THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO.44 OF 1990

JOYCE GRACE KATENDE……APPELLANT

VERSUS

SULAIMAN SIMAGAMAGA……RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING

This is an application by Chamber Summons brought under Order 6 Rule 18 of the Civil Procedure Rules by the applicant moving this court to amend the Notice of Motion filed in this court as per the application "A" is supported by en affidavit deponed to by one S.F. Kityo.

The background of this application as briefly as follows: The applicant was the plaintiff at the Magistrates Grade II Court Mpigi. He filed a civil suit against the respondent claiming that the latter had illegally occupied her piece of land situate at Namagoma. Judgment was entered in her favour and it was ordered that the respondent vacates the land in dispute. The latter being dissatisfied with the decision of the trial magistrate appealed to the Chief Magistrate Court, Mpigi. The appeal was registered as Mpigi Civil. Appeal No. 5 of 1988. The learned Chief Magistrate allowed the appeal with costs here and below having held that no cause of trespass did exist. The applicant then applied for leave from Chief Magistrates Court to appeal to the High Court under S. 232 (1) C (4) of the Magistrates Court Act 1970 on a substantial question of law leave to appeal to this Honourable Court was dismissed by the learned Chief Magistrate having failed to satisfy the latter that the matter intended to be appealed against raised some points of law requiring consideration by this court.

Nonetheless leave was sought from this court and the same was readily granted by Kityo J. on the 13th November 1990. The file then landed before Kalanda J. on 9/5/91 for hearing. The learned Judge dismissed the appeal as incompetent on the ground that it was provisional Memorandum of Appeal before him. The learned Counsel appearing for the applicant then filed in papers for Amended Notice of Motion dated 11th March, 1991 arguing that the Judge was misled when he was given another file in Civil Appeal No. 7/90 Kamadi Sentamu vs. Abdu Serunsibwe. The matter came before two of my brother judges until when it landed before me.

With that background I now proceed to consider the application. The learned counsel for the applicant submitted that he discovered that after the dismissal of the appeal he learnt that the Judge had been given a wrong file so he filed in a Notice of Motion to set aside that order. It is the notice of motion he was seeking leave to amend. His grounds in the notice of motion were that he did not mention the number of the files which was given to the Judge. He also failed to allege the reasons why he came late to court. He was therefore asking this court to allow him to amend the notice of motion**.**

Mr. Sendege the learned Counsel appearing for the respondent strongly opposed the application. He submitted that on the further ground that the file was not brought before the Judge he submitted that the original notice of motion dated 27th March 1991 showed that there was no need to amend because the grounds had always been there.

As regards the second ground on which the application is based he submitted that the court will be setting up a dangerous precedent if it will allow a party to supply evidence if it was in existence and which he failed to adduce for no reasons I was referred to the affidavit deponed by Kityo dated 3/8/93. That in paragraph 3 the latter failed to allege that it had rained heavily on that day. He does not say why he failed, if the evidence was there when he prepared the affidavit why did he not include it in his affidavit. He says he read the file after the dismissal. He must have noticed that the appeal was fairly dismissed for want of prosecution because of his absence.

The learned Counsel further submitted that short causes by their nature are supposed to be disposed of very easily. To allow to amend for new things the matter will never end. That Para 3

contained some falsehood that he later read the file and discovered that that was a wrong file. That was not one at all as per the notice of March 1991.

On paragraph 2 that the learned judge was given a wrong file learned counsel argued that the affidavit on which the application is based is false. The paragraph obtains some obnoxious reasons it was not possible to separate the two that it has rained very heavily.

Mr. Sendege submitted that his prayer was the time factor, though notice of motion sought to amend is dated 27th March 1991 but the chamber summons sought is dated August 1993. There is time lapse of over two years. He does not say why it has taken him so long to remember. He gave no reason why he could not come to court earlier on. If such an application of that nature was allowed after so long, the parties will come up with figments concoctions in order to strengthen their case. This is a very dangerous precedent. The notice of motion came up several times. He had time to look at it from time to time. It is difficult to see or tell why that important event came back to his mind after 3 years when he had the opportunity to put in the papers from time to time. He prayed that the chamber application be dismissed with costs and the original notice of motion be fixed for hearing so that the rights of the parties should be adjudicated upon as soon as possible.

