

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT FORT PORTAL**

**CIVIL SUIT NO. DR. MFP 16/90**

**CLOVIS KARATUNGA:.....PLAINTIFF**

**VERSUS**

**EDRISA NYAKAIRU:.....DEFENDANT**

**BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA**

**RULING**

The plaintiff Clovis Karatunga filed a Civil Suit against the defendant Edirisa Nyakairu under summary procedure rules order 33 of the Civil Procedure rules claiming for a liquidated sum of Shillings 810,000/= plus costs and any other relief the court may deem fit. In accordance with the said order the summons were served on the defendant on 16<sup>th</sup> July 1990. On 20<sup>th</sup> July 1990 M/S Nyakabwa and Company Advocates, advocates representing the defendant by notice of motion under order 33 rule 3 and order 48 rule 1 of the Civil Procedure rules applied for leave to appear and defend the suit. The Civil Registry fixed the application for hearing on 5<sup>th</sup> October 1990. I think hearing was to be before the District Registrar. There is no minute in the court file for the above date.

However, on 2<sup>nd</sup> August 1990 M/S Mugawba and Company Advocates a firm of Advocates representing the plaintiff filed in an amended plaint. M/S Mugamba and Co. Advocates did not indicate in the amended plaint whether they were amending the plaint under summary procedure rules or any plaint at all. The application for leave to appear and defend the suit was never heard before the District Registrar as should have been the case under order 46 rule 3 of the Civil Procedure rules which states:-

*“All formal steps preliminary to the trial and all interlocutory applications may be taken before that Registrar.”*

Be that as it may on 19<sup>th</sup> October 1990 the court file landed before this court. There were two matters before the court for consideration. The application for leave to appear and defend the suit as required under order 33 r 3 of the Civil Procedure Rules and an amended plaint. The learned counsel representing the defendant seeks to have the amended plaint dismissed under order 21 CPR hence this ruling.

Mr. Nyakabwa of M/S Nyakabwa and Co. Advocates representing the plaintiff submitted that he will proceed with the chamber application under order 6 r 21 of the CPR. He argued that the plaintiff filed a suit under summary procedure claiming certain amount of money and other relief. After service of the plaint and summons on the defendant they filed a notice of motion on 20<sup>th</sup> July 1990 seeking for leave to defend the suit. While the notice of motion was still pending due to be heard on 5<sup>th</sup> October, 1990. On 2nd August 1990 the plaintiff filed in an amended plaint “without under summary procedure,” That was duly served on them. He submitted that it was the amended plaint they were seeking the courts power to dismiss or disallow because it had completely changed the whole nature of the proceedings. He referred me to the case of **Uganda Transport Co. Ltd vs. Count De La pasture Civil Apea1 No. 83 of 1953 Rep. C.A. Eastern Africa Vol. XXI 1954 P. 163.** In that case the amended plaint was dismissed. I will consider this case later in my ruling. He prayed that the amended plaint be dismissed. The learned counsel representing the plaintiff submitted that he had read the dicta in the above case and was of the view that the same was not binding to this court. He contended that the terms of order 6 r 19 of the Civil Procedure rules is not necessarily the same as order 1 rule 19 of the Civil Procedure rules because in that judgment reference is made to order 1 r 19 and not order 6 rule 19 of the Civil Procedure rules.. That order 1 rule 19 does not apply to Uganda. He submitted that the amended plaint was properly filed under the provision of Uganda Order 6 Rule 19 of the Civil Procedure Rules. Had the learned judges intended to state that order 6 r 19 does not apply to Uganda they would have clone so because they used order 1 rule 19 interchangeably. So the judgment is not relevant to the present case. He prayed that the application be dismissed with costs as there was no need to seek clearance from court before amendment.

In reply Mr. Nyakabwa submitted that the judgment cited was that of the defunct court of Appeal for East Africa which was higher court than the high Court. Its decisions on the relevant points of law have been binding on the High Court of Uganda although those decisions are not binding on the Supreme Court of Uganda to day. That holding No. 4 incorrectly refers to order 1 rule 19. That was a typing error it should have been Order 6 Rule 19. The amendment took the case from order 33 of the Civil Procedure Rules without fresh summons being served on the defendant. The latter was confused. He prayed that the amendment be struck off with costs because it was made to defeat the purpose for which the original suit was made.

I have very carefully considered the forceful submissions by the learned counsels appearing for the parties. The matter is a simple one whether the amended plaint should be struck out or disallowed as not conforming to the laid down rules as stipulated in order 6 r 19 of the Civil Procedure Rules.

