

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

MISC. APPLICATION NO. 0038 OF 2007

ALBERT PETER BANDA KAMULEGEYA :::::::::::::::::::::::::::APPLICANT

VERSUS

EMMAUS FOUNDATION LTD & ANOR :::::::::::::::::::::::::::RESPONDENTS

Before: HON. MR. JUSTICE HENRY I. KAWESA

RULING

At the start of the trial, and during scheduling, Counsel for the 1st – 4th Defendants raised a preliminary objection grounded on the following complaints:

- a) That the amendments of the plaint as proposed by the Plaintiff is not admissible.
- b) That the plaint discloses no cause of action against the Defendants.
- c) The suit is *scandalous, frivolous* and *vexatious*.
- d) The reliefs sought by the Plaintiff are barred by limitation.

The background to the said objections is that the Plaintiff filed Civil Suit No. 38 of 2007. Then on the 29th day of August 2016, the Plaintiff filed an amended plaint, incorporating proposals which the Defendants now are raising objections to.

I notice on record that on the 24th day of August 2016, the Applicant/Plaintiff made the application for amendment in open Court, and by consent, the amendment was allowed and Court allowed the Plaintiff to have the amended plaint filed and served upon the Defendants; within a week; then the Defendants were to file their written statement of defence within a week after service on them.

All the above was done. The record further shows that on the 20th day of October 2016, when the matter was called for conferencing, the Defendant's Counsel informed Court that he had issues with the suit before Court and wished to raise a preliminary objection arising therefrom.

The preliminary points raised were that he would not participate in the scheduling because;

- 1) There is no amended plaint filed because no fees have been paid for the plaint.
- 2) No reasonable cause of action is disclosed in the plaint.
- 3) That no orders are made for the parties that are not in Court.

Court noted these preliminary objections and fixed the matter for hearing. The record shows that during a Court sitting on 9th February 2016, again counsel for the 1st - 4th Defendants informed Court that he was ready to address his preliminary objections.

Court then gave them a schedule within which to file the submissions. Parties accordingly filed their submissions. I note from the submissions that the Plaintiff abandoned the issue of unpaid fees, and addressed Court on the preliminary objections stated in the terms as;

1. Plaint inadmissible
2. No cause of action
3. Suit is *frivolous*
4. Reliefs barred by limitation.

I will address each of them in the order they were presented/argued by Counsel for the Plaintiff as herebelow:

1. AMENDMENTS DONE BY THE PLAINTIFF ARE NOT ADMISSIBLE

Counsel argued that the amendments proposed to be made to the plaint are highly prejudicial to the Defendants. These changed the Plaintiff's case into one of a different character

entirely by changing the subject matter. Counsel argues that in the original plaint, the Plaintiff stated that he gave the 2nd Defendant (now 3rd Defendant) duly signed transfer forms under paragraph 4 (v).

However, he amended this position under paragraphs 8 (x), 9, 10, 12(1), 12(5) of the amended plaint where he denied having been given any such forms and alleged they were merely forged.

Counsel argued that this amended the cause of action if any from wrongful transfer to fraudulent transfer. He then referred to decided case law to argue that such an amendment cannot be allowed. He referred to *Ntungamo District Local Council versus John Kazzarwe HCMA NO. 27/97.*

In reply, Counsel for the Plaintiff opposed this contention. He argued that the amended plaint was consented to by the Defendants who even went ahead to file an amended written statement of defense. He referred to *Gasu Transport Services (Bus) Ltd. versus Martin Adala Obene SCCA No.4/1994* for the averment that amendments can be allowed at any time of the proceedings, once no prejudice is occasioned to the other party at the time the amendment is sought. He argued that the amended plaint did not in any way alter the subject matter or cause of action. He referred to *Mulwooza & Brothers Ltd. versus Shah SCCA NO.26/2010.*

He argued that the new amendments refer to the same subject matter being Plaintiff's plots of land alienated by the Defendant. He argued that the plea of fraud did not change anything as per the decision in *Mulwooza (supra)*.

I have perused the old plaint and the new amended plaint. I have also read and internalized the law as to what amounts to an amendment which changes the case into one of a different character or nature.

In *Gasu Transport Services (Bus) Ltd. versus Martin Adala Obene SCCA No.4/1994*, the Supreme Court held that;

‘No amendment should be allowed where it is expressly or impliedly prohibited by any law’.

In the case of *Eastern Bakery versus Castellino [1958] EA 46* – quoted with approval in *Ntungamo District Local Council versus John Karazarwe HCMA NO. 27/97 (Mbarara)* it was guided and held that;

‘A Court will not exercise a discretion to allow an amendment which substitutes a distinctive cause of action for another or to change by means of amendment the subject matter of the suit. The Court will refuse to exercise the discretion where the amendment would change the action into, one of a substantially different character’

Looking at the original plaint under its paragraph 4(iv), it is pleaded that;

‘the first Defendant requested for security from the Plaintiff as this interest free loan whereupon the Plaintiff secured the same by issuing the 2nd Defendant with his land title for property comprised in block 243 plot no’s 1123, 2124 and 2043 at Mutungo..’.

4(iv) ‘the Plaintiff in addition..... gave the 2nd Defendant duly signed transfer forms in respect thereof as further security and not as a basis of effecting transfer of the suit land into the 1st Defendant’s names.’

In paragraph 5, he averred in the plaint

‘By transferring the land into the 1st Defendant’s names using the transfer form given to him as a mere assurance for repayment of the loan and well knowing that the Plaintiff had never received his beneficial entitlements, the 2nd Defendant acted in bad faith and in total disregard of the loan terms and as such his actions ought to be declared unauthorized and unfair in the circumstance.’

