

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 817 OF 2021
(Arising from Civil Suit No.950 of 2019)**

BAKALUMBA ENTERPRISES LIMITED ::::::::::::::: APPLICANT/ PLAINTIFF

VERSUS

- 1. UGANDA BREWERIES LIMITED**
- 2. STANBIC BANK LIMITED ::::::::::::::: 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 granted leave to amend its pleadings (Plaint).
- b) Costs of this Application be provided for.

Background

The Applicant instituted the main suit on 19th November 2019 against the Respondents herein seeking declaratory orders, compensatory orders, recovery of monies, punitive and exemplary damages, damages for breach of contract, general damages, special damages, and costs of the suit. The Applicant sued the 1st Respondent claiming breach of a Distributorship Agreement it had with the 1st Respondent and sued the 2nd Respondent in as far as the 1st Respondent had attempted to recall a bank Guarantee held by the 2nd Respondent. To this effect, the Applicant also filed Misc. Application No.1068 of 2019 seeking a Temporary Injunction and Misc. Application No.1069 of 2019 seeking for an Interim Order, both to restrain the 2nd Respondent from paying **UGX 800,000,000/=** (the "Guaranteed sums") to the 1st Respondent. The 2nd Respondent claims that because no court order was issued, it subsequently complied with the 1st Respondent's demand and honoured the demand by executing payment of the Guaranteed sums to the 1st Respondent on 25th November 2019. The Applicant's

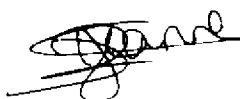


interlocutory applications came up for hearing on 26th November 2019, at the hearing the Plaintiff withdrew the applications since the orders sought therein had been overtaken by events, namely, the bank Guarantee had already been paid by the 2nd Respondent to the 1st Respondent, the 2nd Respondent now claims inter alia that, as far as the matter now stands, the Applicant has no cause of action against the 2nd Respondent.

The Applicant's application herein is brought on grounds that it discovered new evidence after a stock-taking exercise of its goods in the warehouse which was not available at the time of filing the Plaintiff. Having done so, the Applicant now claims that it has discovered new details justifying the pleading for special damages in the Amended Plaintiff, which pleadings were not included in the original Plaintiff and its subsequent amendment which happened in December 2019. The Plaintiff avers that the present amendment being sought is made in good faith, to resolve the real issues in controversy between the parties, that it will not prejudice any party to the suit, and that it is in the interests of justice that Court grants this application.

This application is supported by an Affidavit in Support deposed by **Mr. Kalumba George William Ssalongo**, the Applicant's Director. In **paragraph 2** of his Affidavit, the Applicant's deponent states that the Applicant intends to amend its Plaintiff by adding details of its claims for special damages which include but are not limited to particulars of special damages relating to trade terms, promotions, empties not credited, cheque reversals, payment for unknown invoices, breakages, debited accounts with no supplies, debits with no references, withdrawals debited on the Plaintiff's account, monies claimed in trade bonanzas, monies claimed in the self collection, money transfers for products not supplied, Monies held in dead stock and non moving stock. To this end, the deponent attached a copy of the proposed Amended Plaintiff to his Affidavit as **Annexure "A"**.

He further averred in **paragraphs 3 and 4** of his Affidavit that after the case was filed in November 2019, the concentration was placed on the interlocutory applications which he avers were filed because his property was at risk of being taken by the 2nd Defendant and that the said applications were not concluded until July 2020 when a temporary injunction was issued by Court. In **paragraph 5** of his Affidavit he further avers that due to the COVID-19 pandemic lockdowns that ensued in 2020 and the restricted movement, the Applicants officials were not able to access their offices and warehouse to scrutinize their records and establish the details of the evidence they intended to use in order to buttress



their claims. And that now, since the relevant documents and evidence have been obtained, the Applicant seeks to amend the pleadings to include them in order to pursue justice in the case.

The 1st Respondent did not file any pleadings in this matter to oppose the application but the 2nd Respondent filed an Affidavit in Reply opposing the Application.

The 2nd Respondent's Affidavit in Reply was deponed by **Mr Jonarsan Were**, the 2nd Respondent's legal manager. In **paragraph 10** of the 2nd Respondent's Affidavit in Reply the 2nd Respondent's deponent contends that the Amended Plaintiff the Applicant is seeking to adduce does not disclose a cause of action against the 2nd Respondent. And that the proposed amendments are bad in law as far as the 2nd Respondent is concerned because the 2nd Respondent raised a point in law that the Plaintiff as it stands does not disclose a cause of action against it, and this still stands notwithstanding the proposed amendments being sought in this application.

In **paragraph 13** of the 2nd Respondent's Affidavit in Reply, the 2nd Respondent's deponent avers that the Applicant is seeking in **paragraph 8** of the proposed Amended Plaintiff to introduce a new cause of action against the 2nd Respondent that it is indebted to the Applicant which, he contended, was not pleaded in the first Plaintiff. That the Amended Plaintiff which the Applicant is seeking to adduce does not disclose a cause of action against the 2nd Respondent and allowing the amendment would cause an injustice to the 2nd Respondent which cannot be compensated for by an award of costs.

