THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 232 OF 2022
[ARISING FROM CIVIL SUIT NO. 291 OF 2018]

KIWANUKA ERICK :: APPLICANT

VERSUS

1. CENTENARY RURAL DEVELOPMEMT BANK LTD
2. GABOI NICHOLAS
3.KABANDA CHARLES :: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicant brought this application by Chamber Summons under Section 98 of the CPA, Section 33 of the Judicature Act, Order 1 rules 10(2) & 13 and Order 6 rule 19 of the CPR seeking orders that;

a) The 2nd and 3rd Respondents be added as defendants to Civil Suit No. 291 of 2018.
b) The Applicant be given leave to file an amended plaint with the names of the 2nd and 3rd Respondents as defendants in Civil Suit No. 291 of 2018.
c) The Applicant/Plaintiff be given leave to amend his plaint by curing the minor defects in the existing plaint to wit: quoting the correct spelling of the 1st Respondent's name, properly itemizing particulars of fraud, introducing facts elucidating the existing cause of action, and introducing an alternative prayer to recover of the current value of the mortgaged properties.
d) Costs of the application be provided for.

[2] The grounds of the application are set out in the Chamber Summons and in an affidavit in support of the application deposed by **Kiwanuka Erick**, the Applicant. Briefly, the grounds are that the Applicant as a self-represented litigant and without a back ground of legal procedures, while in jail in Luzira-

Upper Maximum prison, filed Civil Suit No. 291 of 2018 under summary procedure against the 1st Respondent seeking, among others, recovery of the mortgaged properties. He prepared the pleadings but omitted to endorse the plaint. The 1st Respondent successfully applied for leave to appear and defend the suit and filed a WSD but never served the Applicant. The 2nd and 3rd Respondents purchased the mortgaged properties whose sale and manner of acquisition form the subject matter of the main suit. The Applicant avers that the amendment sought to be made does not introduce a new cause of action or divergent facts constituting a separate cause of action but, if allowed, shall avoid a multiplicity of suits given that the prayers sought will affect the 2nd and 3rd Respondent's alleged interest in the mortgaged properties. The amendment will also rectify minor defects in the original plaint, set out facts elucidating the existing cause of action, set out particulars of fraud against the defendants and a new alternative prayer of recovery of the actual amount of the mortgaged properties. He concluded that the amendment will not prejudice the Respondents and prayed that the same be allowed by the Court.

[3] The Application was opposed through three affidavits in reply deposed by **Ronald Sekidde**, the Acting Chief Manager Legal Services of the 1st Respondent; **Gaboi Nicholas**, the 2nd Respondent and **Kabanda Charles**, the 3rd Respondent. In his affidavit, Ronald Sekidde stated that the present application is misconceived, vexatious and an abuse of the court process. He stated that the affidavit in support of the summary plaint was incurably defective on account of non-execution, suing a wrong party and having been improperly brought by way of summary procedure. He further stated that the proposed amendments are brought in bad faith the Applicant having perused the WSD and discovered that there is no case against the Defendant. The deponent also stated that the 1st Respondent sold the mortgaged properties to the 2nd and 3rd Respondents in exercise of its right to sell upon default by the Applicant. He concluded that the proposed amendment is intended to

introduce a new cause of action and it should be rejected since the Respondents are likely to suffer injustice if the amendment is granted.

[4] In the second affidavit, Gaboi Nicholas stated that the 1st Respondent advertised the land comprised in Kyagwe Block 189 Plot 597 in the Daily Monitor of 29th June 2015 to which he made an offer of UGX 90,000,000/= and purchased the land in good faith for valuable consideration and became the registered proprietor thereof. He stated that the sale was lawful and the Applicant has no basis to seek to add him as a defendant to Civil Suit No. 291 of 2018.

[5] In the third affidavit, Kabanda Charles stated that he executed a sale agreement for land comprised in LRV Block 107 Plot 2005 at Nabuti with Banu General Agencies on behalf of the 1st Respondent and paid a total sum of UGX 32,000,000/=. He is currently the registered proprietor of the said land having purchased the same from the 1st Respondent in good faith for valuable consideration. He stated that the sale was lawful and the Applicant has no basis to add him as a defendant to Civil Suit No. 291 Of 2018.

Representation and Hearing

[6] At the hearing, the Applicant was represented **Mr. Sserwanga Geoffrey** while the Respondents were represented by **Mr. Eric Eloket** who was holding brief for **Mr. Isaac Bakayana**. Counsel agreed to make and file written submissions which were duly filed and have been considered in the determination of this matter.

Issues for Determination by the Court

[7] Three issues are up for determination by the Court, namely;

a) **Whether the Respondents' affidavits in reply are improperly before Court?**

b) **Whether the 2nd and 3rd Respondents should be added as Defendants to Civil Suit No. 291 of 2018?**
c) **Whether the Applicant should be granted leave to file an amended plaint?**

Resolution of the Issues

Issue 1: Whether the Respondents' affidavits in reply are properly before Court?

