THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 587 OF 2015

1. **NAKIRYOWA MAJORIE KIDDU**
2. **NAMULWADDE VICTORIA KIDDU::::::::::::::::::::::::::::::PLAINTIFFS**

VERSUS

1. **MAURICE SSERUGO KIDDU**
2. **THE ADMINISTRATOR GENERAL::::::::::::::::::::::::::::DEFENDANTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This is a ruling arising from the preliminary objections raised by the 1st Defendant.

1. The plaint does not disclose a cause of action.
2. The amendment pf the plaint by the Plaintiff was done without leave of Court and is improper.

When this matter came up for hearing on the 13th day of February 2018 in the presence of Iga Stephen and Nabatanzi Claire of S. K. Kiiza & Co. Advocates for the Plaintiffs, and Solomon Sebowa**,** on brief for Katende Ssempebwa & Co. Advocates for the 1st Defendant. Counsel for the 1st Defendant intimated to raise a preliminary objection as per the written statement of defence. He also raised a preliminary objection that the Plaintiff's amendment was improperly done without leave, but sought Courts' guidance on the matter.

That notwithstanding, Court only directed that the 1st Defendant addressed Court by written submissions on the preliminary objection as per the written statement of defence.

In their respective written submissions, both Counsel addressed Court on the preliminary objection as per the written statement of defence and the issue of the amended plaint. It thus became clear that they wished Court to pronounce itself on the issue of the amended plaint before resolving the preliminary objection as per the written statement of defence.

In ***Ndaula Ronald versus Haji Nadduli Abdul, Election Petition No.20 of 2006*****,** the *Court of Appeal* cited with approval the statement by ***Scrutton L.J., in Phillip versus Copping [1935]1 KB 15*** that;

> *"It is a duty of the Court when asked to give a Judgment which is contrary to a statute to take the point although litigants may not take it"*

It is also trite law that points of law can be raised at any stage of the proceedings whether or not they were pleaded in the pleadings: See also ***Hon. Mr. Justice Bashaija K. Andrew*** *in* ***Mathias Lwanga Kaganda versus UEB CS No.124 of 2003*****.**

O.15 r. 2 Civil Procedure Rules dictates that once points of law are raised, Court has to resolve them first in a Ruling or Judgment. In the *Supreme Court* of ***Uganda Telecom Ltd versus Zte Corporation CA No.03 of 2017,*** Court held unanimously a trial Court has discretion to dispose of a preliminary objection either at or after the hearing explaining, however, that the exercise of the discretion depends on the circumstances of each case.

In the circumstances of this case and in view of the above authorities, I find it necessary to first determine the propriety of the amended plaint. This is because the question of whether the Plaintiffs have a cause of action against the Defendants rests on one of the plaints on the record.

Counsel for the 1st Defendant submitted that the amended plaint was filed out of the 14 days from the filing of the 1st Defendant's written statement of defence. He also added that the rules provide for seeking leave from Court before such amendment is done. Counsel relied on O.6 r. 31 Civil Procedure Rules to submit that the procedure for an application for amendment is by chamber summons but the Plaintiffs ignored and chose to file without following the right procedure.

He further added that the amendment was targeted at defeating the 1st Defendant's defence that the plaint did not disclose a cause of action. Further that the amendment introduces a new cause of action. Counsel relied on O.6 r.22 of the Civil Procedure Rules**,** the case of ***Edward Kabugo versus Bank of Baroda HCMA No. 203 of 2007*** and, ***Ariho Emmanuel and Anor versus Centenary Rural Development Bank Ltd and Others; Civil Suit No. 14 of 2016*** urged Court to disallow the amended plaint by striking it off the Court file.

Counsel for the Plaintiffs in reply, submitted that the law allows a Plaintiff to amend his or her plaint without leave within 21 days from the date of issue of summons to the Defendant or, where a written statement of defence is filed, then within 14 days from the filing of the written statement of defence or the last of such written statements, and that this can be upon written or oral application. Counsel relied on O.6 r. 19, 20, and 31 Civil Procedure Rules**;** the cases of; ***D.D Bawa Ltd versus Didar Singh [1961] EA 282, Ntambi versus AG [1992]v KALR 90, and Nakondi versus Mukasa [1991] ULSR 101***.

