THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS APPLICATION NO. 101 OF 2022

(ARISING FROM CIVIL SUIT NO. 029 OF 2019)

WALIMU COOPERATIVE SAVINGS AND CREDIT UNION ..... APPLICANT

VERSUS

1. **OKUMU BENJAMIN**
2. **KOMAKECH AMOS PAITO..... RESPONDENTS**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Introduction

This is an application to add a third defendant to Civil Suit No. 029 of 2019. The third defendant sought to be added is Kitgum High School Co-Operative Savings and Credit Society Ltd of P.O Box 87, Kitgum District. The Application is brought under Order 1 rule 10, Order 52 rules 1 and 3 of the Civil Procedure Rules, S.I 71-1 (CPR), and section 98 of the Civil Procedure Act, Cap. 71 (CPA.)

There are six grounds, supported by the affidavit of Kiyai Carolyn Atai, the General Manager of the Applicant. In brief, it is averred, and deposed that the Applicant filed the head suit, by former advocates, Rwabwogo and

company Advocates, who omitted to include the intended (third) defendant to the suit. That, the intended defendant played a central role in the loan agreement with the applicant, to secure various loans, but later reneged on its responsibility to pay back the loan, with interest. The Applicant contends that, the grant of the application will forestall multiplicity of suits over the same subject matter; that, allowing the motion and adding the intended defendant will not constitute a new cause of action; that the addition will enable court to effectually and conclusively determine the real questions in controversy. It is further contended that, the amendment will not occasion any injustice to the present Respondents; and that, the application is made bonafide, after the omission by the former counsel to add the intended defendant, and it would therefore serve the interest of justice to allow the application. The grounds of the Application are further amplified by the deponent, which I will not reproduce, but do take into account.

Background

The Applicant does not give the background facts giving rise to the application. What I could however gather from the averments in the plaint are that, the applicant (allegedly) advanced a financial facility to the respondents in August and November, 2016; and in March and September 2017, respectively, totaling to UGX 160,000,000, at 8% interest per annum. That, it was agreed that a penalty of 2% would be charged in the

event of default on the monthly loan repayment. The applicant avers that, the respondents only repaid UGX 81,450,053, and are now in default, and remains indebted to the tune of UGX 89,834,690, an amount the applicant seeks to recover in the suit. The Applicant (plaintiff) annexes the alleged copies of the loan agreements.

In their joint written statement of defence, the Respondents, who describe themselves as the Chairman and Treasurer, respectively, of Kitgum High School Co-Operative and Savings and Credit Society Limited, deny the applicant's averments, and contend that, the applicant gave out credit facilities to individual teachers, through Kitgum High School Co-Operative and Savings and Credit Society Limited, not to the respondents. They therefore contend that they are wrongly sued.

Representation

At the hearing of this matter on 1st September, 2022, the Applicant was represented by Mr. Ruzima Derrick, on brief by Mr. Atwijukire Dennis. The Respondents were absent and unrepresented. Mr. Ruzima Derrick applied to proceed *exparte*. Learned counsel addressed me on the issue of service, contending that, the respondents were duly served, through their advocates, on 13th May, 2022. I declined the prayer, although there was sufficient proof of service of the Application, but only in respect of an earlier case fixture of 19th May, 2022, which did not take off. I observed

that, there was no proof of service for the new hearing date of 1st September, 2022. I opined that, although served with the Motion to which no reply has been filed, the respondents ought to have been informed about the new hearing date, so that they could appear in court, if they so wished. I was alive to the legal position that they do have a right to be heard on points of law, even where they have not filed a replying affidavit. I therefore directed that, in the circumstances, the Applicant files written submission in the matter, and serves the respondents' advocates, so that they could be accommodated, in the interest of justice. At the time of writing the ruling, the respondent had not filed its submissions, within the given timelines, but the Applicant filed hers.

Issues

In his written submission, the Applicant raised one issue, thus, whether the Applicant/ Plaintiff can add Kitgum High School Co-operatives Savings and Credit Society Limited as a 3rd Defendant.

I have decided to amend the issue, to make it sharper, in the exercise of court's power under Order 15 rule 5 (1) of the CPR. See: Odd Jobs Vs. Mubia [1970] EA 476.

The issues therefore are;

1. Whether the applicant has satisfied the requirements of the law for adding a Defendant to a suit?
2. If so, whether in the circumstances, court ought to add Kitgum High School Co-Operative Savings and Credit Society Limited (hereafter, Kitgum High School SACCO) as the third Defendant in Civil Suit No. 029 of 2019, and on what terms?

Arguments for the applicant

In his written submissions, learned counsel made arguments on the basis of the issue he framed. I see no prejudice, as the issue are encapsulated in that amended by court.