In **paragraph 15** he further averred that the amendment which the Applicant seeks is not necessary to enable Court to determine the real issues in controversy between the Applicant and 2nd Respondent. That the sought amendments are with respect to special damages arising from the alleged breach of the Distributorship Contract between the Applicant and 1st Respondent which the 2nd Respondent was not privy to.

In **paragraphs 17** and **18** of his Affidavit the 2nd Respondent's Deponent contends firstly that the evidence the Applicant now seeks to introduce in the Amended Plaintiff was available at the time of filing the suit and that pleading COVID-19 by the Applicant was an afterthought since the Government's restrictions on movement were ceased by June 2020. That since the Applicant has already amended the Plaintiff in December 2019, allowing a further amendment will delay litigation in this matter.

A handwritten signature in black ink, appearing to be "Jonarsan Were", written over a horizontal line.

The 2nd Respondent's deponent further mentions in **paragraph 19** of his Affidavit that the Applicant previously amended the Plaintiff in December 2019, and that allowing a further amendment would cause further delay to litigating in this matter which, he argued, should come to an end. On this basis and in light of the above the 2nd Respondent's deponent prayed that this application be dismissed with costs as against the 2nd Respondent.

Representation

At the hearing on 2nd November 2021, the Applicant was represented by Kalule Frederick Robert, Nakazibwe Geraldine appeared for the 1st Respondent and Counsel Frank Twongeirwe appeared for the 2nd Respondent.

At the hearing, the 1st Respondent's Counsel informed the Court that the 1st Respondent did not file an Affidavit in Reply because it does not intend to object to the application.

The Court, therefore, gave directions to the Applicant and 2nd Respondent on the filing of submissions which submissions were duly filed. I have considered the Applicant and 2nd Respondent's submissions 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***).

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***).
- 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 claims for special damages but I also note the inclusion of additional claims against the 2nd Respondent premised on the 2nd Respondent's payment of the Bank Guarantee to the 1st Respondent before the interlocutory applications (which attempted to halt this) had been heard.

Concerning the new claims to special damages, in this instance, the Applicant pleads that it was not able to include this evidence earlier on because of the lockdown occasioned by the COVID-19 pandemic as well as the earlier miscellaneous applications that took up the bulk of the Applicant's attention until a temporary injunction was issued in July 2020. I have perused through the proposed Amended Plaintiff and the insertions made therein are indeed extensive. Whilst it is not ideal that this application was filed on 20th May 2021, 30 months after the institution of the suit on 19th November 2019, from a practical standpoint I can understand that the process of collecting and



gathering this evidence in order to provide a basis to the Applicant's claim for special damages would have taken some time. I am also cognizant of the fact that the delays and disruptions occasioned by the COVID-19 pandemic and the lockdowns that ensued in 2020 and 2021 would have made this process more difficult. On this basis, I am inclined to find that the Applicant has brought this application for amendment within a reasonable period given the circumstances and practical realities of this case.

Having said that, the more serious contention raised by the 2nd Respondent in my view concerns the inclusion of new causes of action. Reference is particularly made to **paragraph 8** of the proposed Amended Plaintiff and what the 2nd Respondent claims is an attempt to introduce a new cause of action against it. The said paragraph reads as follows;

8. the plaintiff shall aver and contend at the trial that on the contrary, the 1st and 2nd defendants are indebted to the plaintiff in several spheres which include but not limited to the sums in the bank guarantee, trade terms, promotions, empties not credited, cheque reversals, unknown invoices, breakages, debited accounts with no supplies, debits without references, withdrawals not credited, withdrawals debited on plaintiff's account, monies held in trade bonanzas, monies held in self collection, money transfers with no suppliers, monies held in dead stock and non moving stock as well as monies held on collection account.

In my view, the 2nd Respondent's counsel made two contradictory arguments with reference to the above paragraph. On the one hand, the 2nd Respondent raised a preliminary objection that the proposed amendments do not disclose a cause of action against the 2nd Respondent and yet on the other hand in **paragraph 13** of the 2nd Respondent's Affidavit in Reply it is argued that the above **paragraph 8** sought in the proposed amended Plaintiff seeks to introduce a new cause of action that the 2nd Respondent is indebted to the Applicant which was not pleaded in the first amended Plaintiff.

I have perused both the current proposed Amended Plaintiff and the first Amended Plaintiff. As a starting point, I have noted that the insertion/ alterations made not just to **paragraph 8**, but also to **paragraphs 5, 6 and 7** all of which introduce claims against the 2nd Respondent directly premised on the fact that the Bank Guarantee was paid/ executed by the 2nd Respondent whilst the matter was still pending in this court. I shall reproduce the said paragraphs here for ease of reference;

A handwritten signature in black ink, appearing to be 'S. S. S.', written in a cursive style.