Counsel added that filing of written statement of defence is complete when a written statement of defence is delivered to the Court for placing upon the record and subsequently served upon the opposite party. Counsel supported this proposition with O.8 r 19 of the Civil Procedure Rules ***and Fazal Haq versus Wasawa Singh (1940) 19 K.L.R 23***. Accordingly, Counsel argued that since the 1st Defendant's written statement of defence was filed on the 29th of January 2016 and served upon the Plaintiffs on the 3rd of March 2016; it was exactly 14 days on the 17th day of March 2016, when amendment was done. Counsels' conclusion was that the amendment was properly done without need for the leave of Court.

On the submission that the amendment introduces a new cause of action and intended to defeat the 1st Defendant's defence, Counsel replied that there is nothing inherently wrong in basing an amendment on the nature of the other party's pleadings. Counsel relied on ***Hagod Jack Simonian versus Johar*** *(supra).*

Counsel relied on ***Dhanji Ramji versus Malde Timber Co. [1970] E.A 422*** to conclude that the amendment was properly done, and that the amended plaint is conclusive as to the issues for determination.

In rejoinder, Counsel for the 1st Defendant relied on O.51 r8 of the Civil Procedure Rules and argued that the 14 days as envisaged under O.6 r.20 of the Civil Procedure Rules are clear days and that these run from the date of filing the written statement of defence, and not the time of service of the defence. Counsel also submitted, without prejudice his foregoing submissions, that a count from 3rd March (*when the written statement of defence was served upon the Plaintiffs*) to 17th March 2016, it is 15 days which is nevertheless still out of time. Counsel cited ***Ariho Emmanuel and Anor versus Centenary Rural Development Bank Ltd and Others*** *(supra)* **and again** urged Court to strike the amended plaint off the Court file with cost.

Having read the submission of both Counsel, I do now resolve this issue as follows:

O.6 r.20 Civil Procedure Rules permits a Plaintiff to amend, without leave, once at any time within 21 days from the date of issue of the summons to the Defendant or, *where a* written statement of defence *is filed, then within fourteen days from the filing of the written statement of defence or the last of such written statements.* This position is supported by the case of ***Warid Telecom Ltd versus Robert Byaruhanga HCCS No. 64 of 2012*.**

The Court record indicates that the 1st Defendant's written statement of defence was filed on the 29th of January 2016, and on the 17th of March 2016, the Plaintiff filed an amended plaint. A count from the 29th to 17th leaves a gap of 18 clear days. This means that the Plaintiffs filed their amended plaint 18 days from the date of filing of the written statement of defence.

Counsel for the Plaintiffs argued that filing is complete when the written statement of defence is delivered to the Court for placing upon the record and subsequently delivering a duplicate at the address for service upon the opposite party. O.8 r.19 Civil Procedure Rules as relied on by Counsel provides that;

> *19. Filing of defence*
>
> *Subject to rule 8 of this order, a Defendant shall file his or her defence and either party shall file any pleadings subsequent to the filing of the defence by delivering it or other pleadings to the Court for placing upon the record and by delivering a duplicate of the defence or other pleadings at the address for service of the opposite party.*

In view of this provision Counsel submitted that filing was completed on the 3rd of March 2016 when the written statement of defence was served upon the Plaintiffs.

The above provision has been considered in the case of ***Murangira Kasande Vennie versus The Editor Red Pepper & Another HCMA No. 35 of 2013 by His Lordship Justice Stephen Musota*.** His Lordship observed that O.6 r.19 Civil Procedure Rules "*merely adds more details on the filing of a defence and further provides for the filing of any pleadings subsequent to filing the defence and directs delivery of those pleadings and the address of the opposite party"*.

