THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE MISCN APPLICATION NO.011/2020

ARISING FROM LDC NO.159/2019

NYANGOMA EVELYN …… APPLICANT

VERSUS

KAMAPALA INTERNATIONAL

UNIVERSITY …… RESPONDENT

BEFORE:

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MR. BWIRE ABRAHAM

2.MR. MAVUNWA EDSON

3.MS.JULIAN NYACHWO

RULING

This application is brought by Chamber summons under Order 1 Rules 10and 13, for orders that:

1. The applicant be allowed to amend her pleadings (memorandum of claim).
2. The costs of the Application be provided for.

BACKGROUND

The Applicant was unfairly terminated by the Respondent. She filed a labour complaint before the Ministry of Gender labour and Social Development in 2019. The Respondent refused to comply with the summons from the Ministry resulting in the matter being referred to the Industrial court. According to her, her previous Advocates made an error on the date of her termination, and stated it as 16/03/2016 instead of 16/3/2015, hence this application.

The Applicant's case as set out in an Affidavit deponed by Sheila Kasolo, an advocate working with Taskk Advocates, is as follows:

1. That the amendment sought is to make a change of the Claimant's date of dismissal from March 2016 to March 2015, which mistake was occasioned by the Applicant's former Counsel, Abbas Advocates, when drafting the pleadings in Labour Claim No. 159 of 2019.
2. The amendment is necessary for the complete disposal of the question in controversy and shall not be prejudicial to the Respondent's case.
3. That the application is granted in the interest of Justice and equity.
4. The proposed amendment is attached as annexure "A" on the Affidavit in support.

In reply Janice Busingye, the Respondent's Deputy Vice Chancellor, opposes the Application on the basis of advice from Counsel for the Respondent on the grounds that;

1. The applicant filed a memorandum of claim in this Court on 25/07/2019, in which she pleaded that she was dismissed in March 2016(memorandum is attached as "A"). The Respondent replied to the claim and raised a preliminary objection to the effect that the Applicant/Claimant had no cause of action against the Respondent because by the time of her dismissal her contract had expired, therefore she was no longer its employee.

2. The objection was raised during the precession hearing on 17/02/2020, 6 months after the Respondent had filed its reply to the claim, therefore the application is intended to pre-empt the determination of the Preliminary objection, which is a total abuse of court process.
3. The applicant further abused court process when she prematurely filed an unsigned and un commissioned witness statement containing the amendment before obtaining leave.
4. The application is an afterthought, misconceived frivolous and vexatious and is only intended to violate the objective and principles of fair, just speedy disposal of cases before this court, and is prejudicial to the Respondent, therefore it should be dismissed with costs.

REPRESENTATION

The Applicant was represented by Mr.Kauzi Peter and Ms. Takola Deborah of TasKK Advocates Kampala and the Respondent by Evelyn Tumuhairwe of Magna Advocates Kampala.

SUBMISSIONS

It was submitted for the Applicant that the application is brought under Order 6 Rule 19 of the Civil Procedure Rules S.I 71-1, seeking amendment of the memorandum of claim by changing the date of dismissal from 16/03/2016 to 16/03/2015. Counsel stated that on 16/03/2015, the Applicant was unfairly terminated by the Respondent.

ISSUES

Whether the Application is valid and competent?

Counsel for the Applicant submitted that, the law allows a party to amend its pleadings and the general rule is that Courts have the discretion to allow such amendments at any stage of the proceedings, where they are satisfied that the amendment will enable

complete adjudication and disposal of the questions in controversy. Counsel cited, **Gaso Transport (bus) Ltd vs Obene [1990-94] EA88,** for the principles governing such amendments that: they should not occasion injustice to the opposite party, they should avoid creating a multiplicity of proceedings, they should be in good faith, and should not be barred by the statute of limitation.

It was further submitted that, the application meets these principles and it would not be prejudicial to the Respondent if it is granted. He contended that although lawyers work on the instructions of their clients, courts have a duty to protect the interest and rights of innocent litigants. He cited **Captain Philip Ongom vs Catherine Nyero SCCA No. 14/2004,** and **AG vs AKPM Lutaaya SCCA No.12/2007**, for the legal proposition that a litigant's right to a fair hearing as enshrined under Article 28 of the Constitution, should not be defeated on ground of his or her lawyer's mistake.

He contended that, the letter from the Ministry of Gender(supra) notifying the Respondent about the Applicant's complaint stated the date of termination as 16/03/2015 and this sufficiently shows that the lawyers errored in stating it as 16/03/2016 in the memorandum of claim. He argued that this was a mere slip which should not be visited on the Applicant.