Submissions by Counsel for the Applicant

[8] Counsel for the Applicant submitted that the affidavits in reply to the present application were filed outside time and without the Respondents seeking leave of the court to file outside the required time. Counsel cited the provision of Order 12 rule 3(2) of the CPR to the effect that all replies to interlocutory applications should be filed within 15 days from the date of service. Counsel also relied on the decision in *Stop and See (U) Ltd v Tropical Africa Bank Ltd MA No. 333 of 2010* over the same position. Counsel submitted that while the Respondents and their lawyers were served on 16th and 17th May 2022, their affidavits in reply were filed on 24th June 2022, which was out of time and in absence of leave of the court. Counsel prayed that the application should be allowed as uncontested.

Submissions by Counsel for the Respondent

[9] In reply, Counsel for the Respondent argued that the Applicant's application is incompetent for contravening the provision under Order 12 Rule 3 which requires all remaining interlocutory applications to be filed within 21 days from the date of completion of alternative dispute resolution (ADR) or where there is no ADR, within 15 days from the completion of the scheduling conference. Counsel submitted that in the instant case, the main suit was filed on 20th July 2018 and the failed mediation was concluded in 2019. The instant

application was, however, filed on 16th May 2022 three years after mediation, which makes it incompetent.

[10] Regarding the competency of the affidavits in reply, Counsel for the Respondents cited the case of *Dr. Lam Lagoro v Muni University MC No. 007 of 2016* to support the submission that the rules of procedure are generally silent on the timelines for filing affidavits in reply and where the rules committee considered it necessary to specify time limits for filing affidavits in reply, it prescribed such time periods. Where the rules are deficient, the court has to exercise its discretion to grant orders that would help in furtherance of the administration of justice rather than hampering it. Counsel submitted that an affidavit in reply, being evidence rather than a pleading in the strict sense, should be filed and served on the adverse party within a reasonable time before the date fixed for hearing; time sufficient enough to allow the adverse party a fair opportunity to respond. Counsel argued that in the present case, the Respondents' affidavits in reply were filed on 29th June 2022 before the hearing of the application and the Applicant had an opportunity to respond and was not prejudiced in the circumstances. Counsel prayed to the Court to reject the preliminary objection.

Determination by the Court

[11] It is apparent that the provision under Order 12 rule 3(1) of the CPR that requires all "remaining interlocutory applications [to] be filed within twenty-one days from the date of completion of the alternative dispute resolution and where there has been no alternative dispute resolution, within fifteen days after the completion of the scheduling conference," is not applicable to the present case. This is because, there are specific provisions of the law under Order 6 CPR that govern amendment of pleadings. Specifically, under Order 6 rule 19 CPR, the court is empowered to grant leave to a party to amend their pleadings at any stage of the proceedings. This specific provision of the law cannot be

ousted by the general provision for a cut off period under Order 12 rule 3(1) of the CPR. Clearly, in my view, rule 3(1) of Order 12 CPR was not meant for applications such as the present one. As such, the objection by Counsel for the Respondents to the competency of the present application is not borne out by the law and is rejected.

[12] Turning to the objection concerning the competency of the affidavits in reply deposed by the Respondents, I hold the view that in an application where evidence is led by way of affidavits, the timelines for filing a defence in an ordinary suit ought not apply strictly. I am alive to the decision in *Stop & See (U) Ltd v Tropical Africa Bank Ltd, HCMA No. 333 of 2010*. I however find more persuasive authority in *Dr. Lam Lagoro v Muni University MC No. 007 of 2016* wherein the Learned Judge held that in an application to be determined on basis of affidavits, all affidavits and pertinent documents should be filed and served on the opposite party before the date fixed for the hearing of the particular application. The Learned Judge further held the view that an affidavit in reply, being evidence rather that a pleading in *stricto sensu*, should be filed and served on the adverse party within reasonable time before the date fixed for hearing. In that case, the Learned Judge called for flexibility in regard to the filing of affidavits in reply and allowed the late filing of an affidavit in reply.

[13] I am greatly persuaded by the latter decision as representing the correct position of the law regarding the filing of affidavits in reply in interlocutory applications where the rules do not provide for specific time lines. In the present case, the affidavits in reply were filed before the date fixed for hearing of the application and the Applicant had the time and opportunity to file an affidavit in rejoinder. Indeed, the Applicant filed an affidavit in rejoinder to the three affidavits in reply. I find that although the Applicant was inconvenienced by the Respondents' late reply, no substantial prejudice was occasioned to him

such as would outweigh the Respondents' right to be heard on the application. In the circumstances, I find that the affidavits in reply are competent before the court and the objection in that regard is overruled.

