

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 145 OF 1987

TRANSAMI (U) LTD:..... PLAINTIFF

—versus—

TRANSOCEAN (U) LTD:..... DEFENDANT

BEFORE:-THE HONOURABLE MR. JUSTICE G.M. OKELLO

RULING

This ruling is in respect of a preliminary objection. At the commencement of the hearing of the application which was by Chamber Summons brought under 0,6 rr 18 and 30 of the CPR whereby the Plaintiff/Applicant sought an order for leave to amend his plaint, Counsel, for the Defendant/Respondent took a preliminary objection to the application. He contended that the application for the proposed amendment was brought mala fide aimed at rendering the defendant's pending Appeal useless. That there is a pending appeal between the same parties in the same heard suit on a point of law of limitation. He argued that the proposed amendment seeks to circumvent the statute of limitation and to thus render the defendant's pending appeal useless. Counsel pointed out that in the original Plaint, the cause of action was stated to have occurred in 1974 But that the proposed amendment, seeks to show that the cause of action occurred in 1986. Counsel submitted that this Court has always refused to allow amendment which renders the defendant's defence of limitation useless. He relied on the case of NZIRANE .V. MATIYA LUKWAGO (1971) HCB 75. The learned Counsel further contended that the intended amendment also seeks to substitute a new case and to introduce a new cause of action. He finally prayed that the application should that be allowed to proceed.

On his part Mr. Kazzora, counsel for the Plaintiff/ Applicant submitted that the preliminary objection was misconceived and that it should be overruled. He pointed out that this application for leave to amend is brought Under O.6 r. 18 of the CPR. That the guiding principles under this rule are (1) that the amendment is necessary for determining the real question in controversy between the parties. (2) That the proposed amendment is to enable justice to be done between the parties. He submitted that it

is irrelevant how careless the original errors were and or how late the application for amendment is brought.

Counsel denied however that there was any pending appeal between the parties as the Respondent did not comply with rule 76 of the Court of Appeal Rules 1972. That failure of the Respondent to serve Notice of the appeal if it was ever filed on the applicant vitiated the validity of the pendency of the Appeal. He further, denied that the proposed amendment seeks to substitute a new case because the prayers in the original plaint and in the proposed amendment are the same. That in both, documents the prayers seek orders for eviction, special damages, mesne profit, general damages, costs and interest on the decretal amount. The learned Counsel also denied that the proposed amendment seeks to introduce new cause of action because in both the original plaint and the proposed amendment the cause of action is wrongful occupation of the Plaintiff's properties on the same plots.

As to the allegation that the proposed amendment would defeat the defendant's existing defence of Limitation Act, Mr. Kazzora contended that the law allows that cause of amendment. He relied on Odgers pleadings 23rd Ed. at page 199. Counsel finally prayed that the preliminary objection be overruled.

It must be pointed out from the outset that O.6 r.18 of the CPR gives this Court a wide discretion in allowing amendment to pleadings at any stage of proceedings. The guiding principles in the exercise of this discretion, was correctly pointed out by Mr. Kazzora. They are summarised thus: to determine the real questions in controversy between the parties without causing injustice to the other party.

In the instant preliminary objection, the crucial question in my considered view is whether the applicant acted mala fide aimed at defeating the alleged pending appeal between the parties when he brought the application for leave to amend his plaint. The other issues like the proposed amendment seeking to defeat the defendant's existing defence of limitation; that the proposed amendment seeks to introduce new case and cause of action are matter which go to the substance of the application. I shall not concern myself with them at this stage for fear to pre-empt my discussion of the application.

There was dispute between the parties about the validity of the pendency of an appeal on account of noncompliance with rule 76 of Court of Appeal Rules 72. Counsel for the Applicant contends that he

was not served with the Notice of the said Appeal as required by the above rule and that that failure vitiated the validity of the pendency of the appeal if it was ever filed. On his part counsel for the Respondent contends that the Notice of the appeal was duly served on the applicant. That even if it was not served, that failure would not vitiate the validity of the pendency of the Appeal.

I need not go into a detailed discussion of this issue because it is not material to the determination of the issue at hand. It suffices for me to state that rule 76 seems to me mandatory and failure to comply with it would be more than irregularity. The effect would be far reaching.

On the question whether the applicant acted male fide aimed at rendering the alleged pending appeal useless when he, brought the application for leave to amend his plaint. I fully agree with counsel for the Respondent when he said that this court has always refused to give leave to amend where it is satisfied that a party seeking amendment was acting mala-fide. But whether or not a party is acting mala fide is a question of fact which can only be established by evidence.

In the instant case, there is an affidavit dated, 6.12.91 sworn by Walter Hoe, the Resident General Manager of the Plaintiff/Applicant Company. The affidavit was filed in Court in support of the application for leave to amend the plaint. It shows the plaintiff's claim of right over he properties; how the defendant first got into occupation of the properties and the defendant's source of claim over the properties; when the Plaintiff first demanded the defendant to vacate the properties and the defendant's refusal thus marking the cause of action.

These facts were sworn to justify and support the application for the proposed Amendment. There is nothing from those facts which suggest mala fide action on the part of the applicant in bringing this app1ieaou There is no contrary evidence to support the defendant/ Respondent's claim of objection. In the circumstances I am not satisfied that the applicant brought that app1ication mala fide. The objection is therefore overruled.

G.M. OKELLO

J U D G E

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