It was his prayer that Court exercises its jurisdiction as provided under Section 98 of the Civil procedure Act, Section 33 of the Judicature Act to protect the rights of the Applicant to allow the amendment which is very crucial and the gist of the application was a means to aid court to determine the real question in controversy between the parties as was held in **N.Asha & Co. Ltd vs Mulowoza & brothers Lts, Commissioner for Land Registration CACA No.57/2009.**

Citing **Eastern Bakery vs Casteline [1958] EA 461,** in which it was held that a court would not refuse to allow an amendment simply because it introduces a new case, counsel refuted the Respondent's assertion that the Application did not meet the test

for amendment and was only intended to smuggle in a cause of action. Counsel asserted that the Court could only refuse to grant leave to amend if the entire character of the amendment changed the entire character of the case. They submitted that the application is brought in good faith and there is no intention to misled court and it is not prejudicial to the Respondent given that the main suit is in its early stages therefore the Respondent has sufficient time to adduce evidence to the contrary.

In reply Counsel for the Respondent submitted that, the application was fatally defective because it was sworn by a one Sheila Kasolo, who was neither the applicant nor the Applicant's attorney or authorized agent. She merely claims to be an advocate working with the firm of TASKK advocates, but she does not attach anything to show that she was authorized to depone on behalf of the applicant. Counsel further stated that, the matters on which kasolo depones were supposed to be matters within the knowledge of the Applicant and besides she was not working with the Applicant's previous Counsel to allege that there were typing errors in the pleadings neither was she privy to the facts given to the former Counsel by the Applicant, upon which the plaint was drafted.

Relying on Order 3 rule 1 of the Civil Procedure Rules, as applied in **Mugoya Construction vs Central Electricals International Ltd MA 699 of 2011 and Kayondo Muhammed & Others vs Administrator General HCMA NO27/2016,** she stated that, the law bars an advocate from deponing an affidavit on behalf of the client and on this ground alone the affidavit in this case is fatally defective and renders the application incompetent

She argued that in the event that Court is inclined to disregard the arguments on the first issue, the application fails to meet the threshold for grant of amendment because, although Order 6 r19 grants Courts discretion to determine such applications, she insisted that, they are expected to do so judiciously and on sound grounds. It was her

submission that this application offends the principles laid down in **Gaso Transport services Ltd** (supra) because the proposed amendment is intended to create a cause of action despite the Respondent's objection that the memorandum of Claim discloses no cause of action.

She cited Order 7 rule 1 and 11(a) of the CPR, which provides that a plaint which does not disclose a cause of action should be rejected and the holding in **Mulindwa Birimumaso vs Government Central Purchasing Corporation CACA No.3 of 2001,** where Twinomujuni JA ,as he then was held that: *"…it is now settled law that when a court is considering whether a plaint raises a cause of action or not Order 7 r1, it must only look at the plaint and its annextures. The plaint will be rejected by Court where no cause of action is disclosed."*

Counsel further contended that, in her memorandum of claim filed on 26/7/2019, the Applicant stated under clause 4 (c) that, she was dismissed from employment in the March 2016, without notice or a hearing. She reiterated that, in its response to the claim in August 2019, the Respondent raised a preliminary objection to the effect that the Applicant's contract expired at the time she was allegedly dismissed as stated in her pleading and therefore, the pleading did not disclose any cause of action. According to her, the Applicant did not make any reply to the response and only filed this application after the Respondent raised the Preliminary objection during the precession hearing on 17/02/2020. She asserted that the application was solely intended to create a cause of action by attempting to plead new dates. Citing **Ssewagudde Nicholas Serunkuma &2 others vs Namasole Namusoke Namatovu Veronica HCMA No.1307 of 2016,** she asserted that the Applicant's attempt to alter the facts was an afterthought which if allowed would override the principles of fair, just speedy disposal of cases before it. She insisted that the applicant could not plead mistake of her former Counsel given the holding in **Mohammad Buwule Kasasa vs**

Jaspher Buyonga Bwogi CACA No.42/2008, to the effect that, a client is bound by the actions of his or her Counsel.

She insisted that, the application was brought in bad faith and was an abuse of court process because the affidavit in support was deponed by Sheila Kasolo who did not disclose the source of her information and there was no explanation why the applicant did not swear the Affidavit herself. She submitted that, the applicant should have disclosed these facts at the inception of the case and allotting blame on her former lawyers was escapist and unmeritorious given that lawyers act on the instructions of their clients. In any case there was no affidavit from her former lawyer to the effect that the facts were inadvertent or a typing error. In her view the only remedy for negligence and incompetence on the part of her former lawyer would be an action for professional negligence. She insisted that this court was bound by Muhammed **Buwule**(supra).

It was her prayer that the application seeking to amend pleadings to introduce a cause of action after the Respondent raised a preliminary objection, before it is determined, was an afterthought, which clearly shows that the applicant is on fishing expedition and therefore the application is malafide, invalid and incompetent, therefore it should be dismissed with costs.

DECISION OF COURT

Whether the application is valid and competent?

We have considered the application, the submissions of both Counsel and the law applicable and find that indeed Order 6 rule 19 of the Civil Procedure Rules gives Court discretion to allow amendment of pleadings in such manner and on such terms as may be just and necessary for purposes of determining the real questions in controversy between the parties. It is also the legal position that, leave to amend must always be

granted unless, the party applying did so in bad faith and where it is not necessary for determining the real question in controversy between parties.

