IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLIC. NO. 875 OF 2016

ARISING FROM CIVIL SUIT NO. 54 OF 2015

COWESER MEDICAL CENTRE……..APPLICANT

V

UGANDA NATIONAL ROADS AUTHORITY……..RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

By motion under sections 14 and 33 of the Judicature Act , sectionn98 of the CPA and order 1 rule 10(1) and (2) and order 52 of the CPR, the applicant through its advocates Kitumba Magala & Co. sought two orders:

1. The applicant be substituted with Hon. Dr. Lwanga Herbert and Ssewanyana Fred be added as second defendant.
2. Costs

The respondent was represented by Mr. Kenneth Mwebembezi of the respondent's legal department.

The applicant's case

Through the affidavit in support, the gist of its case is that the substitution of the applicant and addition of the second defendant are necessary for the effectual adjudication of the dispute. It is the applicant's case that after the joint scheduling conference, counsel examined the memorandum and articles of association of the applicant and deemed it necessary to effect changes in the plaint.

Furthermore, that it is the intended plaintiff Dr. Lwanga who entered into a tenancy agreement with Ssewanyana who in turn was paid compensation for crops and medicinal plants on the land .

My analysis of the applicant's case is that it did not have locus standi to sue the respondent hence it now wants the party with locus standi and with a proprietary interest in the claim to do so and also to be permitted to add a party who in fact took the compensation which the intended plaintiff claims.

The respondent's case

The gist of the respondent's case presented through its affidavit in reply is that the applicant does not exist as a legal entity because a search at the URSB revealed that the entity that exists is '**Community welfare services'** but neither the applicant nor '**Coweser Uganda community welfare services'** exists. The applicant is '**Coweser medical centre'.** That since the applicant does not exist in the first place, it cannot seek to substitute a non existent entity.

It is further the respondent's case that the intended amendment seeks to introduce a new cause of action by a new plaintiff that shall substantially prejudice the respondent .

That the applicant seeks to cure a defect in its plaint through a power of attorney to Dr. Lwanga by '**Coweser Welfare Services** ' which entity is not the applicant.

That the applicant filed its reply to the defense on 26.3.2015 and therefore there has been delay to apply for amendment.

Resolution of the case

I have carefully considered submissions of both counsel and studied the authorities cited.

Order 1 rule 10(1) under which the first leg of the application is brought stipulates

> *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 , the court may at any stage of the suit , if satisfied that <u>the suit has been instituted through a bona fide mistake</u>, 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 upon such terms as the court thinks fit'*

A plain reading of order 1 rule 10 (1) suggests that courts will generally allow substitution of a plaintiff if there has been a bona fide mistake in citing the wrong party.

I note that counsel for the applicant did not discuss order 1 rule 10(1) yet it was cited as one of the rules under which the application was brought.

A comparison of order 1 rule 10(1) and order 6 rules 19 is important as it puts the issue under discussion in perspective. While order 1 rule 10(1) is strictly about substitution , order 6 rule 19 is about amendment of pleadings.

A closer scrutiny of the applicant's case shows that it not only wants to substitute and add parties but it also wants to amend pleadings, a course of action envisaged by order 6 rule 19 . In the interests of resolving all issues in controversy in this application, I shall ignore the fact that the application is defective in as far is it seeks to amend pleadings without citing the enabling law.

This brings me to the rationale behind order 1 rule 10(1) which is to allow a party to cite the correct litigant and to allow a party to add or remove a litigant which explains why the title of the order is

'*Suit in name of wrong plaintiff; addition and removal of parties.* '

With respect to substitution of the applicant with Dr. Lwanga, the respondent raised the fundamental question of whether the applicant exists as an entity in order for it to be allowed to bring in another person in its place. The applicant did not respond to the assertion by the respondent that it does not exist in law. What the respondent ascertained from its search at URSB was **Community welfare services (Coweser)** . The respondent ascertained that **neither Coweser Medical Centre nor Coweser Uganda Community welfare service**s exists.

The applicant in annexture A to its affidavit in support filed a power of attorney that names Community welfare services (Coweser) as the donor of a power of attorney to Dr. Lwanga. This power of attorney is dated 22.9. 2016.

