

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 773 OF 2021
(Arising from Civil Suit No.243 of 2017)**

GULBERG HIDES & SKINS (U) LTD APPLICANT

VERSUS

BANK OF AFRICA (U) LIMITED RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by way of Chamber Summons under section 98 of the Civil Procedure Act Cap 71 and Order 6 rules 19 and 31 of the Civil Procedure Rules SI 71-1 (“CPR”) for orders that:

- a) Leave be granted to the Applicant to amend its Plaintiff
- b) Costs in the application be in the cause

Background

The Applicant instituted the main suit against the Defendants on 3rd April 2017 for recovery of **USD 151,716 (One Hundred and Fifty-One Thousand Seven Hundred and Sixteen United States Dollars)** and also sought an Order for the return of title deeds for land comprised in Block 378 Plot 325 at Katale Seguku (“the land at Seguku”) and Plot 116 Block 90 Mawokota-Mutuba Mengo District (“the land at Mawokota”) be returned to it. These properties had been pledged as collateral security in a loan transaction.

The crux of the Applicant’s claim against the Respondent is that it operated a United States Dollar Account no. 01146530015 and a Uganda Shillings account No. 01146530002 with the Applicant/ Counterclaimant Bank and that the Applicant/ Counterclaimant Bank had released a fake statement to it with false entries on the account which surpassed the sum of USD 151,716.



The Respondent denied the Applicant's allegations in its Written Statement of Defence and further counterclaimed to recover a sum of **USD 71,789 (Seventy-One Thousand, Seven Hundred and Eighty-Nine United States Dollars)** from the Respondents as money due and owing to it under a number of credit facilities advanced to the Respondents plus interest, general damages and costs of the suit. The Respondent has since also been granted leave to amend the Counterclaim to include **UGX 477,000,000 (Four Hundred and Seventy-Seven Million Uganda Shillings)** which was paid to one Mr. Beyendeza Edward on 16th December 2020 and 5th January 2021 following the High Court's Judgement in Civil Suit No.642 of 2014 where it was ordered that Mr. Beyendeza be refunded the money he had paid to the Respondent under what was found to be an illegal mortgage transaction with respect to the land comprised in Block 378 Plot 325 at Katale Seguku.

The Applicant now seeks to make the following amendments to the Plaintiff;

- a) To amend the Plaintiff by withdrawing the claim for the land at Seguku in light of the above turn of events.
- b) To amend the Plaintiff to include a prayer that the alleged sale of the land at Mawokota be cancelled or in the alternative that the value of the property be refunded to it in light of the fact that the Respondent admitted to disposing of the land (under **paragraph 3(i)** in the Respondent's Counterclaim).
- c) To amend the prayers in the Plaintiff to include UGX 180,000,000/= (One Hundred and Eighty Million Uganda Shillings) as money it claims was arbitrarily transferred from its account under paragraph 6 in the Plaintiff.
- d) To amend the Plaintiff to include a claim for USD 20,000 (Twenty Thousand United States Dollars) as money it alleges was illegally transferred from its account on 30th March 2010.
- e) To amend the Plaintiff to include a claim for USD 14,800 (Fourteen Thousand Eight Hundred United States Dollars) as money it alleges was illegally transferred from its account on 11th May 2009.
- f) To amend the Plaintiff to include a claim for UGX 10,000,000/= (Ten Million Uganda Shillings) as money it alleges was illegally withdrawn from his account on an undisclosed date using counter leave No.091597.

The Respondent opposed this Application by filing an Affidavit in Reply deposed by Ms. Eva Nabadda. It is unclear from reading the Affidavit what the deponent's proximity to the Respondent is other than the fact that she is an Advocate who claims to be "well conversant with the matters relating to this Application". In any event, in **paragraph 7** of her Affidavit, the Respondent's deponent avers that



the proposed contested sale of the land at Mawokota is barred by law as it will constitute an introduction of a new cause of action and change the subject matter of the suit and in **paragraph 8** she avers that the validity of the sale can only be resolved in a separate suit with the purchaser of the property as a party and not through the amendment of the present suit where the purchaser is not a party.