Issue 2: Whether the 2nd and 3rd Respondents should be added as Defendants to Civil Suit No. 291 of 2018?

Submissions by Counsel for the Applicant

[14] Counsel for the Applicant relied on the decisions in the cases of *Samson Sempasa v P.K Sengendo HCMA No. 577 of 2013* and *Kololo Curing Co. Ltd v West Mengo Co-operative Union [1980] HCB 60* to the effect that before a person is joined as party, it must be stablished that the party has high interest in the case and that the orders sought in the main suit would directly legally affect the party sought to be added. Counsel referred the Court to paragraphs 9 and 10 of the affidavit in support of the application to the effect that the 2nd and 3rd Respondents purchased the mortgaged properties from the 1st Respondent; which averment is admitted by the 2nd and 3rd Respondents in their affidavits in reply. Counsel concluded that their addition is necessary for the proper and just resolution of the main suit.

Submissions by Counsel for the Respondents

[15] In reply, Counsel for the Respondents submitted that the addition of the 2nd and 3rd Respondents is not necessary for the determination of Civil Suit No. 291 of 2018. Counsel argued that in their affidavits in reply, the said Respondents have shown that they acquired the respective properties in accordance with the law. Their titles cannot be impeached other than for reason of fraud and the Applicant has challenged neither the titles nor the process of acquiring the same. Counsel further submitted that the 2nd and 3rd Respondents were not parties to the mortgage executed between the Applicant and the 1st Respondent. They were thus unaware of the events that transpired before the 1st Respondent lawfully exercised its right to sell as a mortgagee

which is the subject of contention. As such, their addition is not necessary to determine the issues arising from the main suit.

Determination by the Court

[16] Order 1 rule 10(2) of the CPR provides 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."*

[17] In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd, SCCA No. 9 of 1998*, the Court pointed out that there is a clear distinction between joining a party who ought to have been joined as a defendant on the one hand and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, on the other hand. Citing with approval the decision in *Amon v Raphael Tuck & Sons Ltd (1956) 1 ALLER p. 273*, the Supreme Court held that "a party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter".

[18] It is also the correct legal position that in an application for joining a party to a suit, the applicant has to satisfy the court that the person sought to be joined as a party has high interest in the case or that the orders sought in the main suit would directly or legally affect the party sought to be added, or that it is desirable to have that person joined to avoid a multiplicity of suits, or that

the defendant could not effectually set up a desired defence unless that person was joined or that the order that may be made in the suit would bind that person. See: *Kololo Curing Co. Ltd v West Mengo Co-operative Union [1980] HCB 60; Alley Route Ltd v Uganda Development Bank HCMA 459 of 2007; Lea Associates Limited v Bunga Hill House Ltd HCCMA No. 348 of 2008;* and *Samson Sempasa v P. K. Sengendo HCMA No.577 of 2013.*

[19] On the case before me, there is evidence to the effect that the 2nd and 3rd Respondents purchased properties that had been mortgaged by the Applicant to the 1st Respondent. The evidence on record shows that the 1st Respondent is said to have sold the properties to the 2nd and 3rd Respondents in exercise of its right as a mortgagee upon default of the Applicant. It is clear to me that the dispute concerning the said properties cannot be litigated and adjudicated without the participation of the 2nd and 3rd Respondents. In case the eventual decision by the Court is to affect the said sale, the interests of the said Respondents will definitely be directly legally affected by any orders that may be made by the Court. In that regard, the argument by Counsel for the Respondents that the 2nd and 3rd Respondents were not privy to the Mortgage dealings bears no merit in light of the position of the law and the facts as above highlighted. The Applicant has, therefore, satisfied the Court that it is necessary to add the 2nd and 3rd Respondents as defendants to Civil Suit No. 291 of 2018. This issue is decided in the affirmative.

Issue 3: Whether the Applicant should be granted leave to file an amended plaint?

Submissions by Counsel for the Applicant

[20] Counsel for the Applicant relied on the provisions of Order 6 rule 19 CPR for the position of law on amendment of pleadings and submitted that the Applicant seeks to amend the original plaint and correct the spelling of the name of the 1st Respondent, structure the particulars of fraud, and include a

new alternative prayer for the actual amount of the mortgaged properties. Counsel cited the text in **Civil Procedure and Practice** by **Musa Ssekaana et al, at page 51** where it is stated that if a party is sued in an assumed name or acquired by usage or reputation, an amendment will be allowed to correct such misnomer.

