

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION NO 2427 OF 2023

(Arising from Civil Suit No.801 of 2021)

BANG CHENG INVESTMENT CO.LTD=====APPLICANT

VERSUS

ROKO CONSTRUCTION CO.LTD=====RESPONDENT

Before Hon Lady Justice Patricia Kahigi Asimwe

Ruling

Introduction

1. This Application was brought under Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71, Order 6 Rule 19 & 31, and Order 1 Rule 13 of the Civil Procedure Rules.
2. The Application was brought by way of Chamber Summons seeking orders that leave be granted to the Applicant to amend its Complaint in Civil Suit No 801 of 2021 and costs of the Application be in the cause.
3. The grounds of the Application are laid down in the Affidavit in Support deposed by Li Kang Yuan, Director of the Applicant. He stated that:

- a) The Applicant's Advocates informed him that at the time of filing the suit, they made a typographical mistake in the name of the Respondent; the amendment seeks to clear the mistake.
- b) The Defendant/Respondent was mistakenly typed as Roko Construction Co. Ltd instead of Roko Construction Limited in the plaint.
- c) The typographical mistake and errors sought to be rectified in Civil Suit No.801 of 2021 in the amended Plaint arise from a mistake of the Applicant's Advocate
- d) The proposed amendments are necessary to determine the real questions in controversy in the suit.
- e) The proposed amendment will not prejudice the Respondent/ Defendant.

4. The Respondent in an Affidavit in Reply deponed by Mark Koehler, the Director of the Respondent stated as follows:

- a) The Respondent shall raise a preliminary objection that the application is barred by law and ought to be dismissed because the Respondent is a non-existent party and thus cannot be sued.
- b) The Respondent shall further raise a preliminary objection that the Application is barred by law and ought to be dismissed because the Applicant has no cause of action against the Respondent.
- c) That this Application is barred by law and ought to be dismissed because it was brought under the wrong law.

- d) The party served with the Court process disputes the allegations therein as the Respondent is a non-existent party.
- e) There is no typographical mistake, the party that was sued is non-existent, and therefore the suit and the application should fail.
- f) The annexures attached all indicate dealings "with Roko and not the party served with Court process".
- g) The amendment will not help Court determine the real issue in controversy because the party sued is non-existent.
- h) The amendment shall prejudice the Applicant because it shall be subject to unnecessary costs to the lawyers to defend the suit the subject matter of which it is not a party.
- i) The allegations also relate to a non-existent party and a non-existent party cannot admit to anything as that would be an illegality that cannot be enforced by court.

5. In Rejoinder the Applicant through an Affidavit deponed by Li Kang Yuan, the Director of the Applicant stated that:

- a) The Application is not barred by law since the parties have been exchanging documents pertaining to the contract to wit local purchase orders, cheques, direct account debits, receipts, delivery notes, and demand notice which the Respondent received without claiming that it is not party.

- b) The Respondent acknowledges in its Written Statement of Defence making payments to the Applicant.
- c) The Respondent shall not be prejudiced and seeks to use Court to circumvent payment of the outstanding balance.
- d) The attached receipts on the Respondent's Written Statement of Defence issued by the Applicant to the Respondent were issued in the names of Roko Construction Co. Ltd, Roko Construction Company Limited, and Roko Construction Limited; all were issued the Respondent acknowledged receipt as proof of payments without objection to the bona fide mistake in the name.

Representation

6. The Applicant was represented by M/S Galac Advocates, and the Respondent was represented by M/S Newmark Advocates.

Issues

7. The issues arising from the pleadings and submissions of the parties are as follows:

I - Whether the application was brought under the wrong law

II - Whether the application brought against a non-existent party can be cured.

III - Whether the Applicant should be granted leave to amend the pleadings.

Resolution

Issue 1: Whether the application was brought under the wrong law

8. Under Order 6 Rule 9 of the Civil Procedure Rules it is provided as follows:

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. [Emphasis added]

9. A pleading is defined in **The Black's Law Dictionary 8th Edition** at page 3658 as a formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defences. The same dictionary at page 252 also defines "amend" as to make right; to correct or rectify, to fix a clerical error.
10. In this case, the Application was made by chamber summons under Order 6 Rules 19 and 31. One of the grounds of the application is that there was a clerical or typing error in the name of the respondent on the plaint.
11. Court finds that this being an application for amendment of a plaint it was not brought under the wrong law. This issue is therefore answered in the negative.

Issue 2: Whether an Application is brought against a non-existent party can be cured

12. Counsel for the Respondent submitted that the Applicant sued a non-existent party. Counsel relied on the case of *Wasswa Primo v Moulders (U) limited* HCM No 685 of 2017 where Court cited the case of *Fort Hall Bakery Supply Company v Fredrick Muigai Wangoe* (1959) EA 474 where it was held that a non-existent person cannot sue and the anomaly cannot be cured under Order 1 Rule 10.”

