

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS APPLICATION NO. 1035 OF 2023
[ARISING FROM CIVIL SUIT NO. 506 OF 2022]

ROYAL INSTITUTE NJERU LIMITED

] APPLICANT

VERSUS

POST BANK UGANDA LIMITED

] RESPONDENT

Before: Hon. Justice Ocaya Thomas O.R

RULING

Background

The Applicant brought this application under the provisions of Order 6 rules 19 and 31 of the Civil Procedure Rules SI 71-1. The application seeks the following orders;

- a) Leave be granted to the applicant/defendant to amend the defense in civil suit No. 506 of 2022.
- b) Costs of the application be provided for.

This application is supported by the affidavit of the Nalumansi Clemmy and the grounds upon which it is premised are that some facts were left out by the Applicant's former attorneys. That the amendment will not prejudice the Respondent in any way and; further that the amendment is necessary to help the Court properly determine the issues in controversy.

The crux of the Applicant's application lies in paragraphs 2, 3, 4, and 5 of her affidavit which I shall labor to reproduce here for ease of reference;

1. That when it was instructing my former lawyers of M/S Ayebare Makorogo & Co. Advocates, it explained to them in detail how the plaintiff's acts had



5 affected my school business to the point of collapse but they did not include it in the Applicant's defence.

2. That the Defendant was not aware of some facts at the time of filing the defense which have now just been discovered and they are vital to the determination of the main suit.

10 3. That at the time of filing the defense, its former lawyer's M/S Ayebare Makorogo & Co. Advocates mistakenly omitted many facts that it finds important and vital to my defense in civil suit No. 506 of 2022 and yet it explained to them everything in detail.

15 4. That the amendment in the defense solely seeks to clarify on a number of allegations made in the plaint by the plaintiff against me as a defendant, add facts relating to the defense, and introduce a point of law.

The Applicant's affidavit in support is opposed by an affidavit in reply sworn by Rhona Nsiima Kiiza, the Respondent's Manager Credit Monitoring & Recoveries. It is deposed
20 that the Applicant's affidavit is full of deliberate falsehoods and ought to be dismissed with costs.

It is also deposed that the Applicant's application is made malafide with the intention of delaying the trial and defeating the Respondent's claim.

25 The brief facts are that the Respondent/Plaintiff brought Civil suit no. 506 of 2022 against the Applicant/Plaintiff for specific performance of the contract of sale and an order compelling the Defendant to pay the balance purchase price of UGX 143,000,000/=. In the alternative, an order to repudiate the contract, mesne profit, an eviction order, and vacant
30 possession.

The parties entered into an agreement for sale of a property which the Respondent/Plaintiff claims that the Applicant/Defendant breached by not completing the payment thereon and is still in possession of the property hence the main suit from
35 which this application arises.



5 **Representation**

The Applicant was represented by M/S K. Christopher Advocates & Solicitors and the Respondent was represented by the Legal Department of Post Bank Uganda Limited.

Evidence and Submissions

- 10 The Applicant led evidence by way of an affidavit deposed by Nalumanso Clemy, the Director of the Applicant institution and the Respondent equally led evidence by way of an affidavit in Reply deposed by Rhona Nsiima Kiiza, the Manager Credit Monitoring & Recoveries of the Respondent bank.
- 15 Both parties made written submissions written submissions in support of their respective cases which I have read but I have not seen the need to reiterate the same below but will refer to them where appropriate in the decision.

Decision

- 20 The Applicant prayed for leave for the court to grant the Applicant to amend the defense in Civil Suit No. 506 of 2022.

The Counsel for the Applicant submitted that their former lawyers of Ayebazibwe Makorogo Advocates in paragraph 5 of the Written statement of defense mistakenly and
25 falsely admitted that the Applicant made a bid as opposed to the Applicant's narration to them. That the Applicant has never made a bid to the Respondent regarding the purchase of the suit property.

Further that the former lawyers did not address this honorable court on the facts of how
30 the Applicant came to occupy the suit property and the controversies in the ownership of the suit property and the loan which all constitute the aorta of Civil Suit No. 506 of 2022.

The Respondent submitted that the affidavit in support where the Applicant denies the Respondent's loan transaction with Raj Investments Limited and alleged to have gained
35 possession of the suit land by permission from Baguma James and denies ever making a bid to buy the suit property from the Respondent and it claims the offers documents are foreign are falsehoods.



5 **Order 6 Rule 19** provides thus:

“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.”

