

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 828 OF 2021
(Arising from Civil Suit No. 381 of 2016)**

KIRONDE ASHIRAF APPLICANT

VERSUS

KOBIL (U) LTD RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by way of chamber summons under Article 126(2)(e) of the 1995 Constitution, Section 98 of the Civil Procedure Act, Cap 71, Order 6 Rules 19 & 31 of the Civil Procedure Rules, Si 71-1 for orders that:

- (a) Leave be granted to the Applicant to amend his pleadings in Civil Suit No. 381 of 2016.
- (b) Costs of the Application be provided for.

Background

The Applicant filed Civil Suit No. 381 of 2016 (the main suit) against the Respondent (now known as Rubis Energy Uganda Limited) contesting the sums allegedly owed by the Respondent, mismanagement of the Applicant's account leading to loss, and challenging the "legal mortgage" created on the Applicant's property comprised in Busiro Block 266-267 Plot 809. This claim arises out contracts for supply of fuel and lubricants between the parties.

This Applicant contends that he conducted a reconciliation of his accounts in or around January 2021 and established that the Respondent is indebted to him to a tune of UGX. 1,188,599,564/= as a result of erroneous debits made on his account. He intends to include this in his claim in the main suit, as well as pray for the release of his certificates of title deposited with the Respondent. He also states that he intends to plead that the Respondent/Defendant breached the contract of supply of fuel with the Applicant. That these facts were not within the Applicant's knowledge at the time of filing the main suit. He claims that the proposed amendments will not disadvantage the Respondent in any way.



The Respondent filed an affidavit in reply sworn by its country manager stating as follows. That the Applicant's intended claims in the draft amended plaint attached to the application are contrary and exact opposites to all his claims in the original plaint. That the amended plaint seeks to introduce new, distinct, contrary and inconsistent causes of action that cannot be introduced by amendment of the plaint. Additionally, that the intended amendments are based on the Applicant's books of account for a time period 29th March 2012 to 24th September, 2013 which books of account have always been with him. Also that the intended amendments are barred by the law of limitation, and court cannot allow such an amendment. The Applicant is accused of dilatory conduct in that he has for 8 years not prosecuted his case, and that he seeks to further delay the main suit with this application.

Representation

The Applicant is represented by Elias Seguya while the Respondent is represented by Raymond Mwebesa.

Resolution

Issue: Whether the Applicant should be granted leave to amend the plaint in Civil Suit No. 381 of 2016.

Order 6 Rule 19 of the Civil Procedure Rules states:

19. Amendment of pleadings.

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. (Underlined for emphasis.)

The guiding principles to grant of an application for amendment of pleadings were well enunciated in **Eastern Bakery -v- Castelino [1958] 1 EA 461**. See also **Gasu Transport Services (Bus) Ltd -v- Obene [1990-1994] 1 EA 88**. In **Eastern Bakery -v- Castelino** it was held that:

"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: Tildesley v. Harper (1) (1878), 10 Ch. D. 393; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262. The court will not refuse to

allow an amendment simply because it introduces a new case: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: Ma Shwe Mya v. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitaley p. 1313.” (Underlined for emphasis.)

The Applicant avers in paragraph 9 of his affidavit in support of the application that the application will not prejudice the Respondent in any way. The Respondent’s counsel on the other hand contends that the application will prejudice it as it introduces new causes of action inconsistent with the original plaint. The Respondent in paragraphs 3,4,5 of the affidavit in reply compared the claims in the original plaint and amended plaint and stated that the claims are different. I shall review the claims in the original plaint and those in the proposed amendment.

Paragraph 3 of the original plaint lays out the Applicant’s claim as:

“3. The Plaintiff’s claim against the defendant is for:

- a) A declaration that the defendant mismanaged the plaintiff’s Wakiso 2 account by making numerous mistakes on the same leading to loss.
- b) A declaration that sums demanded by defendant are exaggerated and imprecise and is accordingly not due and payable.
- c) An order of an independent third party forensic audit of the plaintiff’s financial affairs with the defendant with a view of determining the amount payable by the plaintiff under the contract of supply of petroleum products between the plaintiff and defendant.
- d) A declaration that the interest on the above sums demanded by the defendant is illegal and as such unenforceable.
- e) A declaration that the purported “legal mortgage” created in favour of the defendant in respect of the plaintiff’s property



comprised in Busiro Block 266-267 Plot 809 is illegal and as such null and void hence unenforceable.

- f) An order of cancellation of the “legal mortgage” purported to have been created in favour of the defendant in respect of the plaintiff’s property comprised in Busiro Block 266-267 Plot 809.
- g) A permanent injunction restraining the defendant from disposing of and or dealing with the “mortgaged property” comprised in Busiro Block 266-267 Plot 809 and any other property belonging to the plaintiff on account of the improper sum being demanded or at all.
- h) Aggravated damages
- i) General damages for inconvenience
- j) Interest
- k) Costs of the suit.”

The proposed amended plaint marked Annexure B to the affidavit in support of the application contains numerous amendments to the original plaint and I shall summarize each of them.

It introduces a claim for breach of the supply agreement in paragraph 4(a). This is the same supply agreement that the basis of the relationship and subsequent dispute between the parties in the original plaint.

It also introduces a prayer for recovery of UGX. 1,188,599,564/= as monies illegally debited from the Plaintiff’s trading account in paragraphs 4(b) & 19(b). The facts of this are stated under the proposed amended plaint, paragraph 5(v)(i) that the Applicant conducted a reconciliation of his trading accounts with the defendant for the period of March 2012 to 24th September 2012 and discovered he had been erroneously and illegally debited by the Respondent to a tune of Ugx. 1,888,599,564. See paragraph 5(v)(i) & 6 of the proposed amended plaint.

