

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC. APPLICATION NO. 094 OF 2023
(ARISING FROM HCT – 01 – CV – CS – LD – 10 OF 2020)

5 **ZAVERIO NDABAHWEREZE BYABAGAMBI APPLICANT**

(Admin. of the Estate of the late Mukasimu Ndabahwereze)

VERSUS

1. MTN (U) LIMITED

2. ATC (U) LTD

10 **3. KYALISHIMA SCOVIA RESPONDENTS**

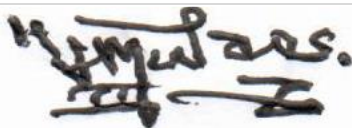
BEFORE: HON. JUSTICE VINCENT WAGONA

RULING

15 The applicant commenced this application under section 33 of the Judicature Act, Section 13, 98 and 100 of the Civil Procedure Act and Order 6 rule 19 and 31 of the Civil Procedure Rules for orders that:

- 1. Leave be granted to the applicant to amend the plaint.**
- 2. Costs of taking out the application provided for.**

The grounds on which the application was premised are stated in the affidavit of the applicant where he stated as follows:



1. That the applicant engaged a new counsel who upon perusal of the suit discovered that the transactions between the 1st, 2nd and 3rd Respondents in the main suit were tainted with fraud.

2. That it is proper to have the plaint amended to include the elements and particulars of fraud. That the ends of justice shall be served if the orders sought were granted. That the application was brought without inordinate delay and as such should be granted.

The application was opposed by the 1st, 2nd and 3rd Respondents as follows:

1. That the proposed amendment is bad at law as it seeks to introduce a new cause of action which was not previously pleaded by the applicant in the original plaint and the proposed amended plaint was not attached to the application as required by law.

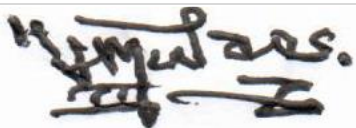
2. That there is nothing new that the applicant discovered since the transactions between the 1st, 2nd and 3rd Respondents have been in currency since the filing of the suit.

3. That the application was brought with inordinate delay and the respondents shall suffer great prejudice if the same was allowed. That as such the application should be dismissed with costs.

In rejoinder, the applicant maintained thus:

1. That it is not a mandatory requirement to attach a proposed amended plaint to the application.

2. That the proposed amendment does not seek to introduce a new cause of action but to plead elements of fraud which were glaring in the transaction between the defendants and if omitted, he will suffer injustice.

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3. That amendments before trial are freely allowed to avoid multiplicity of suits and to help to determine the real issues in controversy between the parties.

Issues:

I find the following issues relevant to the determination of this application:

- 5 **1. Whether the applicant should be granted leave to amend the plaint and plead particular and elements of fraud.**
- 2. What remedies are available?**

Representation and hearing:

10 ***M/s Karungi & Partners, Advocates & Solicitors*** represented the applicant while ***M/s Shonubi, Musoke & Co. Advocates*** represented the 1st Respondent, ***M/s Katende Ssempebwa & Co. Advocates*** appeared for the 2nd Respondent and ***M/s Bwatota Bashonga & Co. Advocates*** appeared for the 3rd Respondent. Counsel filed written submissions which I have duly considered herein.

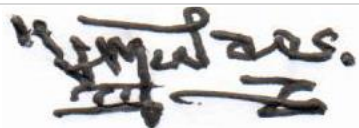
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Resolution:

Order 6 rule 19 of the Civil Procedure Rules provides thus:

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.

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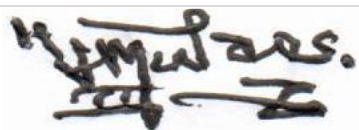


The above provision grants court the discretion to grant leave to the parties to amend their pleadings at any stage of the proceedings. However, courts have overtime developed parameters within which such discretion should be exercised. In *Muwolooza & Brothers v N Shah & Co Ltd (Civil Appeal No. 26 of 2010)* 5 *[2011] UGSC 112 (14 November 2011)*, the Supreme Court cited the decision in *Eastern Bakery v. Castelino C.A.C.A No. 30 of 1958 [1958] E.A 461* where Sir Kenneth O'Connor stated:

“Amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and ... 10 there is no injustice if the other side can be compensated by costs ... the court will not refuse to allow an amendment simply because it introduces a new case but there is no power to enable one distinct cause of action to be substituted for another ... the court will refuse leave to amend where the amendment would change the action 15 into one of a substantially different character... or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation.”

Tumwesigye JSC further guided in *Muwolooza & Brothers* (supra) thus:

20 “This is I think the correct statement of the law on amendments to pleadings. Amendments are allowed by courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities in accordance with Article 126(2) (e) of the Constitution. Therefore, if a plaintiff applies for leave to amend



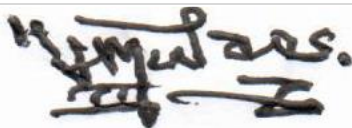
his pleadings, courts should in the interest of promoting justice, freely allow him to do so unless this would cause an injustice to the opposite party which cannot be compensated for by an award of costs, or unless the amendment would introduce a distinct cause of action in place of the original cause.”

It therefore follows that an amendment should be granted where it seeks to have the matters in controversy resolved and to avoid multiplicity of suits. However, where an application for leave is made mala-fide or where it seeks to introduce a new cause of action or where it is prohibited by law, where it is prejudicial to the opposite party or where it is made at advanced stages of the hearing of the case, then such amendments may be denied. The opposition by the Respondents to the amendment is - that the amendment introduces a new cause of action that was not pleaded in the original plaint. That the application for amendment has been brought with inordinate delay and if allowed, the respondent shall suffer prejudice.

