

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.142 OF 2019

(Arising out of Civil Suit No.363 of 2017)

- 1. HUSSEIN ZZIWA**
- 2. SSULA KIYITAWAGULU**
- 3. JAMADA MASEMBE**
- 4. ALI KAWERE:.....APPLICANTS**

VERSUS

- 1. SSEMBATYA CHARLES**
- 2. ANNET SSEMBATYA:.....RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING:

Introduction:

This application is brought under the provisions of **Order 6 rules 19 and 31 of the Civil Procedure Rules S.I 71-1**, seeking orders that:

- 1. The applicants be allowed to amend their written statement of defence and counter claim to correct a misdescription of the subject matter to plead material facts and refocus pleadings accordingly.*

- 2. Costs of the suit be provided for.*

Grounds of the application:

The grounds of this application are contained in the affidavit in support of the application sworn by Mr. Kayanja Osman Saed, an advocate of the High Court attached to **M/s United Advocates**, the firm representing the applicants.

He deponed that while interviewing the 1st applicant in the course of preparing the written statement of defence and counter claim, he was misinformed by the 1st applicant who

mistakenly informed him that the land in respect of which him the 2nd and 4th applicants had been in lawful uncontested possession and occupation for 15 years was comprised in **Kyadondo Block 210, plot 1640 at Kyebando.**

That the firm engaged **M/s Prime Surveyors & Digital Mapping Consultants Limited** to open up boundaries of the said land after which they confirmed that the land in respect of which the 1st, 2nd and 4th applicants have been in occupation is comprised in **Kyadondo/Kawempe Division Block 210 plot 1985 at Kyebando** and not **Kyadondo Block 210 plot 1640 at Kyebando** as earlier informed by the 1st applicant.

In addition, that the survey report clearly shows that the 1st 2nd and 4th applicants' structures including rental units and shops are located on **Plot 1985** not **plot 1640** at Kyebando and that it was further discovered that the respondents bought land comprised in **Kyadondo/Kawempe Division Block 210 plot 1985 at Kyebando** (the suit land) from Nanyonga Hadijjah, therefore it is necessary to amend the applicants' WSD and counterclaim to have all the matters in controversy between the parties resolved conclusively since the respondents will not be prejudiced in anyway if this application is allowed.

The affidavit in opposition was deponed by the 1st respondent. The gist of the objection was that the applicants have no proper explanation for misdescribing the land as the suit property was properly defined in *paragraphs 3 & 5* of the plaint as **Kawempe Division Block 210, plot 1985 measuring 0.089 hectares situate at Kyebando Kampala**, and that the applicants are trying to improve their inadequate defence and come up with new claims of fraud.

Further, that the applicants have no justification to say that **Kyadondo Block 210 plot 1640 at Kyebando** which they claim to have an interest in is now **plot 1985** since both plots exist, distinct from each other; and that the applicants do not have any developments on the suit land.

In rejoinder, the 1st applicant *inter alia* stated he misinformed counsel Kayanja Osman Saed that the land in respect of which the 1st, 2nd and 4th applicants had been in lawful uncontested possession and occupation for 15 years was comprised in **Kyadondo Block 210 plot 1640 at Kyebando** whereas in fact it was **Kyadondo/Kawempe Division Block 210 plot 1985 at Kyebando** and that it is in the interest of justice that the application be granted.

Representation:

The applicants are jointly represented by **M/s United Advocates** jointly with **M/s Mayanja Nakibuule & Co. Advocates** while the respondents are represented by **M/s Sekabojja & Co. Advocates.**

Both sides filed written submissions, the details of which are on court record. I have taken them into consideration, in resolving the issues herein.

Resolution of the issue:

The law:

Under **Order 6 rule 19 Civil Procedure Rules, S.I 71-1**, the court has discretion to allow amendment of pleadings at any time. This could be done for reasons ranging from discovery
5 of new information to realization of errors in the existing pleadings.

Generally an amendment should not be denied, unless it is done *mala fide* and/or occasions prejudice or injustice to the other party which cannot be compensated by award of costs.
(See: **Eastern Bakery v Castelino [1958] EA 462**).

In **Gas Transport Services Ltd Vs Martin Adala Obene SCCA 4/1994** stated that the four
10 principles that appear to be recognized as governing the exercise of discretion in allowing amendments are:-

1. ***the amendment should not work any injustice to the other side. An injury which can be compensated by an award of costs is not treated as an injustice;***
- 15 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 mala fide should not be granted;***
- 20 4. ***no amendment should be allowed where it is expressly or impliedly prohibited by any law (for example limitation actions).***

Courts further taken the view that an amendment that substitutes one distinct cause of action for another or changes the subject matter of the suit or that which would change the action into one of a substantially different character should not be allowed. (See: **Eastern Bakery (supra)**)
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From the amendment it is clear that following the findings from the survey the applicant was in possession of a plot completely different from the one in respect of which he had initially filed the defence.

It also goes to show that immediately after the dispute arose, he never took the trouble to
30 establish what was actually on the ground, before filing his defence and counterclaim. It puts the respondents/plaintiffs in a rather awkward situation if they have to amend the pleadings each time merely to accommodate the applicant, on account of his failure to make appropriate and timely preparations for his defence.

Indeed the new information as reflected in the amendment which also introduces an element
35 of fraud, (although the 1st applicant denies it in the rejoinder), purportedly committed by the respondents.

It points towards new evidence to be adduced, that would possibly require the respondents to go back to the drawing board and review their own pleadings. That to me is the purest test for one to establish whether or not a new cause of action has been introduced.

Be that as it may, as duly noted by court, the proposed amendment was presented before the conclusion of the preliminaries for the trial. The amendment can be allowed for as long as the other party can be compensated for in costs. **See: Eastern Bakery v. Castellino (supra); Wamayi v. Interfreight Forwarders (U) Ltd. [1990] II KALR 67.**

It is also one overriding concern that a multiplicity of proceedings should be avoided as far as possible. Accordingly, all amendments which avoid such multiplicity should be allowed. **(Refer: Gaso Transport Services Ltd vs Martin Adala Obene (supra)).**

On that basis, I would allow this application, with costs payable to the respondents.

Other orders:

1. The respondents/plaintiffs are to be served with an amended copy of the defence and counterclaim, within seven days after delivery of this ruling.
 2. The respondents/plaintiffs shall file a reply to the amended defence and counterclaim within two weeks upon receiving the amended pleadings; served and filed together with their trial bundle and the notes for the scheduling.
 3. The applicants/defendants shall present their rejoinder to the counterclaim, defendants, trial bundle and final input for the scheduling notes, within seven days after receiving the court documents from the respondents, in preparation for the scheduling.
- Date of scheduling to be appointed by court after delivery of the ruling.

I so order.

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Alexandra Nkonge Rugadya
Judge
29th September 2021.

Delivered via email

Asho agv

29/9/2021