THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

MISCELLANEOUS APPLICATION NO. 373 OF 2017
(ARISING FROM CIVIL SUIT NO. 14 OF 2015)

1. ZURAH TRIKAM MULJI LADWA

2. SMITA TRIKAM MULJI LADWA :: APPLICANTS

VERSUS

1. FRIZOLA MOHAMDALI ANDANI

2. SALIM NURALI ANDANI **:::::::::::::::::::::::::::: RESPONDENTS**

3. ANISH NURAL ANDANI

BEFORE HON JUSTICE SUSAN OKALANY

RULING

INTRODUCTION

[1] This application was brought under section 38 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 1, Rule 13 as well as Order 6, Rules 19 and 31 of the Civil Procedure Rules.

[2] The applicants sought for the orders that:

1. Unconditional leave be granted to the applicants to amend the original plaint in Civil Suit No. 14 of 2015.

2. Costs of this application be provided for.

THE APPLICANTS CASE

[3] The applicants' case according to the affidavit of Zarah Trikam Mulji Ladwa, is that the applicants filed Civil Suit No. 14 of 2015 against the respondents which suit is pending hearing. According to her, the suit is founded on fraud and numerous illegalities committed by the respondents while acquiring the property comprised of LRV 352 Folio 1, Plot 11 Ormsby Avenue, Mbale District.

[4] She averred that at the time of filing the said suit, the applicants were represented by M/S Kizito Lumu & Co. Advocates but later instructed M/S Okurut & Co. Advocates to conduct the said matter to its logical conclusion. That it was their new advocates, who noticed, after studying the plaint and conducting interviews with her, that there was vital information which was inadvertently omitted from the plaint by the previous lawyers. She also stated that the proposed areas of amendment are highlighted in the attached draft amended plaint.

[5] In addition, the 1st applicant averred that she was advised by her lawyers that the proposed amendment to include Jagdish Parsotam Jadavwere as one of the defendants is necessary for the appropriate determination of the issues raised in the plaint. She also deponed that if the errors in the plaint are not rectified or corrected, they might significantly jeopardize the applicant's interest in the main suit. She declared that an application for amendment of pleadings can be made at any stage of the proceedings and if this application is granted, it will not cause injustice in any way to the respondent.

THE RESPONDENT'S CASE

[6] Frizola Mohmadali Andani the 1st respondent in his affidavit in reply, deponed that the application is tainted with falsehoods meant to mislead this court and is thus fundamentally defective and ought to be struck out. He stated that there is no authority on the court record given to the 1st applicant by the second applicant to swear any affidavit on his behalf. Furthermore, he deponed that there was never a change of advocates by the applicant. That the advocate in personal conduct of the matter simply moved from one firm to another, that is to say; from M/S Kizito Lumu & Co. Advocates to M/S Okurut &

Co. Advocates and that the said Counsel had at all material times represented the applicants and the purported change of instructions was only raised as an excuse.

[7] The second respondent, Salim Nurali Andani deponed that the application to add Jagdish Parsotam Jadavwere as fourth defendant is incompetent, an abuse of court process and is bad in law, since the attached proposed amended plaint does not indicate the nature of the claim against the said Jagdish. He further deponed that the applicants have not given reasons as to why they had failed to include Jagdish in the plaint at the inception of the suit and averred that the intended amendment was meant to defeat or deprive the respondents of the defence of limitation, by omitting paragraphs 6 (g) and (h) of the original plaint.

[8] He also averred that the said amendment does not disclose any cause of action against the respondents since the facts sought to be added have at all times been within the knowledge of the applicants. Lastly, he stated that this application was brought in bad faith since it was brought after the main suit had been set down for hearing on 12th of March, 2018.

REPRESENTATIONS

[9] The applicants were represented by Mr. Simon Odongoi while the respondents were represented by Mr. Anthony Bazira.

[10] When the matter came up before me for hearing on 12/7/2018, Mr. Bazira informed the court that he had just received news of the death of his aunt and prayed for an adjournment which Mr. Odongoi did not oppose. I allowed the prayer for adjournment and for the convenience of court, counsel were ordered to file written submissions.

