THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1124 OF 2015

(ARISING FROM CIVIL SUIT NO. 54 OF 2012)

1. **SSENKUBUGE DENIS**
2. **NAKAGIRI CHRISTINE :::::::::::::::::::::::::::::::: APPLICANTS**
3. **MUSOKE BLASIO KIRYOWA**

VERSUS

1. **HAJJATI MADINA NASSALI**
2. **COMMISSIONER LAND REGISTRATION ::::::: RESPONDENTS**

BEFORE HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

The Applicants herein brought this application under Order 1. r. 10; Order 6 r.19; Order 52 rr. 1& 2 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act, Cap.71 (CPA) seeking orders that;

(a) The Applicants be allowed to amend the plaint.

(b) A one Kiyimba be added ad 3rd defendant.

(c) A one Geoffrey Nangumya be added as the 4th defendant.

(d) Costs of this application be in the cause.

The grounds of the application are set out in the notice of motion and amplified in the affidavit sworn by the 1st Applicant, Senkubuge Denis, but are briefly that;

(a) The Applicants filed the main suit against the Respondents herein for the recovery of land formerly comprised in Kibuga Block 10, Plot 88 later on subdivided into various plots.

(b) Without the knowledge of the Applicants, the suit land was transferred into the names of the 1st Respondent.

(c) The 1st Respondent has since sold the suit land to other parties like a one Joseph Kiyimba who has since been registered as [proprietor of part of the suit land.

(d) The said Joseph Kiyimba has gone ahead to occupy land belonging to the estate of the late Lauben Mukasa in excess of what he illegally bought from the 1st Respondent.

(e) The Applicants therefore intend to plead new facts, new particulars of fraud with additional orders of cancellation of Joseph Kiyimba names from the title on ground of illegalities and fraud.

(f) The 4th intended defendant was the Advocate involved; he acted negligently and therefore ought to be added as a party.

(g) The Applicants shall suffer irreparable injury and damages if this application is not granted.

(h) It is just, fair and equitable that this application be allowed in favour of the Applicants.

The Respondents filed an affidavit in reply, sworn by Hajjati Madina Nassali, the 1st Respondent, basically opposing the application. The Respondents' main contention is that the Applicants filed their plaint on 16/02/2011, and subsequently amended the same and filed an amended plaint on the 24/03/2011.That the case proceeded and a joint scheduling memorandum was prepared and filed. That following the development of the case, the Applicants have purported to have identified new persons as defendants but that from their attached amended plaint, the Applicants have gone ahead to add facts which were not pleaded in their original and amended plaints. That

the facts introduced by the Applicants not only change their claim but also the subject matter which forms the basis of their subject matter. The Respondents prayed that the application be disallowed with costs for not meeting the criteria under the law for amendment of pleadings.

The issues for determination in this application are;

1. ***Whether the application meets the criteria for the amendment of pleadings.***
2. ***What remedies are available to the parties?***

Resolution of the issues:

Issue No.1: Whether the application meets the criteria under the law for the amendment of pleadings.

Order 6. r. 19 CPR which governs amazement of pleadings generally provides as that;

> ***"The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such a 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."***

Clearly, the court is under the law vested with wide discretion to allow amendment to pleadings of a party at any stage of the proceedings on such terms as may be just, and such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties, and to avoid multiplicity of proceedings.

The Supreme Court set out guiding principles for amendment of pleadings in ***Gaso Transporter Services Ltd. vs. Martin Adala Obene, SCCA No.4 of 1994.*** They are that;

(a) The amendment should not occasion injustice to the opposite party. See also: ***Mulowoza & Brothers Ltd vs. N. Shah & Co. Ltd SCCA No. 26 of 2010.***

(b) *The amendment should be granted if it is in the interest of justice and to avoid multiplicity of suits.* See also: ***Eastern Bakery vs. Castelino [1958] EA 461.***

(c) *It should be made in good faith.* Also see: ***Abdu Karim Khan vs. Muhammed Roshan [1965] EA 289***

(d) *It must not be expressly or impliedly prohibited by law.*

Thus a party generally encounters little or no difficulty in obtaining leave to amend its pleadings but the application should not be left to a stage so late in the proceedings which if allowed would prejudice the opposite party and occasioning injustice. See: ***General Manager E.A R & H vs. Theirstein [1968] EA 354.***

It is also the settled that the prejudice is not considered as occasioning any injustice to the opposite party if it is of such a nature that it can be atoned for with costs. See: ***Mohan Musisi Kiwanuka vs. Asha Claud, SCCA No. 14 of 2002; Wamanyi vs. Interfreight Forwarders (U) Ltd [1990] II KALR 67.***

It ought to be emphasized that in all circumstances the onus of proving that the prejudice occasioned by the amendment to pleadings cannot be atoned for in costs is on the party seeking to block the amendment.

