THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO. 0453 OF 2019

(Arising out of HCCS No. 70 of 2019)

ST. PETERS SEN. SECONDARY SCHOOL NAALYA::::::::::::::::::::::::::::::::APPLICANT

VERSUS

ODETTA DENIS::RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application under Order 6 Rule 19 and 31 of the Civil Procedure Rules SI 71-1 for orders that leave be granted to the applicant to amend the written statement of defense in the main suit to add material facts pertinent for the determination of the case by this court in order to arrive at a just decision.

The application was supported by the affidavit of Counsel Irumba Robert who stated that as the applicant's new lawyers, upon examination of the applicant's headmaster, they had realized material facts pertinent to the case surrounding the negligent nature of the plaintiff in regard to the accident in issue which had not been captured in the written statement of defense. It was stated that the respondent would not be in any way prejudiced by the amendment.

The respondent in an affidavit sworn by Counsel Sarah Zawedde opposed the application on grounds that it was oppressive, unnecessary, an abuse of court

process, and intended to delay and defeat the course of justice by delaying the hearing and disposal of the main suit. It stated among others that the applicant sought to perpetuate a repetition of facts that were already on the record of the court and as such the applicant would not be prejudiced in any way if the application was denied with costs.

The parties were directed by this court to file written submissions that were duly considered in this ruling.

Counsel for the applicant submitted that as stated in the affidavit in support of this application, the fact that the respondent was negligent in the performance of his duties at the school and that the alleged injuries if any arose as a result of his own negligence were not clearly captured in the written statement of defense that was on the court record which had been filed by the previous advocates for the applicant/defendant.

Counsel submitted that it was therefore prudent that leave to amend the defence be granted, so the court could have all relevant facts relating to the negligence of the applicant in the circumstances and further guide it to arrive at a just decision.

Counsel cited Order 6 Rule 19 and ***Mulowooza & Brothers Ltd vs N. Shah & Ltd SCCA No. 26 of 2010*** in support of his submission. He prayed that the court allow the application to ensure proper determination of the controversy between the parties and that it would not cause any injustice to the respondent.

In response, counsel for the respondent submitted that this application was *malafide* since the applicant was vehemently introducing a distinct and new defense of the negligent nature of the respondent in the proposed amended

written statement of defense at a later stage of the matter when hearing should have commenced having had approximately two years or so to do so.

Counsel submitted that if the application was allowed, it would occasion an injustice on the respondent which would not be compensated for by an order of costs. Counsel submitted that the injustices would include continuous non-compliance with the court's directions by the applicant, the non-appearance for court without notification or justification for two years and the fact that applicant's advocates had a period of about two years since they were appointed to represent the applicant but waited until August 16, 2022 to file the application when the matter was coming up for hearing on 23rd August 2022.

Counsel submitted further that the applicant was pleading new facts and a new defense of contributory negligence that if allowed would require the respondent to also amend their plaint hence causing delay. Counsel cited the case of ***The Kabaka of Buganda and Buganda Royal Institute of business and technical service vs Mugema Charles Misc. application No. 1301 of 2020 and Gulberg Hides & Skins (U) Ltd vs Bank of Africa (U) Ltd High Court Misc. Application No. 773 of 2021*** to support his argument.

In rejoinder, counsel reiterated that the proposed amendment was to enable court to decide all the issues in controversy. Counsel submitted that relying on the respondent's allegations that the amendment should be denied because it was brought a bit late would be punishing the defendant/applicant which would be a diversion from the objective of the court to decide on the rights and controversies of the parties. He submitted that the respondent by filing the main case in court was ready to reply any defense set up by the defendant.

Counsel further submitted that the respondent would have an opportunity to reply to the amended defense without amending his plaint as he alleged since the Civil Procedure Rules allow a plaintiff to reply to any written statement of defense made by the defendant.

Lastly, counsel argued that the respondents apart from just lamenting had not shown any injustice likely to be suffered upon grant of this application which could not be compensated for by award of costs or general damages. Counsel cited **Mulla, the Code of Civil Procedure, 17th Edition Volume 2, at page 333,334 and 336**, which states that;

Leave to amend should be granted where no injustice will be caused to the opposite party which cannot be cured by costs or other remedy. It was also stated leave to amend must always be granted unless the party is acting malafide.

