

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL APPEAL NO. 0011 OF 2020
(ARISING OUT OF CIVIL SUIT NO 268 OF 2010 IN THE CHIEF MAGISTRATES COURT OF MAKINDYE AT
MAKINDYE)

KAYIZZI JOHN APPELLANT

V.

1. ISABIRYE AHAMED	{	
2. KIVUMBI MATHIAS		
3. DOGO SINGH		
4. NAKITENDE EDITH	
		RESPONDENTS

BEFORE: - HON. LADY JUSTICE P. BASAZA- WASSWA

J U D G M E N T

Representation:

Mr. David Keeya for the Appellant

None for the Respondents

Introduction:

[1] This judgment is in respect of an appeal filed by **Mr. Kayizzi John**; the Appellant herein, against the Ruling and Orders, dated May 30, 2018 of **Her Worship Nantege Christine, Magistrate Grade 1**, vide **Civil Suit No. 263 of 2010**. (The said Ruling and Orders are hereinafter referred to as '**the impugned Ruling**').

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- [2] In the original suit vide **CS. No. 263 of 2010, Mr. Kayizzi** was the Plaintiff, while **Mr. Isabirye, Mr. Kivumbi, Mr. Dogo and Ms. Nakitende** (the Respondents herein) were the Defendants Nos. 1 - 4.
- [3] During the pendency of the original suit, Mr. Kayizzi amended his plaint three (3) times. The original plaint was filed on 25/05/2010, the first amendment was filed on 19/05/2011, and the subsequent 3rd and 4th amendments were filed on 19/03/2012 and 18/11/2016 respectively. It is on the basis of an objection to the last amendment of 18/11/2016 that Mr. Kayizzi's plaint was struck out, and hence this present appeal.

Background:

- [4] At the stage of the cross-examination of the Plaintiff, **Mr. Ojambo David**; learned Counsel for **Ms. Nakitende** (the 4th Defendant); raised an objection to the effect that: **'the amended plaint filed on 18/11/2016, introduced a distinct cause of action in fraud and illegality, from that in the original plaint filed on 25/05/2010, whose action was in alleged trespass'.**
- [5] **Mr. Ojambo** further submitted that; **'the amendment of 18/11/2016 is in respect of land comprised in Kyadondo Block 246 Plots 1942 and 1943 at Kyeyitabya, which plots were allegedly sub-divided from plot 1843. That the cause of action in the original plaint filed on 25/5/2010, was in respect of alleged trespass to land comprised in Kyadondo Block 246 plot 1558 at Kyeyitabya'.**

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[6] **Mr. Segamwenge Hudson** and **Mr. Masereka Martin** Learned Counsel for the 1st and 2nd Defendants respectively, associated themselves with the submissions of **Mr. Ojambo**.

[7] **Mr. Kintu Nteza**, learned Counsel for the Plaintiff counter argued that the objection raised by **Mr. Ojambo** was misconceived, as there is no amended cause of action. He made other arguments at the lower court, which he repeated in this present appeal. I have shown only the relevant portions thereof, here below in paragraphs [17] and [18].

The impugned Ruling:

[8] The learned Trial Magistrate allowed Mr. Ojambo's objection, and held that the amended plaintiff filed on 18/11/2016 created a new cause of action of fraud and illegality, and thus substituted the cause of action in trespass that was in the original plaintiff filed in 2010. She consequently struck off the amended plaintiff from the record, with orders that each party bears its own costs.

Grounds of Appeal:

[9] Dissatisfied with the impugned Ruling, Mr. Kayizzi filed the present appeal, raising the following four (4) grounds as stated in his memorandum of appeal;

1. That the learned Trial Magistrate erred in law and fact when she struck out the amended plaintiff without considering that the amendment was actuated by consent of both parties and endorsed by court and thereby reached a wrong conclusion.

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2. That the learned Trial Magistrate erred in law and fact when she failed to appreciate that the amendment was for the purpose of adding parties to the suit and the Appellant had to plead a case against them.
3. That the learned Trial Magistrate erred in law and fact when she failed to apply and or misapplied the principles governing amendment of pleadings and thereby reached a wrong conclusion.
4. That the learned Trial Magistrate erred in law and fact in holding that the amended plaint filed on 18.11.2016 substituted the cause of action of trespass in the original plaint with fraud.

[10] The above four grounds of appeal shall be summed up into one, and or addressed jointly as one ground of appeal.

Submissions of Counsel:

[11] Learned Counsel for the Appellant filed written submissions, and for brevity, I will not reproduce his arguments here. I will only refer to them where, and when necessary. I have however duly considered all his arguments.

[12] Learned Counsel for the Respondents, although served with the Appellant's written submissions accompanied with a letter, did not file any submissions.