SUBMISSIONS OF COUNSEL

Arguments for the applicant

[11] In his submissions, Counsel Odongoi for the applicant raised a point of law to the effect that the respondents had filed their affidavit in reply out of time and without the leave of the court. Citing Order 8, Rule 1 and Order 12, Rule 3 (2) of the Civil Procedure Rules,

he contended that it is trite law that rules of procedure applicable to filing and service of written statements of defence equally applied to affidavits in reply. He submitted that the said provisions are coached in mandatory terms and the courts have been consistent in upholding them.

[12] On the merits of the application, Mr. Odongoi, cited Order 6, Rule 19 of the Civil Procedure Rules and submitted that the principles governing amendment of pleadings are that amendments should not occasion a miscarriage of justice to the opposite party. That an amendment should be granted if it is in the interest of justice and in order to avoid multiplicity of suits. Furthermore, he submitted that amendments should be made in good faith and must not be expressly or impliedly prohibited by law. To support his submissions, counsel cited the cases of *Senkubuge Denis & 2 others vs Hajjati Madina Nassali & anor HCMA No. 1124 of 2014 and Great Lakes Ports LTD versus Tom Mugenga HCMA No. 374 of 2012* which reiterate the principles of law on amendment of pleadings.

[13] Mr. Odongoi stated that the applicants were seeking to add the fourth defendant to the main suit and to provide further facts and particulars of fraud and illegalities in the plaint. That from paragraphs 1-3 of the application, read together with paragraphs 2-8 of the affidavit in support of the application, the proposed amendment is necessary to give a proper perspective to the issues of fraud and illegalities that this court will investigate in the main suit. Additionally, he submitted that the new facts introduced by the proposed amendment are highlighted in the annexure to the application and that the said proposed amendment does not introduce a new cause of action since it maintains fraud and illegality as the main cause of action. He argued hat the remedies sought for have in the same way remained the same. Counsel invited this court to consider paragraphs 5, 6 (p), 6 (r) and 10 of the proposed amended plaint together with paragraphs 5, 6 (j), 6 (i) and 10 of the original plaint and submitted that the proposed amendment will not occasion any injustice to the respondents and is not in any way prejudicial to their interests. He stated that the application has been brought within reasonable time, since scheduling and hearing of the main suit have not yet commenced. Moreover, the respondents shall have the opportunity to reply to any new facts.

[14] Furthermore, Mr. Odongoi submitted that the contents of paragraph 6 (g) and (h) of the original plaint have simply been expanded and broken down into several paragraphs in the amended paint i.e. paragraphs 6 (j) - (n). That the amendment will not deny the respondents the opportunity of raising their defence in the course of hearing of the main suit.

Arguments for the respondent

[15] In reply to the point of law raised by Mr. Odongoi to the effect that the respondents had filed their affidavit in reply out of time and without the leave of court, Mr. Bazira argued that *Order 8 Rule 1 (2) of the Civil Procedure Rules* applies only to timelines for filing defences, while *Order 12 Rule 3 (2)* relates to timelines for filing replies in interlocutory applications. He submitted that this application has nothing to do with the filing of a defence, having been brought under *Order 1 Rule 13 and Order 6 Rule 19 of the Civil Procedure Rules*, and that there are no specific timelines stipulated for filing of affidavits in reply in such matters.

[16] It was Counsel's submission that the intention of the framers of the law was to have affidavits in reply filed before the hearing of the Motion/Chamber Summons, provided that the said pleadings were served within a reasonable time, to enable the other party file a reply. The mere fact that the Rules committee did not generally specify time limits for filing of affidavits in reply is indicative of the flexibility with which it intended courts to deal with them.

[17] He contended that except where there are specific statutory provisions, failure to adhere to timelines should not be fatal to the case, especially where the offended party has suffered no injustice or extreme hardship thereby. Injustice or extreme hardship would have been established for instance, by circumstances necessitating an adjournment to enable the applicants file a rejoinder, which did not happen in this case. In support of his submissions, he cited *SOT Enterprises Limited versus Agatha Rukeribuga Doii HCMA No.157/2016* in which the Hon. Justice Eva Luswata held *inter-alia* that except where

there are specific statutory requirements, failure to adhere to timelines should not be fatal to proceedings.

