

**MISC. APPLICATION NO 1595 OF 2018-NAMUSISI YOZEFINA vs. DAVID KIKAAWA
(RULING)**

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]**

**MISC. APPLICATION NO 1595 OF 2018
(ARISING OUT OF CIVIL SUIT NO 245 OF 2011)**

NAMUSISI YOZEFINA:.....APPLICANT

VERSUS

DAVID KIKAAWA:.....RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This application is brought by chamber summons under Section 33 of the Judicature Act, Cap 13, Section 98 of the Civil Procedure Act Cap 71, and O.6 rr19 and 33 of the Civil Procedure Rules SI 71-1 seeking orders that;

1. The Applicant/2nd Defendant be granted leave to amend her written statement of defence and counterclaim;
2. The costs of this application be provided.

The grounds upon which this application is premised are that the facts were mistakenly represented by Counsel for the Applicant in the counterclaim. That the amendment will not prejudice the Respondent in any way and; further that the amendment is necessary to help Court resolve the real issue between the parties.

The application is supported by an affidavit deposed by the Applicant. The gist of the Applicant's case lies in paragraph 6, 7, 8, 9 and 10 of her affidavit which I shall reproduce them for ease of reference;

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6. *That the Plaintiff/Respondent sued me in the instant suit wherein I am the 2nd Defendant to which I filed a WSD and counterclaim through my lawyers to wit; Lukwago & Co. Advocates Suit 1, Media Plaza, Plot 78 Kira Road, P.O. Box 980 Kampala.*
7. *That however, material facts were mistakenly represented by my lawyers in the counterclaim that is the facts in the WSD are slightly different from those in the counterclaim yet they all arise from the same transaction that is;*
 - a) *Paragraph 6 of my written statement of defence states that the land subject to the sale agreement was transferred in the names of the Plaintiff and it is comprised in Block 204 Plot 396. And that the allegation that the Plaintiff purchased two acres is a misrepresentation of the 2nd Defendant. In as far as in the sale agreement the Plaintiff described to the Plaintiff the land and thereafter took him to the physical land and showed him his boundaries which they both understood. However that Plaintiff fraudulently surveyed and registered Plot 408 without the 2nd Defendant's knowledge.*
 - b) *Paragraph 7(a) of the written statement of defence states that "Following the purchase of land by the Plaintiff from the 2nd Defendant, the same was shown to the Plaintiff by the 2nd Defendant and was transferred into his names without any problem and it is comprised in Block 204 Plot 396.*
8. *That on the other hand paragraph 3(a) of the counterclaim states that following the counterclaimant's sale of two acres to which was registered in Block 204 Plot 396, the Counter Defendant erroneously and fraudulently registered Block 204 Plot 408 without the knowledge of the counter claimants.*
9. *That I wish to inform this Honorable Court that paragraph 3(a) of the counterclaim is not wholly true and also not wholly in line with my facts. My true facts are those in paragraph 6 and 7(a) of the written statement of defence.*
10. *That I wish to state that my then lawyers mistakenly prepared paragraph 3(a) of the counterclaim for which I have been advised by my lawyers herein which advise I verily believe to be true that the same can be remedied by an amendment so as to bring paragraph 3(a) of the counterclaim in line with the written statement of defence.*

The Applicant also filed a supplementary affidavit to which a copy of the written statement of defence and counterclaim are attached as annexure A. This I have also considered.

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The application was opposed by an affidavit sworn by the Respondent. It is deponed in this affidavit that the Applicant's application is an afterthought and full of falsehoods. It is also deponed that the Applicant has always known of selling two acres of land something she has on several occasions admitted and; that it was not by mistake that this is what she informed her lawyers who originated her pleadings. The deponent referred to a document from Kakiri Police Land Protection Unit although this was not attached to the affidavit. Further, that it is after the Applicant has realized that her admission is self-defeating that she now chooses to shift her goal after seven (7) years yet when she was asked by the predecessor Judge why she wanted to amend she never replied. It is also deponed that paragraph 3(a) of the counterclaim does not necessitate amendment because if amended it would prejudice the Respondent's case especially in the absence of the sale agreement. Additionally, that the Respondent has produced a Police Land Protection Unit report indicating the Applicant's admission of having sold two (2) acres of land to the Respondent.