The proposed amended plaint introduces a claim for illegality under paragraphs 4(c) & 6. The illegality is in respect of the Defendant preparing delivery notes in the Plaintiff’s name for fuel not delivered, which fuel was apparently diverted by the Defendant’s agents. Also for the erroneous debits to the Plaintiff’s trading account.

The Applicant seeks an order for the unconditional release of his certificates of title deposited with the Respondent as security in paragraphs 4(f) & 19(f) of the proposed amendment.

In the narration of fact giving rise to the cause of action, the proposed amended plaint introduces a new fact that the Plaintiff complained of orders of fuel debited

from his account by the Respondent yet he had never ordered or taken the fuel mentioned. That the Respondent promised to rectify this by crediting his account but this was not done. The Plaintiff claims to have come across delivery notes for fuel purportedly supplied to him, but these delivery notes were never supplied or delivered to him yet he was debited for the supply. See paragraph 5(f)-(j).

The Applicant also now claims for fuel supply to a tune of UGX. 400,000,000/= and UGX. 150,000,000/= which was to be considered as a rent advance (given that the Plaintiff was landlord at the petrol stations and was entitled to rent from the Defendant). The rent advances were apparently revoked by the Defendant even after supplying the Plaintiff with the fuel. The Plaintiff's account was therefore debited. See paragraphs 5(j)-(p) of the proposed amended plaint.

Under the proposed amended plaint, the Applicant also claims that fuel worth Ugx. 1,426,895,031/= was never supplied to him. See paragraphs 5(v)(ii) & 7.

Paragraph 8 of the proposed amended plaint introduces the claim that the Respondent illegally and fraudulently registered a mortgage on the land comprised in Busiro Block 809 Plot 266-267. Paragraph 8(f) introduces a new aspect of fraud and illegality that the transaction documents purporting spousal consent, and the Applicant's wife as witness bear no certificate of translation yet she is illiterate.

The above amendments mostly arise out of a reconciliation undertaken by the Applicant undertaken round January 2021. See paragraph 3 of the affidavit in support. This reconciliation was done seven years and about eight months after the main suit was instituted. The main suit was filed on 16th October, 2013. There has been an inordinate delay by the Applicant in prosecuting his suit, as was stated by this court at the hearing of the main suit on 5th May, 2021. To allow an amendment this much later from when the main suit was instituted would be an abuse of the justice system, and further clog it up. It would lead to yet another delay before the dispute can be fully resolved, and would not be in the interest of justice.

Among the prayers sought in the original plaint is for an independent forensic audit of the Plaintiff's financial affairs with the view of such expert determining the amount payable by the Plaintiff under the contract of supply of petroleum products. I find that an independent auditor's report will sufficiently address the question of sums due to either party and therefore cover the amendments as to the additional sums of money sought by the Applicant in the proposed amendment.



I take note of the fact that there have been numerous challenges to appointing an independent auditor. The record reflects that this court on 15th April, 2014 appointed Ernst & Young as the independent auditors to carry out the assessment upon failure of the parties to agree upon an independent auditor. This audit was to be done within two months. Ernst & Young was engaged, and upon two adjournments, the parties reported to court on 8th April, 2015 that the audit was not completed because of a conflict of interest with Ernst & Young. The court then appointed Deloitte as the new auditors. However, on 22nd October, 2015 both parties reported to court that they could not meet the professional fees of Deloitte and curiously prayed for the court to reappoint Ernst & Young.

The parties represented to the court at the last hearing that they were in the process of pursuing a settlement. Upon failure to do so, the case shall be heard, and fresh orders made as to the independent audit in the course of the hearing to ensure that it is carried out.

The Respondent submitted that the Applicant's proposed amendments introduce new and inconsistent causes of action. This is supported by paragraphs 5 & 6 of the affidavit in reply. The Applicant's counsel though submitted that the proposed amendments do not introduce a new cause of action but rather arise out of the same facts and transactions.

I have read the original plaint and the amendment. I find that the proposed amendment introduces new causes of action as to illegality. It also raises a new claim for recovery of fuel supply worth UGX. 400,000,000/= and UGX. 150,000,000/=, and additional UGX. 1,426,895,031/= as the value of fuel that was never supplied to the Applicant. These amendments are in my opinion belatedly raised and re-structure the Plaintiff's case. The proposed amended plaint read in comparison with the original plaint presents a whole new complaint and dispute between the same parties.

From reading the original plaint, the Plaintiff's case was that the Respondent claimed an exorbitant and unjustified amount of money and interest from it arising from the supply contract between them. In the original claim, the Plaintiff/Applicant makes no claim for recovery of money whatsoever. The other claims by the Applicant/Plaintiff in the original plaint are that the Respondent was fraudulent, and mismanaged its accounts, and illegally mortgaged its property. It may be arguable that they are result from the same contractual relationship. However, given that the Plaintiff had most of this information, or could have attained it with due diligence from the start, and the fact that the suit has not been prosecuted for years, to allow such an amendment would be an abuse of process.



Therefore, to introduce new claims eight years later for recovery of money is disrespectful of the court's time. A plaintiff, especially one with legal representation is expected to file a suit upon careful consideration of his or her facts, and upon the advice of counsel. For this reason, amendments are only permissible in cases where it is deserving. This case is not such one.

Conclusion:

This application is therefore denied. Costs are awarded to the Respondent.



Jeanne Rwakakooko
JUDGE
29/06/2022

This Ruling was delivered electronically on the 1st day of July, 2022