[18] Counsel asserted that the applicants have not demonstrated either by their application or through their submissions how they were prejudiced by the respondents filing of the affidavit in reply on 10th May 2018. That they had enough time to rejoin, but chose not file an affidavit in rejoinder. Counsel prayed that the preliminary objection should be overruled and that in the alternative, this honorable court should exercise its discretion to allow the affidavit in reply.

[19] Referring to paragraphs 1 and 2 of the affidavit in support of the application, Mr. Bazira submitted that there was no valid application by the second applicant since there's no authority signed by the second applicant authorizing the first applicant to depone an affidavit on her behalf. That in the absence of written authority, the affidavit becomes defective and cannot stand. Counsel cited the judgment in *Lena Nakalema & 3 Ors vs Mucunguzi Myers Misc. App. No. 0460 of 2013* to support his submissions. In the said case, the Hon. Justice Andrew K. Bashaija held that an affidavit is defective by reason of being sworn on behalf of the others without their authority in writing.

[20] Regarding the merits of the application, Mr. Bazira agreed with Mr. Odongoi's submissions in respect of the statement of the law on amendment of pleadings and additionally cited the decision in *Gaso Transported Ltd vs Martin Adala Obene, S.C.C.A. No. 4 of* 1994 on the same subject. He also submitted that the proposed amendment intends to defeat the issue of limitation of the applicants' cause of action, which was raised by the defendants in their defence. That if the amendment is allowed, it would defeat the right of the respondents to have the said issue determined by court, a right that existed before the said amendment. Referring to paragraph 2 of the Written Statement of Defence and Paragraph 12 and 13 of the affidavit in reply, Counsel submitted that the suit was filed in 2015 after the expiry of the statutory period of 12 years and the proposed amendment is therefore an afterthought that is intended to fill the gaps in the applicant's plaint. He declared that it is a well-established principle of law that a court will refuse an amendment where it is expressly or impliedly prohibited by any law, such as the law on limitation.

[21] According to Counsel for the respondents, in the original plaint under paragraph 6 (g) and (h), the cause of action arose in 2000 and yet the suit i.e. Civil Suit No. 14 of 2015 was filed 15 years later. In the proposed amendment under paragraph 6 (n), the cause of action arose in 2012. By indicating that the cause of action commenced in 2012, the suit would mean that the suit was brought within time. Counsel cited the above mentioned paragraphs to help Court establish whether or not the defendants will be deprived of the defence of limitation at trial. Furthermore, Mr. Bazira submitted that whereas Order 6, in rules 18 and 19 of the Civil Procedure Rules grants discretion to court to allow amendment of pleadings, such discretion must be exercised judiciously. Court must establish whether the party seeking for an order to amend a plaint has met the requisite considerations.

[22] Citing the decision in Gaso Transporters Ltd (supra), Counsel further submitted that the belated application to amend pleadings places a heavy burden on the applicant to convince this court about why he never made this application earlier on. He stated that where an applicant fails to justify court about why the application is belatedly filed, the same ought to be dismissed. He additionally submitted that the applicants claim of change of advocates cannot stand, because Mr. Odongoi has at all material times represented the applicants and the purported change of instructions was only raised as an excuse. That the advocate in personal conduct of the matter moved from one law firm to the another that is to say; from M/S Kizito Lumu & Co. Advocates to M/S Okurut & Co. Advocates.

[23] Concerning the issue of adding Jagdish Parsotam Jadavwere, Mr. Bazira submitted that the applicants did not indicate in their amended plaint the nature of the amendment sought to be made in respect of the said Jagdish. He argued that it is a well-established principle and rule of practice that amendments sought should be clearly spelt out and underlined in the amended pleadings, otherwise it would be hard for the court to establish what the amendments are and whether or not they are necessary or will cause injustice to the respondent. He argued that the applicants have not advanced any reason why Jagdish Parsotam Jadavwere was not added as a party at the inception of the suit.

Counsel for the applicants' arguments in rejoinder

[24] Mr. Odongoi in rejoinder, submitted that paragraph 1 of the affidavit in support clearly reveals that the first applicant swore the affidavit in her own capacity as well as on behalf of the second applicant. He asked this Court to invokes its inherent powers under Section 98 of the Civil Procedure Rules and Article 126 (2) (e) of the Constitution to overrule the respondent's objection.

