

IN THE HIGH COURT OF UGANDA
AT KAMPALA
CIVIL SUIT NO 604 OF 1971

Between

NAMPERA TRADING CO.....PLAINTIFF

And

1. YUSUFU SSEMWANJE)

2. SULAIMANI LULE).....DEFENDANTS

28th February, 1973.

BEFORE: THE HONOURABLE AG. CHIEF JUSTICE S. W. W. WAMBUZI:

RULING:

Mr. Tibamanya, counsel for the plaintiff, raised a preliminary point to the effect that on the 28th November, 1972 this Court made an order granting leave to the defendants to file an amended written statement of defence within 15 days and to serve the amendment upon counsel for the plaintiff. The order has not been complied with and consequently counsel argued, there is no defence to the action and prayed that the Court do proceed accordingly.

Mr. Mayanja Nkangi for the defendants argued that there was a defence to the action and that the proposed amendment related only to the counter-claim. The case was adjourned for a full hearing on the effect of the order made by Phadke J. on the 28th November, 1972.

At the resumed hearing Mr. Lukera for the plaintiff referred to the proceedings on the 28th November, 197a when the order in question was made. The record is short and the relevant part reads as follows:-

"Court

It is my view that the amended written statement which raises a counter-claim and introduces parties who are not before the Court is not competent in the circumstances of the case.

Binaisa

I appreciate what the Court thinks. I will file an amended written statement of defence if you permit, within 15 days.

Order

I give leave to the defendants to file an amended written statement of defence.

Such amended defence will be filed within 15 days from to-day and served upon the plaintiff's counsel. The hearing is adjourned to a fresh date to be fixed by the Registrar in due course "

In Mr. Lukera's view the Court expressed a view as regards the incompetence of the written statement of defence which was accepted by learned counsel for the defendants and consequent upon that the order granting leave to amend was made. The Court believed the written statement of defence was incompetent; counsel for the defendant believed the statement was incompetent and the plaintiff was led, to accept the pleading was incompetent and accordingly the pleading was automatically struck out.

Mr. Lukera further argued that as Mr. Binaisa had accepted that the written statement of defence was incompetent the defendants are now estopped from arguing the contrary.

Mr. Mayanja Nkangi for the defendants argued that the order of Phadke J. did not effect the amended written statement of defence in so far as it constituted an answer to the claim. What was effected was the portion relating to the counter-claim. Notwithstanding the failure to amend, the written statement of defence remained intact and this forms the defence of the defendants. Counsel went on to say that the

order of Phadke J. was contrary to Order 8 Rule 8 which permits a defendant to introduce new parties to the claim by way of counter-claim and that according to this rule the amended written statement of defence was in order. He did not agree, that the doctrine of estoppel was applicable in this case. There was no evidence that the plaintiff relied on the statement by Binaisa Q.C. or that they were prejudiced as there had been no objection to the defence by the plaintiffs. Counsel argued further that the court had jurisdiction to put right a procedural mistake.

Order 8 Rule 8 of the Civil Procedure Rules provides:

"Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff together with any other persons, he shall add to the title of his defence a further title similar to the title in a plaint setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence."

The title to the written statement of defence dated 11th December, 1971 is set out as follows:

“IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO 604 OF 1971

NAMPERA TRADING COMPANY LIMITED..... PLAINTIFF

Versus

1. YUSUFU SEMWANJE)

2. SULEMANI LULE).....DEFENDANTS

(BY ORIGINAL CLAIM)

And Between the said:

1. YUSUFU SEMWANJE)
2. SULEMANI LULE).....PLAINTIFFS

Versus the said

1. NAMPERA TRADING COMPANY and
2. CHARLES LULE
3. MARY NAMISANGO}
4. JANE NAMAGAMBE}
5. WILSON JOHN NYANZI}
6. AUGSTINE NAMPERA}.....DEFENDANTS

(BY COUNTER-CLAIM)

AMMENDED WRITTEN STATEMENT OF DEFENCE"

There follows paragraphs answering the claim and then the counter-claim. It would appear that apart from answering the plaintiff's claim the defendants were putting forward a claim not only against the plaintiffs, but also against a number of other people who were not parties to the original suit. In these circumstances, it appears that the amended written statement of defence did comply with Rule 8 of Order 8.

On the day the order was made it appears that Mr. Tibamanya appeared for plaintiff and Binaisa Q.C. for the defendants. The record does not show who appeared for the parties named in the amended written statement of defence who were not parties to the original suit, or that those parties were present in person.

Rules 9, 10, and 11 of the Order 8 provides:-

"9. Where any such person as in the last proceeding rule mentioned is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence,

which shall be served in accordance with the rules for regulating service of summons.

10. Any person not already a party to the suit who is served with a defence and counterclaim as aforesaid must appear thereto as if he had been served with a summons to appear in the suit.

11. Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the Court, deliver a reply within 15 days after service upon him of the counterclaim".

There is no indication that the parties named in the counterclaim as defendants 2, 3, 4, and 5 were served with the defence in accordance with Rule 9 or that any of them appeared thereto in accordance with Rule 10.

They were not represented nor did they appear at the hearing before Phadke J. In these circumstances I am not surprised that the learned judge observed that the amended written statement of defence which raised a counterclaim and introduced parties who were not before the court was incompetent in the circumstances of the case.

In my view it was open to counsel after this observation by the court either to apply to the court for an adjournment to enable service to be effected upon the parties who were not before the court in accordance with the Rules of Procedure as outlined in this ruling or to apply to amend the written statement of defence to remove the names of these people from the statement.

It would appear that counsel chose to amend. Having failed to amend within the time permitted, it is my view that as the parties are still not before the Court') Rules 8; 9 and 10 of Order 8 were not fully complied with. I note with regret the way this case has been handled by counsel, various counsel I should say, because the defendants appear to have changed counsel at least twice. its own motion the court indicated that there was something wrong but nothing was done to rectify the position. I have no

alternative but to rule that the amended written statement of defence dated 11th December, 1971 is still incompetent and consequently that there is no defence to the action.