He reiterated that the delays in the proceedings that were being attributed to the applicant could adequately be compensated for in form of costs and general damages and thus could not be a basis for this court to deny the application.

Counsel concluded that the amendment of the defense was necessary, justifiable, and had been brought in good faith, and denying it would leave the court in darkness about material facts crucial in the determination of the main case.

Court Analysis

Order 6 Rule 19 of the CPR empowers Court to grant leave to a party to amend their pleadings at any stage of the proceedings. It provides as follows; *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.

Tsekooko JSC (as he then was) in the case of ***Gaso Transport Services (Bus) Ltd vs Martin Adalla Obene [1990-94] EA 88***, stated these four principles that are recognized as governing the exercise of discretion, in allowing amendments as:

1. The amendment should not work injustice to the other side. An injury which can be compensated by award of costs is not treated as an injustice.
2. Multiplicity of proceedings should be avoided as far as possible and all amendment which avoid such multiplicity should be allowed.
3. An application made malafide should not be granted.
4. No amendment should be allowed where it is expressly or impliedly prohibited by law, e.g. limitation of actions.

Parties are at liberty to amend their pleadings whenever it is appropriate to do so in order to bring into focus the real issues in controversy for determination by the court. In considering whether or not to grant an amendment to pleadings, the court must always be guided by the materiality of the amendment sought, the rule of *audi alteram partem* and the genuiness of the amendment. The court in checking surreptitious motives will always consider the balance of convenience between the parties or take into account competing rights of the parties to justice. ***See Ng Chee Weng v Lim Jit Ming Bryan [2012] 1 SLR 457***

The respondent argued that the possible injustices arising out of the grant of this application cannot be compensated by an award of costs. These injustices included continuous non-compliance with the court's directions by the applicant, the non-appearance for court without notification or justification for two years

and the fact that applicant's advocates had a period of about two years since they were appointed to represent the applicant but waited until August 16, 2022 to file the application when the matter was coming up for hearing on 23rd August 2022. I agree with the argument of the applicant's counsel that all these can sufficiently be compensated for through the award of costs or damages.

The applicant has also not shown any bad faith or intention in bringing this application that makes the application *malafide*. The issues raised in the proposed amended written statement of defense surround the respondent's negligence which was a fact that was already alluded to in the written statement of defense on record. The amendment seeks to clearly elaborate and plead this alleged negligence. It is my view that allowing the amendment will enable the applicant ably state their defense and allow the court to conclusively determine the issues of controversy between the parties.

The wide and extensive powers of amendment vested in courts are designed to prevent failure of justice due to procedural errors, mistakes and defects and they are exercised to further and serve the aims of justice. The powers of amendment are intended to make more effective the function of the courts to determine the true substantive merits of the case, to have more regard to substance than to form, and thus free the parties and the court from technicalities and formalities of procedure and correct errors and defects in proceedings. However, such extensive powers would, by no means, translate to a *carte blanche* for effecting amendments which not only seek to overreach the adversary by attempting to alter the nature of the defence; or for unfairly prejudicing the plaintiff, or if granted, would entail further evidence to be lead on both sides, although one of

them had closed its case. What is paramount in the mind of a court is always to ensure that justice is served to all parties who should not be allowed to take an undue advantage of the other. See ***Lam Soon Oil and Soap Manufacturing Sdn Bhd v Whang Tar Choung [2001] 3 SLR (R) 451***

I find that no injustice will be occasioned on the respondent if the application is granted since he will have an opportunity to respond to the amended written statement of defence.

The application therefore succeeds and is accordingly allowed. The applicant shall meet the costs of this application in any event.

I so order.

Obiter dictum

This court loathes the practice of every new advocate instructed in matter seeking to amend inherited pleadings to their own style. It is unnecessary and prejudices the opposite party or becomes a great inconvenience to court flow management. If new matters are raised when they ought to have been raised at an earlier stage, the court should be inclined, in the interest of efficiency and expedition, to disallow the amendment and leave it to the party concerned to pursue his/her own remedy against his/her lawyer/Advocate for professional negligence at the Disciplinary Committee of the Law Council.

SSEKAANA MUSA
JUDGE
30th November 2022