

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**  
**MISCELLANEOUS APPLICATION NO.250 OF 2013**  
**ARISING OUT OF CIVIL SUIT NO. 119 OF 2011**

1. MICHAEL MULAGGUSI MULO
2. EDWARD ZIMULA MUGWANYA.....PLAINTIFFS/APPLICANTS

**VERSUS**

1. JOSEPH BALIBASEKA MUSIITWA
2. ZAIDI MISISI MBARANGU
3. THE ADMINISTRATOR GENERAL .....DEFENDANTS/RESPONDENTS

**BEFORE LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This is an application by chamber summons brought under Order 6 rule 19 & 31 of the Civil Procedure Rules (CPR) for the following orders:-

1. That the applicants be allowed to amend their plaint
2. Costs of this suit be provided for.

The application is supported by the affidavit of Michael Mulaggusi Mulo the 1<sup>st</sup> applicant. It was opposed by the 1<sup>st</sup> and 3<sup>rd</sup> respondent who each filed an affidavit in reply, to which the 1<sup>st</sup> applicant filed respective affidavits in rejoinder. The 2<sup>nd</sup> respondent did not file any affidavit in reply. Counsel made oral submissions on the matter.

In his submissions, counsel Urban Tibamanya for the applicants relied on the affidavit evidence of Michael Mulaggusi Mulo. He implored this court to grant the orders sought. He cited **Eastern Bakery V Casterino [1958] EA 461** and **N. Ashah & Co Ltd V Mulwooza & Brothers & Another Civil Appeal No. 57/2009** to support his position. Counsel Matthias Mwanje for the 3<sup>rd</sup> respondent opposed the application. He reiterated the affidavit evidence of the 3<sup>rd</sup> respondent sworn by Nakibuule Madinah. He prayed court to dismiss the application with costs, stating that it was prejudicial to the Administrator General's interests. Counsel Anthony Namugoba for the 1<sup>st</sup> respondent abided by the submissions of the 3<sup>rd</sup> respondent and also prayed that the application be dismissed with costs.

The applicants' evidence, as is gathered from the 1<sup>st</sup> applicant's affidavits and the annexed amended plaint (annexture **A** to the affidavit in support of the application), is that he filed Civil

Suit No.119/2013 against the defendants. Some material facts were omitted in the plaint necessary for the determination of the issues between the parties. These are that the administrator had not filed an inventory for the estate since he was granted letters of administration in 1974, and has not cared to administer the deceased's estate as legally required; that the annexed amended plaint does not introduce a new cause of action; and that it is brought without delay, will not cause any injustice, and avoid multiplicity of proceedings.

The 1<sup>st</sup> respondent's affidavit evidence is that there is a will to the estate in question; that he is not aware of any letters of administration granted to the 3<sup>rd</sup> respondent; that the 1<sup>st</sup> and 2<sup>nd</sup> applicants got their shares of the estate through their respective fathers; that they are running from the truth and trying to encroach on the estate Wilfred Mugwanya Kabuusu who died without making a will but left an heir and other children who are beneficiaries to his estate; that if any letters of administration were granted to the Administrator General when there is a will, it is a matter of law which cannot be cured by amendment; and that the 1<sup>st</sup> and 2<sup>nd</sup> applicants have no cause of action and their application to amend does not cure the defect in the pleadings which are incompetent and ought to be dismissed with costs.

The 3<sup>rd</sup> respondent's affidavit evidence is that the 3<sup>rd</sup> respondent obtained letters of administration to administer the estate of the deceased in 1974; that the distribution of the estate was contained in a will whose contents are recorded in the Succession Register; that the applicants benefitted from the distribution and are thus stopped from challenging the same; and that the said respondent filed an inventory and is in the process of renouncing the letters of administration in favour of the rightful beneficiaries.

Order 6 rule 19 of the CPR 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.”*

In **Eastern Bakery V Casterino [1958] EA 461**, Sir Kenneth O'Connor stated that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be adequately compensated by costs. Also see **Cooper V Smith (1884) Ch. 700**.

I have looked at the application, carefully analyzed the affidavit evidence on record, and addressed the submissions of counsel, together with the law applicable to this situation. The respondents' affidavit evidence and submissions of their counsel mainly delve into the merits of the main suit which is yet to be heard, not on whether to allow or not to allow the amendment. I do not agree with the submissions of the 3<sup>rd</sup> respondent that the amendment will prejudice the interests of the 3<sup>rd</sup> respondent who claims to have distributed the estate and renounced the letters of administration issued to him in 1974. I agree with the applicants' counsel's submissions that

“prejudice” or “injustice” does not mean making “a bad case” for the party opposing the application to amend, in this case, the Administrator General. The prejudice envisaged by court as highlighted in the cited case of **Eastern Bakery V Casterino** is as follows:-

*“where the amendment would change the action into one of a substantially different character, or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ.”*

**Also see N. Ashah & Co Ltd V Mulwooza & Brothers & Another Civil Appeal No. 57/2009.**

I have compared the original plaint (annexture **A** to the applicants’ supporting affidavit) and the intended amended plaint. The intended amendments are clarifying that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs acted together. They also plead that the 3<sup>rd</sup> respondent, the original holder of letters of administration, has failed to fulfill his responsibilities. The particulars of fraud existed in the original plaint and the intended amended plaint merely elaborates on them. There is nothing in the intended plaint that creates a new cause of action or prejudices the rights of the respondents existing at the date of the proposed amendment. In my opinion, the amendments will enable this court to determine the real questions in controversy in this case.

On basis of the evidence adduced before this court, and the foregoing authorities, I am satisfied that there are compelling reasons for the amendment. In the interests of justice, I am satisfied that the amendment sought is necessary for the purpose of determining the real questions in controversy between the parties. I am also satisfied that this application, if allowed, will not cause injustice to the respondents.

The application is allowed. The amended plaint should be served on the respondents to allow them file their respective defences before the case proceeds to scheduling.

The costs of this application will abide in the main suit.

**Dated** this 26<sup>th</sup> day of June 2014.

Percy Night Tuhaise

**Judge.**