

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 129 OF 2021
(Arising from Civil Suit No.148 of 2009)

NATIONAL DRUG AUTHORITY ::::::::::::::::::::::::::::::: APPLICANT/ PLAINTIFF

VERSUS

- 1. SAMUEL KASOZI**
- 2. IRENE N. KALULE**
- 3. NTALE SHARIFAH ::::::::::::::::::::::::::::::: RESPONDENTS/DEFENDANTS**

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by way of Chamber Summons under Order 6 rules 19 and 31 of the Civil Procedure Rules S.I. 71-3 (CPR) seeking orders that:

- a) The Applicant be allowed to amend its pleadings (Plaint) in order to determine the real question in controversy between the parties.
- b) Costs of this Application be in the cause.

Background

The Applicant instituted the main suit in 2009 against the Respondents herein claiming money for compensation it claims it lost at the hands of the Respondents' negligence. The Respondents were all former employees of the



Applicant in the roles of Senior Accountant, Assistant Accountant and Accounts Assistant Revenue respectively.

The Applicant's application herein is brought on grounds that it is necessary to amend the Plaintiff in order to determine the real questions in controversy between the parties, that the proposed amendments shall not prejudice the Respondents in any way at all, and that it is in the interests of justice that the application be allowed to enable the parties to achieve the real ends of justice.

This Application is supported by an Affidavit in Support deposed by **Mr. David Nahamya**, the Applicant's Secretary. In **paragraph 5** of his Affidavit, the Applicant's deponent states that the prayers in the Plaintiff did not include an order to payment of **USD 232,011** (Two Hundred and Thirty Two Thousand and Eleven United States Dollars) which money, he avers was discovered according to the special audit report as having been fraudulently taken by the Respondents over the period of 1st July 2004 and 26th February 2007.

He, therefore, averred in paragraph 6 of his Affidavit that the Plaintiff is desirous of amending the Plaintiff to include prayers for an order for payment of USD 232,011 and a proposed Amended Plaintiff is attached to the affidavit as **Annexure "A"**. He further averred that the sum of UGX 198,130,876 (One Hundred and Ninety Eight Million One Hundred and Thirty Thousand Eight Hundred and Seventy Six Uganda Shillings) currently claimed under paragraph 5(c) of the Plaintiff is far less than USD 232,011 and if granted, the Plaintiff will recover less than the amount due to them from the Respondents.

He further averred in paragraph 8 that the above facts do not prejudice the Respondents in any way since the proposed amendment has been made before the suit has been scheduled or heard in Court.

The Respondents have not filed any pleadings in this matter to oppose the application. Thus the application shall be determined based only on the Applicant's pleadings.



Representation

At the hearing on 1st April 2021, the Applicant was represented by Counsel Namulindwa Hasfa, the 1st Respondent attended court but counsel for the Respondents and the 2nd and 3rd Respondents were absent.

At the hearing, the Applicant's counsel informed Court that the Application was served but the Respondents were yet to file their Reply and Rejoinder and sought directions on the filing of further pleadings and submissions.

The Court gave a direction on the filing of further pleadings and the submissions and directed the Applicant's counsel to write to the Respondent's counsel giving them the directive. The Applicant duly wrote a letter to the Respondents communicating the Court's directives on 1st April 2021 and filed the same in this Court on 6th April 2021.

Following this none of the Respondents filed a Reply to the Application and no submissions were filed by any of the parties. Thus the application stands unopposed. I shall however consider the Affidavit in Support and annexures in granting this Ruling.

Issues for Determination

The issue for determination herein is whether the Applicant should be granted leave to amend the Plaintiff in these circumstances.

Resolution

Issue: Whether the Applicant should be granted leave to amend the Plaintiff in these circumstances.

The Court has wide and extensive powers to allow the amendment of pleadings. These powers are designed to prevent the failure of justice due to procedural



errors, mistakes, and defects. Thus the object of amendment of pleadings is to enable the parties to alter their pleadings so as to determine the true substantive merits of the case, having regard to substance rather than form.


Article 126(2)(e) of the **Constitution of the Republic of Uganda 1995 (As amended)** provides that in adjudicating cases of both a civil and criminal nature, courts shall, subject to the law administer substantive justice without undue regard to technicalities.

Thus, under **section 100** of the **Civil Procedure Act Cap. 71** it provides for the general power to amend;

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.”

However, it should be noted that the Court cannot amend pleadings under the above provisions where to do so would be tantamount to exonerating a party from complying with statutory provisions (see ***Biiso v Tibamwenda [1991] HCB 92***).

Having said that, amendment ought to be pursued at the earliest available opportunity, that is as soon as the issue which requires amendment is brought to the Court or parties’ attention. A party, therefore, should not leave their application to a stage so late in the proceedings that to allow an amendment then would be unjust to his opponent (see ***Eastern Bakery v Castelino [1958] EA 461***). But having said that, generally speaking, an application for amendment should be allowed however negligent or careless the omission may have been and however late the proposed amendment, if the amendment can be made without injustice to the other side (see ***Nsereko v Taibu Lubega [1982] HCB 51***).