[21] Counsel submitted that in the instant case, the Applicant spelt the name of the 1st Respondent as Centenary Bank instead of "CENTENARY RURAL DEVELOPMENT BANK LTD". However, by usage, the 1st Respondent identifies itself as Centenary Bank as can be seen in their receiving stamps on annexures Al and A2 to the affidavit in rejoinder. Counsel argued that the plaint is not defective because the misnomer in the description of the names of the 1st Respondent can clearly be rectified by amendment and no prejudice is likely to be suffered by the Respondents. Counsel further stated that the Applicant needs to properly set out the particulars of fraud which, although contained in the facts, were not properly structured as the plaint was drawn by the plaintiff himself as a lay person. The Applicant also needs to set out an alternative prayer for recovery of the value of the properties in case the properties cannot be recovered. Counsel prayed that the application for amendment be allowed.

Submissions by Counsel for the Respondents

[22] It was submitted by Counsel for the Respondents that the Applicant is using the proposed amendment to cure fatal defects in the plaint which is barred by the law. Counsel submitted that the Applicant failed to particularize fraud in his plaint as required by law and is using the instant application to cure a fatal defect. Counsel cited the decisions in *Kampala Bottlers v Domanico (U) Ltd CA No. 22 of 1992; Lubega v Barclays Bank (1990-94) EA 294; Okello v UNEB CA No. 12 of 1987* and *Iddi Ouma & Anor v UNEB HCCS No. 159 of 2018* to the effect that it is mandatory to plead the particulars of fraud. Counsel also submitted that the Applicant cannot amend the plaint to substitute a non-

existent party and that Order 1 rule 10(4) CPR allows for amendment of minor matters of form not affecting the identity of the parties to the suit. Counsel submitted that the Applicant having sued a non-existent party called Centenary Bank which has no legal existence is barred from amending the plaint to include Centenary Rural Development Bank Ltd. Counsel cited the case of *Trustees of Rubaga Miracle Centre v Mulangira Simbwa HCMA No. 576 of 2006* and argued that such amendments are prohibited under the law. Counsel concluded that the instant application is incompetent and should be dismissed with costs.

Determination by the Court.

[23] The provision under *Order 6 rule 19 of the CPR* empower the court to grant leave to a party to amend their pleadings at any stage of the proceedings. It provides that;

"*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."*

[24] The principles that have been recognized by the courts as governing the exercise of discretion to allow or disallow amendment of pleadings have been summarized in a number of decided cases as follows;

a) Amendments are allowed by the courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities.

b) An amendment should not work an injustice to the other side. An injury that can be compensated by an award of damages is not treated as an injustice.

c) Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.

d) An application that is made malafide should not be granted.

e) No amendments should be allowed where it is expressly or impliedly prohibited by any law.

f) The court shall not exercise its discretion to allow an amendment which has the effect of substituting one distinctive cause of action for another.

See: *Gaso Transport Services (Bus) Ltd v Obene (1990-1994) EA 88; Mulowooza & Brothers Ltd v Shah & Co. Ltd, SCCA No. 26 of 2010;* and *Nicholas Serunkuma Ssewagudde & 2 Others v Namasole Namusoke Namatovu Veronica HCMA No. 1307 of 2016*.

[25] In the present case, upon perusal of the original plaint, the proposed amended plaint and the other evidence on record, I agree with Counsel for the Applicant that the 1st Respondent in the usual course of business conveniently trades as Centenary Bank. The official stamps affixed on Annexures A1 and A2 to the affidavit in rejoinder are testimony to this fact. There was no doubt either in the mind of the 1st Respondent or any other third party that the reference to Centenary Bank was in fact made in reference to Centenary Rural Development Bank Ltd. In the circumstances, therefore, the same was simply a misnomer that can be rectified by way of amendment without occasioning the 1st Respondent any miscarriage of justice. See: **Musa Ssekaana et al, <u>Civil Procedure and Practice</u>, at page 51**.

[26] On the other aspects of the proposed amendment, I note that the facts that the Applicant seeks to introduce are sequential to the material facts already before the court. The facts pointing to fraud are set out in the original plaint. The fact that the said aspects were not particularized in the manner required by the law is simply a technicality that is incapable of barring an amendment. I do not find any introduction of a new cause of action by the Applicant or a substitution of one distinctive cause of action for another. I have also seen nothing to indicate that the Applicant has brought this application in bad faith

or in circumstances amounting to abuse of the court process. I am satisfied that the facts sought to be introduced into the plaint by the Applicant are necessary for a fair and complete determination of the real issues in controversy between the parties in the main suit and may assist the court to avoid a multiplicity of suits.

[27] In all, therefore, the application accordingly succeeds and is allowed with orders that;

a) The 2nd and 3rd Respondents shall be joined as defendants in Civil Suit No. 291 of 2018.
b) The Applicant is allowed to amend the plaint in Civil Suit No. 291 of 2018 in the terms and upon the matters highlighted in this application.
c) The amended plaint shall be served onto the defendants within 15 days from the date of this order together with fresh summons to file a defence.
d) The costs of this application shall abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered by email this 7th day of November, 2023.

Boniface Wamala
JUDGE