[25] Counsel also contended that Section 25 (a) of the Limitation Act provides that where in the case of any action for which a period of limitation is prescribed and the action is based upon the fraud of the defendant, the period of limitation does not begin to run until the plaintiff has discovered the fraud. He submitted that from the original plaint, the fraud and illegalities complained of by the applicants were allegedly committed between 2000 and 2015. That the important issue for the court to decide is about when the applicants discovered the said fraud and illegalities. Counsel invited this court to consider paragraph 6 (g), (h) and (k) of the original plaint and submitted that the alleged fraud by the respondents was discovered on 6th February, 2015. As such the suit is not time barred. He submitted that the authorities cited by Counsel for the respondent in respect of this issue are distinguishable from the current application.

[26] Counsel also submitted that the proposed areas of amendment in the current application are explained and underlined as a matter of practice. He invited the court to look at paragraph 6 (k), (l), (m) and (n) of the proposed amended plaint which is referred to in paragraph 6 of the affidavit of the affidavit in support of the application. That these paragraphs vividly present the facts that relate to the 4th defendant, which will be vital in investigating and determining issues of fraud and illegalities complained of by the applicants. That the proposed fourth defendant together with the late Trikam Mulji Ladwa were tenants in common in respect of the suit property. He is therefore a proper defendant in the main suit.

[27] In respect of change of advocates, Mr. Simon Odongoi submitted that when he appeared on record while practicing with M/S Kizito Lumu & Advocates, he was only holding brief for Counsel Felix Omuron. Furthermore, that the instant application was filed within time since M/S Okurut & Co. Advocates filed this application as soon as they got the instructions from the applicant in 2017.

ISSUES

[28] I have considered the application and affidavits in support as well as in opposition. I have also considered the submissions of both Counsel. The following in my view are the issues raised for determination by the pleadings and submissions of counsel:

1. Whether or not the first respondent's affidavit in reply was filed out of time;
2. Whether or not the affidavit in support of the application is defective;
3. Whether or not the application for amendment offends the principles of amendment of pleadings.
4. Whether or not Jagdish Parsotam Jadavwere can be added as a party to the suit; and
5. Whether or not there was a change of advocate for the applicants.

RESOLUTION

WHETHER OR NOT THE FIRST RESPONDENT'S AFFIDAVIT IN REPLY WAS FILED OUT OF TIME

[29] Mr. Odongoi's contention is that the first respondent's affidavit was filed out of time contrary to Order 8 Rule 1 of the Civil Procedure Rules. Order 8 Rule 1 of the CPR provides:

> *(1) The defendant may, and if so required by the court at the time of issue of the summons or at any time thereafter shall, at or before the first hearing or within such time as the court may prescribe, file his or her defence.*
>
> *(2) Where a defendant has been served with a summons in the form provided by Rule 1(1) (a) of Order V of these Rules, he or she shall, unless some other or further order is made by the court, file his or her defence within fifteen days after service of the summons.*

[30] Order 12 Rule 3 (2) of the Civil Procedure Rules on the other hand provides:

Service of an interlocutory application to the opposite party shall be made within fifteen days from the filing of the application, and a reply to the application by the opposite party shall be filed within fifteen days from the date of service of the application and be served on the applicant within fifteen days from the date of filing of the reply.

[31] The question that must first be answered before deciding whether or not the replying affidavit was filed late, ***is whether or not the current application is a suit or an interlocutory application.*** It is trite, that all applications except those that are suits are interlocutory in nature, since they arise from a main suit. The instant application brought *Order 1 Rule 13 and Order 6 Rules 19 and 13 of the Civil Procedure Rules* is an interlocutory application which arises from Civil Suit No. 14 of 2015.

