

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
MISC. APPLICATION NO. 2501 OF 2021
[ARISING FROM CIVIL SUIT NO. 120 OF 2021]

GEBAWAYA DENNIS

.....

APPLICANT

V

1. FARIDAH NANYONGA

2. UGANDA NATIONAL ROADS AUTHORITY.....

RESPONDENTS

BEFORE: - HON. LADY JUSTICE P. BASAZA - WASSWA

R U L I N G

[Pursuant to Order 50 Rule 7 of the CPR]

Representation:

Mr. Kiwanuka George and Mr. Ssekyanzi Lawrence for the Applicant.

Mr. Fahim Matovu for the 1st Respondent.

Mr. Kenneth Walusimbi for the 2nd Respondent

Introduction:

[1] The present application was brought by the Applicant; Mr. Gebawaya in which he seeks this court's leave to amend his pleadings (plaint) in the Head Suit No. 120 of 2021, and to add a one Mr. Mutebi Gerald as a Co - Defendant therein.

Nasakhuwani 16/5

Background:

[2] Mr. Gebawayaya sued Ms. Nanyonga and UNRA (the Respondents herein) vide the Head Suit No. 120 of 2021, on February 15, 2021. In his plaint; he contends that Ms. Nanyonga fraudulently obtained title to, and the registration of her name on the title of the suit property comprised in **LRV 4682 Folio 22, Kyadondo Block 273 Plot 24165 at Kibiri, Wakiso**. He seeks *inter alia* for declarations and Orders that;

- i) The registration of Ms. Nanyonga on the certificate of title to the suit property as the sole owner, was done fraudulently.
- ii) He jointly owns the suit property with Ms. Nanyonga, and is entitled to share half of the sum of compensation from UNRA.
- iii) The process of land compensation for the suit property between Ms. Nanyonga and UNRA be halted until the issue of ownership is resolved.

[3] Later on March 22, 2021 Ms. Nanyonga also filed a Petition against Mr. Gebawayaya vide Matrimonial Cause No. 50 of 2021 in the family Division of the High Court. Judgment in that Cause was delivered on May 18, 2021, in which the marriage between Ms. Nanyonga and Mr. Gebawayaya was annulled, and a Declaration was made, *inter alia*; that Mr. Gebawayaya has no interest in the suit property. The suit property was held to be solely owned by Ms. Nanyonga, and the Commissioner Land Registration was directed to remove any caveats lodged thereon by Mr. Gebawayaya.

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- [4] Currently the registered proprietor of the suit property is a one Mr. Mutebi Gerald, with effect from June 7, 2021.
- [5] Mr. Gebawayya has since appealed the Judgment of the family Division in Matrimonial Cause No. 50 of 2021 vide Civil Appeal No. 45 of 2021 in the Court of Appeal.
- [6] This application was initially handled by the Learned Asst. Registrar H/W Mr. Kintu Zirintusa who, pursuant to **Order 50 Rule 7 of the CPR**, referred the matter to me as the trial Judge.
- [7] By the time the matter came before me, both Counsel had filed their respective written submissions for and against this application, including the submissions in rejoinder. I now make this Ruling.

The Applicant's case:

- [8] The gist of Mr Gebawayya's application and supporting affidavits¹ is;
- i) That the amendment shall enable court determine the real questions in controversy in the suit.
 - ii) That the proposed amendment does not introduce a new cause of action but takes care of new facts and evidence. That the person sought to be added actively participated in the fraudulent transfer of the suit property by Ms. Nanyonga to himself.

¹ Including his affidavit in rejoinder

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- iii) That the proposed amendment shall prevent a multiplicity of suits.
- iv) That in Matrimonial Cause No. 50 of 2021 filed by Ms. Nanyonga, he was denied a right to a fair hearing during the case due to numerous procedural irregularities.
- v) That Ms. Nanyonga has since used the orders from Matrimonial Cause No. 50 of 2021 to undermine this suit, and has vacated his caveat and connived with Mr. Mutebi to transfer the suit property into the latter's names.
- vi) That Mr. Mutebi is not new in this matter, and is not an innocent third party. That Mr. Mutebi appeared in his Cross – Petition as Ms. Nanyonga's employer and a man she engaged in an adulterous relationship with.
- vii) That Ms. Nanyonga connived with Mr. Mutebi and indicated that there was no development on the suit property and undervalued the same in the transfer forms down from UGX. 350M to UGX. 20M, that is in the alleged sale agreement.
- viii) That UNRA has revealed that the compensation process is there and it shall deal with Mr. Mutebi.

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- ix) That as new registered proprietor, the allegations of how Mr. Mutebi became the beneficiary of the suit property warrants that he be added as a party.
- x) That the Head suit: No. 120 of 2021 was filed on February 15, 2021 before Matrimonial Cause No. 50 of 2021 which was filed on March 17, 2021.
- xi) That he (Mr. Gebawayaya) has only laid claim to the suit property which he contributed and has proprietary interests, and shall suffer great injustice if this application is not granted.

The 1st Respondent's answer:

[9] The gist of Ms. Nanyonga's answer to this application, as stated in her affidavit in reply, is;

- i) That the present application is prolix, misconceived, frivolous, devoid of merit, vexatious, barred in law and an abuse of court process.
- ii) That Mr. Gebawayaya filed M.A No. 229 of 2021 which was dismissed on May 21, 2021 on the grounds that the same was moot and intended to halt a non-existent process.
- iii) That she (Ms. Nanyonga) filed Matrimonial Cause No. 50 of 2021 and the decision therein of Mugambe, J. had a direct bearing on the issue of ownership of the suit property, and found her to be the owner.

