

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
MISCELLANEOUS APPLICATION NO. 628 OF 2016
ARISING FROM CIVIL SUIT NO 526 /1996

1. **KAYONDO MOHAMMED**
2. **JJUUKO MUSA**
3. **SEMPEBWA IBRAHIM**
4. **WALUGEMBE SULAIMAN.....APPLICANTS**

VERSUS

1. **THE ADMINISTRATOR GENERAL**
2. **HAJATI SARAH NAMUSISI**
3. **ABDUL KADDU.....RESPONDENTS**

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under Article 126(2)(e) of the Constitution; sections 98 and 100 of the Civil Procedure Act; Order 6 rules 19 & 23 and Order 1 rules 10(2), (4) & 13 of the Civil Procedure Rules (CPR) for orders that:-

- (a) This Honourable Court be pleased to grant the applicants/plaintiffs leave to add the 3rd respondent as a party to Civil Suit No. 526 of 1996.
- (b) This Honourable Court be pleased to grant the applicants/plaintiffs leave to amend their plaint in Civil Suit No. 526 of 1996.
- (c) The costs of the application be in the cause.

The application is supported by the affidavits of **Jjuuko Musa** the 2nd applicant and is based on numerous grounds, but briefly:-

1. That since the filing of the plaint in Civil Suit No. 526/1996 on the 11th June 1996, and upon being granted an order setting aside the consent judgement, decree and order that had been entered into in the said suit, the applicants have obtained more pertinent facts which arose subsequent to the filing of the suit, and documents which materially affect the registration status/proprietorship and description of the suit property forming part of the estate of the late Badru Kakungulu and impact on the reliefs sought by the applicants thereby necessitating the amendment of the plaint.

2. That the new developments mentioned have impacted on the original pleadings and relief sought by the applicants and necessitate the addition of the 3rd respondent as a defendant to the suit.
3. That the intended amendment is necessary to enable the applicants plead the new material facts and to include relief against the 3rd defendant/respondent's registration in respect of the suit property and further enable court determine the real questions in controversy between the parties in finality, so as to avoid multiplicity of suits arising from the same transaction or a series thereof.
4. That since the 3rd respondent derives his registration on the suit property from the 2nd respondent, the 3rd respondent is a necessary party as a defendant in the head suit, whose presence is vital to enable court effectually and completely adjudicate and determine the matter.
5. That the effectual and conclusive determination of all issues relating to the suit property necessitates the addition of the 3rd respondent herein as a defendant in Civil Suit No. 526/1996 and consequently, an amendment of the plaint.
6. That the intended amendments in the plaint do not change the cause of action neither do they in any way adversely depart from the plaintiffs' original claim substantially alleged against the defendants and no prejudices shall be suffered by the addition of the 3rd respondent as a defendant and the amendment of the plaint.
7. That it is in the interests of justice that this honourable court grants the applicants/plaintiffs leave to amend the plaint in Civil Suit No. 526/1996.

When the matter came up for hearing, the 1st and 2nd respondents informed court that they had no intentions to oppose the application. The 3rd respondent, **Abdul Kaddu**, opposed the application. He filed an affidavit in reply to which the 2nd applicant filed an affidavit in rejoinder.

Order 6 rule 19 of the CPR 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.”

In **Gaso Transport Services (Bus) Ltd V Martin Adala Obene SCCA No 4/1994**, Tsekoko JSC recognised the following principles as governing the exercise of discretion in allowing amendments:-

1. The amendment should not occasion injustice to the opposite party. An injury which can be compensated by the award of costs is not an injustice.
2. The amendment should be granted if it is in the interests of justice and to avoid multiplicity of suits.
3. The application for amendment should be made in good faith.

4. No amendment should be allowed where it is expressly or impliedly prohibited by any law (e.g limitation of actions).

Thus, as a general rule, amendment of pleadings should be allowed at any stage of the proceedings where court is satisfied that the amendment will enable the real questions in controversy between the parties to be adjudicated and where no injustice would be occasioned to the opposite party. An amendment will not be allowed where it will substantially change the cause of action into a different one, or will deprive the defendant of an accrued right, or where it is made *mala fide*.