In reply Mr. Kityo submitted that pleading can be amended at any time. So the question of time is not a bar to amend and that depended on the circumstances of each case. There was no affidavit in reply to allege that the notice of motion could not be amended. He prayed that the application for leave to amend be granted.

I have had the occasion to peruse the affidavit of J. Kityo in support of the Chamber Summons and have at the same time heard the submissions of the learned Counsel,

Order 6 Rule 18 of the Civil Procedure Rules provides

> "The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such 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."

There is also authority to the effect that amendments to Pleadings sought before the hearing, should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by cost **see Eastern Bakery VS. Costellino 1958 EA P 461 Also see Tidlasly vs. Harper (1878) 10 Ch Dp 373 Clarapeds Vs. Commercial Union Association 1883 VLR 262**. And the court will not refuse to allow an amendment simply because it introduces a new cause. **See Budding V Mudoch 1875 1 Ch DP 42.** But there is no power to enable one distinct cause of action to be substituted for another not to change by means of amendment to the subject. The court will however refuse leave to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment **Welshot vs. Noel (1878) 19 QBD P.399.**

The authorities referred to above refer to amendment to pleadings as opposed to amendment of notice of motion. However under section 2 of the Civil Procedure Act (Cap 65)**.**

"Pleading includes Petition or Summons and also includes the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant. Thereto end of the reply of hope to any defence or counter claim of a defendant."

I am of the view that amendment to a notice of motion is a kind of petition and the application is properly filed under order 6 r 18 of the Civil Procedure Rules. Be that as it may in the instant case the learned counsel appearing for the applicant is seeking leave to amend the original notice of notion because after the dismissal of the appeal he realised that the judge had been given a wrong file and as a result he filed a notice of notion to set aside the order. I am of the view that if the amendment is allowed no injustice will be caused to the respondent and looking on the affidavit in support of the application there is nothing to show that there is any introduction of a new cause of matter and there is also no distinct cause of action heir instituted for another. The subject being merely an appeal from the Chief Magistrate Court. I do not therefore agree with counsel appearing for the respondent that the application would in any way prejudice the rights of his client as existing at the date of the proposed amendment. I do however agree with Mr. Sendege that Mr. Kityo took too long to think of amending the notice of motion about two years had elapsed. I am of the opinion that the purpose of the intended amendment is to enable the parties to put their case properly and broadly so that the court may hopefully come up with a fair

decision on the crucial issue in the appeal which in the instant case was the ownership of the land in dispute moreover in Essaji Vs. Solanki l968 EA page. It was held that the Administration of justice should normally require that the substance of all disputes should be investigated and decided upon on their merits and the errors and lapses should not bar the applicant from pursuing his rights. In the instant case lapses should not debar the applicant from pursuing his rights by amending the notice of motion.

It was argued on behalf of the respondent that the affidavit sworn by Mr. Kityo in para 2 and 3 were false and that the applicant was trying to introduce in the motion evidence which did not exist at the time the original notice of motion was instituted.

The principle is that an application supported by a false affidavit is bound to fail because the applicant in such **c**ase does not go to the court with clean hands to tell the truth. See **Baritatan Kananura CAA No.47 of 1976 reported 1977 HCB P.33**.

In the instant case I do not see any falsity in the affidavit sworn by Kityo, J in support of the application. It is a fact that the appeal was dismissed on 28th March 1991 by Kalanda J and that a wrong file civil **App. No. 7/90 Kamadi Sentamu vs Abdu Serunkuma** was placed before him as opposed to the instant appeal Katende vs. Simagamaga. There is such no merit in the argument. Moreover in the absence of the affidavit in reply to controvert the affidavit in support of the application the said affidavit remains unchallenged.

As to the introduction of a new matter I see no new matter seriously introduced by Kityo in his evidence/affidavit in the application though evidence must have been available at the inception of the original notice of motion when filed. As already stated earlier injustice will be occasioned to the respondent if the amendment was allowed.

In the end the application to amend the original notice of motion is allowed with costs in the cause.

I. MUKANZA

JUDGE

2.12.1993