Counsel argued that, since the respondent has not lodged an opposing affidavit in reply, the application ought to be allowed. The submission and invitation by learned is not entirely correct. On the contrary, the law is that, whereas in a matter proceeding by way of affidavit evidence, where there is no replying affidavit, the application remains unchallenged, however, the unchallenged application must intrinsically be tenable on its own. See: Makerere University Vs. St. Mark Education Institute, HCCS No. 378 of 1993, [1994] V KALR, 26 (Lugayizi, J.); Byamukama Edson Vs. Makerere University, HCT Misc. Application No. 312 of 2008 (Elizabeth Musoke, J. (as she then was).

Court will therefore consider the application on its merit, in light of the law and the evidence, and the rest of the submission of learned counsel.

Learned counsel relied on Order 1 rule 10 of the CPR (apparently sub-rule 1) and submitted that, the rule allows for addition of parties to the suit at any stage if (court is) satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute. Again, with due respect, sub-rule 1 is not applicable to the matter at hand. Sub rule 1 of rule (2) only applies to a situation where a suit has been instituted in the name of the wrong person as **plaintiff**, or where it is doubtful whether it has been instituted in the name of the right **plaintiff**, in which case the court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as **plaintiff** on such terms as the court thinks fit.

So as seen above, the sub-rule is concerned with the substitution or addition of the name of the proper plaintiff, which the present matter is not. So, the proper rule is Order 1 rule 10 (2) CPR.

Learned counsel submitted that Kitgum High School Co-operatives Savings and Credit Society Limited should be added as 3rd Defendant because the said intended defendant has an interest in the suit and was

directly involved in the transaction together with the present respondents, where they obtained loan facilities, jointly, from the applicant, but defaulted to repay the principal loan and interest. Court's view is that arguments about the alleged interest of the intended 3rd defendant would only sound well in an application where she was the one seeking to be added. This is not the case.

Learned counsel quite rightly, retreated, and cited the correct law, being, Order 1 rule 10 (2) of the CPR and argued that, not only can the parties avail themselves of the provisions of the rule but the court itself can *suo moto* join any party as plaintiff or defendant if in court's opinion such joinder would facilitate effective and complete determination of the suit. Reliance was placed on Kololo Curing Co. Ltd Vs. West Mengo Co-op Union (1981) HCB 29, wherein it was held that, the main purpose of joining parties is to enable court to deal with the matter brought before it and to avoid multiplicity of proceedings.

Learned counsel cited excerpts from Departed Asians Property Custodian Board Vs. Jaffer Brothers Ltd (1999) 1 E.A 55, and urged that, the intended defendant be joined, to avoid multiplicity of suits over the same subject matter. He also cited section 33 of the Judicature Act, in support of his arguments. He emphasized that, the proposed addition would not constitute a new cause of action. He submitted that, due to mistake of the applicant's former counsel, they omitted to include the intended defendant

at the stage of drafting the plaint in the head suit. He prayed that the application be granted, pursuant to Order 1 rule 13 CPR, and in the interest of justice.

Determination

As noted, the law applicable to the matter at hand is Order 1 rule 10 (2) of the CPR. It provides,

"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 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." (Emphasis is mine.)

There is a distinction between the two scenarios provided for under O.1 rule 10 (2) CPR, namely, 'a person who ought to be joined' and 'a person whose presence is necessary'. See: The Electoral Commission V. Sebuliba Mutumba Richard and 2 others, Misc. Application No. 30 of 2012 (Court of Appeal of Uganda.), p.5. There, the Court of Appeal adverted to the decision of the Supreme Court in Departed Asians Property Custodian Board V. Jaffer Brothers Ltd [1991] EA 55 where Mulenga, JSC observed,

" in order for a person to be joined to a suit on the ground that his presence was necessary for the effective and complete settlement of all questions involved in the suit, it was necessary to show either that the orders sought would legally affect the interests 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."

The distinction is even more clearly stated by the learned authors, Mulla, in their literary works, the Code of Civil Procedure, Volume 2, page 1488. According to the learned authors, a necessary party is one without whom no order can be effectively made. In order that a person be considered a necessary party, there must be a right to some relief against him in respect of the matter involved in the suit.

A proper party on the other hand is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. It seems in real practice, the distinctions are often not taken, in the rule's application, as the line distinguishing could, in real cases, be difficult to draw. It appears a party could be a proper and a necessary party at the same time, depending on the circumstances of the case.

A proper party should however have a defined, subsisting, direct and substantive interest in the issues arising in the litigation. The interest must be cognizable in the court of law, that is, an interest which the law recognizes and which the court will enforce.