[32] In *Stop & See (U) Ltd vs. Tropical Africa Bank Ltd HCMA 333 of 2010, Madrama J,* while faced with a similar issue as the one at hand, struck out the respondent's affidavit in reply which had had been filed 5 months from the time of service of the application on the respondent. He ordered that counsel for the respondent submits only on the merits of the application. He explained *inter-alia* that *Order 12 Rule 3 sub Rule 2* is meant to give timelines for all interlocutory applications that are envisaged after the completion of the scheduling conference or Alternative Dispute Resolution (ADR). He observed as follows:

> *"The strict interpretation of the Rule would imply that time has to be reckoned from the matters stated in Rule 3 sub-Rule 1. This means that time runs from the date of completion of the ADR or from the completion of the scheduling conference…."*
>
> *"These pleadings follow the same pattern as that of a plaint and a written statement of defence. It follows that the same time lines would apply to interlocutory applications. A reply or defence to an application has to be filed within 15 days. Failure to file within 15 days would put a defence or affidavit in reply out of the time prescribed by the Rules. Once the party is out of time, he or she needs to seek the leave of court to file the defence or affidavit in reply outside the prescribed time."*

[33] From the evidence on record, the respondents were served with a copy of the Chamber Summons on 2nd February 2018. The affidavit in reply was filed by counsel for the respondents on 10th May 2018, nearly four (4) months later. Clearly, this was past the 15 days required by law. Counsel for the respondents ought to have sought for the leave of court to file the reply out of time.

[34] Reinforced by the decision of my learned brother in *Stop & See (U) Ltd vs. Tropical Africa Bank Ltd* supra, the affidavit in reply to this application is similarly struck out. This court will however consider counsel for the respondent's submissions on the merits of the application.

WHETHER OR NOT THE AFFIDAVIT IN SUPPORT OF THE APPLICATION IS DEFECTIVE

[35] It was Mr. Bazira's contention was that there is no valid application by the second applicant since there's no authority signed by the said second applicant allowing the first applicant to depone the affidavit in support of the application on her behalf. Order 1, Rule 12 of the Civil Procedure Rules provides:

> *"(1) Where there's more plaintiffs than one any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceedings, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceedings."*
>
> *"(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."*

[36] The wording of this Rule is mandatory in nature and implies strict compliance with the said rule, failure of which, renders the affidavit defective. The first applicant in paragraph 1 of her affidavit in support states:

"That I am an adult female Ugandan of sound mind, the first applicant herein and I swear this affidavit on my behalf and that of the second applicant."

[37] The first applicant has not attached any form of authority to show that she obtained the required permission to swear the affidavit in support of the application on behalf of the second applicant. Mr. Odongoi asked this Court to invoke its inherent powers under Section 98 of the Civil Procedure Rules and Article 126 (2) (e) of the Constitution to overrule the respondent's objection. Article 126 (2) (e) of the Constitution enjoins courts to deliver justice without undue regard to technicalities. The question of what amounts to "undue technicalities" is to be decided by the court on a case by case basis. The learned Justices in the case *of Kasirye Byaruhanga & Co. Advocates vs U.D.B SCCA No.2 of 1997,* held that a litigant who relies on the provisions of Article 126 (2) (e) of the Constitution must satisfy the court that it was not desirable to have the undue regard to a relevant technicality. That *Article 126 (2) (e) of the* Constitution is not a magical wand in the hands of defaulting litigants.

[38] Therefore, it is my opinion particularly strengthened by the decision in *Lena Nakalema (supra),* that the first applicant's affidavit is fundamentally defective since it is brought in contravention of *Order 1 Rule 12 of the Civil Procedure Rules*. The said affidavit is hereby struck off the record of this court.

[39] Having struck out the affidavit in support of this application, the next question that begs an answer is ***whether or not this application can stand without the affidavit in support of the application***.

[40] The Hon. Justice Helen Obura in the case of *Uganda Health Marketing Group vs Katinvuma Broadcasting and General Ltd T/A Signal FM HCMA No. 270/2012* discussed the effect of such declaration and held as follows:

"The effect of declaring an affidavit a nullity on an application would, in my view, largely depend on whether that application raises a question of law that does not require evidence by affidavit or a question of fact which must be supported by affidavit evidence."

[41] It is trite that a question of law relates to what the correct legal test is, while a question of fact is concerned with what actually took place between the parties to a dispute. When the issue is whether the facts satisfy the legal test, then it a question of mixed law and fact.

