

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT JINJA**  
**CIVIL APPEAL No. 23 of 2017**

**TSMP (U) LTD**

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**APPELLANT**

**VERSUS**

**NANTAMBALA JOYCE**

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**RESPONDENTS**

**BEFORE: HON. JUSTICE MICHAEL ELUBU**

**JUDGMENT**

This is an appeal against the decision in the decision of **H/W JOHN FRANCIS KAGGWA Chief Magistrate** which was delivered at Jinja on the 23<sup>rd</sup> day of February 2017.

The background is that the Respondent (plaintiff in the lower court) filed a summary suit against the appellant on the 29<sup>th</sup> of June 2016. The plaintiff's action was for the recovery of vacant possession of the suit property located on plot 24 Spire Road in Jinja. That she had a certificate of title issued to her by the Jinja District Land Board for which the defendant (appellant) is aware.

On the 25<sup>th</sup> of October 2016 the appellant was granted unconditional leave to appear and defend. A defence was subsequently filed on the 3<sup>rd</sup> of November 2016. In it the defendant disputed the plaintiff's contentions claiming ownership of the property and set up a counterclaim asserting fraud in acquisition of the property.

An application by the appellant, for leave to amend the written statement of defence and set up a counter claim, was filed on the 16<sup>th</sup> of December 2016. It stated that there were several grounds for the grant of the application including the need to avoid a multiplicity of suits; the need to add the Jinja District Land Board and the

Commissioner Land Registration as parties to the Counterclaim in order to resolve the real issues and questions in this suit. The proposed defence was attached to the accompanying affidavit. It was stated that there would be no prejudice visited on the plaintiffs if the application was granted.

The respondent opposed that application stating that the intended defence was different from the one initially filed and considered by the Court when allowing the application to appear and defend; that the amendment introduces a new cause of action; and that the defence could not be amended by including a counterclaim.

The learned trial magistrate found that the applicant's prayer, in which they alleged fraud by the plaintiff in acquisition of the land, would in the event of success require that the certificate of title be cancelled. That such an amendment would in effect substitute one cause of action for another. The requirement for cancellation of title would remove the suit from the jurisdiction of the trial court. That as it introduces a new (different) cause of action and removes the matter from the trial court the application was denied with costs.

The appellants being dissatisfied with the Ruling filed this appeal with two grounds:

1. That the learned trial magistrate erred in law when he ruled that if the appellant was allowed to amend its WSD and Counterclaim then the appellant will be introducing a new cause of action which will put the matter beyond the jurisdiction of his court.
2. That the learned trial magistrate erred in law when he awarded the respondent costs of the application.

Prayers were made for orders that:

- a. The appeal is allowed
- b. The ruling and orders of the Chief Magistrate be set aside
- c. Costs of the appeal and application be paid by the respondent.

The appellant was represented by Mr Godfrey Malinga. The respondent by Mr Martin Asingwire.

The grounds of appeal were argued jointly.

The submissions on the grounds are:

Mr Malinga submitted as stated in the pleadings the respondent obtained the certificate of title fraudulently from the Jinja district land board and commissioner



land registration. That his client has been in occupation of the suit property since 1995. Therefore seeking to add the defendants would enable them explain circumstances under which the respondent's title was issued. That way all matters in controversy in the suit would be resolved.

He added that though only the High Court had the jurisdiction to cancel a land title for fraud, a court of competent jurisdiction could hear the matter and then the successful party would make an application for the appropriate consequential orders where cancellation were required.

Regarding an amendment that added a cause of action the submission is that such can be made if there is no prejudice to the other side. In any case where the validity of title or lease is contested then the registrar of titles ought to be made a party.

In reply, Mr Asingwire argued that an application to add parties is different from an application to amend. That an application to add parties ought to be made independently and if granted then another application for amendment follows. No such application was made in this case.

Secondly that the intended amendment was not served on the respondent to study the changes prayed for and it is therefore impossible to see what exactly is being amended. That the appellant does not state what the complaint against those parties he intends to add is.

That there is another suit before this court in which these issues, regarding the fraud, are being challenged. The plaintiff in the lower court only challenged possession and not ownership. The plaintiff simply wants the rent paid or vacant possession. It is not an issue of ownership. That questions of ownership cannot be properly handled in such a suit. Therefore the counter claim cannot conveniently be handled in this case as it changes the entire nature of the suit and should be disallowed.

The fact of a pending suit is already evidence of a multiplicity of suits. In addition, if the appellant were successful they would have to come to High Court for consequential orders and yet they already have that suit at the High Court.

In rejoinder, Counsel for the appellant argued the adding of parties would of necessity require the amendment of the pleadings, as to add or strike out a party inevitably results in the amendment of the pleadings. The two go together. Once you seek to add a party there is no need to first apply to add the party and follow that with an application to amend the pleadings.