He further quoted O.9 r.1 Civil Procedure Rules which provides that;

> ***"--------*** *the copy of the defence so sealed shall be a certificate that the defence was filed on the day indicated by the seal".*

His final observation was that;

> *"It cannot therefore be true […] that filing a defence is complete only when it has been served on the Plaintiff within the time allowed to the Defendant, to file his or her defence. The filing of a written statement of defence is complete the moment O. 8 r 1 and O. 9 r. 1* Civil Procedure Rules *are complied with".*

His Lordship was in agreement with **D. Wangutusi J**., who had earlier on observed in ***M/s. Simon Tendo Kabenge Advocates & Anor versus Mineral Access Systems Ltd HCT-00-CC-MA- 570-2011,*** that;

> *"The rule (O.9 r.1 Civil Procedure Rules) is so clear, that what amounted to filing was the reception of the Written Statement of Defence, the sealing and dating it. Service on the opposite party is an obligation that arises after filing".*

I find these authorities more instructive. I, thus, disagree with Counsel for the Plaintiffs that filing of the 1st Defendant's WSD was completed when it was served upon the Plaintiffs.

It is now clear that the Plaintiffs made the amendment outside the 14 days from the filing of a written statement of defence as permitted to them by O.6 r.20 Civil Procedure Rules**,** and without leave of Court. The amendment was, therefore, improper.

Counsel for the Plaintiffs relied O.6 r.19 Civil Procedure Rules**,** the case of ***Kiiza versus AG [1986]71*** *and,* ***Talikuta versus Nakendo [1979] HCB 276*** and **a**rgued, in the alternative, that the law allows amendment of pleadings at any stage of the proceedings. Counsel accordingly argued that this allows a litigant to amend his or her pleadings even if it causes delay and expense, provided it can be done without causing injustice to the adverse party. Counsel relied on ***Gale versus Super Drug Store (1996) 3 ALL ER 468*****.** He further added that the *Supreme Court,* in ***Gaso Transport Services Ltd versus Martin Adala Obene SCCA No. 4 of 1994,*** guided that the Courts should generally give leave to amend a defect in a pleading rather than give Judgment in ignorance of facts as long as no injustice is caused to the other party.

I agree with Counsel for the Plaintiffs that Court is empowered under O.6 r.19 Civil Procedure Rules to allow an amendment at any stage of the proceedings for the purpose of

resolving the real questions in controversy. It is my observation, however, that before Court can exercise this power, a litigant must seek its leave. The very decision of ***Gaso Transport Services Ltd versus Martin Adala Obene (supra) it*** as cited by Counsel is also instructive on this. *See also* ***Warid Telecom Ltd versus Robert Byaruhanga (****supra).*

Under O.6 r.31 Civil Procedure Rules, applications for leave to amend are by chamber summons, or by oral application as held in ***Huawei Technologies (U) Co. Ltd versus Ever peak Consultants & Technical Services Ltd HCMA No. 189 of 2011*****.**

In this case, no leave was sought by any of those applications. In view of this fact, I am of the opinion that O.6 r.19 Civil Procedure Rules is also inapplicable.

Counsel for the 1st Defendants urged Court that the amendment should be disallowed as under O.6 r.22 of the Civil Procedure Rules**.** In a sharp protest, Counsel for the Plaintiffs criticised this as an insistence on the strict application of the law. Counsel's criticism was based on O.6 r.22 and 31 Civil Procedure Rules**.** He explained that the 1st Defendant has also neither made any application for disallowance of the amendment nor complied with the 15 days limit from the date of service of the amended plaint within which to make such application**.** Counsel in addition cited the case of ***Hagod Jack Simonian versus Johar [1962] EA 336*****.**

I agree with Counsel for the Plaintiffs that O.6 r.22 or r.31 of the Civil Procedure Rules is inapplicable as no application for disallowance was made by the 1st Defendant. I am mindful, however, that Counsel for the 1st Defendant's submission came as a point of law. I have already resolved that points of law can be raised at any time and it's the Court's duty to pronounce itself on such points.