The rationale of the above stated principles was set earlier in the case of ***Copper vs. Smith [1884] 26 CHD 700*** where Bowen L.J. observed that;

> ***"I think is well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise then in accordance with their sights…. I know of no kind of error or mistake which, if not fraudulent or intended to outreach, the court ought to***

correct, if it can be done without injustice to the other party – courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."

As applicable to facts of the instant case, I have not found either in the evidence in the affidavit in reply or submissions of Counsel for the Respondents any cogent reason that fits within the ambit of the principles stated above which disentitles the Applicants from obtaining the amendments to the pleadings as sought. The Applicants essentially seek to have one of the parties mentioned added to the pleadings as a defendant for the reason that he is alleged to have purchased and got registered on part of the land under contention and occupied it. They also seek to add another party also mentioned as defendant for the reason that he was the lawyer for the first party sought to be added and that he acted negligently.

Secondly, the Applicants seek to plead new facts and specifically to particularize the alleged fraud and illegalities against the parties they seek to add as defendants. The applicants also seek to show that though the subject matter of the suit could have changed in description, it is fundamentally the same and hence underlain by the same cause of action. These amendments are, in my view, necessary to enable the court determine all the matters in controversy at once and to avoid multiplicity of suits over the same subject matter. It therefore falls squarely within the ambit of Order 6 r.9 CPR (supra).

It is further observed that this case, though having been jointly scheduled by the parties, has not proceeded far into the hearing stages. It has not been shown, on evidence or otherwise, by the Respondents that the application is brought *mala fides*. As such no prejudice would be occasioned to the Respondents if the Applicants are allowed to amend their pleadings. The stage of the proceedings at which an amendment to pleadings may be brought is clearly provided for under the rules. The import of Order 6 r.19 CPR supra) is that it may be brought *"at any stage of*

the proceedings" for as long as it meets the criteria set out in the ***Gaso Transporter Services Ltd. vs. Martin Adala Obene*** case (supra).

Counsel for the Respondents strenuously labored in their submissions to argue that the proposed amendments introduce new facts which not only substantially but also entirely change the Applicants' claim and the basis on which they founded their cause of action. Counsel also pointed out the particular aspects that they consider having the effect of changing the Applicants' claim and cause of action in the suit.

This court is acutely alive to the position that an amendment that substitutes one distinct cause of action for another or changes the subject matter of a suit or changes an action into one of a substantially different character should not be allowed. See: ***JAS Progressive Investments (U) Ltd vs. Tropical Africa Bank Ltd (HCCS No. 78 of 2011).***

In the instant case, however, a careful perusal of the intended amendments does not bear out the concerns raised by Counsel for the Respondents. The cause of action remains substantially the same founded in fraud. The Applicants only seek to add parties and plead new facts to particularize the alleged fraud. What the law prohibits is to change the cause of action in the same pleadings, but even then, it does not prohibit an amendment that would seek to add parties and plead additional facts giving rise to the same cause of action in the same pleadings.

Counsel for the Respondents also raised the issue that the proposed amendments were not underlined to explicitly show the parts that were targeted by the proposed amendments in the pleadings. Counsel appeared to suggest that on this account the amendments sought ought not to be allowed.

With due respect, underlining of proposed amendments is good practice but is by no means a law whose non-observance renders the pleadings fatal. Suffice it to state that such is a technicality

which ought to be read in the context of Article 126 (2) (e) of the Constitution, and the quest for substantive justice would prevail over the placing undue regard to technicalities. Overall, the application is allowed in the terms sought in the orders. Costs will be in the cause.

BASHAIJA K. ANDREW
JUDGE
31/01/2017

Mr. Joseph Luzige Counsel for the Applicants present.

1st Applicant present.

Mr. Joseph Kyazze Counsel for the Respondents present.

1st Respondent present.

Mr. Godfrey Tumwikirize Court Clerk present.

Court: Ruling read in open Court.

BASHAIJA K. ANDREW
JUDGE
31/01/2017.