

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**MISC. APPLICATION NO. 170 OF 2012
(ARISING FROM CIVIL SUIT NO. 106 OF 2007)**

B.W. KAPIRIRI PLAINTIFF

VERSUS

**1. INTERNATIONAL INVESTMENTS LTD.
2. KALIISA KARANGWA MOSES
3. ELIZABETH MWIGUNDU
4. MITALA BULUBA MOSES
5. MUKUNGU BALATI
6. BULUBA JULIUS DEFENDANTS**

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

RULING

This is an application where the Plaintiff/Applicant seeks leave to amend the Complaint by alleging fraud on the part of the 1st Defendant/Respondent and on the part of the Commissioner for Land Registration, in order for Court to determine the real questions in controversy between the parties and for the Plaintiff/Applicant to seek the cancellation of the 1st Defendant's name from the Registrar of Titles and the Certificate of Titles for Freehold Register Volume 447 Folio 24 Block 22 as the registered proprietor on account of fraud.

Secondly, to be allowed leave to add the Commissioner for Land Registration as a necessary party to the suit.

The summary of the Applicant's case is that the suit land was his as lawful occupant until he was forcefully evicted by the 1st Defendant and that the said 1st Defendant obtained the Certificate of title to the suit land through fraud.

The Applicant claims that at the time the suit was filed, a set of facts were not known to him namely:

- (i) That the 1st Defendant/Respondent possessed a Certificate of Title, and therefore made no reference to it and that it has now come to light that the first Defendant/Respondent was registered as proprietor in March 2007.
- (ii) This only came to light during the hearing of the suit during the cross examination of one of the witnesses but that the said title was not submitted to the Court or to counsel for the Plaintiff.
- (iii) Efforts to have the 1st Defendants produce or avail a copy of the same through notices to the said Defendants dated 28/8/2009 and 21/6/2011 were not adhered to.
- (iv) The Plaintiff seeks to bring out the particulars of fraud on part of the 1st Defendant so that the Court can determine the real issues between the Plaintiff and 1st Defendant.

The affidavit in support of the application states that the Plaintiff only pleaded fraud against the 3rd - 6th Defendants only because the fraudulent actions by the 1st Defendant and the Commissioner for land registration were unknown to the Applicant then.

In paragraph 4(b) thereof, the Applicant claims that the 3rd, 4th, 5th and 6th Defendants/Respondents purported to have

5 sold the suit land to the 1st Defendant/Respondent as Administrators of the Estate of Zakaliga Balati, Lubale Buluba and Tolofisa Kyakuwaire in a Sale Agreement executed in January 2007 and yet the Freehold offer indicates that the 1st Defendant, Respondent had applied for a Freehold in April 2006 long before the purported purchase of the suit land. (The relevant copies of alluded to documents are attached as "A" and "B").

10 Under Paragraph 4(c) of the said affidavit, it is deponed the people who are purported to have recommended the acquisition of the Freehold Title were not members of the area Land Committee and therefore had no authority/jurisdiction to recommend the 1st Defendant for the
15 suit land.

Further, that the area Land Committee that was purported to have made the recommendation (Balawull sub-county) denied ever having made the recommendation while the one under
20 which the recommendation should have been made (Namasagali) declined to do so.

Under Paragraph 4(d) it is alleged that there was no public hearing/Inspection by the area Land Committee as required
25 by the Land Regulations. (Annexure "C" to the affidavit) pointing to fraud on the part of the 1st Defendant.

The deponent further depones that all attempts to get a copy of the title in possession of the 1st Respondent's lawyers for
30 inspection has been to no avail.

Finally that there was collusion and fraud on the part of the 1st Defendant/Respondent and the Commissioner for Land Registration.

The Respondents' brief affidavit in Reply raises three main issues:

5 (1) (In paragraph 3) that the Applicant at the time of filing the suit knew of the existence of the land Title.

(2) That the 2006 agreement referred to by the applicant refers to a different piece of land as opposed to the agreement of 2007.

10 That there exist two independent Freehold Titles for different pieces of land.

(3) That if the amendment is allowed, it will create a different cause of action and will prejudice the 1st Defendant/Respondent's case.

15 The submissions for the Plaintiff/Applicant at the hearing of the application mainly reiterate the averments in the application and affidavit in support thereof.

20 It is submitted that copies of the Certificate of title were only availed on 2/12/2012 when the case was already part heard and almost at the close of the case for the Plaintiff. The case of **Ntungamo District Council Vrs. John Kazarwe CA. 27/97** was cited.

25 In that authority, it was held that Order 6 r.18 CPR confers a very wide discretion to Courts to grant leave to parties to amend their pleadings.

30 However, an amendment that would introduce a new distinctive cause of action or would prejudice the right of the other party would not be allowed.

It is submitted that this proposed amendment is not introducing new matters in the suit but that it is the same

cause of action. The applicants also relied on **GASO Transport Ltd. Vrs. Martin Adala Obene - SCCA 4/94**, where the principles governing the exercise of discretion in amendment of pleadings were laid down. I will get back to these later.

Counsel for the 1st Respondent cross examined the deponent/applicant although when he made his submissions he made no reference to the said cross examination.

10

However, it was submitted for the Respondent that the application is brought in bad faith and intended to defeat the Defendants' defence which is created by statute.

15 He referred to Section 176 of the RTA and specifically stated that in their defence (Paragraph 16 thereof) it was clearly stated that the Defendants had documents of ownership. That he ought to have done due diligence before filing the suit in 2007. That it would be unfair to seek to amend the pleadings 5 years after filing the suit. Instead, he should file a fresh suit subject to limitation.