I have read the case of ***Ariho Emmanuel and Anor versus Centenary Rural Development Bank Ltd and Others*** (*supra*) which Counsel for the 1st Defendant relied on. In that case a preliminary objection was raised against an amended plaint and chamber which were filed without seeking leave of Court. **His Lordship Justice Moses Kazibwe Kawumi** held that the amended plaint [and chamber summons] were incorrectly before Court and "*are hereby struck off the record…*"

I share the view of Court in the above case that the amended plaint in this case also should be struck off the Court file.

Having reached the above conclusion, I shall now rely on the 1st plaint to determine whether it discloses a cause of action against the 1st Defendant.

A cause of action has been defined by the *Supreme Court*, in **Attorney General Versus Major General David Tinyefuza Const. Appeal No 1 of 1997** *Supra***,** citing with approval the following statement from **Mulla's Code of Civil Procedure**, as;

> *"…every fact which if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a Judgment of the Court. In other words it is a bundle of facts which, taken with the law applicable to them gives the Plaintiff a right to claim relief against the Defendants".*

It is now a settled proposition of law as held in ***Tororo Cement Co. Ltd versus Frokina International SCCA No. 02 of 2001*** that; *a plaint discloses a cause of action if it shows that the Plaintiff enjoyed a right; that that right was violated, and that the violation is by the Defendant(s).*

The Supreme Court in ***Narottam Bhatia Hemantini Bhatia & Boutique Shazim Ltd SCCA No. 16 of 2009*** held that; *in determining whether a plaint discloses a cause of action, Court must look at the plaint, and annextures thereto with an assumption that all facts as pleaded are true.*

Both learned Counsel submitted agreeably with the above propositions of law. They relied on the case of ***Auto Garage versus Motokov (1971) EA 514,*** *and* ***Ismail Serugo versus KCC & AG Const. Appeal No.2 of 1998*.**

Counsel for the 1st Defendant relied on ***Auto Garage*** (*supra*) and rightly added that; *a plaint may disclose a cause of action without containing all the facts constituting the cause of action provided that the violation by the Defendant of a right of the Plaintiff is shown*. This position of law was well settled by the *Supreme Court* in ***Tororo Cement Co. Ltd versus Frokina International*** **(***supra***).**

Counsel also relied on Section 176(3) of the Registration of Titles Act to submit that a registered proprietor is protected against ejectment except in cases of fraud. It was Counsel's submission that the plaint in question neither attributes fraud to the 1st Defendant nor gives the particulars of fraud. Counsel thus relied on O.7 r. 11(a)(e) of the Civil Procedure Rules**,**

the case of ***Iga versus Makerere University [1972] EA 65*** and ***Henry N.K Wabui & Anor versus Rogers Hanns Kiyonga Ddungu & 2 others CS No.102 of 2009***, and urged Court to reject the Plaintiff's plaint for failure to disclose a cause of action.

Counsel also relied on **Sections 5, and 20 of the Limitation Act Cap 80** to submit that the Plaintiff's suit is statute barred since it seeks to recover registered land after a period of 20 years. He further relied on ***Henry N. K Wabui & Anor versus Rogers Hanns Kiyonga Ddungu & 2 Others and Badiru Mbazira versus Abasagi Nansubuga [1992-1993] HCB 241*** to submit that the Limitation Act applies to all matters. His explanation was that the late Paul Kiddu Musisi [from whom the 1st Defendant gets his interest] was registered on the suit land in 1966 and the late Christopher Buwule [from whom the Plaintiffs claim interest] died in 1993 without claiming the suit land. His conclusion was that the Plaintiff's suit is time barred.

Counsel for the Plaintiffs did not agree with these conclusions. His view was, that paragraphs 5 and 6 of the 1st plaint demonstrate that there is a cause of action against the 1st and 2nd Defendant. Counsel explained that these paragraphs show that the Plaintiffs enjoyed a right of possession of the suit land; which right has been violated by the 1st Defendant who is threatening to evict them therefrom because of his fraudulent registration by the 2nd Defendant.

As to whether the suit is statute barred, Counsel submitted, with the support of ***Section 20 of the Limitation Act Cap 80*** and the case of ***Rosemary Kabataizibwa Lwemamu versus Francis Sembuya & Anor HCCS No.226 of 2005*** that; the limitation period did not run against the Plaintiffs until they discovered the fraud of the Defendants. It was Counsel's submission with reliance on paragraph 6 of the 1st plaint that they discovered the Defendants' fraud upon receipt of the 1st Defendant's notice to vacate the suit land.

