

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO. 238 OF 2021
ARISING FROM CIVIL SUIT NO. 355 OF 2017

1. PERFECT ROSES FARM LIMITED
2. HOPE KABIRISI LUBERENGA ::: APPLICANT

VERSUS

BANK OF AFRICA (U) LIMITED ::: RESPONDENT

(Before: Hon. Lady Justice Patricia Mutesi)

RULING

Introduction

This is a second application for leave to amend the Complaint in Civil Suit No. 355 of 2017 (“the main suit”). It was brought by chamber summons under Section 98 of the Civil Procedure Act and Order 6 rule 19 and Order 1 rules 1, 3 and 13 of the Civil Procedure Rules.

The brief background of this Application is that the 1st Applicant took out credit facilities from the Respondent totalling to UGX 460,000,000. These facilities were secured by 4 (four) plots of land. The 1st Applicant failed to repay the loans and the Respondent sold the security. The Applicant then filed the main suit challenging the manner in which the security was sold.

The Applicants’ first application for leave to amend the Complaint vide Miscellaneous Application No. 634 of 2018 was allowed by consent.

The Application

This application is supported by the affidavit of Godfrey Luberenga, a director in the 1st Applicant, in which he averred that since the filing of the main suit, the Respondent has fraudulently sold the security to third parties who are now the registered proprietors thereof. Therefore, the Application is intended to add the

new proprietors, plus all persons who were involved in the fraud, to the suit. Mr. Luberenga also filed a supplementary affidavit and an affidavit in rejoinder in support of the case.

The Respondent filed an Affidavit in reply sworn by Ms. Rebecca Cynthia Mutonyi, its Senior Legal Officer. Ms. Mutonyi stated that the application is defective, that the Respondent's disposal of the security was lawful, that this application is defective as it intends to introduce new causes of action and the Respondent will be prejudiced if the application is allowed.

Representation and hearing

At the hearing, the Applicants were represented by Senior Counsel Mr. John Mary Mugisha and Mr. Didas Muhinda of M/S Mugisha & Co. Advocates while the Respondent was represented by Mr. Isaac Walukaga of M/S MMAKS Advocates. The parties filed written submissions which I have duly considered.

Preliminary objections

In its affidavit in reply, the Respondent raised 5 preliminary objections to this Application. First, the Respondent argued that the 2nd Applicant has no cause of action against the Respondent. However the 2nd Applicant is already a plaintiff in the main suit and any objection to her cause(s) of action therein cannot preclude the consideration of the merits of this application.

Secondly, the Respondent averred that the supporting affidavit is fatally defective since it is signed by a person who is not mentioned in the body of the affidavit contrary to **Section 5(1)(a)** of the **Oaths Act Cap 19**. It is clear that in preparing that affidavit, the Applicants omitted to set out the full names, address and oath of the deponent before the body of the Affidavit. However, on the last page, it was expressly stated that the Affidavit was sworn by Mr. Luberenga at Kampala on 22nd February 2021 before a Commissioner for Oaths. Before the Respondent's affidavit in reply was filed, the Applicants recognized these anomalies and filed a supplementary affidavit to correct the anomaly.

In dealing with defective affidavits, the general trend for courts is to take a liberal approach which ensures that substantive justice is delivered without undue regard

to technicalities. Indeed, the filing of a subsequent affidavit before the hearing can cure the defects. Curable defects in the form of an affidavit, as opposed to those in its substance, cannot vitiate its validity (See **Article 126(2)(e) of the Constitution** and **Male H. Mbirizi K. Kiwanuka v The Attorney General, Supreme Court Miscellaneous Application No. 7 of 2018**). For this reason, this Court shall overlook the anomalies in the supporting affidavit in support since the last page thereof, which ought to be read with the remainder of the Affidavit, expressly contains the oath certified by the commissioner for oaths and a supplementary affidavit was also filed to cure the defects.

