THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISC.APP.NO.197 OF 2023
ARISING FROM HCT-CIVIL SUIT NO.493 OF 2016

KENSVILLE LIMITED::::::::::::::::::::::APPLICANT/DEFENDANT

VERSUS

NAKAIBALE VICTORIA::::::::::::::::::RESPONDENT/PLAINTIFF

RULING
BEFORE HON LADY JUSTICE KANYANGE SUSAN

This is an Application brought under Order 6 rule 19, and 31 of the Civil Procedure Rules, Section 98 of the Civil Procedure Rules. It seeks for orders that,
a)That leave to amend the Written Statement of Defence to Civil Suit No.493 of 2016 be granted.
b) That costs of the Application be provided for.

Background.

This Application arises from Civil Suit No.493 filed by the Respondent/Plaintiff against the Applicant seeking for orders;
-Cancellation of certificate of title of LRV 3303 FOLIO 11 PLOT 40 land at Kyambogo Link, Ntinda, Nakawa Division, Kampala District formerly Volume 2442 Folio 14)
- A permanent injunction restraining the 1st Defendant/Respondent from interfering with the Plaintiff's quiet possession and enjoyment of her land
-Declaration that the suit land belongs to the plaintiff/Respondent, that the 3rd defendant illegally dealt with the suit property, general damages, and costs.
Parties consented to a Temporary Injunction in M.A No. 684 of 206.
Pleadings closed but the hearing of Civil Suit No.493 has not commenced.

The grounds of this Application have been stated in the Affidavit of Chirag Dave but briefly they are, that,

- Upon perusal of the pleadings, it was discovered that the written statement of defence had omitted the defendant's counterclaim and other material facts.
- It is necessary to amend the written statement of Defence for purposes of determining the real issues in controversy between the parties.
- No injustice will be occasioned to the Respondent by the amendment sought in the Application since the hearing of the case has not commenced.

The application was opposed by an affidavit sworn by the Respondent. It is deponed in this affidavit that the Application is MISCONCIEVED, FRIVOLOUS, BARRED IN LAW, and an abuse of court process, that the Application is brought in bad faith, and there exists no sufficient reason to justify the amendment of the Applicant's Written Statement of defence seven years after filling it. It is further deponed that the Application is an afterthought and that the Applicant has always been aware of the need to amend its pleadings.

Representation

The applicant is represented by **Akampurira & Partners a**nd the Respondent is represented by **M/s R.M Ruhinda Advocates and solicitors.**

PRELIMINARY OBJECTION

Counsel for the respondent raised a preliminary objection that the Applicant has no right to amend the Written statement of defense to include a counterclaim

Counsel argued that when the prescribed time for filing a defense expires, the defendant cannot be permitted to introduce a counterclaim on the written statement of defence by way of an amendment. Counsel relied on Order 8 rule 7CPR which stipulates that where a defendant seeks to rely upon any ground as supporting, a right of counterclaim, he or she shall, in his or her statement of defence state specifically that he or she does so by way of counterclaim. Further Counsel submitted that the position would be different if the counterclaim sought was part of the pleadings. The Applicant cannot apply to amend the defence to include a counterclaim because the defence is not a separate suit. Counsel relied on the case of ***Omumbejja Namusisi faridah***

Naluwembe aka Namirembe Bwanga Bwamirembe v Makerere university MA 1199 OF 2013 ARISING FROM CIVIL SUIT NO. 326/2013. Where Court Held that; such an *Application would not be granted because apart from exonerating a party from complying with the provisions of the law. It would involve a complete change in the nature of the action and set up entirely different claims from the one before this Honorable Court and would also require a new counter Defence*

In response Counsel for the Applicant submitted that the amendment of the WSD to include a counterclaim is not expressly or impliedly barred by any law as long as it does not substitute one distinct cause of action. Counsel distinguished the case of ***Omumbejja Namusisi faridah Naluwembe aka Namirembe Bwanga Bwamirembe v Makerere university*** with the case of ***Charles Kamudda V f.x Mubuuke M.A No. 230 of 2022. H.c Mukono*** where it was held that "This Application is not expressly or impliedly barred by any law and it does not substitute one distinct cause of action for another.
Counsel argued that Order 8 r 7 only requires that once a party decides to counter-claim, they specifically state so in their Written Statement of Defence, whether it be at the initial stage of responding to the plaint or by amendment.

Order 8, Rule 7 of the Civil Procedure Rules,states that a defendant seeking to rely on a counterclaim must specifically state so in their initial statement of defence. Additionally, the cited precedent of **Omumbejja Nmusis Farida Naluwembe aka Namirember Bwanga Bwamirembe v Makerere university** underscores the importance of complying with these rules and not introducing entirely different claims through amendments.
However, the applicant's counsel has argued that there is no explicit or implied legal prohibition against amending the written statement of defence to include a counterclaim, provided it does not substitute one distinct cause of action for another. They have also cited the case of Charles Kamudda V f.x Mubuuke, which supports their position and emphasizes the absence of any legal prohibition.

In light of these arguments, I find that while Order 8, Rule 7 sets out a procedural requirement, it should not be interpreted in a manner that unduly restricts the court's discretion to consider

amendments that do not fundamentally alter the nature of the case. The cited case, **Charles Kamudda V f.x Mubuuke MA NO 230 OF 2022**, reinforces this perspective by emphasizing the absence of any legal prohibition against such amendments. The applicants evidently recognized the need to add a counterclaim and accordingly included it in their proposed amended written statement of defence.