Lastly, that the intended amendment is in bad faith and intended to whisk away crucial facts of the case at the expense of the Respondent by distorting the evidence already adduced by way of pleadings.

In his submissions, Counsel for the Applicant cited the case of **Gasu Transport Services (Bus) Ltd versus Obene [1990-1994] EA 88 and Sarope Petroleum Ltd versus Orient Bank Ltd & 2 Others Misc Application No.72 of 2011** wherein the principles governing the amendment of pleadings are stated as;

1. *The amendments should not work injustice to the other side. An injury which can be compensated by the award of costs is not treated as an injustice.*
2. *Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.*
3. *An application which is made malafide should not be granted.*

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4. *No amendments should be allowed where it's expressly or impliedly prohibited by any law (e.g. Limitation of actions).*

The Applicant's Counsel submitted that the amendment shall not work any injustice to the Respondent that cannot be compensated for the reason that it is only intended to harmonise the counterclaim with the written statement of defence and; also that the Respondent is not interested in prosecuting the main suit which was filed in 2011 but it only coming up now for hearing. He also reminded Court that the main issue in the main suit is the size of the land which makes the amendment necessary so as to resolve this issue. He also cited the case of Lubowa Gyaviira & Others versus Makerere University HCMA No. 471 of 2009 wherein it is stated that;

“ an amendment made before the commencement of the hearing should be allowed if it does no prejudice to the opposite party and; that there would be no prejudice if the other party can be compensated”.

Further, he submitted that the Respondent does not deserve costs on ground that the question whether the Applicant sold two acres or less is already in issue and; that as such, the mistake in the counterclaim cannot cause injury to the Respondent. The other reason he gave why the Respondent should be disentitled to costs, if any, was that he failed to take reasonable steps to prosecute the main suit at the reasonable time.

With regards to avoiding multiplicity of suits, he submitted that what is sought to be amended is an important fact in the main suit to be resolved by Court something which the Applicant cannot stop pressing on unless leave to amend is granted.

He also submitted that the application was brought in good faith so as to disclose the truth in order to enable Court to effectively administer substantive justice to all the parties involved. He added that the Defendant should not be allowed to benefit from the fact that he hid the sale agreement to give himself more land which, in his view, is the source of the problem.

With regard to disallowance of amendments on ground of prohibition by law; Counsel relied on the case of Mulwooza & Brothers vs. N. Shah Ltd SCCA No.26 of 2010, wherein it is observed that an amendment which introduces an new cause of action should be disallowed, to submit that

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the amendment does not seek to introduce a new cause of action since the counterclaim would still maintain the original cause against the Respondent which is trespass to land.

He also urged Court not to visit the mistake of the Applicant's previous Counsel of wrongly phrasing paragraph 3(a) of the counterclaim on the Applicant. On the ultimate, he invited Court to allow the amendment in order to determine the real controversy between the parties as required by O.6 r19 Civil Procedure Rules.

On the other hand, Counsel for the Respondent urged Court to dismiss the application on ground that it is an afterthought, prejudicial to the Respondent and brought in bad faith; adding that the facts as pleaded in the counterclaim are true as they are what the Applicant furnished to her lawyer. He further added that this fact is also captured in the last paragraph of the Report by the Police Protection Unit wherein the author allegedly observed that the Applicant admitted having sold two (2) acres of land but that instead the Respondent paid for 1.6 decimals at a cost Ugx.1,500,000/=.

He then submitted that if Court is persuaded to rely on the said report, why would an acre be bought by the Respondent at Ugx.1,200,000 and 60 decimals at Ugx.300,000 unless this be a lie. He also referred to the case of *Gasu Transport vs. Obene (supra)* to submit that the intended amendment would cause injustice to the Respondent on ground that he has already made out his facts attached to the evidence on the trial bundle to prove that he indeed bought two acres which the Applicant has admitted. Further, that there was no need for the Plaintiff to wait for Court to direct the parties to file their evidence before she could file this application after about seven (7) years.