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Various decisions of the courts have established the principles that guide the grant of leave to amend pleadings and these are:

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(a) Amendments are allowed by the courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities.

(b) amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs;

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(c) the court will not refuse to allow an amendment simply because it introduces a new cause of action provided it would not change the suit into one of a substantially different character

(d) The amendment should not occasion injustice to the opposite party incapable of atonement by damages.

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(e) It should be granted if it is in the interests of justice and to avoid multiplicity of suits

(f) The application should be made in good faith.

(g) No amendments should be allowed where it is expressly or impliedly prohibited by any law.

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(h) The court shall not exercise its discretion to allow an amendment which has the effect of substituting one distinctive cause of action for another.

See **Molowoza Brothers Ltd v N. Shah & Co. Ltd SCCA No.26 of 2010, Gaso Transport Services (Bus) Ltd v Obene (1990-1994) EA 88, Eastern Bakery v Castelinov(1958) E.A 451.**

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Is there a departure from previous pleadings?

In the original plaint, the Applicant's position is that:

(a) The Respondent is not entitled to the reliefs sought



- 5 (b) The Applicant was unaware of the existence of the mortgage when the Respondent approached it with an eviction notice
- (c) No contract exists between the Applicant and Respondent
- (d) The Applicant did not cause any loss to the Respondent
- 10 In the draft amended plaint, the following key averments exist
- (a) The Respondent has no cause of action against the Applicant
- (b) There has never ever been a contract between the Applicant and Respondent.
- (c) The alleged loan facility has never existed and is intended at grabbing the suit property.
- 15 (d) The Applicant gained possession of the suit property from James Baguma, being the registered proprietor who permitted the applicant's occupation as it was introducing a developmental project, namely a nursing school.
- (e) The Applicant has been in occupation of the suit land since 2016 when the plaintiff started raising false claims with threats of eviction and threats to sell the property.
- 20 (f) The loan transaction involving the Respondent and Raj Investments Limited could not affect the Applicant as the said company was not the registered proprietor.
- (g) Raj Enterprises Limited is a distinct corporate entity and the Applicant wonders why the Respondent did not place a charge on its property but instead charged the suit property which did not belong to it.
- 25 (h) The Applicant gained possession of the suit property from Baguma James who owned the suit property as a kibanja before Baguma Joseph fraudulently registered it in his name.
- (i) The Applicant could not vacate the suit land yet it had a domestic understanding with James Baguma before the suit land was fraudulently registered by Baguma Joseph.
- 30 (j) The malicious and irregular conduct of the Respondent has jeopardized the school, which today has ten students.
- (k) All the purported offer documents are forged.
- (l) No bid for the suit property has ever been made by the Applicant.
- 35

As can be deduced from the above, the thread of the Applicant's case is that it obtained permission to enter the suit property from the suit property's legitimate owner and was



5 unaware of a mortgage until the advanced recovery processes were engaged by the Respondent and that there is no contract for the purchase of the suit property from the Applicant to the Respondent.

10 In my considered view, where a party alleges that there has been a departure from pleadings in the proposed amended pleading, they ought to show how and where such departure has occurred. As was held in **Night Nagujja v Namuwonge Agnes & Ors HCMA 1878/2021**, it is not enough for a party to throw unsubstantiated allegations at the court, hoping that the court will fill in the gaps, speculate or use its powers to separate the hay from the chaff. It is trite law that courts base their decisions on evidence and not
15 assumptions, abstractions or innuendos. See also **Oscar Ssemawere v African Express Airways HCMA 259/2023**, **Byaruhanga Mahmood v Top Finance Bank HCMA 250/2023**

20 I have not seen any departure, in the draft amended defence, of any departure in the Applicant's pleadings. All I could see were additional averments aiming at clarifying the Applicant's position and providing a detailed defence to the averments in the plaint. I therefore take the view that the applicant's application has navigated this requirement satisfactorily.

25 Amendment Is Aimed at Defeating Respondent's Claim

It was averred by the Respondent that the amendment is aimed at defeating its claim in the main suit. In its submissions, Counsel for the Respondent contended that the proposed amended defence seeks to introduce new facts that change the outlook of the pleadings. Counsel cited **Plessly (Pty) Ltd v Mutoni Construction Limited HCMA 178/2021** and **DFCU Bank v Meera Investments Limited HCMA 1087/2022**
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It must be noted that, in regard to amendment, the introduction of a new cause of action or ground of defence, for as long as it does not change the character of the suit substantially can still be allowed. See **Sibamanyo Estates Limited v Equity Bank Uganda Limited & Ors HCMA 414/2022**
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As I understand it, the Respondent's case is that it is the mortgagee of the suit property, the was a default, it took measures to recover the loan sums, it received a bid for the

5 purchase of the suit land by the Applicant, that a purchase prices was agreed and the Applicant reneged on paying the same.