[42] The application before this court is for leave to amend a plaint. Amendment of pleadings is basically for the purpose of including facts that were not available to the party at the time of drafting the pleadings.

[43] The grounds of the application are as follows:

1. That the applicants have filed in this court civil suit No. 14 of 2015 against the respondents and the same is pending determination;
2. That the said suit is founded in fraud and numerous illegalities committed by the respondents in acquiring property comprised in LRV 352, Folio 1, Plot 11, Ormsby Avenue Mbale District (herein referred to as "suit property");
3. That there is vital information which was inadvertently omitted and some errors in the plaint which need to be rectified or corrected in order to enable the court determine issues appropriately; and
4. That it is in the interest of justice that this application should be granted.

[44] Undoubted, grounds 2 and 3 of this application require affidavit evidence to prove. The said numerous illegalities allegedly committed by the respondent in acquiring suit property and omitted from the original plaint as well as the claimed errors in the original plaint, require proof by affidavit evidence. It is therefore my considered opinion that this application cannot stand without an affidavit in support of the application. Having decided so, it is for the academic purposes only that I will proceed to discuss the last issues raised by the parties.

WHETHER OR NOT THE APPLICATION FOR AMENDMENT OFFENDS THE PRINCIPLES OF AMENDMENT OF PLEADINGS

[45] As rightly pointed out by both Counsel, the law on amendment of pleadings is Order 6 Rule 19 of the Civil Procedure Rules. The said order gives court discretion to allow alterations or amendment of pleadings in such a manner and on such terms as may be just

and as may be necessary for the purpose of determining the real questions in controversy between the parties. Leave to amend must be always granted unless the party applying acted malafide and where it is not necessary for determining the real question in controversy between the parties.

[46] The principles governing the exercise of the discretion of Court in allowing amendments were set out in the case of *Gaso Transport Services (Bus) Ltd Vs Obene (supra)* as follows:

1. The amendment should not work injustice to the other side.

2. An injury which can be compensated by award of costs is not treated as an injustice.

3. Multiplicity of proceedings should be avoided as far as possible and all amendment which avoid such multiplicity should be allowed.

4. An application made malafide should not be granted.

5. No amendment should be allowed where it is expressly or impliedly prohibited by law, e.g. limitation of actions.

[47] For ease of reference and clarity, I will reproduce the relevant parts of the original plaint in Civil Suit No.14 of 2015 as well as the intended amended plaint and the written statement of defence below. Paragraph 6 (g) and (h) of the original plaint reads as follows:

(g) upon the demise of the late Trikam Mulji Ladwa in the year 2000, the plaintiffs were confronted by the first defendant who alleged that he had acquired ownership of the suit property.

(h) the first defendant started demanding for rent from both tenants and the plaintiffs and has threatened to evict the plaintiffs from the suit if they fail to do so.

On the other hand, paragraph 6 (n) of the proposed amended plaint states:

''In about 2012, the 1st plaintiff stopped remitting to the 1st defendant money for ground rent if no proper accountability of all rent money was given, which fact angered the defendants, prompting them to declare to the plaintiffs that they had purchased the suit property and the plaintiffs should pay rent as well.''

Paragraph 2 of the Written Statement of Defence states that:

''The defendants shall, before or at the hearing raise the following Preliminary Objections to the suit that: (a) it is time barred…''

While paragraph 3 (a) of the reply to the Written Statement of Defense states that:

''the illegal and fraudulent acts, commissions and omissions of the defendants jointly and severally have continued up to date since some time in 2000 when the defendants purported to acquire the suit property.''

[48] It is clear from the above paragraphs that the applicants in their intended amended plaint have changed the year when they learnt about the purported fraud of the respondents from 2000 to 2012. In the case of *Mohammad B. Kasasa versus Jasphar Buyonga Sirasi Court of Appeal Civil Appeal No.42 of 2008,* the trial judge allowed an application for amendment of a plaint to include the time when the respondent discovered fraud on grounds that there were serious allegations of fraud that merit court's investigation. The respondent being aggrieved by the said decision, appealed to the Court of Appeal. The Justices of the Court of Appeal striking out the amended plaint and dismissing the suit, held that the *judge erroneously allowed the application to amend the plaint to include the time when the respondent discovered fraud. It was contrary to the law. Further that it would absurd if the Court of Appeal allowed the respondent to flout the strict law of limitation on the ground that his counsel was negligent.*

[49] The intended amended plaint is in my opinion meant to defeat the intended defence of limitation by the respondents. The said amendment will obviously occasion a miscarriage of justice to the respondents.