In resolving this application, I shall restrict myself to its substance without divulging in issues of evidence which Counsel for both parties have somehow raised which I believe are for trial in the main suit.

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 question in controversy between the parties to be adjudicated upon and no injustice would be occasioned to the opposite party. It is now clear that what the Applicant seeks to amend is to omit the words "*sale of two acres*" from her counterclaim so as to harmonise it with her written statement of defence. The

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counterclaim being a separate suit, I am of the opinion that this application ought to be determined without regard to the written statement of defence but the reply to the counterclaim.

The Respondent filed a reply to the Applicant's counterclaim in which he availed himself of the Applicant's admission of having sold to him two (2) acres of land. The Applicant now wants to revert from this. Her Counsel submitted that this shall not cause a prejudice to the Respondent. I am however doubtful of this submission given that the Respondent would also have to amend his reply to the counterclaim once this application is granted which in my view would be a prejudice.

This can however be easily compensated though the Applicant's Counsel also submitted that the Respondent would not be entitled to costs, in any case, for the reasons that he showed no interest in prosecuting the main suit. This I also find irrelevant to the instant application reason that the Respondent's failure to take reasonable steps to prosecute the main suit did not in any way bar the Applicant from filing the instant application. This application thus passes the first test in the above case.

Secondly, I also believe that the amendment would avoid multiplicity of suit. The Applicant's Counsel has already intimated that the Applicant would nonetheless press on the denying selling two (2) acres to the Respondent which is disputed in the main suit. I understand that even when this application is denied, the Applicant may still have a choice of withdrawing her counterclaim which she could file later. Of course the Respondent would be entitled to costs incurred in any such event to cure the prejudice he may have suffered but that would not have avoided multiplying suits. For this reason, I also find that the application has passed this test.

With regards to the third element, bad faith is usually inferred from late applications to amend. I understand that amendments can be allowed at any stage of proceedings provided they are intended to enable Court determine the real question in controversy between the parties. Counsel for the Applicant sought to persuade Court to grant this application on ground that it was made before the commencement of trial. I agree that applications made before trial should be freely allowed, so long as no prejudice is occasioned to the other party.

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I however note that the Applicant's counterclaim was filed on the 3rd of August, 2011 and the reply made on the 18th of August, 2011. This is roughly seven years (7) from the filing. It is after the main suit was fixed that the Applicant opted to bring this application. I have also labored to peruse the entire record and discovered that an application of the same kind was made in 2012 but later withdrawn the same year by consent between the parties herein. This logically means that the Applicant has always been aware of the need to amend her counter claim. My concern then is why she had wait for all that time. No reason was furnished for the delay. I now agree with Counsel for the Respondent's submission that this application is an afterthought. Considering all this, I am hesitant not to infer bad faith in the presentation of this application. This test thus fails.

Lastly, amendments prohibited by law are not allowed. These include amendments intended to introduce a new cause of action or will deprive the Defendant of an accrued right. See **Edward Kabugo Sentongo versus Bank of Baroda HCT 00-CC-MA NO. 0203 of 2007 (unreported), Coffee Marketing Board Ltd versus Fred Kizito (1992-93) HCB 175.**

In the instant application, the intended amendment will neither introduce any other cause of action nor deprive the Respondent of any defence to the Plaintiff's counterclaim. I therefore find that this test also succeeds.

Despite inferring bad faith in the presentation of this application, I am nevertheless inclined to grant it with costs to the Respondent for the reasons above.

I am convinced that this is necessary to enable Court determine the real dispute between the parties with regard to the counterclaim.

Application granted with costs to the Respondent.

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Henry I. Kawesa

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JUDGE

4/03/2019

4/03/2019:

Mukasa Pamela for Applicant

Kalule Robert for the Respondent

Court: Ruling delivered to the parties above.

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Henry I. Kawesa

JUDGE

4/03/2019