety of insidious forms of an occurrence or state of affairs which were brought to bear upon the party pleading, which if not specified would take the other party by surprise, e.g. the pleading of mental states, particularly fraudulent intention, malice and bad faith. They provide a degree of specificity to the allegation, but do not reach the level of indicating how the allegations will be proved, which would require the pleading of evidence. To allow introduction of the proposed paragraphs would render the plaint needlessly verbose, tangled, fractured, and repetitive as to require corrective action, in circumstances where precision, conciseness, and brevity are more likely to find judicial favour and advance a litigant's case.

In the instant case, some of the particulars of illegality intended to be pleaded, tend toward prolixity and present more or less as argument rather than as statements of material facts. They could do with some bit of recasting. Nevertheless, the technicalities of the rules of procedure regarding brevity of pleadings should not be permitted to hamper the Court in the administration of justice between the parties. Amendments are allowed by Courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities in accordance with Article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*.

I am satisfied that the applicant has presented a proper case for granting it leave to amend the plaint The objective of this application is to ensure that the litigation between the parties is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed,

but rather on the basis of the true state of facts or the true remedy which the applicant really and finally intends to rely on for its claim.

Accordingly, the applicant is granted 14 (fourteen) days from today within which to file and serve its amended plaint. The respondents are granted fifteen (15) days from the date they are served with the amended plaint, to file and serve their respective amended written statements of defence, if deemed necessary. The applicant shall within seven (7) days of receipt of the amended written statements of defence, if any, file and serve its reply thereto. The costs of the application are to the respondents in any event.

Delivered electronically this 11th day of May, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
11th May, 2022.