The obvious reason, among others, for impleading a necessary party to a suit is because a necessary party could have relevant evidence to give on some of the questions involved in the suit, making it a necessary witness. Where a necessary party is not joined as such, the case is that of non-joinder. A suit should not however be dismissed on the ground of non-joinder. A necessary party may still be declined the right to be impleaded in the suit if it appears to the court that the same shall result in the abuse of the process of the court. In the present matter, the respondents have not taken any objection to the prayer to have a third defendant joined in the suit.

Making a person a party to an action ensures the person is bound by the final order or decree of court on the pronouncement on the issues involved. It should be noted that failure to implead a necessary party to the proceedings is fatal. The condition precedent is that the court must be satisfied that the presence of the party sought to be added, would be necessary in order to enable the court to effectually and completely adjudicate and settle all questions involved in the suit. To bring a person

as a party- defendant is not a substantive right but one of procedure and the court has discretion in its proper exercise.

In my view, an applicant sought to be joined to a suit could be that who ought to be joined (at the time the suit was being filed); he/she could also be a person whose presence is necessary in the suit. He/she could be both, depending on the facts and circumstances of the case. The person sought to be added however need not be both (a person who ought to be joined **or** whose presence is necessary), since the provision of 0.1 rule 10 (2) is disjunctive.

However, in considering whether or not to grant an application under Order 1 rule 10 (2) CPR, court, as noted, exercises discretion, judicially, taking into account all the circumstances of the case. See: Samson Sempesa Vs. P.K Sengendo, Miscellaneous Application No. 577 of 2013 (Bashaija, J.); M/s United India Insurance Co. Ltd Vs. Sharda Adyanathya, AIR 1998 Kant 141 (FB); Mulla Code of Civil Procedure, Vol. 2, p. 1569.

A court could *suo mu*to add a party, within the purview of Order 1 rule 10 (2), provided it is satisfied that the party ought to be joined, or is a necessary party.

A party could also move court, at any time before trial. See Order 1 rule 13 CPR which is also relevant on the procedure to be followed.

A review of decided cases and authoritative writing on the subject, therefore brings out the factors that have guided courts in an application brought under O.1 rule 10 (2) of the CPR. I hasten to add that, these factors are not necessarily cumulative, and may not be relevant in all cases, depending on the circumstances. The factors include;

a) The need to facilitate the determination of the real questions in the suit, that is, that adding a party would facilitate effective and complete determination of the suit. There is thus no need to first have a cause of action against the person sought to be joined. See: Departed Asians Property Custodian Board V. Jaffer Brothers Ltd [1991] EA 55.

b) For a person to be joined on the ground that his or her presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit, the person must show;

i) Either that the orders which the plaintiff seeks in the suit would legally affect the interests of that person or that it is desirable for avoidance of multiplicity of suits so that he/she is bound by the decision of the court in that suit, See:

Ayigihugu & Co. Advocates Vs. Kidza [1985] HCB 46, at 47;

or

ii) Where it is shown (on application by the defendant) that the defendant cannot effectually set up a defence he/she desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

c) The need not to add a party against the will of another, especially where adding a party is opposed by the opposite party. This is common in a situation where a person seeks to join a suit as a defendant against the plaintiff's wishes. Thus, the view that a plaintiff is at liberty to sue anybody he thinks he has a claim against and cannot be forced to sue somebody. And where he sues a wrong party, he has to shoulder the blame. See: Bahemuka Vs. Anywar & another [1987] HCB 71;

d) The requirement that a defendant to be added must be one against whom the plaintiff has some cause of complaint which ought to be determined in the suit. See: Fatuma Osman Hussein Vs. Mahendra Umadbhaipatel [1995] KALR 67.

e) Court has no jurisdiction under O.1 rule 10 (2) to order the addition of parties as defendants where the matter is not liable to be defeated by non-joinder; when they were not persons who ought to have been

sued in the first place; and where their presence as a party is not necessary to enable the court to effectively to adjudicate on all the questions involved. See: Major Ronald Kakooza Mutale Vs. Attorney General, Misc. Application No. 665 of 2003.

f) Where adding a person would lead to introducing a new cause of action, a court ought to refuse the request to add a party.

g) Where adding a party would alter the nature of the suit, the same ought to be declined.

See also : Mulla, Code of Civil Procedure, Vol. 2; Mahomed Badsha V. Nicol (1879) 4 Cal 355; Raleigh V. Goschen (1898) 1 Ch. 73; Kololo Curing Co. Ltd V. West Mengo Co-op Union Ltd [1981] HCB 60; Reliable African Insurance Co. Ltd Vs. NIC [1979] HCB 59; Matugga Coffee Growers V. Lwemwedde Coffee Factory Limited [1988-1990] HCB 116; The Electoral Commission V. Sebuliba Mutumba Richard and 2 Others, Court of Appeal Misc. Application No. 30 of 2012.