She then contends in **paragraphs 9 – 14** of her Affidavit that all the amendments sought by the Applicant are unnecessary and made malafide intended to defeat the interest of justice and to delay the disposal of the Respondent's counterclaim. Her contention is that some of the proposed amendments are unnecessary because they are already covered in various paragraphs in the Plaint. She also argued that the USD 14,800 sought in the amendment is hinged on unauthentic bank statements which were not signed by the Respondent. She, therefore, prayed that in the interests of justice the Applicant's application be struck out.

Representation

At the hearing on 18th March 2022, the Applicant was represented by Kateregga Ronald but neither the Respondent nor the Respondent's counsel was present in Court.

The Parties were directed to file submissions and an Order was extracted on 22nd March 2022 with the said directions. The submissions were duly filed which I have read and considered in making this Ruling.

Issues for Determination

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

Resolution

Issue: Whether the Applicant should be granted leave to amend the Plaint 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 the amendment of pleadings is to enable the parties to alter their pleadings to determine the true substantive merits of the case, having regard to substance rather than form. Sometimes amendment will be ordered to rectify an error that should have been known to



the party at the time of filing his or her pleadings, other times amendment is allowed if, during the course of proceedings before judgement is issued, new and further developments happen in a matter that necessitate amending the original pleadings which were filed.

In deciding whether or not to grant an application to amend pleadings, **Article 126(2)(e)** of the **Constitution of the Republic of Uganda 1995 (As amended)** has to be borne in mind as a starting point, the article 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.

It is in light of the foregoing principle that **section 100** of the **Civil Procedure Act Cap. 71** 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.”

Notwithstanding the above, it should be noted that the court cannot amend pleadings where to do so would be tantamount to exonerating a party from complying with statutory provisions (see ***Biiso v Tibamwenda [1991] HCB 92***). It is therefore a balancing act for the Courts to exercise due caution, even in granting amendments, to see that we do not promote a culture where parties are nonchalant to the relevant rules and procedures concerning the drafting and filing of pleadings.

Having said that, as a general rule, 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 relevant party’s 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 aside from the foregoing, 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 (see ***Nsereko v Taibu Lubega [1982] HCB 51***) because such amendment, even when inconveniencing, can always be paid for by the offending party through costs.

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.

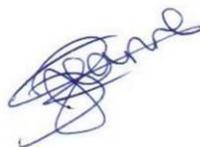
The Supreme Court in **Gasco Transport Services Limited v Martin Adala Obene SCCA 4 OF 1994 [1994] VI KALR 5** laid down the following principles which govern the exercise of discretion in allowing amendments:

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. 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 judgement as long as allowing the amendment shall not prejudice the other party and 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 the present case, the Applicant seeks leave to amend the Plaintiff because firstly such that it reflects the changes and developments that have occurred since the suit was filed with respect to the Seguku property, secondly to make its claim towards the Mawokota property more explicit in light of the fact that, since filing



the suit, the property has since been sold (and therefore its earlier claim seeking a return of the certificate of title may be rendered redundant), thirdly the Applicant is seeking to a) clarify the basis of some of the monetary claims it had already made and b) include new monetary claims which were not within its knowledge at the time of filing the suit.

To support this the Applicant attached a number of bank statements to support his claim with respect to the USD 20,000, the USD 14,800 (which bank statements are being challenged by the Respondent), and the UGX 180,000,000/=, with respect to the UGX 10,000,000 reference is made to a counter leaf No.091597 but a copy of the same was not filed in court despite being referred to in both the Affidavit in Support of this application and the Proposed Amended Plaintiff. All in all, I can see, looking at the Proposed Amended Plaintiff that there are a number of changes the Applicant is seeking to make to the Plaintiff that were not included or ought to be removed from the Plaintiff that was filed in 2017.