The principles laid down by **Justice Tsekooko JSC(RIP)** in **Gaso Transport services Ltd** (supra) which was relied on by both Counsel, have guided Courts in the exercise of their discretion, in allowing amendments as follows:

1. The amendment should not work injustice to the opposite side. An injury which can be compensated by award of costs is not treated as an injustice.
2. Multiplicity of proceedings should be avoided as far as possible and all amendment which avoid such multiplicity should be allowed.
3. An application made malafide should not be granted.
4. No amendment should be allowed where it is expressly or impliedly prohibited by law e.g limitation of actions.

The instant Application seeks to make a change of the Claimant's date of dismissal from March 2016 to March 2015, on the grounds that this mistake was occasioned by the Applicant's former Counsel, Abbas Advocates when drafting the pleadings in Labour Claim No. 159 of 2019. The Respondent in the instant Application, raised a preliminary objection in the main claim to the effect that the Applicant/Claimant did not establish a cause of action against it. Instead of responding to the Preliminary Objection in the main claim, the Applicant made an Application, to amend her pleadings moreover 6 months after the Respondent had put her on notice.

Order 6 rule 27 provides that

> "27. *Any party shall be entitled to raise by his pleadings any point of law, and any point of law so raised shall be disposed of by the court at or after the hearing, provided that by consent of the parties or by order of the Court on the application*

of either party, the same may be set down for hearing and disposed of at any time before the hearing.

There was no consent by the Parties to have the point of law set down for hearing and disposal before, the main hearing nor was there any application to have it heard and disposed of before the main hearing.

However, it is well settled that where a preliminary point of law is expected to wholly determine the controversy between the parties since nothing remains to be heard by the Court, advantage ought to be taken to dispose of it at the close of pleadings or very shortly after the close of the pleadings. Order 15 rule 2 provides that:

> *"where issues of both law and fact arise in the same suit and the court is of the opinion that the case or any part of it may be disposed of on issues of law only, it shall try those issues first and for that purpose may, if it thinks fit postpone the settlement of the issues of fact until the issues of law have been determined.*

The determination and disposal of a preliminary point of law therefore takes precedence. In any case Courts also have discretion to dispose of the Preliminary objection or defer its ruling until after the hearing of the whole case. In **The Attorney General vs Major General David Tinyefuza Supreme Court Constitutional Appeal No. 1 of 1997, Justice Oder**(JSC as he then was) held :

> "*… the defendant in a suit or the respondent in a petition may raise a preliminary objection at the commencement of the hearing of the suit or petition that the plaint or petition discloses no reasonable cause of action. After hearing arguments (if any) from both parties the Court may make a ruling at that stage, upholding or rejecting the preliminary objection. The Court may also defer its ruling on the objection until after hearing the suit or petition. Such deferment*

may be made where it necessary to hear some or the entire evidence to enable the court to decide whether a cause of action is disclosed or not. I think that it is a matter of discretion of Court as regards when to make a ruling on the objection…."

By opting to apply to amend her pleadings instead of responding to the Preliminary Objection, in the instant application, the Applicant/Claimant missed the possibility of having the Preliminary objection heard and differed until the main claim was heard. However, by making the Application 6 months' after the Respondent filed the preliminary objection, was not only inordinate delay, but it was also in our considered view an attempt to frustrate the hearing of the Preliminary Objection, which took precedence.

In addition, as rightly stated by Counsel for the Respondent, Sheila Kasolo, in her Affidavit in support of the Application, did not disclose the source of her information nor did she explain why the applicant did not swear it herself. And most importantly, she did not adequately explain how the former Counsel made the mistake on the Claim, to warrant a grant for amendment of the pleadings. She also did not explain why the Application was made late.

Even if the Application were to be considered as crucial, we are not convinced that the Applicant has sufficiently justified the amendment, given her failure to give an adequate explanation how former Counsel occasioned the mistake and given the fact the Application was filed 6 months' after the Respondent filed a preliminary objection in the main Claim, LDC No 159/2019.

We are inclined to agree with Counsel for Respondent that, the application is an attempt to create a new cause of action by attempting to plead new dates after being put on notice by the Respondents. Court will not exercise its discretion to allow an amendment which constitutes a distinctive cause of action for another or to change it

by means of amendment (see **Lubowa Gyaliira& Ors Vs Makerere University HCMA 471/2009.**

Given the options that were available to the applicant, we are convinced that the application was made in bad faith and it is an abuse of court process which unacceptable in law.

In the circumstances, having been brought in bad faith, we find no merit in the application, for leave to amend pleadings. It is dismissed with no order as to costs.

Signed and delivered by:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE ……

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA …….

PANELISTS

1. MR. BWIRE ABRAHAM ……

2.MR. MAVUNWA EDSON …….

3.MS. JULIAN NYACHWO …….

DATE: 17/12/2020