I do not see how the proposed amendment in any way defeats the Respondent's claim or cause of action in the main suit and the Respondent has not demonstrated the same to
10 me.

The Respondent contends that the Applicant has already admitted to making a bid and the proposed amendment now seeks to claim that no bid was made. The Respondent asserts that the Applicant admits to making a bid in its affidavits in HCMC 28/2019 which
15 the Respondent filed against the Applicant for eviction. I have looked the said affidavits which were annexed to the affidavit in reply to the Respondent's affidavit in reply. The only precedents I could find are for the rejection of falsehoods in affidavits. See **Francis Rutuku & Ors v Eliphas Ndamagye CACA 111/2017, Mugume v. Akankwasa HCMA 4/2008.**

20 This makes sense because affidavits are evidence recorded in writing before a commissioner and, where there are falsehoods, the court can assess the same by considering the evidence on record and then expunge the offensive paragraphs or affidavits.

25 It must be noted that the proposed amendment seeks to introduce averments, and not evidence. Pleadings are not evidence; they are averments which must be proved through evidence at trial. Accordingly, in spite of the fact that, on the face of it, there is variance between the draft amended plaint and the affidavits, I have not seen any precedents
30 showing that court is empowered to reject a proposed amendment on account of the fact that it is alleged to be a falsehood.

Moreover, even if the submission of counsel for the Respondent could be taken to its logical conclusion, it is difficult to see how the court, at this stage would be able to
35 determine that the averments in the draft amended plaint are the falsehood, and not the contents in the affidavits. Accordingly, I take the view the issue of the truthfulness on the averments relating to the bid should be dealt with at trial, during presentation of

5 evidence, rather than to pre-emptively, and without evidence, to determine the same at this stage.

I, in the circumstances, cannot find basis in the Respondent's arguments on this head to deny the proposed amendment.

10 I take the view that the proposed amendment is largely one aimed at adding detail to the Applicant's ground of defence in the main suit and therefore assists in the identification of all the issues between the parties in order to enable comprehensive adjudication and determination of the same. I have seen no evidence that the application is made in bad
15 faith or that the proposed amendments are barred by law.

Prejudice

The Respondent contended that the present application is aimed at derailing the determination of the main suit. As noted above, where an amendment of pleadings causes
20 prejudice to the advance party, and such prejudice is curable by an award of costs, the court may allow the amendment. Moreover, where the court allows such an amendment, it may impose short deadlines for effecting the amendment in order to ensure that the trial is derailed as little as possible.

25 In the present circumstances, I am certain that the award of costs and the imposition of shorter compliance deadlines for the amendment will negate any prejudice likely to be suffered by the Respondent.

Costs:

30 As a rule of law, costs ordinarily follow the event and a successful litigant receives his or her costs in the absence of special circumstances justifying some other order. Where the successful party has been guilty of some misconduct, an order of costs may not be granted. See **Harry Ssempe v Kambagambire David HCCS 408/2014, Section 27(2) Civil Procedure Act, Iyamuleme David vs. AG SCCA NO.4 of 2013,**

35 In the instant case, the present litigation is not a function of any misconduct, default or action of the Respondent but is indeed a function of the actions of the applicant's former



5 lawyers. This means that the Respondent has been dragged into litigation which he ought to have participated in.

In the premises, inspite finding that the application has merit, I award costs of this application to the respondent.

Conclusion:

10 In the premises, I make the following orders

(a) The Applicant is given leave to amend its defence by filing the draft amended defence annexed to its affidavit in support. The Applicant should file and serve its amended plaint within ten (10) days from the date of this ruling.

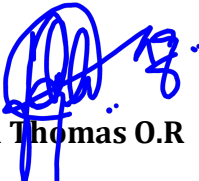
15 (b) The Respondent, if it so wishes, should file an amended reply to the written statement of defence and serve the same within ten (10) days from the date of service of the amended plaint.

(c) Once, the directions above are complied with, the parties should observe the necessary pre-trial processes with the view of having the suit heard and determined.

20 (d) The Applicant shall bear the costs of this application.

I so order.

25 Delivered electronically this 28th day of March 2024 and uploaded on ECCMIS.


Ocaya Thomas O.R
Judge,

30 28th March, 2024