THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 580 OF 2021
(Arising from Civil Suit No. 898 of 2020)

1. MASTER MANAGERS AND TRADERS LIMITED]
2. AMIN ALI MUHAMMAD]..... APPLICANTS

VERSUS

MADATALLY ALLIBHAI POPAT ..... RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Cap 71, Section 33 of the Judicature Act, Cap 13, Order 6 Rules 29 & 30, and Order 52 Rules 1 & 3 of the Civil Procedure Rules, SI 71-1 for orders that:

1. The plaint be amended to include, and or to clearly bring out particulars of fraud against the Respondent.
2. The 2nd Applicant be added as a party to Civil Suit No. 898 of 2020.
3. Costs of the application.

Background

The 1st Applicant holds a 99-year-old lease from 2014 on Kibuga Block 9 Plot 712, land at Makerere, Kagugube. The lease is registered as LRV KCCA 8 Folio 7. This is what shall in this ruling be referred to as the suit property. The Applicants partnered/co-invested with the Respondent to develop the suit property- that is they undertook a construction project together. They agreed in a Memorandum of Understanding dated 30th April, 2019 that the respondent would take over the 1st Applicant's debt with ABC Bank Limited to the tune of USD 120,000. A land sale agreement between the 1st Applicant and Respondent for the suit property was signed. The Applicants contend that this was upon the understanding that it was security for the debt undertaken by the Respondent and ownership would transfer back in the agreed upon percentages.

Ashifa Madatally
July 29, 2022 @ 15:38

The 2nd Applicant and Respondent agreed in the Memorandum of Understanding to share the suit property in a ratio of 34% to 66% respectively.

Upon conclusion of the project, the Respondent claimed ownership of the suit property. The Applicants contend that they directed their former lawyers to file a suit against the Respondent, but the lawyers only filed the suit in the 1st Applicant's name. The Applicants claim that the Respondent took advantage of his friendship and trust with the 2nd Applicant and tricked the 2nd Applicant into signing vague Memorandum of Understanding. The Applicants claim that the Respondent's actions of fraud need to be more particularized in the plaint as well. The 2nd Applicant also claims that it is important that he joins the main suit as a co-Plaintiff to enable the determination of all issues in dispute between the parties.

The Respondent opposes addition of the 2nd Applicant as a Plaintiff in Civil Suit 898 of 2020 (the main suit) on grounds that it will convert the character and nature of the Plaintiff's claim as it exists. That it seeks to substitute the existing cause of action with a new and independent cause of action based on fraud. The Respondent also pointed out that the 1st and 2nd Applicants are two separate and distinct persons with separate claims based on two different documents. Also that the amendments proposed by the Applicants are not based on new information that the Applicants did not have at the time of filing the main suit. Lastly, that the application was belatedly filed, and is therefore an abuse of court process.

Representation

At the hearing, the Applicant was represented by Allan Bariyo, while Paul Kuteesa appeared for the Respondent. The parties filed written submissions.

Resolution

Issue: Whether the Applicants should be granted leave to amend the plaint in Civil Suit No. 898 of 2020.

The Applicants seek leave to amend the plaint in the main suit to give effect to two changes. First, they wish to particularize the fraud allegedly claimed in the plaint, and secondly to add the 2nd Applicant as a Plaintiff in the main suit. Concerning the prayer to include and clearly bring out the particulars of fraud against the Respondent, Order 6 Rule 19 of the Civil Procedure Rules provides:

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 above provision is clear on what needs to be put into consideration before such an application may be granted. The Court of Appeal in **Eastern Bakery –v- Castelino [1958] 1 EA 461** further expounded upon this stating:

> "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 main consideration is that no prejudice is caused to the Respondent. Counsel for the Applicants submitted that the particulars of fraud in the plaint were left out owing to a mistake by their previous lawyers. He prayed on the authority of Article 126(2)(e) of the Constitution of the Republic of Uganda, 1995 and **Horizon Coaches –v- Edward Rurangaranga & Another, SCCA No. 18 of 2009** that mistake of counsel should not be visited upon the litigant. The Applicants' counsel also submitted that this application was brought in a timely manner, after the new advocates came on board, and before the application was set down for hearing. Also that the Plaintiff merely seeks to particularize the fraud claimed in the plaint, and add prayers so as to have all issues in controversy determined. And lastly, counsel submitted that these sought amendments still accrue out of the same contract and transaction.

