

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
MISCELLANEOUS APPLICATION NO. 0194 OF 2019
(ARISING FROM CIVIL SUIT NO. 772 OF 2016)
OWOR KAMU & 26
OTHERS:.....:APPLICANTS

VERSUS

1. HAJJATI HADIJA NAMULONDO

2. KUNOBWA

IBRAHIM:.....:RESPONDENT
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BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This Applicant was brought by the Applicants and prayers for;

- a) Leave to amend the written statement of defence, to plead fraud and illegalities on the side of the Plaintiffs and
- b) File a counter claim.

The grounds are in the notice of motion and the affidavit in support.

The grounds are that; by the time the Respondents filed Civil Suit No. 772 of 2016, they (Respondents) are/were not lawful owners

of the above land and their Registration was illegal. They claimed information to that effect, had not been pleaded in the written statement of defence and it is fair and equitable that they be allowed to amend the written statement of defence.

In support, Owor Kamu deponed an affidavit to the above effect.

In reply, the Respondents by the affidavit of Hadijah Namuilondo, objected to the application on the grounds that all the information pleaded was available to the Applicants at the time they filed their written statement of defence, there is no attached written statement of defence and that the application is an afterthought, false and intended to prejudice the Respondents and mislead Court.

The 2nd Respondent; Kunobwa in reply also opposed the application for similar reasons. In rejoinder, Owor Kam reiterated his ground in support of the application. Both Counsel addressed this Court on the respective case by written submissions.

I now resolve this application as follows:

The Court is granted discretion under O.6 r19 of the Civil Procedure Rules to grant parties a right to amend their pleadings at any stage.

In the case of **Matico Store Ltd & Ors versus James Mbabazi & Ors; 1993 HCB 31**, Court observed that;

“Amendments may be allowed at any stage and as long as it will not prejudice the other party and as long as the other party can be compensated by costs”

In his submissions, Counsel for the Respondents attacked the procedure adopted by the Applicants of using a notice of motion contrary to section O.6 r31 of the Civil Procedure Rules and not O.52 by notice of motion.

This omission is fatal. The law clearly provides that for applications under rules 18,19 and 22 of O.6 of the Civil Procedure Rules, the procedure is by summons in chambers.

I do not agree with the Applicant’s arguments that Article 126(2) be invoked to overlook a mandatory procedure of the law. The case of **Francis Wazarahi Bwengye versus Hak Wabonera** is persuasive and is distinguishable. Moreover cited cases by the Respondents like **Mutesasira Noah & Ors versus Nakalema Jane Kayondo; HCMNo. 0256 of 2016 & Opoka Odwong versus Gulu Local Government; High Court Misc. Appeal No. 014 of 1996** which held that;

“An application of a wrong law is a defect which results in the application by dismissed”.

Even if I was to apply the liberal approach and invoke the provisions of Section 98 of the Civil Procedure Act and analyse the application, I found as follows:

1. Where the application falls within the parameters of the rules of Court and the Case law governing such amendments, I find that this application faults the basic principles of granting of such applications as shown below.

In **Gasu Transport Services (Bus) Ltd versus Martin Adala Obene; SCCA No. 4/1996**, it was held that;-

- i. Multiplicity of proceedings should be avoided*
- ii. Malfide applications should be avoided*
- iii. Prohibited amendments be rejected.*

The case of **Edward Kabugo Sentongo versus Bank of Baroda; HCMA No. 203/2007**, adds a fifth web; that “*an amendment will not be allowed where it will substantiate change the cause of action into a different one or will deprive a penalty of an accrued right where it is made malfide*”

The intended amendment brings forward new facts which are grounded in fraud and allegations of illegalities. However, a look at the file shows that all pleaded matters are shown to have been in existence by the time the first written statement of defence was filed on 1st December 2016.

There is no matter pleaded. A look at the file moreover, further shows that there was laxity by the Applicants who did not take any step to defend the suit to the extent of Court proceeding with the suit *ex-parte* to the level of submissions; a period of over 2 years in between their filing of the first defence and this application.

This is made worse by the fact that the intended written statement of defence is not attached to show the areas of amendments and intended counter claim. Moreover, a counterclaim is a completely new suit which introduces new parameters and therefore substantially changes the anticipated cause of action between the parties. This would be prejudicial to the Respondents who at the time of filing the suit had already prepared themselves for a suit on facts as presented in the plaint, to which a defence was offered for which they responded and even proceeded *ex-parte* owing to the conduct of the Defendants.

To allow an amendment now which basically changes the entire subject matter is to go against the spirit and law of Order 6 r19 and the holding in **Edward Kabugo Sentongo versus Bank of Baroda; HCMA No. 203/2007** (*supra*)

It is therefore my finding that this application is an attempt to alter the defence so as to come up with a new set of facts departing from the cause of action.

All these new facts are matters of evidence which the Defendants can bring to Court in defence without changing the subject matter. There being no written statement of defence attached, the application having been filed under a wrong procedure and the application falling short of the requirements for grant of such amendment, it is dismissed with costs to the Respondents.

I so order.

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Henry I. Kawesa

JUDGE

11/06/2019

11/06/2019

Achilles Lubega for the Applicants.

Applicants present.

Lukongo Innocent for the Respondents.

Respondents present.

Achilles:

Matter for Ruling.

Court:

Ruling delivered to parties above.

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Henry I. Kawesa

JUDGE

14/06/2019