In response to this, the Respondent had argued that most of the sought amendments are inconsequential because the original Plaintiff makes reference to them either directly or indirectly, and that (more fundamentally) the proposed amendment to challenge the sale of the land at Mawokota would introduce a new cause of action (that is fraud and/ or illegality) which will change the subject matter of the suit.

I do not necessarily agree with counsel for the Respondent on this point in light of the fact that looking at the original Plaintiff, fraud has already been pleaded by the Applicant with respect to the money that was debited from the Plaintiff's account under paragraph 4(e) of the Plaintiff. I note that the changes being sought in the Proposed Amended Plaintiff with respect to the Mawokota property could not have been pleaded at the time of filing the original Plaintiff on 3rd April 2017, because the completed sale of the property had not yet been brought to the attention of the Applicant.

I disagree with the Respondent's submissions that the sale and purchase of the mortgaged property can only be resolved in a separate suit with the purchaser of the property as a party because a) the sale of that property was as a direct consequence of what the Respondent avers was a default in repaying the loan by the Applicant (which loan, repayment, and the events that transpired therefrom are the subject matter of this suit), and b) if it is found to be necessary to add the purchaser of the Mawokota land herein this could always be ordered or directed, and c) in the event that the sale is to be found to have been illegal the



Applicant could be able to claim against the Respondent directly and recover the proceeds from the sale without pursuing an action against the purchaser.

I, therefore, do not see how this amendment specifically is fatal or barred by law in light of my foregoing analysis.

When it comes to amending the Plaint to provide for all the amounts being alleged by the Applicant to have been illegally transferred or removed from its account, it is important that a) all of these impugned amounts are clearly provided for and b) the basis for which the amounts are challenged is also clearly provided for.

As it stands, whilst I can see the proposed changes that have been made in the Proposed Amended Plaint, the further amounts sought are not clearly brought out, it is also not clear what impact (if any) this has on the total amounts being sought in the main suit – as no change has been made to this figure (USD 151,762). the Applicant ought to have included the amounts that are now being claimed as additions under the table providing for the “*Particulars of Moneys Fraudulently Debited from the Plaintiff’s Account*” whilst detailing the basis on which each of the sums are claimed and accompanying evidence to support the assertions made in the preceding paragraphs. It is unclear in reading the Plaint whether these amounts are separate from the USD 151,716, if so then why does the Plaint still read that the Plaintiff is seeking to recover “a total amount of US\$ 151,716” when clearly this is not the total and there are other additional amounts being sought?

The point of my comments above is to caution the Applicant that whilst it may be granted leave to amend the Plaint to provide for the proposed changes, the new Plaint to be filed ought to clearly reflect the exact amounts sought, the basis for each amount sought, and what effect this has (if any) on the total amounts being claimed (the USD 151,716). Further requests for amendment thereafter may constitute an abuse of court process in light of the fact that this suit was instituted in 2017 and the Applicant has had more than enough time to gather its evidence and clearly establish its case and the basis of its claim against the Respondent. This now needs to clearly be reflected in the Pleadings filed by both sides.

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 should be granted leave to amend the Plain in Civil Suit No. 243 of 2017. I thus resolve the issue of this application in the affirmative.

Orders



On 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. 243 of 2017.
2. The Applicant/ Plaintiff is hereby directed to file and serve its Amended Plaintiff within Seven (7) days from the date of this Ruling.
3. Once served, the Respondent/ Defendant may file its Amended Written Statement of Defence to the Amended Plaintiff and Amended Counterclaim within fourteen (14) days from the date of this Ruling.
4. After which the Applicant/ Plaintiff shall have Seven (7) days to file its Reply to the Amended Written Statement of Defence and Amended Counterclaim (if any).
5. The costs of this application shall abide by the outcome of the main suit.

It is so ordered.



Jeanne Rwakakooko

JUDGE

22/06/2022

This Ruling was delivered on the 29th day of June, 2022

Received & used
by Kateerege Rendo


Received by Ndawo Hala 29/6/2022