In its 3rd and 4th objections, the Respondent argued that the application offends Order 12 rule 3 of the Civil Procedure Rules and that the main suit abated by operation of law for failure to take out summons for directions as prescribed by the Civil Procedure Rules. However this court is *functus officio* on these objections, having overruled the same on 5th September 2022.

In the last objection, the Respondent averred that the Applicants' supplementary affidavit was filed without leave of Court and is therefore not properly before the Court. Under **Order 8 rule 18(2)** of the Civil Procedure Rules, leave to file subsequent proceedings is only required when pleadings are closed. In this case, the supplementary affidavit was filed before the pleadings were closed, and before the Respondent filed its Affidavit in reply. Accordingly, all the preliminary objections fail.

Determination of the merits of the Application.

Courts have the discretion to allow a party to a case 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 (see **Order 6 rule 19** of the Civil Procedure Rules). In **Mulwooza Brothers Ltd v N. Shah & Co. Ltd, SCCA No. 26 of 2010**, the Supreme Court quoted with approval, the case of **Eastern Bakery v Castelino (1958) EA 461** in which Sir Kenneth O'Connor stated that;

'... Amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side'

The court record reflects that by the time the Applicants' first application for amendment was filed, they had changed advocates. By the time this application was filed, the Applicants had again changed advocates. Therefore, the Court acknowledges that the Applicants' current advocates did not have the chance to incorporate the changes proposed in this Application into the original plaint or even into the 1st amended plaint. Paragraph 10 of the supplementary Affidavit also recounts several documents which were secured after the filing of the main suit and which the Applicants could not, in all reasonable diligence, have secured earlier.

In this Application, the Applicants seek leave to amend the plaint to add new defendants, to plead more detailed and better particulars of fraud, illegality and misrepresentation and to replace the values claimed for special damages, general damages and mesne profits. The Respondent has argued that these changes will change the plaint into one of a substantially different character. I have compared the original plaint to the 1st amended plaint and to the intended 2nd amended plaint. It is evident that the Applicants' claim initially included fraud, illegality and misrepresentation and the introduction of new and better particulars thereof will only perfect the claim.

This application also seeks leave to add new defendants to the main suit. **Order 1 rule 3** of the **Civil Procedure Rules** allows all persons against whom any right to relief in respect of the same act or transaction is alleged to exist to be joined in the same case as defendants.

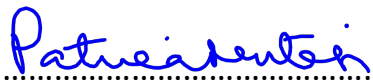
The Applicants clarified that they no longer intend to add M/S ENS Africa as a defendant. Benteyehun Haile, Maria Wanyana, Victoria Equipment Ltd and Kato Paul Katoogo are the transferees of the security. Their addition to the main suit will help the Court satisfy itself as to the propriety of the transfers. The Commissioner Land Registration is the statutory officer charged with the management of land registration in Uganda and could be the subject of consequential orders in the main suit. According to the draft 2nd amended plaint, Robert Kayira, Magidu Kintu and Bukenya Elly connived with the Respondent's former lawyers and bailiff to forge

bids to purchase the security. The bids were unsuccessful and I do not see any way in which they would be affected by the dispute in the main suit.

Furthermore, I agree with the Applicants that the bailiff who conducted the sale can also be added as a defendant. **Section 46(2) of the Judicature Act** only protects bailiffs from civil liability while they lawfully execute court orders and warrants. The provision is silent on situations in which bailiffs are hired to execute instructions from private entities like the Respondent.

In conclusion I find that the intended amendments will enable the Court to conclusively deal with all the matters in controversy in the main suit and will not prejudice the Respondent in any way. To the contrary, the addition of the subsequent transferees of the security may help corroborate the Respondent's account of the disposal of the security. Consequently, I make the following orders:

- i. The Applicant shall file and serve its amended Plaintiff as proposed in the draft 2nd amended plaintiff, save for the addition of M/S ENS Africa, Robert Kayira, Magidu Kintu and Bukenya Elly as defendants, within 7 (seven) days from the date of this ruling.
- ii. The costs of this Application shall abide by the outcome of the main suit.


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Patricia Mutesi

JUDGE

(28/09/23)