Counsel for the Respondent however submitted that this application seeks to introduced a new claim. He submitted that the application is to amend the plaint to include a claim for fraud and particularize the fraud, and not just particularizing the fraud which would introduce a new and fresh cause of action, and substantially change the suit. See also paragraphs 3(a) & (b) of the affidavit in reply. Counsel relied on **Lubowa Gyaviira & Ors –v- Makerere University, Misc. Application No. 471 of 2009** for the position that court will not allow an amendment which constitutes a distinctive cause of action.

The 1st Applicant's claim against the Respondent in the main suit as it stands is for a declaration that it is a co-owner of the suit property, an order that the 1st Applicant's name be entered onto the register of titles as co-owner of the suit property, a declaration that the sale agreement between the 1st Applicant and Respondent dated 26th April, 2019 is null and void, an order for vacant possession, a permanent injunction, general damages, and costs of the suit. See paragraph 3 of the plaint. Paragraph 3 of the proposed amended plaint attached to the 2nd Applicant's affidavit in support introduces a new claim, that is for "a declaration that the defendant [Respondent] grabbed the Plaintiff's share/house units comprised in LRVV KCCA 8 Folio 7, Kibuga Block 9 Plot 712, at Kagugube." The amended plaint also introduces a new alternative prayer for the cancellation of the land title from the Defendant/Respondent's name.

From reading the original plaint alongside the proposed amendment, it is clear that there was no original claim for fraud in the main suit. The claim was for recovery of land, nullification of the sale agreement and other related reliefs. The facts leading to the cause of action as stated in the plaint also do not make a claim for fraud. Therefore, this court, cannot allow an amendment that would introduce a new cause of action different from the one in the original plaint.

The prayer for addition of fraud as a cause of action and particularize it fails. The claimed failure or mistake by the Applicants' previous lawyers to include a cause of action has not been proved. Counsel for the Applicants seeks to ask this court to not have undue regard to a technicality, the technicality being the absence of fraud as a cause of action in the original plaint. He intimates that this absence of fraud as a cause of action was as a mistake of counsel, and that in fact the Applicants forwarded to their former lawyers all information necessary to make a claim for fraud.

However, Article 126(2)(e) of the Constitution of the Republic of Uganda was not made to act as a shield in all circumstances. It states:

126. Exercise of judicial power.

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—

(a) .....

(b) .....

(c) .....

(d) .....

(e) substantive justice shall be administered without undue regard to technicalities.

The application of Article 126(2)(e) of the Constitution is subject to the law. As was held by the Supreme Court in **Kasirye Byaruhanga & Co Advocates –v- Uganda Development Bank, Supreme Court Civil App No. 2 of 1997**;

> "We have underlined the words 'subject to the law'. This means that clause (2) is no license for ignoring existing law. A litigant who relies on the provisions of Article 126 (2) (e) must satisfy the Court that in the circumstances of the particular case before the Court it was not desirable to pay undue regard to a relevant technicality. Article 126 (2) (e) is not a magic wand in the hands of defaulting litigants." (Underlined for emphasis).

In the past courts have applied the above provision and excused mistake of counsel from having an effect on the litigant in cases where the mistake by counsel was demonstrable. It has typically been in cases where an advocate overlooked or misinterpreted his or her obligation to his or her client, and the client was also not guilty of dilatory conduct. See **Banco Arabe Espanol –v- Bank of Uganda, SCCA No. 8 of 1998.** There is no evidence of such behavior. In fact, the 2nd Applicant in paragraphs 16 & 18 of his affidavit in support of the application states the mistake of the former lawyers to have been filing a suit only in the 1st Applicant's name. He does not allege mistake of counsel in relation to not making a claim for fraud. The defense of mistake of counsel not being visited on the litigant has been applied in cases where the interests of justice merit its application. This not such a case.

