THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUBENDE

MISCELLANEOUS APPLICATION NO. 169 OF 2022

ARISING OUT OF HIGH COURT CIVIL SUIT NO. 48 OF 2020

1. **WINDRIVER LOGISTICS LIMITED**
2. **PENNINAH BUSINGYE KABINGANI :: APPLICANTS**

VERSUS

1. **MITYANA FARM GROUP ENTERPRISES LTD**
2. **COMMISSIONER LAND REGISTRATION**
3. **THE ATTORNEY GENERAL :: RESPONDENTS**

BEFORE: HON JUSTICE DR. FLAVIAN ZEIJA

RULING

This is a ruling in respect of an application for leave to be granted to the Applicants to further amend their Plaint in HCCS No. 48 of 2020 and costs to be in the cause.

In support of the application, the Mr. Eria Mubiru, the lawful attorney and the Chief Operations Officer of the 1st Applicant swore an affidavit on behalf of both the 1st and 2nd Applicants.

The gist of all the grounds in support of the application is that when court granted leave to all parties to amend their pleadings prior to the

commencement of the trial in HCCS No. 48 of 2020, the Applicants made an inadvertent typographical error in the 1st amended plaint. The said error is under reliefs c), d), e), f) and i) of the 1st amended plaint where the suit land was erroneously described as "Busiro Block" instead of "Singo Block". The said 1st amended plaint in which the inadvertent error is to be found is marked D2 annexed to the affidavit in support of the application.

The grounds in opposition to this application are contained in the affidavit deponed by Ali Alam, a director in the 1st Respondent Company, said to be well conversant with all factual matters pertaining to the suit. He basically states that on 21st April 2022, the Applicant served on the 1st Respondent an amended plaint without seeking for leave and the said amended plaint sought to cure matters that had been raised by the Respondent by way of a preliminary objection in addition to altering and /or changing the cause of action. That submissions were made on the said preliminary objection and served on the Applicant but there was no response. To date, the ruling on the preliminary objection has never been delivered. As such, the original plaint cannot be amended before court delivers its ruling on the preliminary objection. Further, that the 1st amendment without leave was dishonestly done and aimed at altering and /or changing the cause of action originally pleaded.

Bingi Sarah also deponed an affidavit on behalf of the 3rd Respondent opposing the application and contending that the amendment sought for by the Applicants substantially changes the cause of action.

In rejoinder, it was deponed for the Applicants that the said submissions on preliminary points of law have never been served on KBW Advocates as the Applicants' lead counsel and they are therefore unknown to the Applicant's Advocates. Further, that the affidavit in reply is incurably defective for being supported by un commissioned attachments contrary to the mandatory provisions of the Commissioner for Oaths (Advocates) Act Cap 5.

Representation

The Applicants were jointly represented by KBW Advocates, Katende Sserunjogi & Co. Advocates & Legal Consultants and Kanduho & Co. Advocates & Commissioner for Oaths.

The 1st Respondent was represented by Betunda Yusuf of Plot 97, Bukoto Street Upper-Kololo, Kampala who chose not to file written submissions in total disregard to court's directives to have them filed by 5th October 2022.

The 2nd Respondent was unrepresented while the 3rd Respondent was represented by the Attorney General's Chambers.

Determination

The law on amendment of pleadings is well settled. Amendments to pleadings are governed by Order 6 Rule 19 of the Civil Procedure Rules which provides as follows;

19. Amendment of pleadings.

"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."

The test for allowing or disallowing amendments of pleadings has always been whether the intended amendment would be prejudicial to the other party's case. However, a great string of authorities postulate that even where there is a likely prejudice, an amendment will often be favored over the prejudice as long as the prejudice can sufficiently be compensated for in terms of costs. It therefore goes without saying that the burden heavily lies on the party opposing the amendment to demonstrate to court's satisfaction that the amendment will occasion such an injustice that it cannot be sufficiently compensated for by costs or that the amendment seeks to prejudice the rights of the opposite party which rights are existing as at the date of the proposed amendment e.g. by depriving him of the defense of limitation. See; ***Mohan Musisi Kiwanuka vs. Asha Chand SCCA No. 14 of 2002*** and ***Eastern Bakery v. Castellino, C.A. C.A. No. 30/1958[1958] E.A 461*** both cited with approval by the Supreme Court in ***Mulowooza & Brothers Ltd vs. N Shah & Co. Ltd Civil Appeal No. 26 of 2010.***

Courts of law have often liberally allowed amendments to pleadings to ensure a conclusive determination of all questions in controversy between the parties and to guard against the possibility of unnecessary multiplicities of suits. When parties seek court's intervention, their expectation is a proper adjudication of all their questions in accordance with the law and doing otherwise would be an indictment on the administration of justice.

The question for determination in this ruling therefore is whether the Applicants' 1st and further amendment introduces an entirely new cause of action with the effect of defeating the 1st Respondent's defense so as to

occasion an injustice which cannot be sufficiently compensated by costs. I will address this issue later in the ruling.

