

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HCCS NO. 10 OF 1991

MISC. APPLICATION NO. 8 OF 1992

1. S. ALI KABULUKU
 2. THE BOARD OF GOVERNORS
BUGEMBE ISLAMIC INSTITUTE
- } : : : : : PLAINTIFFS

VERSUS

FRANCIS MAKOMA : : : : : DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE C.M. KATO

R U L I N G

This ruling refers to an application by the two plaintiffs/ applicants for an order that one Abedi Mwase be added to the main suit as a second defendant. The application was lodged by a notice of motion dated 22.5.92 under the provisions of Order 1 rule 10(2) (4) of Civil Procedure Rules and Order 48 rule 1 of the same rules. The application is supported by/affidavit of Sheikh Habib Idi Kabasa dated 21.5.92. The respondent/defendant swore an affidavit in reply and that affidavit is dated 25.5.92.

Mr. Tuyiringire who appeared for the two applicants argued that in order for the court to properly and completely adjudicate upon the main suit it was necessary to have Abedi Mwase added to the suit as a second defendant. It was his contention that if Abedi Mwase is not added the issue of who owns the suit premises may not be properly determined or resolved. On the other hand Mr. Mutyabule who appeared for the respondent/ defendant argued that there was no need for adding Abedi Mwase as one of the defendants in the main suit, since, according to him, the question of title or ownership over the disputed premises was settled long ago by lower courts. According to him (Mr. Mutyabule) the application was not brought in good faith as the main suit is res judicata.

Order 1 rule 10(2) of Civil Procedure Rules under the provisions of which this application was filed state that the court may at any stage of the proceedings order that the name of any person may be joined to the proceedings to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit. The power, given to the court by the provisions of this order is discretionary. The court must as of necessity exercise its discretion judiciously. In a case of

this nature before reaching its final decision the court must satisfy itself that if the application is not granted the issues presented before the court in the suit may not be satisfactorily resolved. In the case of: Coffee Works (Mugambi) Ltd. V Kayemba (Digest of Uganda High Court cases at page 14), which was quoted to this court by Mr. Tuyiringire the learned counsel for the applicant, it was held that no jurisdiction would be exercised by this court under Order 1 rule 10(2) where the matter was not liable to be defeated by no-joinder of any party or parties as defendants. In other words this court will proceed to add a party or parties as defendants only if there is no any other way of resolving the issues other than by making such an addition but where there is another way of resolving the issues the addition may not be required.

In the instant case it is the case for the applicants/plaintiffs that Abedi Mwase who had some dealings in the suit property should be added as a defendant to enable the court to decide the issue of ownership of the suit property. I have carefully examined the pleadings in the main suit along with the affidavits sworn by both sides in respect of this application and I have come to the conclusion that although Abedi Mwase's name appears in a number of places as a person who was involved in the disposal of the disputed premises, his presence in court as a defendant is not vital for the determination of the issues that may be raised at the hearing of the suit.

At this point I must, with due respect, express my agreement with Mr. Mutyabule the learned counsel for the respondent when he says that this application was not lodged in good faith. This view is based on two paragraphs appearing in the notice of motion itself. In the first paragraph of the grounds of this application it is said that all along the plaintiffs believed that Abedi Mwase would be a reliable witness for the plaintiffs and that he had assured them of that fact; the same statement is repeated in paragraph 4 of Sheikh Habib Idi Kabasa's affidavit sworn in support of this application; in ground 5 of the notice of motion it is said: "Abedi Mwase can no longer be a reliable witness to the applicants." These facts clearly suggest that the reason why this application was lodged is because the applicants had found it difficult to have Abedi Mwase as their witness although Mr. Tuyiringire denied this fact when I brought it to his notice during his submission. The mere fact that a person has refused to cooperate with a party in a case is not enough to drag him to court by making him a party on the opposite side; those who come to this court for redress must come with clean hands. I must say the applicants in this present application have not come to this court with clean hands. Their hands are tainted with some stains of bad faith.

Judging from the above account which I have observed in the notice of motion and in the affidavit of Kabasa it is only reasonable to conclude that had Abedi Mwase agreed to appear and testify on behalf of the two applicants in the main suit this application would not have been heard of. The main reason for this application, it seems, was for the applicants to express their displeasure to Mwase for his refusal to support them in their claim against the defendant/respondent but not to meet the ends of justice.

In all these circumstances I find no merit in this application and I do dismiss it with costs to the respondent/defendant.

C.M. KATO
JUDGE

18.6.1992