It is pertinent to note that the plaintiff filed a suit against the defendant under order 33 of the Civil Procedure Rules. The summons or plaint under the said suit was served on the defendant who filed in a notice of motion seeking for leave to appear and defend the suit under Order 33 Rule 2 of the Civil Procedure rules. But before the application was heard the plaintiff filed in an amended plaint.

Under order 6 rule 19 a plaintiff may without leave amend his plaint once at any time within 21 days from the date specified in the summons for the appearance of or the entering of an appearance by the defendant or where a written statement of defence is filed then within fourteen days from the filing of the written statement of defence or the last of such written statements. The plaintiff could make use of Order 6 r 19 where he had filed in an ordinary plaint but not where a plaintiff has filed a suit under summary procedure order 33 of the Civil Procedure Rules. I had the occasion to peruse the entire order 33 but I did not see any provision whereby plaintiff could have carried out he amendment as was in the instant case. In **Uganda Transport Co. Ltd v Count De la pasture Supra (Ugandan case appeal from the decision of H.M. High Court Griffin CJ).**

In that case the plaintiff/respondent sued the defendant/appellant for salary and allowance alleged to be due to him and for unliquidated damages irregularly presenting his plaint under order 33 aforesaid endorsed for summary procedure instead of presenting it under orders 1 and 5 (Ordinary Plaint). The day following an application by the defendant for leave to appear and defend the suit the plaintiff filed without leave an amended plaint Briggs J A as he then was held (In holding 4):-

*“That in Uganda order 1 rule 19 (6 r 19) does not apply to plaints brought under order 33 so that before a defence is filed a plaint endorsed for summary procedure cannot be amended but it may thereafter be amended. And in holding 5, for the purpose of Order 6 Rule 19 aforesaid an affidavit filed in support of an application for leave to appear and defend cannot be treated as a written statement of defence”*

In the referred to case the appeal was allowed. The amended plaint was struck out. The original plaint was to stand without prejudice to any attempt to a later date to amend it. The case just referred to above applies to the instant case. It is in fact an authority for the present situation where the plaintiff had filed in amended plaint before the court had the occasion to hear and dispose of the application for leave to appear and defend the suit as required under Order 33 Rule 2 of the Civil Procedure Rules. It is inconceivable that the affidavit filed in by the defendant for leave to appear and defend the suit could be taken as a written statement of defence for the purpose of order 6 rule 19 of the Civil Procedure Rules. Briggs J in his judgment at P. 166- 167 had this -to say:—

*“The argument is ingenious, for the affidavit does perform the same function as a written statement of defence in an ordinary case in that it gives the plaintiff his first intimation of the nature of the defence to be raised, but in Uganda a written statement defence is a term of art and its meaning cannot be extended to cover an affidavit of this kind nor can it be said that convenience requires the extension of the rule by analogy to cover summary procedure cases. Indeed convenience seems to require that the rule or at least the provision for amendment before defence should not be extended confusion might or both and as to the time at which judgment might be obtained or application be made for leave to appear and defend.”*

I fully associate myself with that exposition of the law as expounded by the learned Judge perhaps I would add that the amended plaintiff was without legal foundation. It was jeered at making a mockery of our Civil Procedure rules more since the learned counsel did not even mention the law under which the amendment was purportedly made.

Mr. Mugamba submitted that Order 1 Rule 19 mentioned in holding no.4 of the case quoted above was not applicable to the instant case and that the case referred to was not binding to this court. With respect to the learned counsel Briggs J.A in his judgment throughout was referring to Order 6 Rule 19. He did not mention order 1 & 19 in his judgment. I am of the view that the mention of order 1 rule 19 in holding No. 4 was a typing error. The proper order should have been order 6 rule 19 of the Civil Procedure rule and in this way I endorse the submission of the learned counsel for the defendant over this issue. That the quoting of order 1 r 19 in holding No.4 of the said case was a typing error. Mr. Mugamba had further submitted that the decision of Her Majesty court as a court of appeal for Eastern Africa was not binding on this court. The learned counsel did not cite me any authority to fortify his assertion. It suffices here to note that though the Eastern Africa court of appeal had disintegrated the practice has been that the decisions of that court still binds the High court here and we have been following them. It is the considered opinion of this court that perhaps the decision of the said court EACA are not binding on the Supreme Court of Uganda but the latter have been quoting them with approval on a number of occasions.

From what has been explained above the amended plaintiff is disallowed with costs to the defendant (order 6 r 21 CPR). I order that the application for leave to appear and defend the suit be proceeded with costs of this application are provided for.

**I. MUKANZA**

**JUDGE**

**23/10/90**