Regarding whether the intended amendment was properly attached and marked to the application, Counsel submits that the amendment was well set out and clearly marked from page 3 of the intended amendment (page 3 of the appellant's supplementary affidavit).

It is also argued that the submission that a new cause of action is introduced is not well elaborated and no new cause of action is shown or intended.

As for another suit filed, it is true there is another suit filed in the High Court over the same subject matter. That suit has a subsisting interim order barring any action on the land. It is precisely why the Jinja Land Board and Commissioner Land Registration should be added to explain how they could make a fresh entry in spite of this court order.

That as the appellant is only a defendant in this suit which was filed by the respondent well aware that there was already another matter before the High Court, then the appellant needed leave to defend, followed by leave to be allowed to add the parties.

I shall turn to the merits.

The Civil Procedure Rules make provision for the adding of parties and for the amendment of pleadings.

Order 1 r 10(2)

*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.*

Order 1 r 13

*Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion or summons or at the trial of the suit in a summary manner.*



Order 6 r 19

*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.*

The above rules can be summarized in principals stated by the **Supreme Court of Uganda in Gaso Transport Services (Bus) Ltd vs Obene (1990-1994) E.A. 88** and they are,

- i) The amendment should not work injustice to the other side. An injury which can be compensated by an award of costs is not treated as an injustice.
- ii) Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.
- iii) An application which is made mala fide should not be granted.
- iv) No amendment should be allowed where it is expressly or impliedly prohibited by any law (for example limitation actions)”

The court is guided by the law set out and the above principals.

It should be added that Court may allow an amendment which introduced a new cause of action, but there was no power to enable one cause of action to be substituted for another.

In reference to the instant case an amendment would be allowed at any stage provided it would not work injustice against the respondent.

Second is the complaint that it was not clear in this case, whether the applicants intended to make an application to amend their pleadings or one to add parties. The respondent does not dispute that the appellant’s right to apply to amend their pleadings at any stage. The complaint is that if the applicant intended to add parties, then that application should be made. In the event of success another application to amend would follow. In answer to this submission I am persuaded by the holding in **Kalumba Benjamin and Anor vs Kakira Sugar Works (1985) HCMA 4611 of 2014 (land Division)** where it was held that,



...to amend pleadings as in the instant case would include, but not limited, to adding or striking out a party, and where the amendment seeks to add or strike out a party to the pleadings such pleadings are considered as amended thereby. Therefore, it is perfectly in order for an application for amendment to seek to add a party to the pleadings and in the same course of adding the party the pleadings are amended. As such there would be no necessity to file two applications, one for adding a party and the other for amending pleadings because one automatically leads to and/or is consequent upon the other.

That said the complaint that the intended amendment is not attached is misleading. The appellant had in their application in the lower court attached the intended amendment which sought to introduce a counter claim that named the Jinja District Land Board and the Commissioner Land Registration as defendants.

The learned trial chief magistrate had also made a finding that allowing that amendment, which may result in an order to cancel the land title, would change the cause of action by removing the jurisdiction to handle the matter from his court to the High Court.

The learned chief magistrate, as a court of competent jurisdiction could hear and determine the matters before it. In the event the outcome required the cancellation of title it was then up to the party requiring the title to be cancelled to apply to the High Court for appropriate orders by virtue of its powers under law (see **Munobwa Muhamed vs Uganda Muslim Supreme Council Jinja Civil Revision No 1 of 2006**).

The lower court therefore erred in finding that an amendment for the inclusion of the counter claim would remove the matter from the jurisdiction of the Chief Magistrates Court. The Chief Magistrate had the mandate to handle the matter as it was a court of competent jurisdiction and could arrive at whatever findings the justice of the case required. It would not therefore be proper to say that the counter claim in this matter introduced a new cause of action.

Lastly the counter claim would in my view enable the court to finally decide all matters in controversy between the parties as this is a case where validity of title is contested and the Commissioner Land Registration and the Jinja land Board are clearly a necessary parties to enable the court effectually and completely adjudicate upon and settle all questions involved in the issuance of the title.

Besides all the above, the respondent has not demonstrated to this court what prejudice they would suffer if leave for an amendment to set up the counterclaim is granted. This court has not seen any.

It is therefore the finding of this court that the lower court retains the jurisdiction to hear the matter even where the counter claim is introduced. That there is no prejudice on the respondent where leave to make the amendment is granted.

In the result I find that this appeal should succeed. The appellant shall have the costs here and in the court below.

A handwritten signature in black ink, appearing to read 'Michael Elubu', is written over a horizontal dotted line.

**Michael Elubu**

**Judge**

**1.8.18**