Next is the question of whether the 2nd Applicant should be added as a plaintiff to the main suit. In this regard, counsel for the Applicants pointed this court to Order 1 Rules 1, 10 & 13, Order 2 Rule 4, and Order 2 Rule 3 of the Civil Procedure Rules. He submitted that these provisions permit for joinder of parties

so as to avoid a multiplicity of suits. Counsel argued that the Respondent is also liable to the 2nd Applicant for damages as well. This is because the Respondent hoodwinked the 2nd Applicant into signing a vague document with the intention of cheating him thereby committing a tort.

Counsel for the Respondent submitted that there is no merit for this addition. He referenced the principles on addition of parties in **Mukuye & 73 Ors –v- Madhvani Group Ltd, Misc. Application No. 821 of 2013.** That there is no evidence available to the 2nd Applicant that cannot be brought in the matter. That the 2nd Applicant has never been the registered proprietor of the suit property and neither was he a party to the sale agreement. He therefore, according to Mr. Paul Kuteesa, has no interest in the main suit.

Order 1 Rule 1 of the Civil Procedure Rules provides:

> All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if those persons brought separate suits, any common question of law or fact would arise.

The objective of joinder of parties to suit is to avoid a multiplicity of suits. It should be noted that joinder of a party to a suit is done at the court's discretion.

The Applicants' case is that they intended to bring the main suit as co-Plaintiffs. These same instructions were passed on to their lawyers at the time. However, the main suit was instituted only in the 1st Applicant's name. See paragraphs 16 & 18 of the affidavit in support. The Respondent on the other hand swore in paragraph 3(d) of his affidavit in reply that the 1st and 2nd Applicants are two separate and distinct persons with separate claims that are based on two separate and distinct documents and as such causes of action.

The claim in the main suit is dependent on a transaction where the Applicants partnered/co-invested with the Respondent to develop the suit property by constructing housing units on the property. That transaction is based on a series of documents, including the Memorandum of Understanding dated 30th April, 2019 between the 2nd Applicant (as majority shareholder in the 1st Applicant company) and Respondent, and the Sales Agreement dated 26th April, 2019 between the 1st Applicant and the Respondent. It is in the Memorandum of Understanding that provides for co-ownership of the suit property upon completion of the project with the 2nd Applicant taking 34% (equivalent of two houses/duplexes) and the Respondent 66% (equivalent of four houses/duplexes). See clause 5 of the Memorandum of Understanding. The 1st

Applicant/Plaintiff prays for vacant possession of two duplexes on the suit property, and an order for amendment of the register of titles to include the 1st Applicant as co-owner of the suit property.

I agree that indeed the 1st Applicant company and the 2nd Applicant are two distinct persons in law. It does not matter that the 2nd Applicant is the majority shareholder in the 1st Applicant company or that he even executed the sales agreement on behalf of the 1st Applicant. It is for that reason that an action based on the Memorandum of Understanding must be instituted by the 2nd Applicant. He is the second contracting party, and not the 1st Applicant company. Therefore, any order enforcing clause 5 of the Memorandum of Understanding has to be as against the contracting parties, that is the 2nd Applicant and Respondent

For that reason, this application is granted in part, and the 2nd Applicant is joined as a plaintiff to the main suit.

Conclusion

1. The prayer for amendment of the plaint to include, and or to clearly bring out the particulars of fraud against the Respondent is denied.
2. The 2nd Applicant is hereby added as a plaintiff to Civil Suit No 898 of 2020.
3. The Applicant are hereby ordered to file an amended plaint capturing the amendment permitted in (2) above within seven days from the date of this ruling.
4. Costs shall abide the outcome of the main suit.

I so order.

Jeanne Rwakakooko
JUDGE
29/07/2022

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