In the amended plaint under paragraph 8(iv) he pleads that;

‘The 3rd Defendant (2nd Defendant before), requested for security from the Plaintiff on the interest free loan where upon the Plaintiff secured the same issuing the Defendant with land titles for property comprised in Block 243, plot 2124, block 243, plot 2043 Mutungo.

Paragraph 8 (v) the secretary to 2nd and 3rd Defendants fraudulently caused the transfer of the suit land into the names of the 2nd Defendant and later the 1st Defendant after forging the Plaintiff’s signatures.

Paragraph 10 ‘...using forged transfer forms purportedly signed and given to them by the Plaintiff was an act of fraud as the Plaintiff had never signed any transfer forms in favour of any of the registered proprietor or anyone else..’

The above extracts from the old plaint and the amended plaint obviously postulate two very different case scenarios. While in the first plaint, the Plaintiff conceded to giving signed transfer forms as security and only complained that he did not authorise the transfer and that the Defendants acted in bad faith to transfer the property, using the signed transfer forms.

In the amendment, he denied ever giving, signing or parting with the transfer forms. He alleged that his signature thereon is forged and the Defendants acted fraudulently while transferring the titles. The two scenarios are built on two different causes. One in the old plaint bend a ‘*wrongful act*’ while on the amended plaint, the act is ‘*fraudulent*’.

From the above discourse thereof and guided by the law, I agree with Counsel for the Defendants that the proposed amendments changed the subject matter of the suit entirely and do prejudice the rights of the Defendants as they existed at the time the amendment was done. The amendment substantially changes the subject matter from the complaint of ‘bad faith’/*wrongful transfer to fraudulent transfer*.

I would therefore decline to allow an amendment of the plaint whose effect would substantially change the cause of action to that of a different character, as is the case before me. I uphold this objection.

2. NO CAUSE OF ACTION

The amended plaint having been found incompetent, it follows that the proposed amendments cannot stand. The plaint therefore as it stands now cannot satisfy the standard set up in **Auto Garage versus Motokov (3) [1971] EA 514** that is;

- (i) *That the Plaintiff enjoyed a right*
- (ii) *That right has been violated*
- (iii) *The Defendant is liable.*

When the above case is considered alongside O.7 R1 (2) of the Civil Procedure rules:

‘A plaint shall contain facts constituting the cause of action and when it arose’.

I have gone through the old and amended plaints and I do find that the Plaintiff has abandoned the facts constituting his cause of action as per the old plaint and replaced them with a completely different set of facts which this Court has found untenable on account of the trust of the 1st Preliminary Objection.

The plaint therefore remains a shell and has not disclosed a cause of action. The 2nd Preliminary Objection is also upheld.

The 3rd and 4th Preliminary Objections will be handled together as they have a bearing on the 1st Preliminary Objection.

I am satisfied that, the Applicant has satisfied this Court that the Plaintiff’s proposed amended plaint is barred by limitation. This is because in all cases in which a party pleading relies on any misrepresentation, fraud, breach of trusts..... and in all cases in which particulars may be necessary, such particulars with dates shall be stated in the pleadings (*Per Okello – Okello versus Uganda National Examination Board (CA) No. 12/87*; the Supreme Court held that;

This rule is mandatory in that particulars of fraud and dates regarding the alleged fraud should be given’.

In this case as shown from the pleadings, there were no particulars of dates given; and as such it fails the above tests.

Secondly I agree with Counsel for the Defendants that once fraud is pleaded, then **Section 25 of the Limitation Act** comes into play; in that in action founded as fraud, the period of limitation shall begin to run from the time of discovery of the fraud. **Section 3(1) (a) of the Limitation Act** requires matters founded in **tort** to be commenced not later than six years. The argument by the Plaintiff’s Counsel that the fraud began in 1999 and hence action is not time barred, since the transfer went beyond 2002, is not tenable. This is because no clear dates when this fraud was committed as alluded to, are given. The plaint refers to the early 1990’s. If that was to be taken as the time frame then an action based on fraud filed in 2016 would be out of time. I find that this preliminary objection is also sustained.

There is no need to find if the suit was *frivolous* since this is already determined under the findings above.

Finally the Plaintiff’s Counsel argued that the Defendants had consented to the amendments and so should not raise any complaints thereafter.

That be as it is, however, I am aware of the holding in *Makula International versus His Eminence Cardinal Nsubuga & Another (1982) HCB 11(CA)*, that Court cannot sustain an *illegality*.

It is the law that an illegality once brought to the attention of Court overrides all questions of pleadings and admissions made therein. The fact that the Defendants had agreed that the plaint be amended, cannot be used as a license to allow the illegalities pointed out regarding the amended plaint to stand.

In view of all the above findings, I do hold that the preliminary objections raised are all sustained. The plaint is found incompetent, and is struck out.

The suit is accordingly dismissed with costs to the Defendants.

I so order.

.....

Henry I. Kawesa

JUDGE

01/11/2017

01/11/2017

Mr. Peter Katutsi for the Defendants

Mr. Kamba Hassan and Mr. Turinawe Julius for the Plaintiff

Parties absent

Clerk: Apollo

Court: Ruling delivered in chambers

Before me;

.....

Samuel Emokor

DEPUTY REGISTRAR

01/11/2017

On whether the Respondent would suffer prejudice, counsel relied on **Eastern Bakery v. Castellino**, C.A. C.A. No. 30/1958[1958] E.A 461 that there would be no prejudice if the party could be compensated in cost. Counsel argued that the Respondent would be prejudiced by the amendment because they .

The Applicant is granted costs of this application.

I so order.

.....

Henry I. Kawesa

JUDGE

1/11/2017

1/11/2017

..... Applicants.

.....

.....

.....

Court: Ruling communicated to parties as above.

.....

Henry I. Kawesa

JUDGE

1/11/2017