Turning to the application before court, the gravamen of the application is that the intended defendant, Kitgum High School Co-Operative Savings and Credit Society Limited (hereafter, for brevity, referred to as Kitgum High School SACCO) was omitted from the main suit by the Applicant's former counsel, yet the intended defendant is alleged to have played a

central role in the loan agreement with the Applicant, thereby securing various loans, but allegedly reneging on the obligation to repay.

The affidavit evidence and the material on Court record, support the argument that Kitgum High School SACCO ought to have been joined as a defendant in the head suit, at the time the plaint was drawn and lodged in court. This did not happen, due to oversight of former counsel. Mistake of counsel is usually excusable, provided the client did not contribute to the making of the mistake. In Haji Nurdin Matovu Vs. Ben Kiwanuka, Civil Application No. 12 of 1991, [1992] 3 KALR 103, the Supreme Court, cited Georges CJ in Essaji Vs. Solanki [1968] EA 218, at 224, where it was held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and errors and lapses should not necessarily debar a litigant from the pursuit of his rights. I agree with this statement of the law. Although decided before the 1995 Constitution of Uganda was promulgated, it nevertheless underpins what was to be promulgated in article 126 (2) (e) of the Constitution of Uganda, 1995, which states, to the effect that, in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, administer substantive justice without undue regard to technicalities.

In the instant matter, the allegation made about the former counsel is bolstered by the fact that the firm of Rwabwogo & Co. Advocates attached the purported loan agreements to the plaint. If the draftsperson in that firm cared to peruse the agreements, he/she would have readily noticed that Kitgum High School SACCO is shown to have executed the loan agreements with the applicant, in which the present respondents are named as Chairman and Treasurer of the SACCO, respectively. A diligent lawyer would have therefore made the said SACCO a party to the suit. However, counsel chose to sue the respondents only.

Looking at the pleadings in the main suit in totality, it seems to me that, issues of who the parties to the loan agreement are, and whether there was breach, and if so, by who, are likely to arise at the trial of civil suit No. 029 of 2019. An effectual and complete resolution of the issues would therefore require the presence of Kitgum High School SACCO.

Court is cognizant of the fact that the Applicant is *dominus litis*, therefore, having the right and the prerogative to choose to, and implead in the suit, Kitgum High School SACCO, as a person against whom she seeks relief. As such, the Applicant is not obliged to sue a person against whom she has no relief. Here, she has demonstrated that, *prima facie*, she has reliefs against Kitgum High School SACCO, alongside the present respondents.

For the foregoing reasons, I find that the applicant has made out a case for adding a defendant to civil suit no. 29 of 2019. The application succeeds. At any rate, adding Kitgum High School SACCO (or whatever name the applicant would like to call it) would forestall multifariousness, which this court is enjoined by section 33 of the Judicature Act to avoid. Multiplicity of suits saddles court unnecessarily and does not promote judicial economy, aside from exposing litigants to case protraction, inconveniences, and costs and expenses. Having allowed the motion, I order as follows;

1. The applicant is allowed to add/ and implead Kitgum High School Co-operative Savings and Credit Society Ltd (or whatever name will most accurately describe her) as a Defendant in Civil Suit No. 29 of 2019.

2. The Applicant shall file an amended plaint to include the said person, within 15 days from the date of this ruling, and shall serve all the Defendants within 7 days from the date of filing the amended Plaint. See: O.1 rule 10 (4) CPR; Kananura Mielvin Consultant Engineer Vs. Kabanda [1992] III KALR 61, at 63 (SCU).

3. The Respondents herein who are defendants to the suit may file an amended Written Statement of Defence to the amended plaint,

within 15 days from the date of service of the amended plaint upon them or their counsel on record.

4. Kitgum High School Co-operative Savings and Credit Society Ltd (or whatever name she might be called) may file written statement of defense in the matter, within 15 days from the date of service of summons and the plaint upon her, and in accordance with the Civil Procedure Rules.

5. The applicant shall not introduce a new cause of action in the amended plaint and shall restrict its action to the alleged breach of the loan agreements, and shall not change the nature of the suit which is by ordinary plaint.

6. The applicant shall bear its own costs of this application, given that the Respondents did not contribute to the applicant's situation, but the applicant's former counsel.

I so Order.

Delivered, dated and signed in chambers this 30th September, 2022.

30-9-2022

George Okello
JUDGE HIGH COURT

Ruling read in chambers.

Appearances:

Grace Avola, Court Clerk.

Parties and counsel absent.

Ruling delivered.

HH Obeid
JUDGE
30.9.2022