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Consideration of the Appeal:

[13] Before I consider this appeal, I will first state the duty of this court when sitting as an appellate court. It is settled that an appellate court has the duty to re-evaluate and reconsider the facts and matter that was before the trial court, and then hold its own views on the matter as a whole, and draw its own conclusions. (See DinKerrai R. Pandya v R¹ and Fr. Nasensio Begumisa & 3 Ors v Eric Tibebaga²).

[14] Next, I will restate the principles and Rules that govern amendments of pleadings.

Order 6 Rule 19 of the Civil Procedure Rules provides that:

'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'

[15] The *locus classicus* case on amendment of pleadings is Eastern Bakery v. Castelino³, which was cited and applied by the Supreme Court in Mulowooza & Brothers Ltd v N. Shah⁴. In that Eastern Bakery case, Sir Kenneth O' Conner, P. enumerated the following principles that should guide a court in granting or refusing amendments to pleadings;

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¹ [1957] E.A at pages 336 - 340

² SCCA No. 17 of 2002

³ [1958] E.A pg. 462

⁴ SCCA No. 26 of 2010

1. That amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.
2. That the court will not refuse to allow an amendment simply because it introduces a new case, but there is no power to enable one distinct cause of action to be substituted for another, not to change, by means of amendment, the subject matter of the suit.
3. That the court will refuse leave to amend where the amendment would change the action to one of a substantially different character, or where the amendment would prejudice the rights of the opposite party, existing at the date of the proposed amendment, e.g by depriving him or her of a defence of limitation.
- 4 That a counterclaim can be added by an amendment, provided it does not transgress any of the principles set out above.

[16] Guided by the criteria set out in the above principles and Rules, I will now turn to consider the merits of this appeal.

[17] Mr. Keeya, learned counsel for the Appellant, submitted that the learned Trial Magistrate failed or misapplied the principles guiding amendment of pleadings, and thereby reached a wrong decision. He argued that the learned Trial Magistrate erred when she failed to consider the circumstances that led to the amendment and the adding of the parties to the suit. He stated that the circumstances were that the amended plaint of 18/11/2016 was by consent of the

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parties, and by the order of court. That the reason for adding the 2nd - 4th Respondents as parties in **CS. No. 263 of 2010** was that the 1st Respondent subdivided plot 1558 into plots 1842, 1843 and 1844, and transferred the same into the names of the 2nd, 3rd and 4th Respondents, in contempt of court orders of a temporary injunction.

[18] He further submitted that the amendment was to add parties as opposed to amending the pleadings between the same parties to a suit. That when a party is added as a defendant to a case, facts disclosing a cause of action against them have to be pleaded in the plaint. That the amendment neither prejudiced the Respondents, nor did it work any injustice against them. That the learned Trial Magistrate erred when she failed to appreciate the purpose for the amendment, and when she struck out the amended plaint on technical grounds.

For his propositions, Counsel relied on **Banco Arabe Espanol v Bank of Uganda**⁵ and on Article 126 (2) (e) of the 1995 Constitution.

[19] I have very carefully read through the three (3) complaints that are in issue in this appeal, to wit: out of the four (4) complaints that were filed in the lower court by Mr. Kayizzi. For clarity, and completeness I will very briefly, capture the thrust of each of the three (3) complaints here.

- i) In his original complaint filed on 25/05/2010, Mr. Kayizzi's claim was for special and general damages for alleged trespass against Mr. Isabirye (the 1st

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⁵ SCCA No. 08 of 1998

Respondent). He alleged therein that Mr. Isabirye had, without any colour of right, entered into and commenced construction of a building in the middle of land that he (Kayizzi) claims as his, that he described as **Kyadondo Block 246 Plot 1558 at Kyeitabya**. He sought for an order for vacant possession, a permanent injunction and costs of the suit.

- ii) In his 2nd amended plaint filed on 19/03/2012, Mr. Kayizzi maintained his allegation that Mr. Isabirye had trespassed upon the said land and that the latter had continued the construction of the building thereon. He also complained that in total defiance of, and in contempt of an interim order and an order of a temporary injunction **vide M.A Nos. 103 and 102 of 2010** respectively, Mr. Isabirye had continued with the alleged construction and had also illegally sub-divided part of the suit land and created **Plot 1843**, and had fraudulently transferred and registered the same into his own names. He (Kayizzi) listed under paragraph 4 (i) of that plaint, particulars of the alleged fraud, and sought *inter alia* for an order directing that Mr. Isabirye hands over the title, and vacant possession of **plot 1843**.
- iii) In the last amended plaint filed on 18/11/2016, Mr Kayizzi added three (3) new Defendants: to wit: **Mr. Kivumbi Mathias, Mr. Dogo Singh and Ms. Nakitende Edith**, whom he contended, are the transferees / registered proprietors of **plots 1942 and 1943** that he alleges were subdivided further

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out of **plot 1843**. In that **Plaint**, Mr. Kayizzi maintained his allegation that without any colour of right, Mr. Isabirye entered onto the original **plot 1558** that he claims as his, by construction of a building thereon. He also maintained his allegation that in total defiance of, and contempt of an interim order and an order of a temporary injunction **vide M.A Nos. 103 and 102 of 2010** respectively, Mr. Isabirye had continued with the alleged construction and had also illegally sub-divided part of the suit land to create **Plot 1843**. He added that in further defiance of the said Orders, Mr. Isabirye further illegally sub-divided **plot 1843 into plots 1942 and 1943** and transferred the said two plots into the names of the 2nd – 4th Defendants. He then listed therein, the alleged particulars of fraud and illegality.