In the instant application the amendment sought is to add the 3rd respondent as a 3rd defendant to Civil Suit No. 526/1996. On addition of parties, order 1 rule 10(2) of the CPR states:-

“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.”

On the question of who may be joined as defendant(s), Order 1 rule 3 of the CPR provides as follows:-

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common questions of law or fact would arise.”

Order 1 rule 7 of the CPR further states that:-

“Where the plaintiff is in doubt as to the persons from whom she or he is entitled to obtain redress, he or she may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.”

Thus, court has, under Order 1 rule 10(2), the discretion to order anyone to be joined as a plaintiff or defendant or as a person whose presence before court may be necessary in order to enable court to effectively and completely adjudicate upon and settle all questions involved in the suit. Such person may be joined even if the plaintiff has no cause of action against him or her provided that such party's presence is necessary for effectual and complete adjudication and settlement of all issues involved in the suit before court. The application to add a party could be by any of the parties, or done by the court on its own motion, or by any person whose legal right may be directly affected by the grant of the relief claimed in the action and who can show that

his or her presence is necessary to enable court effectively and completely adjudicate or settle the suit before it.

The aim is to bring on record all persons who are parties relating to the subject matter before court so that the dispute may be determined in their presence and at the same time without any prostration, inconvenience, and to avoid multiplicity of proceedings.

I have looked at the application and all affidavits on this matter, including the pleadings in Civil Suit No. 526/1996, and the intended amended plaint which is annexed as **A** to the affidavit in support of the application. I have also analysed the submissions of both Counsel and the law applicable to the situation.

The affidavit evidence of the applicant is essentially that since the filing of Civil Suit No. 526/1996, which was first settled by consent but which consent was later set aside, the property forming part of the estate and other material facts have materially changed consequently impacting on the nature of the reliefs sought, hence necessitating the amendments and the addition of the 3rd respondent as a defendant. The applicants aver that some properties forming part of the estate of the late Badru Kakungulu have been stealthily transferred into the names of the 2nd respondent and subsequently into the names of the 3rd respondent who is not a beneficiary of the estate. The 2nd applicant also avers that after instituting Civil Suit No. 526/1996 the applicants discovered other properties comprising the estate of the late Badru Kakungulu which the 2nd defendant/respondent had concealed and which properties she had transferred into her names.

The applicants' counsel submitted that by virtue of the fact that the applicants are seeking cancellation of the certificates of title in land registered in the names of the 3rd defendant, it in effect challenges the 3rd respondent's ownership and title in the disputed properties; and that the amendment to add the 3rd respondent as a defendant will not prejudice him but rather avail him an opportunity to defend himself in the circumstances; and that it is important that the 3rd respondent is bound by the decision of the court; and to avoid multiplicity of suits.

The affidavit in reply of **Abdul Kaddu** is briefly that he was registered as proprietor of land comprised in Kyadondo Block 208 Plots 4190 & 4189 land at Kawempe which was at the time of his registration not part of the estate of the late Badru Kakungulu; that he stands to suffer substantial injustice and prejudice in as far as the applicants are after an inordinate delay and passage of time seeking to renew their beneficial claims on his land; and that the intended amended plaint does not disclose a cause of action against him.

Counsel for the respondent submitted that the amendment is only intended to deprive the 3rd respondent of the defence that the applicants have no cause of action against the 3rd respondent, and that the applicants have acted *mala fide*.