5. *The plaintiff shall further contend at the trial that when the 1st Defendant attempted to foreclose the Bank guarantee, the plaintiff contested it before reconciliation could be conducted and filed Misc. Application No.1069 of 2019 seeking Court's intervention to restrain the 2nd defendant from paying the said sums to the 1st Defendant pending the determination of the main application vide Misc. Application No.1068 of 2019.*
6. *The plaintiff shall further contend that when the said application was served on the 2nd Defendant, in total disregard of the Court process, and also in order to defeat justice, the 2nd defendant proceeded to pay the said sums of Ug. Shs. 800,000,000/= to the 1st Defendant before the said application was heard.*
7. *The plaintiff shall further aver and contend at the trial that the actions of the 2nd Defendant were in bad faith intended to defeat justice for which it seeks damages against the 2nd Defendant.*

There are a few things to be noted from the above insertions/ proposed amendments, as a starting point they are premised on events that happened after the institution of this suit on 25th November 2019. Namely the payment by the 2nd Respondent of the Bank Guarantee to the 1st Respondent. This was not included in the original Plaintiff which was filed on 19th November 2019 because the events constituting this claim had not yet occurred. The other observation I make is that whilst these claims are significantly different from those that were levied against the 2nd Respondent in the original Plaintiff. In **paragraphs 16** and **17** of the original Plaintiff it provides;

16. *That the 2nd Defendant is combined as a necessary party to this matter in as far as the 1st Defendant's attempt to recall a bank guarantee over which the 2nd Defendant may act if not stopped by this honourable court[...]*
17. *The Plaintiff shall further contend that the 2nd Defendant is further sued for the obvious reason that the orders intended to restrain it from acting at the request of the 1st Defendant in respect of the guarantee be not given in vacuum.*


From the above, it is clear that the premise of the Plaintiff's claim against the 2nd Respondent in the initial Plaintiff was to prevent/ restrain it from paying the bank Guarantee. This claim has now changed since, a) the bank Guarantee was paid and b) the Plaintiff's contention now is premised on the fact that it believes, this payment was made by the 2nd Respondent illegally, in bad faith, in disregard of Court process and to defeat justice (see **paragraph 6** above of the proposed Amended Plaintiff).



The above cited authorities, particularly ***Nambi v Bunyoro General Merchants [1974] HCB 124*** and ***GP Jani Properties v Dar-es-Salaam City Council [1966] EA 281*** provide that leave to amend a plaint will not be readily given where, firstly, the amendment would involve a complete change in the nature of the action and, secondly, where the amendment involves setting up an entirely different claim from that which the defendant came to meet. In some sense, the 2nd Respondent could argue that the current proposed amendment seeks to raise an entirely different claim from that which was brought against them in the original plaint but to this, I would say, the events constituting the present claim had not yet occurred when the suit was instituted. If one party sues another under a claim which is later overtaken by events and wishes to alter/ adjust that claim to take into account the developments that have happened since the institution of the suit then this should not be prevented provided the subsequent developments still fall within the same facts or series of events constituting the basis of the initial claim. In this case, the Applicant's initial claims against the 2nd Respondent were to prevent it from paying the bank Guarantee, the 2nd Respondent subsequently paid the bank Guarantee and now, in light of these developments the Plaintiff is bringing a claim against the 2nd Respondent directly for its actions. I wish to say, in light of all of this, that I wholly disagree with the 2nd Respondent's claim that the proposed amendments to the Plaint herein do not raise a cause of action against the 2nd Respondent, to the contrary I would say they do more so than the initial/ original Plaint.

I am cognizant of these principles whilst, at the same time being aware of the overriding principle that governs/ promotes the amendment of pleadings which is that the multiplicity of proceedings should be avoided as far as possible and all amendments, which avoid such multiplicity, should be allowed (see ***Gasco Transport Services Limited v Martin Adala Obene SCCA 4 OF 1994 [1994] VI KALR 5***). In this instance were the proposed amendments to be disallowed then the Applicant may be left with having to institute another separate suit against the 2nd Respondent alone claiming on the issue of payment of the Bank Guarantee, which issue, in my view could more easily be resolved in the present suit together with the Applicant's claim against the 1st Respondent.

On this basis, I am inclined to resolve this issue in favour of the Applicant with a finding that the Applicant should be granted leave to amend its Plaint. In these circumstances, I see that in order to conclusively resolve the issues in controversy between the parties, and also in order to prevent the potential multiplicity of proceedings, the Applicant ought to be granted leave to amend the Plaint. I hereby make the following Orders.

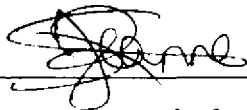
A handwritten signature in black ink, appearing to be 'S. D. M.', written in a cursive style.

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.950 of 2019.
2. The Applicant/ Plaintiff is hereby directed to file and serve the Amended Plaintiff within Fourteen (14) days from the date of this Ruling.
3. Once served the Respondents/ Defendants may file their Amended Written Statements of Defence to the Amended Plaintiff within Fourteen (14) days of being served.
4. The costs of this application shall abide the outcome of the main suit.

It is so ordered.



Jeanne Rwakakooko
JUDGE
21/06/2022

This Ruling was delivered on the 28th day of June, 2022