20 Finally that the application is premised in falsehoods as evidenced in paragraphs 4(a) and paragraph 3 of the affidavit in support of the application.

25 In rejoinder it was submitted that the basis of the suit is fraud and the Applicant should be given a chance to prosecute the case over land he was evicted from.

30

I have looked at the proceedings of this suit which started way back in 2007. Outside of the various interlocutory applications, continuous and sometimes acrimonious correspondences, the case file moving from one Judicial

Officer to another, the real hearing started in March 2009 with Scheduling and the first witness Hon. Egonda Ntende testified in July the same year and the last witness for the Plaintiff gave evidence in October 2009.

5

The 1st Notice to the Respondents/Defendants to produce the Certificate of Title was issued on 28/8/2009 and the last in June 2011, several witnesses down the road having testified.

10 This instant application was filed in 2012 purportedly in response to being served with a copy of the Certificate of Title in Misc. Application 726/07 but the record shows that this was after an order by the then Judge (Hon. Murangira) that parties file all the documents to be relied on 13/7/2011.

15

For all intents and purposes, one wonders why no effort was made to secure a substantive order to ensure the production of the said Certificate of title by the Defendants, when they realized that they needed it but instead proceeded with placing 8 other witnesses on the stand!

20

The record of proceedings does not in any case reveal that this was ever brought to the notice of Hon. Justice Magezi then who should have directed the said production of the document and could have even halted the proceedings if it became necessary to do so.

25

I have also looked at the pleadings and especially the original Plaintiff and the intended amendment under this application.

30

The suit was originally based on alleged trespass by the 1st and 2nd Defendants fraudulent sale by the 3rd to 6th Defendants. The Written statement of defence filed at the time in paragraph 16 therein categorically stated that the 1st

Defendant was a bona fide purchaser for value and had the necessary documentary evidence of ownership.

5 At that time, the Plaintiffs should have invoked the provisions of Order 10 CPR to seek clarifications and answers by way of interrogatories to clear the issues raised in paragraph 16 of the said defence, instead of jumping into the lake for a fishing expedition by going into the hearing of the suit.

10 In respect of the intended amendment, it appears as if a whole new dimension to the suit is being introduced into this matter which would substantively alter the cause of action.

15 There are also practical dimensions that may come into play if the application were to be allowed that would add confusion to an already complicated and in my view messy situation.

- For example would witnesses be recalled, (those who have testified?).
- Would the defence of D1 change in anyway having already shown that they are bona fide purchasers with the necessary evidence?
- Are the alleged fraudulent sales by D3 to D6 connected in anyway with those of D1 and D2 in having their purchase regularized by registration of ownership through/by the parties sought to be added to the suit?
- How about compliance with the required statutory requirements for bringing the intended 7th Defendant to court? E.g. Statutory Notice etc.
- And what about the role of the local Land Board which has been mentioned as having been involved in fraudulent dealings and approvals, are they also at one stage going to be added as parties and if not why not?

The law:

I note that both parties are alive to the principles that govern amendment of pleadings as seen from the authorities cited. Suffice it to say that Order 6 rule 19 CPR gives very wide discretion to the Court to allow amendment of pleadings in
5 deserving cases.

It is because of this very wide discretion that it was found necessary to lay down parameters for its exercise, to limit abuse there of or put a limit to what may lead to endless and
10 unnecessary changes to the disadvantage of opposite parties. The Supreme Court case of **GASO Transport Services Vrs. Adala Obene (CA 4/94)** has remained the leading authority on amendment of pleadings and has been applied by all other Courts in the country. There in, the Hon. Justices made the
15 following observations and holdings:

- (i) The High Court has wide discretionary powers to permit the amendment of pleadings to be made at any stage of the proceedings and in appropriate cases, amendment may be permitted as late as
20 during an appeal.
- (ii) It is trite law that Courts are more flexible in allowing amendments whenever applications thereof are made promptly, at the earliest stage in litigation. The more advanced the litigation, the
25 greater the burden upon the Applicant to satisfy the Court that leave to amend ought to be granted.
- (iii) The principles governing the exercise of discretion in allowing amendments are as follows:
 - (a) The amendment should not work injustice to
30 the other side. An injury which can be compensated by costs is not treated as an injustice.
 - (b) Multiplicity of proceedings should be avoided as far as possible and all amendments which

would avoid such multiplicity should be allowed.

(c) An application made malafide should not be granted.

5 (d) No amendment should be allowed where it is expressly prohibited by law (e.g. limitation of actions).

10 I have already alluded to the delay/lack of diligence on the part of the Applicant and/or failure to have corrected or cleaned their house earlier.

15 The complications, both practical and legal I have also earlier pointed out would in my view result in injustice to the other party.

20 They way this application has been brought and reading from the cross-examination of the Applicant by Counsel for the defence, it is clear the Applicant knew about the existence of the Title but according to him never bothered to check because he knew they were forgeries.

So is this application not made with malafide intentions?

25 I have looked and considered all the circumstances of this case.

30 I am satisfied that allowing this proposed amendment will irreparably injure the Respondents in their case, apart from causing unnecessary delays and complications. The alternative for the Applicants would if possible be to withdraw this case and depending on limitation file a fresh suit with clearly defined Defendants, parties, claims and evidence. I

accordingly decline to grant the application and it is dismissed with costs to the Respondents.

5

Godfrey Namundi
Judge
19/02/2014

10

19/02/2014:
Orono Emma for Applicant
15 Okalang for Respondents

Court: Ruling delivered in Court.

20

Godfrey Namundi
Judge
19/02/2014

25