

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO. 241 OF 2016**

**PATRICIA MUTESI ::: APPLICANT**

*Versus*

**ATTORNEY GENERAL ::: RESPONDENT**

**BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA**

**RULING:**

At the commencement of the hearing of ***MA 912 of 2016*** Mr. Kabiito learned counsel for the applicant made an oral application to amend the Notice of Motion. The reason for this application is that when the respondent served them with an affidavit in reply, it contained clear facts of contention which require an amendment to the notice of motion to address them. That the new matters raised in the affidavit in reply are that on 9<sup>th</sup> November 2016 after the filing of the application and service onto the respondent, the Public Service wrote a letter to Mr. Mwambustya (a Senior State Attorney in the Attorney General’s Chambers) offering him the appointment of the post of Commissioner, the position in contest and that Mr. Mwambustya had accepted that appointment on the 11<sup>th</sup> of November 2016.

That the effect or implication of this new fact is that the process of appointment which was not completed at the time of filing the application was implemented and is now concluded. That this was an advancement of an illegality that was complained about.

Learned counsel further submitted that the amendment is necessary for the determination of the real matter in controversy as can be seen from a copy of the proposed amendment which has

been served onto the respondent. That the amendment in the order sought to be filed will not fundamentally change the application or introduce a new cause of action. That it is in response to the new facts as pleaded by Mr. Francis Atoke's affidavit in reply and developments that followed the filing.

In reply, Mr. Madete learned counsel for the respondent opposed the application on grounds that the applicant seeks to introduce a new cause of action. That in the main application, the first order sought seeks to quash the decision to issue an instrument of appointment to Mr. Martin Mwambustya. That after the respondent had filed their defence arguing that grounds 1, 2, 3, 4 and 5 of the application had been overtaken by events, the applicant now seeks to amend their application. Mr. Madete further argued that court should not allow amendments which deprive a defendant of a defence. He referred to the case of *Hilton Vs Salon Steam Laundry [1946] KB 65* and *Mulwooza Brothers Vs Shaa SCCA 26 of 2010*.

That this application is moot and/or time barred and it seeks to defeat the respondent's defence to the application by introducing a new cause of action.

The matter before me is for Judicial Review. That means that the primary rules that govern these proceedings are the Judicature (Judicial Review) Rules, 2009.

Under rule 7 thereof:

***“(1) The court may on the hearing of the motion, allow the applicant to amend his or her motion, whether by specifying different additional grounds or reliefs or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any party to the application.***

***(2) Where the applicant intends to ask to be allowed to amend his or her motion or to use further affidavits, he or she shall***

***give notice of his or her intention and of any proposed amendment to every other party.....”***

Clearly, the Judicial Review Rules allow amendments which may include other grounds or reliefs and filing of additional affidavits.

However, it is my considered opinion that this liberal provision has to be considered while taking into account the laid down legal principles that govern amendment of pleadings which have been developed over time. For example the amendment introducing new grounds should not introduce what would be prejudicial to the other party’s case unless the prejudice can be compensated in costs. Secondly, although amendments sought before or during the hearing of a Judicial Review motion, should be freely allowed, this can be done without injustice to the other side although it introduces a new case. There is however no power given to court to allow one distinct cause of action to be substituted for another. The court will refuse leave to amend where the amendment would change the action into 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 of the defence of limitation or any other defence. See ***Mulwooza Brothers Vs Shaa SCCA 26 of 2010.***

I have considered the submissions by respective counsel. I have studied and compared the original contents of the Notice of Motion with the proposed amendments. I have found out that the applicant has completely altered the cause of action contained in the original motion. In the original pleading what was sought were prerogative orders of certiorari, prohibition and mandamus. The amendment is seeking for declarations. The grounds in the proposed amendment are at variance with what was contained in the original pleading. It would appear the amendment is a reaction to the respondent’s answer to the earlier motion which if allowed would deprive the respondent of the defenses revealed in the reply.

As rightly submitted by Mr. Madete, if this amendment is allowed, it will prejudice the rights of the respondent in its defence.

Further to this, the amendment envisaged under ***Rule 7 of the Judicature (Judicial Review) Rules*** must have arisen within the period allowed for filing for Judicial Review as provided under rule 5 of the Judicial Review Rules not outside it.

Consequently the proposed amendment is refused. The oral application is dismissed.

I so order.

**Stephen Musota**  
**J U D G E**

**12.12.2016**