

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA
(LAND DIVISION)**

**MISCELLANEOUS APPLICATION NO. 386 OF 2013
(Arising from Civil Appeal No. 52 of 2010)**

MUSISI GABRIEL Suing through his Lawful Attorney CHARLES KYAGABA	}	: : : : : : : : : : APPLICANT
VERSUS		
1. EDCO LIMITED 2. GEORGE RAGUI KAMONI	}	: : : : : : : : : : RESPONDENTS

RULING BY HON. MR. JUSTICE JOSEPH MURANGIRA

1.0 Introduction

- 1.1. The applicant through his lawyers Kabega, Bogezi & Bukenya Advocates brought this application by Notice of Motion under Section 80 (1) (d) and Section 98 of the Civil Procedure Act, Cap. 71 and Order 43, rule 22 of the Civil Procedure Rules, S.I. 71-1 against the two respondents, jointly or/and severally. This application is supported by an affidavit by Charles Kyagaba, the lawful attorney of the applicant.

- 1.2 The respondents are represented by Kimuli & Sozi Advocates. They filed their arguments and an affidavit in reply and

opposition to this application. They vehemently opposed this application.

2.0 Parties' arguments

- 2.1 Counsel for the applicant in his submissions and the authorities cited submitted that this application is properly before this Court and that it has merit. He prayed that this application be allowed with costs.
- 2.2 In reply Counsel for the respondents argued in his submissions that in accordance with the authorities he cited, that there is no merit in the applicant's application. He submitted, further, that the authorities cited by Counsel for the applicant are not relevant to this application. He prayed that this application be dismissed with costs.

3.0 Resolution of the matter by Court

The applicant brings the applicant seeking leave to amend the memorandum of appeal to add the 3 grounds as indicated in the body of the notice of motion relating to:-

- (a) The nature of the respondent company that is whether a Foreign company (respondent) could hold mailo land?
- (b) The question whether the trial magistrate had jurisdiction to handle the matter.

(c) Whether the whole suit is not time barred in view of the provision of the Limitation Act.

All the proposed grounds intended to be added were never urged during hearing of the main suit but are all matters of law which can be raised at any stage.

Order 43 rule 2 of Civil Procedure Rules permits a party to seek court's leave to argue a ground on appeal not initially included on the memorandum of appeal in effect allowing an amendment of the memorandum of appeal.

Bowen L.J in Cropper vs Smith (1883) 26 CH D. 700 at page 711 noted “ it is well established principle that the objection of the Court is to decided the right of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with rights. I know of the no kind of error or mistake which if not fraudulent or intended to over reach the court ought not to correct if it can be done without injustice to the other party, courts do not exist for the sake of discipline but for the sake of deciding matter in controversy and I do not regard such amendment as a matter of favour or greed....it seems to me that as soon as it appears that way in which the party had framed his case will not lead to the decision of the real matter in controversy, it is as much as matter of rights on his part to have it corrected if it can be done without prejudice as anything else is a matter of right” .

I entirely agree with the above decision and I hold that the case of Cropper vs Smith (supra) is very relevant to this instant application.

The discretion to allow an amendment or not is a judicial one and not an arbitrary exercise of the power. The circumstances under which the prayer for amendment is to be allowed cannot be exhaustively enumerated. It depends upon the facts of each individual case. But the principle is to do substantial justice and not to punish the party on technical grounds.

The supreme Court while agreeing with Bowen L.J in its case of **Gas Transport Services (Bus) Ltd vs Martin Adala Obene SCCA No. 4 of 1994** set the principles upon which the discretion may be exercised including:-

- (a) The amendment should not work injustice to the other side. An injury which can be compensated by the award of costs is not treated as an injustice.**
- (b) Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.**
- (c) An application which is made malafide should not be granted.**
- (d) No amendment should be allowed where it is expressly or impliedly prohibited by any law "limitation of action".**

It is my considered view that the present application meets the test set for Court to exercise its discretion for allowing the application. The 1st

respondent in its affidavit in reply sworn by Messu Toure Mwaniki on 9th May, 2013 don't indicate that an amendment would be prejudicial to them and/or that the amendment is made malafide. Instead the applicant's raised fundamental matters of law pointing to glaring illegalities that were not considered during hearing of the main case.

Its trite law that a matter of law can be brought up at any time and where question of illegality is brought to the attention of Court, it override all other considerations and Court cannot close its eyes but it is duty bound to investigate such claims of illegalities as is the case.

Guiding principles in Court allowing fresh evidence on appeal include among others:

- (i) Whether evidences upon which Court is asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plan see: Case of **Tanganyika Farmers vs Unyamwezi [1960] EA 620**, where Goudl Ag. V.P. said:-

“the objection to this submission is that it raised a question which was never in the contemplation of the parties in the Court below it was not argued there nor was it ever mentioned in the correspondences between the parties. An appeal Court has discretion to allow a new point to be taken on appeal but it will permit such course only when it is assured that full justice can be done to the parties”.

I perused the annexures attached to this application particularly the plaint (annexture “H1”) and noted that it is the appellant who filed a Civil Suit No. 384 of 2008 against the respondents in the Chief Magistrates Court of Entebbe. In that instance, the appellant is the one who determined the jurisdiction of the Court. In paragraph 9 of the plaint he stated:-

“Notice of intention to sue was communicated to the defendants and the Court has jurisdiction to hear and determine this suit”.

Even the issue of jurisdiction was never argued in the lower Court. Thus, I am of the considered opinion that the appellant/applicant cannot raise the ground of jurisdiction at this stage. Hence the order being sought in 1 (b) of this application is unattainable.

Further in appeal no. 52 of 2010 between the parties, in the memorandum of appeal the appellant is aggrieved with the judgment and orders of the trial magistrate dated 2nd December, 2009. The appellant in the appeal is faulting the trial magistrate on the intended grounds, which would be issued that were never framed and argued by the parties before the trial magistrate. The judgment of the trial magistrate did not address such grievances. Then how can this Court fault the trial magistrates on anything which is not her finding? Hence, the orders being sought in 1 (c), 2 and 3 in this application in my view would be unattainable.

Consequent to the above, the memorandum of appeal which is to be amended by the applicant was filed on 14th September, 2010, that's ten (10) months after the delivery of the judgment of the lower Court on 2nd December, 2009. To that extent the appeal would be affected by Order 43 rule 1 of the Civil Procedure Rules, S.I 71-1 and Section 79 (1) (a) of the Civil Procedure Act, Cap. 71 which are to the effect that an appeal shall be filed in the High Court within 30 (thirty) days from the date of the decision of the decree or order. It appears to me, therefore, that the memorandum of appeal in Civil Appeal no. 52 of 2010 cannot be amended.

However, under Order 43 rule 2 of the Civil Procedure Rules, S.I 71-1 a party can argue grounds which were not included in the grounds of the appeal.

4.0 Conclusion

To that extent and for the reasons given hereinabove in this ruling, this application, Miscellaneous Application no. 386 of 2013, is allowed in the terms of Order 43 rule 2 (supra) with costs in the cause.

Dated at Kampala this 7th day of June, 2013.

sgd
Murangira Joseph
Judge