13. In the case of **AC Yafeng Construction Limited v The Registered Trustees of Living Word Assembly Church MA No 0001 of 2021** Mubiru J held as follows:

It is trite that an unincorporated entity that does not exist in Uganda as a body corporate is incapable of maintaining a suit ... and where a suit is filed by a non-existent party, such an error cannot be cured by amendment, ... On the other hand, an amendment may be allowed in case of a misnomer. While one involves a change in identity due to inability to identify the correct person, the other arises when the person is certain but he/she is given an incorrect name.

14. In the case of **Trust Ventures Ltd v Powerfoam (U) Ltd Civil Suit No 669 of 2017**, the Plaintiff was wrongly named and Counsel for the Defendant submitted that the Plaintiff is a non-existent party. Court defined a misnomer as follows:

A misnomer refers to a mistake in naming a person, place, or thing in a legal instrument which can be corrected by an amendment to the pleadings. It is also a well-established principle that a misnomer can under certain circumstances be rectified by amendment replacing the name appearing on

the Plaintiff or Written Statement of Defence with what parties believe to be the right litigant....Such a correction of name however is only possible where the Plaintiff or Written Statement speaks the truth and the misnomer was done in good faith.

15. Furthermore, in the case of **AC Yafeng Construction Limited v Registered Trustees of Living Word Assembly Church and Anor** Mubiru J held as follows:

The misnomer principle is the process by which a court determines the attribution of a name. ... Misnomer arises when the author merely misnames the correct person as opposed to not being unable to identify the correct person.

16. The Learned Judge further held that:

Generally, expressions of names should be construed objectively to ascertain whether a reasonable person, with all of the background knowledge that would reasonably have been available to the author, would attribute the name to the individual to whom it is sought to be attributed. The relevant question is; to which individual would a reasonable person attribute the name? The attribution must generally be construed by reference to the known background facts. The test is whether or not a reasonable person reading the name, in all the circumstances of the case, and looking at it as a whole, may say to himself or herself, "of course, it must mean so and so, but they have got his or her name wrong."

17. In the case of **J. B.Kholi & Others v Bachulal Popatlal [1964] EA 219 at page 228 Crabbe J** held that:

The question is not whom the plaintiff intended to sue but whether a reasonable man reading all the documents in the proceedings before the Resident magistrate having regard to all the circumstances would entertain no doubt that the named defendants were intended to be sued by the plaintiff."

18. The learned judge cited the case of **Davies v Elsby Brothers Ltd [1960] 3 ALLER** where it was held that "The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole he would say to himself; 'Of course it must mean me', but they have got my name wrong, then there is a case of a mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document if whether they mean me or not and I shall have to make inquiries' then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer."
19. From the above authorities, Court finds that given the circumstances of the case, a reasonable person would come to the conclusion that the drafters of the court documents in Civil Suit No. 801 of 2023 intended to refer to Roko Construction Limited. It should be noted that the Respondent attached to their WSD as proof of payment receipts some of which are addressed to Roko Construction Co Ltd, Roko Construction Limited. Therefore, on receipt of the pleadings, the Respondent should have concluded that the Plaintiff intended to name Roko Construction Limited as the Defendant and not Roko Construction Co. Ltd.

20. Court therefore finds that a suit brought against a non-existent party can be cured by amendment in cases of a misnomer. In this case court finds that there was a misnomer which can be cured by amendment.

Issue 3: Whether the applicant should be granted leave to amend the pleadings.

21. The principles for granting leave to amend proceedings as stated in the cases of **Gasu Transport Services (Bus) Ltd V. Obene SCCA No.4 of 1994 [1990-1994] 1 EA 88**, **Eastern Bakery V Castelino 1958 1 EA 461** and **Mulowooza & Brothers Ltd vs Shah & Co. Ltd, SCCA No. 26 of 2010** are as follows:

- a) There is no injustice caused to the other party and if there is it can be compensated by costs.
- b) Amendments are allowed by courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities.
- c) The amendment would not prejudice the rights of the opposite party.
- d) The application should not be malafide.
- e) Multiplicity of proceedings should be avoided.
- f) A court will not allow an amendment that enables the substitution of one distinct cause of action for another or changes the subject matter of the suit into one of a substantially different character.

22. In the present case, court finds that the amendment will not cause an injustice to the Respondent, it will not prejudice the Respondent and will avoid a multiplicity of suits. In addition, the amendment will facilitate the determination of the real issues in controversy which is whether Roko Construction Limited owes the Applicant the decretal sums.

23. In the circumstances, this Application is granted. Costs shall abide by the main cause.

Dated this 11th day of January 2024



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Patricia Kahigi Asiimwe

Judge

Delivered on ECCMIS