Taking into consideration the overall circumstances, the court overrules the preliminary objection raised by the respondent's counsel. The court will proceed to consider the application on its merits.

ISSUE

1)Whether the Applicant has sufficient grounds to justify the grant of an order allowing the amendment of the Written Statement of Defence

As a general rule stipulated under **Order 6 Rule 19 CPR** amendment of pleadings should be allowed at any stage of the proceedings where the 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.

In Matico Store Limited & Anor v James Mbabazi &Anor 1993 HCB 31, the court observed *that amendment may be allowed at any stage as long as it will not prejudice the other party and as long as the other party can be compensated by costs.*

The basic premise for allowing the amendment is that the said amendment should not work an injustice to the other side. An injury that can be compensated by an award of damages is not treated as an injustice. Ref. Mulowooza & Brothers Ltd V Shah& Co. Ltd SCCA nO.26 OF 2010. The Courts have laid out principles to govern the grant of leave to amend pleadings. In **Gaso Transport Services Ltd Vs Martin Adala Obene SCCA 4/1994**. They are:

- The intended amendment should not cause injustice to the other side.
- Multiplicity of proceedings should be avoided and amendments that avoid such multiplicity should be allowed.
- The application should not be made mala fide.

- An amendment expressly prohibited by law should not be allowed.

The other consideration was laid down in **Edward Kabugo Sentongo Vs Bank of Uganda HCMA 203/ 2007,** where it was held that ***an amendment that substantially changes the cause of action into a different one or that deprives the other party of an accrued right will not be allowed.***

Counsel for the Applicant submitted that since the hearing has not commenced, the amendment would not in any way prejudice the Respondent.

Counsel relied on the case of **Lubowa Gyavira& Others V Makerere University HCMA No. 471 of 2009.** It was stated that; *an amendment made before the commencement of the hearing should be allowed if it does no prejudice if the other party can be compensated*

While **C**ounsel for the Respondent argued that the cause of action against the Applicant is trespass to land. That the Applicant in his defence did not allude as to its being a bonafide purchaser for value without notice but is stated in the WSD and counterclaim. He further contended that this is to defeat the Respondent's claim and thus change the cause of action which would be prejudicial to the Respondent.

After careful examination of the record and the original statement of defence filed on the 23rd day of August 2016. It is clear that the aforementioned assertion was indeed included in the original statement of defence in particular Paragraph 6 (b) where it was stated that It's a bonafide purchaser for value without notice.....

On the principle that the Application should be in good faith. Counsel for the Applicant submitted that the Application is not made malafide as the Applicant's reason for the delayed amendment was explained that they instructed new lawyers who advised them on the necessity to amend pleadings to address all of the issues

On the other hand, the Counsel for the Respondent argued that the application was brought in bad faith and there exists no sufficient reason to justify the amendment after seven years.

Counsel relied on the case of **NAMUSISI V KIKAAWA(MISCELLANEOUS APPLICATION NO.203 OF 2007, *Court noted the application was made roughly 7 years from filing. It logically means that the applicant has always been aware of the need to amend. No reason was furnished for the delay.***

I am alive to the fact that in the case above, despite inferring bad faith, the court went ahead to grant the application with costs to the Respondent having passed all the other tests.

In instant the Respondent has rightly raised concerns regarding the timing of the amendment application, emphasizing that some facts relevant to the proposed amendments may have been known to the Applicants from early enough.

It is noted that the Applicants contend that the delay in seeking amendments was primarily due to the engagement of new legal counsel who advised them on the necessity of the amendments. The written statement of defence was filed on 23rd August 2016. The application to amend written statement of defence was filed 17th January 2023. This is 7years after the initial filing. The applicants were also aware of the temporary injunction from 24th November 2016.
I agree with counsel for the respondent that there is no valid reason for the delay that was furnished. Change of counsel is not a valid reason for such a delay. I am hesitant not to infer bad faith in presentation of this application

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. Ref: ***Edward Kabugo Sentongo versus Bank of Baroda HCT 00-CC-MA NO. 0203 of 2007 (unreported)*** also cited by Counsel for the Respondent.

In the intended counterclaim the defendant is introducing a claim for special damages and mesne profits of shillings 320,000,000 arising as a result of the counter defendant's failing to prosecute the matter. It claims it had plans prior the grant of the injunctive order, to construct warehouses made deposit to contractors and did architectural designs. That since the filing of the suit, the counter defendant has not taken steps to prosecute the claim. That

the anticipated income to the tune of USD 4000 monthly is the claim for mesne profits.

Its true from the record that the civil suit no 493 0f 2016 has not been heard. Record shows that both parties are at fault as Applicant and counsel have not turned up for hearing on some days when plaintiff's counsel is present, and matter was adjourned.
The applicant has also been aware of the injunction since 24th November 2016 and were well aware of the loss that would occur. The claim now sought after 7 years for special and mesne profits is a new distinct cause of action and an afterthought which will prejudice the Respondent.

I thereby deny the amendment as its brought in bad faith and it's a new distinct cause of action.
Application is hereby dismissed. Respondent is awarded costs of this Application.

DATED AT KAMPALA THIS ----31st----DAY OF ----October----2023

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KANYANGE SUSAN
AG JUDGE LAND DIVISION.