This is an indication that the applicant knows it did not exist in law and sought to correct this anomaly by Annexture A, long after the plaint was filed in February 2015.

HCMA 299 of 2012 Attorney General v SABRIC Building and Decorating Contractors Ltd was cited by respondent's counsel in support**.** Justice Musene considered several precedents where it was held that a suit brought by a wrong party is a non starter and that a suit

by an incorporated body is a nullity except that this case was about rejection of plaint whereas in the instant application the applicant seeks to substitute a party.

It is not denied by the applicant that it did not exist in law at the time of filing the suit, an indication that it was a bona fide mistake. If the applicant was seeking to call itself by the correct name, this application would be allowed.

But , this application seeks to bring in a totally different person not being an entity but a natural person. This was certainly not the intention of order 1 rule 10(1) .

This means the application to substitute the applicant with Dr. Lwanga is disallowed.

With respect to joining Sewanyana as second defendant, the test is whether it is necessary for the effectual resolution of the dispute.

Order 1 rule 10(2) stipulates that

> *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 the 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.'*

The applicant intends to amend the pleadings to reflect that Dr. Lwanga has a cause of action against Sewanyana and ultimately the respondent.

The intended amendment is not just to enable the presence of Sewanyana in the proceedings but it seeks to defeat the respondent's defence that the plaint did not disclose a cause of action against it. This point was well brought out in **Commercial Court MA 254 of 2011 arising from CS No. 14 of 2011 Bright Chicks Uganda ltd v Dan Bahingire** where Justice Helen Obura J as she then was ruled that

where an action has been brought on a substantial cause of action, to which a good defence has been pleaded, the plaintiff will not be allowed to amend his claim …'

The same point was discussed **in SCCA No. 26 of 2010 Mulowoza & Brothers v N. Shah** where the Supreme Court cited with approval **Eastern Bakery v Castellano** where it was held that while the court will freely allow an amendment, there is no power to enable distinct cause of action to be substituted for another or where the amendment would prejudice the rights of the opposite party existing prior to the proposed amendment.

Counsel for the applicant cited **DAPCB v Jaffer Brothers ltd SCCA 9 of 1999** where the Supreme Court held that for a person to be joined as a party, it must be shown that the orders sought would legally bind that person and to avoid multiplicity of suits, that person be joined. Or, that the defendant cannot effectually set up a defence unless that person is joined. The Supreme Court made a distinction between joining a party who ought to have been joined in the first instance and joining a defendant whose presence before the court is necessary in order for the court to effectually and completely adjudicate the dispute. In the Shah case (supra) , the defendants' presence (Attorney general and DAPCB) were necessary to effectually determine the dispute which is the purpose of order 1 rule 10(2) .

The applicant seeks to join Sewanyana as a second defendant yet this should have been done when filing the suit initially.

The applicant's intention is not only to defeat the respondent's defense that it has no cause of action but it also seeks to smuggle in a cause of action by substituting Dr. Lwanga who has a cause of action as he entered into a tenancy agreement with Sewanyana who was compensated by the respondent.

This is a new cause of action different from the original cause of action premised on loss of business, loss of income and loss of property (herbal medicine). Joining Sewanyana is not to just for his presence in court but it enables the applicant through Dr. Lwanga to have a cause of action against the respondent.

In the final analysis, I find that the application to substitute Dr. Lwanga with the applicant is a not out of a bona fide mistake but intended to establish a cause of action, therefore it is disallowed.

Secondly, the application to add Sewanyana is disallowed because it seeks to introduce a new cause of action to defeat the respondent's original defense to the action.

Before I take leave of this case, I take issue with counsel for the applicant's omission to attach the intended amended plaint to the application as is the standard practice. For all intents and purposes, both counsel and myself were compelled to discuss intended changes to the plaint in the abstract which is not fair.

This application is dismissed with costs to the respondent that must be settled before another suit is filed by whoever claims a cause of action against the respondent.

DATED AT KAMPALA THIS 13TH DAY OF JANAURY 2017

HON. LADY JUSTICE H. WOLAYO