(a) Introduction of a new cause of action:

It was contended by the applicant that the amendment seeks to plead particulars and elements of fraud which are visible in the transaction agreements between the 1st, 2nd and 3rd Respondents. That as such leave should be granted to have the plaint amended to capture those particulars. The applicant attached a copy of the amended plaint to the affidavit in rejoinder highlighting the said particulars.

In reply, learned counsel for the 1st, 2nd and 3rd Respondents argued that the amendment seeks to introduce a new cause of action “fraud” which was not pleaded in the original plaint. That as such the said amendment is barred by law



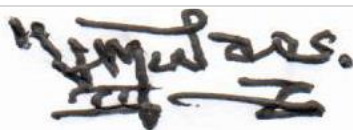
since it seeks to introduce a new distinctive cause of action and as such should be rejected. Learned counsel cited a plethora of authorities from the High Court and Court of Appeal to support their position. In rejoinder, learned counsel for the applicant insisted that the applicant does not seek to alter the original cause of action being trespass so as to change the face of the suit; the applicant seeks to simply bring to light elements of fraud.

I have noted that the applicant in the amended plaint attached to the affidavit in reply does not change the original cause of action being trespass and seeks to add a new cause of action being fraud. The issue is whether or not the said amendment is proper and allowed by law.

Tumwesigye JSC in Muwolooza & Brothers v N Shah & Co Ltd (supra) guided in relation to the question above thus:

“It is, therefore, right to unite in the same suit several causes of action and courts should not discourage it even if it is to be done through an amendment to pleadings....

Rules allow uniting in the same suit several causes of action against a defendant or defendants. This is intended to promote just disposal of suits and to guard against multiplicity of suits, see Mohan Musisi Kiwanuka vs. Asha Chand SCCA No. 14 of 2002. What case law seems to prohibit is introducing an amendment that would be prejudicial to the other party's case, but as it will be shown later in this judgment, even such an amendment will be allowed if the prejudice can be sufficiently compensated for by costs.” (Empasis is mine)



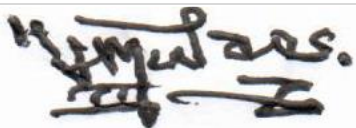
What the law appears to prohibit in my understanding is substitution of a cause of action with a completely different one. That is, where a party seeks to change the original suit into a different suit by way of amendment, then such amendment is
5 barred by law. However, where a party seeks to add a cause of action to an already existing one, then such amendment is not barred by law since it seeks to have all questions in controversy between the parties heard and settled in one suit to avert multiplicity.

10 I am satisfied that the proposed amendment by the applicant does not introduce a distinct cause of action with a view of changing the face of the case. The applicant seeks to introduce an additional cause of action.

(b) In-ordinate delay:

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The applicant contended that the application was brought without inordinate delay and no prejudice shall be suffered by the Respondents if the same is granted. The Respondents on the other hand contended that the applicant has always had the documents that the applicant alleges are marred with fraud, since the filing of the
20 suit in 2020 and there is nothing new. Further, that the suit is in advanced stages, parties having scheduled the case and filed witness statements. No explanation has been offered by the applicant to account for the undue delay in filing the application at hand. That if the amendment is allowed, it would mean that the suit will go back to pleadings and other steps which will occasion an injustice to the
25 Respondents.

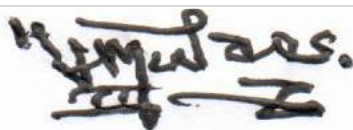
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I have considered the pleadings and the submissions of both counsels. Whereas the law allows court to grant leave to parties to amend their pleadings, such amendment cannot be allowed where it is brought at late stages of the trial process.

5 In the **Bright Chicks Uganda Limited v. Dan Bahingire, H. C. Misc. Application No. 254 of 2011, at page 4** it was held that amendment should not be allowed when they will cause undue delay. Further in **Gasu Transport Services (Bus) Limited v. Martin AdalaObene, S. C. Civil Appeal No. 4 of 1994,** at page14 it was held that an amendment which is mala fide should not be allowed.

10 The applicant filed the original plaint on 26th May 2020 and the defendants filed their respective written statements of defense on 14/7/2020 and 15th July 2020 respectively. The 3rd defendant attached an agreement of purchase of the suit land from a one Z. Byabagambi. The applicant filed an amended plaint on 28th July
15 2020 where there is no mention of fraud as a cause of action or elements thereof. Later the parties generated a joint scheduling memorandum which counsel for all the parties signed and subsequently filed witness statements and the case was scheduled for hearing on 25th August 2023. The applicant filed this application on 20th October 2023 after the suit had been scheduled for hearing.

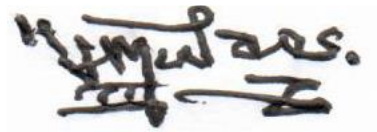
20 I find that the applicant had all the time to file an amendment but only waited until scheduling was done and the case was fixed for hearing to file the application at hand. Whereas am cognizant of the fact that leave to amend pleadings should be granted freely, where a prayer for leave to amend is made when a party has for a
25 long time been in possession of evidence that they did not bring forth into their

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pleadings until a case is in its advanced stages of the trial process, court should be reluctant to grant such permission since it would have a bearing on the case and on the right to a speedy and fair trial guaranteed under the Constitution.

- 5 I find that this application was brought with inordinate delay and it fails at this stage. I find no merit in this application and it is hereby dismissed with costs awarded to the Respondents in the cause.

I so order



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Vincent Wagana

High Court Judge

Fort-portal

DATE: 22/03/2024

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