It is apparent from the affidavit evidence of both sides that the fact of the suit land comprised in Kyadondo Block 208 Plots 4190 & 4189 at Kawempe being registered in the names of the 3rd respondent is not disputed. In the intended plaint annexed to the applicants' supporting affidavit, the applicants claim the land was part of the estate of the late Badru Kakungulu. The 3rd respondent denies in his affidavit in reply that the said land is part of the estate. This therefore is an issue which can only be settled by court upon evidence being adduced by both parties. There is already a pending suit in this court, from where this application arises, namely Civil Suit No. 526/1996, where the stated issue can be appropriately raised and handled without the applicants' necessarily filing a separate suit against the 3rd respondent, which in effect will avoid multiplicity of suits and save time for court, the parties and counsel.

In that regard the 3rd respondent, who does not deny that the said disputed land is registered in his names, ought to be joined as defendant, or at least his presence before this court may be necessary in order to enable this court effectually and completely adjudicate upon and settle all questions involved in the suit, including the issue of whether the disputed land forms part of the estate of the late Badru Kakungulu, or whether the 3rd respondent's claims on the land are valid. For this reason alone, I would allow the amendment.

The 3rd respondent contends in this application that the applicants have not established a cause of action against him hence the reason why he should not be added as a party to the suit. Under Order 1 rule 10(2) highlighted above, this court has the discretion to order anyone to be joined as a plaintiff or defendant or as a person whose presence before court may be necessary in order to enable court to effectively and completely adjudicate upon and settle all questions involved in the suit. Such person may be joined even if the plaintiff has no cause of action against him or her provided that such party's presence is necessary for effectual and complete adjudication and settlement of all issues involved in the suit before court.

The application to add a party could be by any of the parties or done by the court on its own motion or by any person whose legal right may be directly affected by the grant of the relief claimed in the action and who can show that his or her presence is necessary to enable court effectively and completely adjudicate or settle the suit before it. The aim is to bring on record all persons who are parties relating to the subject matter before court so that the dispute may be determined in their presence and at the same time without any prostration, inconvenience and to avoid multiplicity of proceedings.

The 3rd respondent also contends that the intended amendment is introducing a new cause of action against the 2nd respondent and the 3rd respondent in fraud without pleading and proving the same. On reading the record however, I do not find this to be a correct position. The record shows that fraud was initially pleaded in the plaint in Civil Suit No. 526/1996. The action was founded on fraud. The intended amendment seeks to add the 3rd respondent as a defendant and plead new facts allegedly pertaining to the fraud initially pleaded. Thus it is my opinion, and I

accordingly agree with the submissions of the applicants' counsel, that no new cause of action arises from the given circumstances.

The 3rd respondent further contends that the applicants acted *mala fide* in as far as the intended amendment is to deprive the 3rd respondent of indefeasibility of his titles to the suit land by introducing fraud against the 2nd respondent. Having ruled above that the intended amendment is in order in that it seeks to add the 3rd respondent as defendant and also plead new facts allegedly pertaining to the fraud initially pleaded, I do not find any *mala fide* intent or conduct on the part of the applicants in their filing of this application.

In addition, applying the criteria set out in the law cited above, I note from the annexed intended amended plaint that it includes, among other things, claims by the applicants of rights of relief against the 3rd respondent as the intended 3rd defendant, severally and jointly with the other two defendants/respondents. These include orders cancelling the 3rd defendant's name from part of the suit land, and orders directing the 2nd and 3rd defendants to return all certificates of title to the suit land. If a separate suit, other than Civil Suit No. 526/1996, was brought by the applicant against the 3rd respondent in respect of the same suit property, common questions of law and fact would arise. Addressing such suits separately would lead to multiplicity of suits. Thus, it is necessary that the applicant be added as the 3rd defendant in Civil Suit No. 526 of 1996 so that all questions arising out of the dispute can be resolved at once.

In the premises, and on the foregoing authorities, I would allow this application. The applicants are granted leave to add the 3rd respondent as a party/defendant to Civil Suit No. 526/1996, and to amend the plaint accordingly.

Costs of this application shall be in the cause of the main suit.

Dated at Kampala this 04th day of October 2017.

Percy Night Tuhaise.

Judge.