Firstly, however, as to whether the affidavit in reply is incurably defective for being supported by un commissioned attachments, rule 8 of the First Schedule to Commissioner for Oaths (Advocates) Act Cap 53 Laws of Uganda provides as follows:

> ***All exhibits to affidavits shall be securely sealed to the affidavits under the seal of the commissioner and shall be marked with serial letters of identification.***

While applying the above rule in the case of **Uganda Corp. Creamaries Ltd & Another Vs Reamoton Ltd. Civil Application No. 44 of 1998 (unreported)** Engwau JA held as follows;

> ***"In my view, whether or not those annextures have been securely sealed with the seal of the advocate who commissioned the affidavits thereof, does not offend Rule 8 because they were not exhibits produced and exhibited to a Court during a trial or hearing in proof of facts. In any case, the annextures in the present case were not in dispute. Even if those annextures were detached, the affidavits thereof would still be competent to support the Notice of Motion. Rule 8, though mandatory, is procedural and does not go to the root as to competence of affidavits. In the premises, substantive justice should be administered without undue regard to technicalities".***

In light of the foregoing authority, the Applicant's averment that the affidavit in reply is incurably defective for being supported by un commissioned attachments collapses. I have looked at the affidavit in reply itself and I am satisfied that it was competently commissioned by a Commissioner for Oaths.

New Cause of Action

It was deponed for the 1st and 3rd Respondents that the 1st and further amendment to the plaint seek to introduce a new cause of action. Whereas the 1st Respondent did not labor to indicate to court what new cause of action is being introduced by the amendments, Counsel for the 3rd Respondent submitted that in paragraph 15 and 16 of the further amended plaint, the Applicants seek to fault the Uganda police for connivance and trespass on grounds that the police caused the halting of all the activities of the Plaintiffs on the suit land while at the same time allowing the 1st Defendant to cross the buffer zone and plough and plant sugar cane. Further, that in paragraph 22 of the intended amendments, the subject matter is re-described meaning that the plaint initially filed is for a different piece of land which is non-existent.

I have had opportunity to look at the original plaint in Civil Suit No. 48 of 2020 attached as annexture 'D1' to the affidavit in support of the application. The subject matter of the suit was land comprised in **FRV HQT 130 FOLIO 7 Singo Mubende Block 308 Plot 143 land at Lwamasanga-Bukompe measuring approximately 1,078.9670 hectares and Block 308 Plot 142 measuring approximately 628 acres**

In paragraph 6 of the 1st amendment attached as "D2" to the affidavit in support of the application, the suit land is described as **FRV HQT 130 Folio 7 Singo Block 308 Plot 143 land at Lwamasanga Bukompe measuring approximately 1,079 hectares and Singo Block 308 Plot 142 measuring approximately 628 acres.** This description is consistent with that in the original plaint which lends credence to the averment by the Applicants that the mis-description in the 1st amended plaint under reliefs c), d), e), f) and i) was an inadvertent error. The error was only in misdesribing 'Singo Block' as 'Busiro Block' although all the other particulars of the suit land remained intact.

As to whether the amendment introduces a new cause of action, Counsel for the 3rd Respondents submitted that paragraphs 15 and 16 of the amended plaint introduces a new cause of action of connivance and trespass by the Uganda Police. I have however made findings in previous applications touching the same subject matter that it was necessary for the Uganda Police to create a buffer zone on the suit land for purposes of maintaining peace and security. Particularly in Miscellaneous Application No. 30 of 2022 arising from MA No. 71 of 2021 arising from CS No. 22 of 2021, this court directed the Uganda Police to maintain the existing buffer zone separating the varying parties until the main suit is disposed of. For this reason, therefore, I do not expect that a new cause of action should arise against the Uganda Police for having established the said buffer zone and for maintaining it. The 3rd Respondents fears are therefore misplaced. In any case, the facts introduced by the Applicant will have to be supported by evidence and strictly proved by the Applicant. Once the facts are

admissible and material to the case, the real issue is whether they are true or false. This issue cannot be determined in any other way other than through evidence adduced at the trial. In such circumstances, a party would therefore be allowed to introduce such facts and then be put to strict proof of the said facts.

It is also a point of contention in this application as to whether the 1st amendment of the plaint was effected without leave of court and therefore fatal. Under O.6 r.20 of Civil Procedure Rules, the Plaintiff may without leave of Court amend his or her plaint once at any time within twenty-one days from the date of issue of summons to the Defendant, or where a written statement of defence is filed, then within fourteen days from the filing of the Written Statement of Defence. This is however not a matter where the said rule strictly applies. When the parties appeared before me on 29th October 2021 I allowed them to make amendments to their pleadings but Counsel Yusuf Betunda raised an objection to the effect that he had a preliminary objection which may be overtaken if the amendment is allowed because the objection goes to the very existence of the suit. Court then allowed the amendment and directed Counsel Yusuf Betunda for the 1st Respondent to put his objections in writing with the view that the amendments would be vacated if court found merit in the preliminary objections. The said preliminary objections were then filed in this court on 11th November 2021. There is however no affidavit of service on record to show that opposite Counsel was served with these preliminary objections. Nonetheless, I have applied my mind to these preliminary points of law and come to the conclusion that they are without merit. The said 'points of law' are in fact points of fact which shall be determined in the main suit by way of evidence.

Consequently, I find that no prejudice will be suffered by the Respondents if the Applicants further amend their plaint by correcting the typographical error as pleaded.

This application is therefore allowed. Costs shall be in the cause.

I so order.

Dated at Kampala this ..... 18th day of October 2022

Flavian Zeija (PhD)

PRINCIPAL JUDGE