WHETHER JAGDISH PARSOTAM JADAVWERE CAN BE ADDED AS A PARTY TO THE SUIT

[50] In respect to adding Jagdish Parsotam Jadavwere as a defendant in a suit, the law is very clear. *Order 1 Rule 10 (2) CPR* provides that;

> *"The court may, at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."*

[51] It is a fundamental consideration that before a person can be joined as party, it must be established that the party has high interest in the case. In addition, it must be clearly demonstrated that the orders sought in the main suit would directly legally affect the party seeking to be added. These considerations were amplified by the Supreme Court of Uganda in the case of the *Departed Asians Property Custodian Board vs Jaffer Brothers Ltd [1999] I.E.A 55.* It held that for a party to be joined on the ground that his presence is necessary for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person and that it is desirable to have that person joined to avoid multiplicity of suits, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person. See also: *Gokaldas Laximidas Tanna vs Store Rose Muyinza, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21.*

[52] In the instant application, the applicants have not shown that Jagdish Parsotam Jadavwere whom they intended to add as a fourth defendant has an interest in this matter. Paragraph 6 (k), (l), (m) and (n) of the proposed amended plaint referred to by Mr. Odongoi as vividly bring out the cause of action against Jagdish Parsotam Jadavwere relate to him being a close associate with her deceased husband and that he and the first respondent after the death of her husband informed her the deceased had an outstanding loan to pay from the rent collected from the tenants. Plainly, Jagdish Parsotam Jadavwere cannot be added as a fourth defendant since the applicants have failed to establish a cause of action against him.

WHETHER OR NOT THERE WAS CHANGE OF ADVOCATES

[53] It was the applicant's claim that they changed an advocate and that it was their new advocates, who noticed, after perusing the plaint and conducting interviews with her, that there was vital information which was inadvertently omitted from the plaint by the previous lawyers. Upon perusal of the court record, it is evident that there was a Notice of Change of Advocates from M/S Kizito Lumu & Advocates to M/S Okurut & Co. Advocates was filed on 20th September 2017. In practice, change of advocates means that the litigant has got a new firm to handle his/her matter. On the face of it, it can be said that there was a change of advocates given the Notice of Change of Advocates on the record of this court.

[54] However, as rightly submitted by Mr. Bazira, one cannot say that there was an actual change of advocates because Mr. Ondongoi has at all material times appeared in court in respect of this matter, while working with M/s Kizito Lumu & Advocates. For example, in Miscellaneous Application No. 72 of 2015 which is an application by the applicants herein for an interim injunction restraining the respondents, their agents, assignees or successors from evicting, levying rent and interfering with the applicants' possession and property comprised of LRV 352, Folio 1. Plot 11 Ormsby Avenue Mbale District, before the final disposal of the main application, Mr. Odongoi appeared before the Her Worship Deborah Wanume who was the Assistant Registrar at the time, to argue the application. He was also present on 28th May 2015 when the ruling in the matter was delivered. Further, in Miscellaneous Application No. 71 of 2015 which was an application for a temporary injunction before me, Mr. Odongoi on 27/10/2016, appeared as Counsel in personal conduct of the matter. He made oral submissions in respect of the said application. He was also present on 21/8/2017 when I delivered the ruling in the said application.

[55] It is therefore my holding that apart form of change, reflected by the notice of change of advocates, there was no actual change of advocates in the instant case since Mr. Odongoi at all material times appeared in this matter. Even if that was the case, the change was of no effect to counsel's instructions since he was in personal conduct of the matter. It seems to me that counsel is attempting to use the excuse of change of advocates to cause

an amendment to the plaint that will in effect defeat the respondents proposed defence of limitation.

[56] Consequently, the application is dismissed with costs to the respondents.

I so order.

Susan Okalany
JUDGE
8/5/2019