

THE REPUBLIC OF UGANDA
IN THE HIGH COURT UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISC. APPLICATION No. 297 OF 2018
(Arising Out of H.C.C.S-198 of 2016)

NABUGABO UPDEAL JV.....:APPLICANT
VERSUS

BIN IT SERVICES LIMITED.....: RESPONDENT

BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI

RULING

This application was brought by summons in chambers under *Order 6 rule 19 and 31 of the CPR* for orders that the Applicant be allowed to amend its defence and that costs be deferred until the final determination of the main suit.

The grounds for this application are contained in the affidavit of **Ssonko Abu**, the Project Manager of the applicant. He deposes that; that the applicant filed its written statement of defence in respect of Civil Suit No. 198 of 2016 defending itself against the respondent's claims. That there are facts which ought to be included in the defence which were not at the time it was drafted.

That at the time of filing the defence, their former counsel was instructed to include a counterclaim against the respondent for the colossal loss caused to the applicant by the respondent but counsel omitted to do it.

That the proposed amendments are necessary to enable court adjudicate upon the real questions in controversy between parties. That the applicant's lawyers

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requested the respondent for a consent approval prior to the filing of the application which the respondent declined. That the respondent will not be prejudiced by the grant since trial of the main suit had not commenced. It is in the interest of justice that the application is allowed.

The application was opposed by **Alvin Nzaro**, the Managing Director of the respondent. He deposes in an affidavit that; the proposed amendment is an introduction of a counterclaim which introduces a new cause of action. That the application is intended to delay and defeat the course of justice. That the applicant will not be prejudiced if the orders sought are not granted. The application is without merit and should be dismissed.

Representation.

The applicant was represented by **M/s Crane Associated Advocates** and the respondent was represented by **Byenkya, Kihika & Co. Advocates**. The parties made their respective submissions to this application which I have considered while resolving this matter.

Resolution.

The issue for determination as raised by counsel for the applicant is *whether the application to amend the applicant's written statement of defence in Civil Suit No. 198 of 2016 should be granted?*

Counsel for the applicant submitted that **Order 6 rule 9 CPR** gives wide discretion to the court to allow amendments necessary for the purpose of determining the real matter in controversy between parties. He cited the case of **Gas Transport Services (Bus) Ltd Vs Obene SCCA No. 4/1994 E.A** that laid four principles upon which applications for leave to amend should be granted, it

held that;

1. *The amendments should not work injustice to the other side. An injury which can be compensated by the award of costs is not treated as an injustice.*
2. *Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.*
3. *An application which is made malafide should not be granted.*
4. *No amendments should be allowed where it's expressly or impliedly prohibited by any law (e.g. Limitation of actions).*

While submitting on the above grounds, counsel for the applicant averred that the amendment is necessary for court to determine the real questions in controversy. That there are crucial facts which were left out but are necessary for court to determine the matters in controversy as spelt out in the proposed amended written statement of defence.

Counsel further said that the respondent will not be prejudiced for the applicant will give an opportunity to the respondent to defend itself both on facts in the amended written statement of defence and in the counterclaim.

Counsel submitted that the intended WSD introduces a counterclaim which former counsel had been instructed to file but omitted to do so. The intention of introducing a counterclaim is to avoid multiplicity of suits in respect of the same subject matter. He also added that, it is now law that an amendment cannot be refused on ground that it introduces a new cause of action as per the case of **Tororo Cement Company Limited Vs Frokina International Limitec SCCA No. 2 of 2001.**

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On the contrast, respondent counsel only agreed with the applicant on the conditions for court to allow an amendment. Counsel submitted that the proposed amendment seeks to introduce a counter-claim out of time without seeking leave

of court. That one cannot purport to amend what is not in the pleadings, that there was no counterclaim filed earlier with the WSD filed on 18th April 2016.

Counsel cited the case of **Omumbejja Namusisi & 3 others Vs Makerere University Miscellaneous Application No. 1199 of 2013** which held that; *"Additionally, since a counterclaim is a separate action, an application seeking leave to amend the defence to introduce a counterclaim would in essence be seeking leave to amend pleadings to introduce a new cause of action; which would be legally untenable. See: Nambi v. Bunyoro General Merchants [1974] HCB 12. Such an application would not be granted because apart from amounting to exonerating a party from complying with provisions of the law, it would also involve a complete change in the nature of the action and set up an entirely different claim from what the parties came to meet, and would require an entirely new counter defence."*

That the application should be disallowed because it seeks to introduce a counter claim that was not initially included in the defence. He also contended that the proposed written statement of defence is based on old information that was always within the knowledge of the applicant and it has no new facts that have been discovered. Counsel cited the case of **Daniel Kayizi Vs Prince Muhammed Kayondo Misc. App. No. 387 of 2016** and **Gas Transport Ltd(supra)**.

I have carefully considered the submissions made by counsel. **Order 8 rule 2 of the Civil Procedure Rules** provides that *a defendant in an action may set off or set up by way of counterclaim against the claims of the plaintiff any claim of right.*

It is trite that a counter-claim is a separate suit which if raised, court ought to consider it and make specific findings on it as a distinct action with distinct remedies to render. **Order 8 rule 7 of the Civil Procedure Rules** provides that *where any defendant seeks to rely upon any grounds as supporting a right of*

counterclaim, he or she shall in his or her statement of defence state specifically that he or she does so by way of counterclaim. A reply to a counterclaim is supposed to be delivered within 15 days after service of the counterclaim. In this case the applicant never included a counterclaim in his pleadings at the time of filing but seeks to amend its pleadings and includes a counterclaim.

The presence of a counterclaim herein introduces a whole new cause of action because a counterclaim is not a defence. Applicant counsel argued that from the case of **Tororo Cement Company Limited Vs Frokina International (supra)**, it is now law that an amendment cannot be refused on ground of introducing new cause of action. This is not true. That case is on totally different set of facts and therefore does not apply in this case. In that case, the appellant argued that the respondent's plaint should be rejected on ground that particulars of negligence were not pleaded and therefore the plaint had no cause of action. The Supreme court was of the view that whereas the plaint disclosed a cause of action because of the alleged negligence, the plaintiff ought to have included the particulars of the negligence complained of to enable the defendant prepare its defence properly. The defects in the plaintiff's case could be cured by an amendment of pleadings.

In my view, it is not in order to apply for an amendment of a defence and therein include a counterclaim which was not part of the pleadings at the time of filing. In the first place, there was no counterclaim set up in the written statement of defence and hence there can be no amendment of a non-existent pleading. The Applicant should have sought leave of court to file a counterclaim out of time but not include it in an application to amend WSD. Perhaps the applicant would have made an omnibus application.

01/22 Be that as it may, the applicant also sought to amend its WSD by adding some facts which were omitted by counsel at the time of drafting. This should be

allowed to enable court effectively adjudicate on the matter, having all facts before it and to avoid multiplicity of suits.

In the circumstances, this application succeeds but in part. The proposed amendments as per the written statement of defence are allowed, however, the proposed counterclaim is denied.

Costs of this application shall be in the cause.

It is so ordered.



CORNELIA K. SABIITI
JUDGE

Date: ----- 17/01/22