

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISC. APPLICATION NO. 0119 OF 2016
(ARISING FROM CIVIL SUIT NO. 119 OF 2013)

LUMALA BAKER:::APPLICANT/COUNTER CLAIMANT

V E R S U S

- 1. KIGOZI CRISPUS**
- 2. PAUL TUSUBIRA LUBEGA**
- 3. ESTHER KATEM BARBRA KIRONDE**
- 4. A. KIRONDE**

BEFORE HON. MR. JUSTICE HENRY I. KAWESA

RULING

This is an application for leave to amend the written statement of defence and counterclaim. The application is supported by the affidavit of LUMALA BAKER who stated *inter alia* in the affidavit in support that the proposed amendment will not prejudice the Respondents.

The application is opposed by the 2nd Respondent; Paul Tusubira Lubega; who swore an affidavit in reply. When the matter came up for hearing, it was agreed that parties file written submissions. The parties accordingly by written submissions addressed this Court as herebelow:

It was argued by Counsel for the Applicant that the basis of the application is that the amendment as proposed does not prejudice the Respondents. The application, if granted would help Court to reach a just and fair decision after full investigation of all the facts. The Applicant further points out that the *ex parte* proceedings were set aside and hence the Respondent's witnesses have to appear and testify in the presence of the Applicant and his Advocates in any event.

He argued that the allegations of fraud which were raised by the 2nd Respondent in his affidavit require proof at the main trial. Counsel alluded to the need to investigate all the matters pertaining to the grant of Letters of Administration after allowing the amendment to the pleadings; as prayed.

In reply, the 2nd Respondent's Counsel submitted that the Applicant is relying on a forged grant of Letters of Administration. It was her submission that the documents sought to be relied on by the Applicant are a complete *nullity*, total forgeries and should not be entertained by Court.

Counsel referred to **Section 100 of the Civil Procedure Act and O.6 R10 of the Civil Procedure Rules** – to argue that Court can at any time on such terms as to costs or otherwise amend any defect or error in any proceedings for as long as it is for the purpose of determining the real question or issue raised. Counsel referred Court to the principles governing such amendment as articulated in several decided cases such as *Eastern Bakeries versus Castellino (1958) EA (EACA) 461 at 462. Mang Po Hnaung (1921) 48 IA 214, and Haji Semakula Haruna versus Stanbic Bank U (Ltd) HCMA NO. 642 of 2011.*

These cases restate the principle that any proposed amendment should not lead to injustice to the other side, or substantially change the cause of action.

Counsel argues that the proposed amendments seeks to introduce new defences, and new parties to the suit. He argued that the amendment proposed is malfeide and no reasons are given for the proposed amendments. It was her case that the amendment proposes a totally different account of events and introduces new defences. In rejoinder/reply, the Applicant maintained their arguments and prayers.

The law regarding amendments is contained in **O.6 R19 of the Civil Procedure Rules and Section 100 of the Civil Procedure Act.** The above law has been interpreted by the Courts

in several Courts and the following principles have been settled as paramount before Court allows such an amendment.

Under **O.6 R19** of the **Civil Procedure Rules**, *‘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’*

This was the position in **General Manager EAR and H. Thiesten (1968) EA 354**; where it was observed that amendments may be allowed before or at the trial, or after the trial, or even after the Judgment, as long as allowing the amendment shall not prejudice the other party or as long as the other party can be compensated by costs, amendment of pleadings should be freely allowed.

(Also per **Matico Store Ltd versus James Mbabazi HCCS NO. 993 of 1993 [1995] 111 KARL 31**).

The above rule therefore clears the way for the Applicant to bring this application inspite of the stage at which the original mother suit has reached. Court has to consider the following principles before granting the application as laid out in **Gasu Transport Services Ltd versus Martin Adala Obene SCCA NO. 4/1995**;

a) **The amendment should not work an injustice to the Respondents.**

From the proposed amended written statement of defence, I do notice that all matters being pleaded were pleaded in the original written statement of defence. The details being proposed are all facts which in my opinion relate to the proposed defences to matters specifically stated in the plaint. There is therefore no prejudice likely to occur to the Respondents.

- b) **The amendment involves a change in the nature of action; or sets up an entirely different claim from that which the Defendant came to meet** (*per Moss versus Malings (1886) 33 CHD 603* and *Patel versus Josin (1952) 19 EACA 42.*)

When the above tests are applied to the application before me, I notice that the intended amendment to the written statement of defence does not raise any new defences. It only expounds on the earlier statement of defence which stated them in general terms.

I note that the parties are basically the same, and no new parties are introduced. I also note that in the old written statement of defence under paragraph 5, he mentions the fact that he is the rightful beneficiary to the late Yosefu Makubuya, to obtain Letters of Administration and that the alleged Letters of Administration obtained by the 1st Plaintiff (1st Respondent) were fraudulently obtained and are a forgery and the Defendant will counterclaim and pray for their cancellation.

These same averments are the concern of all the proposed amendments under paragraph 4 – 12 of the proposed amended written statement of defence, where details are given.

Also the counterclaim under the old written statement of defence is general, while the proposed amendment has a more detailed account of fraud alluded to, above. None of the facts as presented introduce a new matter or fresh pleadings.

The issue raised by the 2nd Respondent in opposition and in preliminary objection, regarding the frauds in the Letters of Administration and documents by the Applicant are not for this application but for the main trial. This application which merely seeks to allow the amendments, which is not the right avenue for raising the said objections.

Accordingly the preliminary objection is overruled. I do hereby find that the Applicant does not seek to introduce any new matters.

From the above findings and in view of the nature of the pleadings before me, I do find that the Applicant herein has satisfied the requirements for the grant of the application; as stated in *Mulwooza & Brothers versus N. Shah SCCA No. 26 of 2010 (unreported)*, that;

‘the test is whether the proposed amendment introduces a distinct new cause of action instead of the original or whether and in what way it would prejudice the rights of the Respondent if it was allowed.

As a rule, leave to amend will be granted so as to enable the real question in issue between two parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party. Leave to amend must always be granted unless the party applying is acting malafide. Leave is granted where it will be necessary for determining the real question in controversy between the parties’

From the tests, I am convinced that the proposed written statement of defence does not bring forth any new matters, it is not malafide and raises matters which if determined, will help Court to resolve the real questions in controversy between the parties.

For the above reasons, this application is granted.

The costs be in the cause.

I so order.

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Henry I. Kawesa

JUDGE

9/2/2018

9/2/2018:

Mr. Turinawe for Kibirango for the Applicant.

Applicant absent.

Respondents absent.

Court: Ruling delivered

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Henry I. Kawesa

JUDGE

9/2/2018