In rejoinder, Counsel for the 1st Defendant disputed that paragraphs 5 and 6, as relied on by the Plaintiffs, disclose any cause of action. He reiterated that the plaint should be rejected by Court as O.7 r.11 (a) (e) Civil Procedure Rules dictates.

It is now my turn to comment on whether the plaint discloses a cause of action as per the authorities above.

The Plaintiffs claim under paragraph 5(b)(ii) of the plaint that the suit land belongs to the late Christopher Buwule. They add under paragraph 5(c)(d)that the late Christopher Buwule had mortgaged the suit land but failed to redeem it. That since this was the only family land, the late Paul Kiddu Musisi [the 1st Defendant's father] then besought the 2nd Plaintiff who sold her six acres of land at Muyenga in order enable the former to redeem it. Under paragraph 5(e) of the plaint, they claim that the suit land was later fraudulently transferred from the name of the late Christopher Buwule into the name of the late Paul Kiddu Musisi [1st Defendant's father] and mortgaged again by the latter. No annextures were attached to these paragraphs.

They further claim under paragraph 5(f)(g) and (h) that the late Paul Kiddu Musisi also died without redeeming the suit land. That they had paid off shs. 222,610/= only, (*two hundred twenty two, six hundred and ten)* of this motgage to Grindlays Bank(U) Ltd in 1988 when the 2nd Defendant [acting as administrator of the estate of the late Paul Kiddu Musisi] cleared off the balance and later registered it into the 1st Defendant's name. Copies of bank slips, bank statements, and the bank's letter to the 2nd Defendant were attached to the plaint.

Further, under paragraph 5(a),(i)(j)(k) and 7 of the plaint, that they are in possession, and have been in possession of the suit land for over 50 years. It is now their claim under paragraph 5(k) that the 1st Defendant has threatened to evict them from the suit land. They attached annexture "E" which is a copy an eviction notice.

Counsel for the Plaintiffs' explanation was that these paragraphs show that Plaintiffs enjoyed a right of possession of the suit land; which right has been violated by the 1st Defendant who is threatening to evict them therefrom because of his fraudulent registration by the 2nd Defendant, which I do not agree with. None of these claims shows how the Plaintiffs got an interest in the suit land.

In paragraph 4(c) of the plaint, the Plaintiffs claim a declaration that they have an interest in the suit land, as creditors to the estate of the late Christopher Buwule. However, the facts in the plaint do not show that there was an understanding between them and the said estate that the payment of the alleged mortgage sums would entitle them to an interest in the suit land.

In contradiction to this; under paragraph 4(e) of the plaint, the Plaintiffs claim for a recovery of an equivalent of the said mortgage payments, and the 2nd Plaintiff's land sold in the initial

redemption of the suit land from the estate of the late Christopher Buwule. It is clear that none of the Defendants from whom they claim this relief is an administrator or beneficiary of the estate of the late Christopher Buwule.

Having alleged that they have been in possession of the suit land, as family members, for over 50 years without any disputes, the Plaintiffs also go ahead under paragraph 4(g) of the plaint to claim a declaration that they are bonafide occupants on the suit land. Section 29(2) of the Land Act Cap 227 defines a bonafide occupant as a person who before the coming into force of the Constitution-

> *(a) had occupied and utilised or developed any land unchallenged by the registered owner [or…] for twelve years or more; or*
>
> *(b) had been settled on land by the Government or an agent of the Government, which may include a local authority.*

John Mugambwa in his book; **Principles of Land Law in Uganda** states that under Section 29(2) (a) as above, a bonafide occupant is one who entered the land without consent of the registered owner. The learned author adds that a bonafide occupant under the sub-section is essentially *"a trespasser or a squatter". See* ***J.T. Mugambwa, Principles of Land Law in Uganda (Foundation Publishers, 2006) at page 11*****.**