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The Court in **Wamanyi v Interfreight Forwarders (U) Limited [1990] II KALR 67** held that there is no injustice if the other side can be compensated for by costs. Therefore to the extent that the other party could be compensated by costs for the inconvenience caused by the amendment, an amendment ought to be allowed.

The Supreme Court in **Gasu Transport Services Limited v Martin Adala Obene SCCA 4 OF 1994 [1994] VI KALR 5** laid down the following principles which govern the exercise of discretion in allowing amendments:

1. The amendment should not work injustice to the other side. An injury that can be compensated for by way of costs is not treated as an injustice.
2. The 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 *mala fide* should not be granted.
4. No amendment should be allowed where it is expressly or impliedly prohibited by any law (Limitation of Action).

Accordingly, amendments may be allowed before trial, at trial, or even after judgment as long as allowing the amendment shall not prejudice the other party or as long as the other party can be compensated by costs. Having said that the later the amendment is applied for, the less likely it is that it will be readily given by the Court. Thus, the more advanced the proceedings are and the more changes brought on by the proposed amendment, the greater the burden is upon the applicant who seeks leave to amend to prove to Court that leave ought to be granted. Having said that leave to amend will not readily be given;

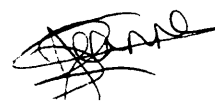
- i. Where the necessity for such amendment was obviously apparent long before trial and was not asked for (see **Moss v Malings (1886) 33 CHD 603**).
- ii. Where the amendment would involve a complete change in the nature of the action (see **Nambi v Bunyoro General Merchants [1974] HCB 124**).

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- iii. Where the amendment involves setting up an entirely different claim from that which the defendant came to meet (see ***GP Jani Properties v Dar-es-Salaam City Council [1966] EA 281***)
- iv. Where the amendment raises an entirely new ground of defence or counter-claim (See ***British India General Insurance Company Limited v GM Pharma and Company [1966] EA 172***).
- v. Where an amendment introduces for the first time a charge of fraud (see ***David Acar v Acar Aciro [1982] HCB 60***).

In this case, the amendment sought is to include an additional amount of **USD 232,011** which was omitted from the amounts claimed in the original Plaintiff. As I understand it the Applicant is claiming this amount as a result of the findings from a special audit into its accounts that was conducted by M/S Biz & Co. Certified Public Accountants, which audit was directed by the Auditor General. And which special audit confirmed an additional USD 232,011 to the UGX 201,336,410/= the Respondents had alleged illegally taken from the Applicant between 1st July 2004 and 26th February 2007. Notably, the special audit report was itself not attached to the Applicant's Affidavit, it is also not attached to the Amended Plaintiff as an Annexure but a statement is made to the effect that the special audit report and receipts showing money received and bank statements shall be relied on at the hearing.

I have already discussed the position that an application for amendment should be raised at the earliest opportunity, in this case, I have noted with concern that the matter was filed in 2009 but the application to amend the Plaintiff was only brought in 2021 (12 years later). I have also noted that the special audit and its findings was information readily available to the Plaintiff before the instituted the suit, as it is following this special audit that the Respondents were dismissed from employment on 22nd October 2007 (see **paragraph 6(i)** of the Amended Plaintiff – **Annexure "A"** to the Affidavit in Support). I am therefore of the view that the Applicant has not brought this application at the earliest opportunity and, it



is unclear to me, why the error in the Plaintiff was discovered so many years after the institution of the suit.

Notwithstanding the above I am inclined to allow this application as directed by a number of authorities including *Nsereko v Taibu Lubega (Supra)* generally speaking, an application for amendment should be allowed however negligent or careless the first omission may have been and however, late the proposed amendment, if the amendment can be made without injustice to the other side and provided the inconvenience occasioned can be compensated for by costs.

The Court in *Wamanya v Interfreight Forwarders (U) Limited [1990] II KALR 67* held that there is no injustice if the other side can be compensated for by costs. Therefore to the extent that the other party could be compensated by costs for the inconvenience caused by the amendment, an amendment ought to be allowed.

In these circumstances, I am inclined to grant the application but shall not award costs for this application to the Applicant, no matter the outcome of the main suit.

In light of the above, I see that to resolve the issues in controversy between the parties and also to prevent the potential multiplicity of proceedings the Applicant is granted leave to amend the Plaintiff and hereby make the following Orders.

Orders

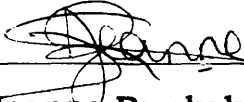
In these premises, the Applicant's application succeeds and I hereby order as follows;

1. The Applicant/ Plaintiff is granted leave to amend its Plaintiff in Civil Suit No.148 of 2009
2. The Applicant/ Plaintiff is hereby directed to file and serve the Amended Plaintiff within Seven (7) days from the date of this Ruling.



3. Once served the Respondents/ Defendants may file their Amended Written Statements of Defence to the Amended Plaint within Fourteen (14) days of being served.
4. The costs of this application are granted to the Respondents notwithstanding the outcome of the main suit.

It is so ordered.



Jeanne Rwakakooko
JUDGE
12/04/2022

This Ruling was delivered on the 12th day of April, 2022