[20] After very carefully considering the nature and contents of the above stated amended **plaints**, and after very carefully considering the circumstances under which they were made, I agree with the Appellant's Counsel that by the impugned Ruling, the learned Trial Magistrate erred in law and in fact, and indeed reached a wrong decision.

[21] First, I find that it was erroneous for the learned trial Magistrate Grade 1: HW. Nantege Christine to have made the impugned Ruling which purported to set aside or vacate the consent Order entered by the trial Magistrate Grade 1: HW

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Nyipir Fortunate, in which the latter allowed the amendment of the plaint filed on 18/11/2016.

- [22] The record of proceedings at the lower court, show that on 29/10/16 learned Counsel for **Mr. Isabirye** informed the court that there was a new development. It is then that learned Counsel for **Mr. Kayizzi** told court that the new development was that the suit title that was **formerly Plot 1843 Block 246**, had been sub-divided into **Plots 1942 and 1943**. That in view of which development, it was prudent that both parties be allowed to amend their pleadings. The learned trial **Magistrate Grade 1: HW Nyipir Fortunate**, then allowed the prayer made, and recorded that; I quote:

'By consent of both counsel for the parties its hereby agreed that both parties amend their pleadings in order to determine the real question in contention.
Adjourned to 18/11/16 at 10.00am for scheduling'.

- [23] In my view, HW. Nantege Christine, who is a Magistrate Grade 1, lacked the power and Jurisdiction to set aside the Ruling and Order (s) of HW. Nyipir Fortunate, who is also a Magistrate Grade 1.

HW. Nantege Christine had no such power, and it would only have been regular if the matter was brought before her by way of a review, which was not the case.

- [24] It is trite that proceedings and Orders of a court / Judicial officer that acts *ultra vires* his / her powers and or Jurisdiction, are a nullity. No Court can confer Jurisdiction upon itself. See Desai v Warsama⁶.

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⁶ [1967] EA 351

[25] Second, I further find that the learned Trial Magistrate erred when she compared the original plaint filed on 25/05/2010, with the last amended plaint filed on 18/11/2016. She ought to have compared the last amended plaint filed on 18/11/2016, with the amended plaint filed on 19/03/2012, which was the plaint that was being amended.

[26] Third, the above notwithstanding, and most importantly, I find that in all the said three (3) plaints, Mr. Kayizzi maintained his action in alleged trespass. He did not, at any one point, substitute it with another cause of action in the amended plaint of 18/11/2016. At all material times he complained that the Defendant (s) had, allegedly without any colour of right, entered onto the suit land illegally as trespassers, and that he had made several warnings to them not to trespass upon the suit land. I note that in the amended plaint of 18/11/2016, he only introduced and added new parties (the 2nd – 4th Defendants) to the suit, and also added a further contention that the land described as **Plot 1843** had been further subdivided into **plots 1942 and 1943**.

[Refer *inter alia*, to paragraph 7 of his amended plaint of 18/11/2016 in which he prays for a permanent injunction against all the Defendants, and their agents, from further trespass].

[27] **In the result**, I hold that the learned trial Magistrate erred in law and in fact, and it was erroneous for her to have concluded as she did in the impugned Ruling.

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Decision of Court:

[28] Having held as I have, this appeal succeeds and is allowed in the following terms:

1. The impugned Ruling and Orders of the learned trial Magistrate, delivered on May 30, 2018 vide **c/s No. 263 of 2010**, are hereby set aside.
2. The lower court file is remitted back to the Chief Magistrate's Court of Makindye, with directions to the learned Chief Magistrate of that Court to assess the values of the disputed land in this matter, with a view to referring the matter to the High Court for trial, should he / she find that the value of the subject matter has since exceeded the Jurisdiction of the lower Court through the effluxion of time. To wit: The values of the disputed land in 2010 when the lower court case was originally filed, may have escalated over the thirteen (13) year period from then, to date: 2023.

(Section 17 (1) of the Judicature Act⁷, Applied).

2. The costs of this appeal shall abide the outcome of the Head suit: **No. 263 / 2010** at the lower court. I so order.

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JUDGE

May 22, 2023

Judgment delivered electronically on the Judiciary ECCMIS Portal and via email to the parties.

⁷ Cap. 13 of the Laws of Uganda.