In the circumstances of this case, I am convinced by this view that the plaint reveals that the Plaintiffs occupied the suit land as family members for over 50 years. My view is that the only way they could become trespassers or squatters to the knowledge of the registered owner, for the 12 years *(twelve)* to run, would be if they had asserted claims on the suit land against the late Paul Kiddu Musisi [the 1st Defendant's predecessor in title]. See ***Musoke Bafirawala versus Jogga [1976] HCB 26*****.**

In this case, the plaint never discloses that the Plaintiffs where ever regarded or taken as trespassers or squatters by the late Paul Kiddu Musisi, 12 years before the coming into force of the Constitution. They cannot have earned a right of occupation of the suit land as bonafide occupants.

It was Counsel for the 1st Defendant's submission that the 1st Defendant, as a registered proprietor on the suit land, is protected from ejectment except in cases of fraud. He relied on **Section 176(3)** and ***Iga versus Makerere University [1972] EA 65*** and, ***Henry N.K Wabui & Anor versus Rogers Hanns Kiyonga Ddungu & 2 others CS No.102 of 2009*****.** His concern, however was that, the plaint neither attributes fraud to the 1st Defendant nor does it disclose the particulars of fraud. Counsel thus urged Court to reject the plaint.

It is clear that, under paragraph 4(c) of the plaint, the Plaintiff seek an order of cancellation of title in the names of the 1st Defendant, and reinstatement of the same into the names of Christopher Buwule. The Plaintiffs claim, under paragraphs 6, and 9 of the plaint, that the suit land was fraudulently registered into the names of the late Paul Kiddu Musisi and later the 1st Defendant in connivance with the 2nd Defendant.

In ***Kampala Bottlers Ltd versus Domanico Brothers SCCA 22 of 1992***, the *Supreme Court* held that; under Section 184 of the Registration of Titles Act (which is now 176(3), "*an action for recovery of land can lie or be sustained only by a person deprived of any land against the person registered as proprietor of such land through fraud"*. **Wambuzi C. J.** added at page 4 that the fraud must be attributable to the transferee either directly or by necessary implication.

On this point, the plaint has two problems. First the plaint does not disclose the capacity under which the Plaintiffs seek the above relief. I am wandering as to whether the Plaintiffs claim deprivation of the suit land as beneficiaries or administrators of the estate of the late Christopher Buwule.

Secondly, no particulars of the fraud by the 1st and the 2nd Defendants are given. This is a breach O.6 r 3 Civil Procedure Rules**.**

I am aware of the *Supreme Court* decision of ***Tororo Cement Co. Ltd versus Frokina International*** *(supra)* in which Court held that;

> *'where a plaint discloses a cause of action but is deficient in particulars, the plaint can be amended so as to include particulars'*.

Court added that;

> *"….a plaint ought not to be rejected for failure to disclose a cause of action unless even when it is amended, within the limits of the law, a cause of action is not disclosed."*

The same notwithstanding, my view remains that the defects in the plaint of this case cannot be cured by an amendment within the limits of the law.

I have already observed that the plaint does not disclose that the Plaintiff's right in the suit land arises from their payment of the mortgage sums. Secondly, I observed that the facts in the plaint do not show that the Plaintiffs are not bonafide occupants on the suit land. Lastly, the facts in the plaint do not show that the Plaintiffs are administrators or beneficiaries of the estate of the late Christopher Buwule [through whom they claim] in order to sustain an action based on fraud against the 1st Defendant.

Having found that the plaint does not disclose that the Plaintiffs enjoyed a right in the suit land, I find it unnecessary to comment on the question of limitation.

In conclusion, I do find that the plaint discloses no cause of action and is accordingly rejected.

This suit is accordingly dismissed with costs to the 1st Defendant.

…….

Henry I. Kawesa

JUDGE

14/06/2018

14/06/2018:

Mr. Solomon Ssebowa for the Defendant.

1st Defendant present.

Plaintiff present.

Clerk: Julia.

Court: Ruling delivered in chambers

Before me: ……

Samuel Emokor

DEPUTY REGISTRAR

14/06/2018