Mugambe J. 16/5

- iv) That the decree in Matrimonial Cause No. 50 of 2021 had by implication resolved the Head Suit No. 120 of 2021 and the court cannot sit to re-determine the issue of ownership of the suit property.
- v) That at all material times, until January 24, 2021 she was the registered proprietor of the suit property, having purchased the same from the late Fr. Walakira Expedito of Mengo – Kisenyi Parish.
- vi) That Mr. Gebawaya never made any contribution towards the purchase and development of the suit property.
- vii) That as registered proprietor of the suit property, she sold the same to Mr. Mutebi on January 11, 2021 and at the time she sold to him, there was no existing court Order barring her from doing so.
- viii) That she has never been in any love relationship with Mr. Mutebi as alleged, he has been her employer from way back even before she met Mr. Gebawaya.
- ix) Mr. Gebawaya's application to amend his pleadings in the Head suit seeks to re-open the issue of ownership which has already been determined by a court of competent Jurisdiction.
- x) That Mr. Gebawaya's intended amendment is expressly and impliedly prohibited by the law, and he shall not suffer any injustice if this application is not granted.

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The 2nd Respondent's answer;

[10] UNRA (the 2nd Respondent) did not file an answer to the application.

Submissions of Counsel:

[11] Learned Counsel for the Plaintiff and for the 1st Respondent each filed their respective written submissions. For brevity, I will not reproduce their arguments here. I will only refer to them where and when it may be necessary. I have however duly considered all their arguments.

Analysis by this Court:

[12] I will begin by restating the principles and Rules that govern amendments of pleadings and joinder of Defendants:

Order 6 Rule 19 of the CPR² provides that:

'The Court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such a 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'

[13] Order 1 Rule 3 of the CPR provides that:

'All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, or severally or in the alternative, where, if separate suits were brought against those persons, any common questions of law or fact would arise.'

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² The Civil Procedure Rules S. 1 71-1

[14] The *locus classicus* case on amendment of pleadings is Eastern Bakery v. Castelino³, which was cited and applied by the Supreme Court in Mulowooza & Brothers Ltd v N. Shah⁴. In that Eastern Bakery case, Sir Kenneth O' Conner, P. enumerated the following principles that should guide a court in granting or refusing amendments to pleadings;

1. That amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.
2. That the court will not refuse to allow an amendment simply because it introduces a new case, but there is no power to enable one distinct cause of action to be substituted for another, not to change, by means of amendment, the subject matter of the suit.
3. That the court will refuse leave to amend where the amendment would change the action to 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 or her of a defence of limitation.
4. That a counterclaim can be added by an amendment, provided it does not transgress any of the principles set out above.

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³ [1958] E.A pg. 462

⁴ SCCA No. 26 of 2010

- [15] In respect of joinder of Defendants, it is trite that two or more defendants may be joined as parties in one suit, though there are two or more causes of action, provided the right to the relief claimed arises from the same act or transaction or series of acts or transactions, and that there are common questions of law or fact. The application of this rule must depend on the particular facts in each case. (Per Duffus, J.A. in Pioneer Investment Trust Ltd v Amarchand and Ors⁵).
- [16] Before I opine whether the present application meets the above criteria, I shall first address the two (2) objections raised against this application by Mr. Matovu; learned Counsel for Ms. Nanyonga.
- [17] Mr. Matovu submitted first that the Head suit: No. 120 of 2021 is *res judicata*, and second that Mr. Gebawaya has no *locus* to bring the Head suit.
- [18] For the first objection, he argued that all the Orders sought in the Head suit rotate around, and are consequential to the issue of ownership of the suit property, and that the same were exhaustively determined in Matrimonial Cause No. 50 of 2021. That as such, the grant of this application shall be moot as it aims at amending a suit whose issues have already been determined by a competent court.
- [19] For the second objection, learned Counsel argued that Mr. Gebawaya has no interest in the suit land, and that until his appeal against the Judgment in

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⁵ [1964] E.A pg. 703 at 707 & 708

Matrimonial Cause No. 50 of 2021 is successful, he does not have *locus* to bring the present application.

[20] In answer to these objections, Mr. Kiwanuka and Mr. Sekyanzi argued for Mr. Gebawayo that Matrimonial Cause No. 50 of 2021 did not deal with how Ms. Nanyonga got registered as sole owner of the suit property, and how she transferred the same to Mr. Mutebi. That the substantial issue in the Head suit is 'whether the title to the suit property was acquired fraudulently'. That, that matter has never been heard nor decided by any court. That Mr. Gebawayo prayed for a declaration that he is entitled to share half of the sum of compensation to be paid by UNRA, and therefore that does not constitute *res judicata*.

[21] On the question of locus, the duo argued that Mr. Gebawayo's attempt to defend his interest in the suit property, and any fraud by Ms. Nanyonga to deprive him of his interest makes him an aggrieved party, thereby giving him *locus standi*. That as an aggrieved party, he has locus to bring this application.

[22] I will start with the first objection that raises the question; 'Is the Head suit *res judicata*?'

[23] The doctrine of *res judicata* is embodied in Sec. 7 of the CPA⁶, that stipulates that:

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court

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⁶ The Civil Procedure Act, Cap 71

competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court'

- [24] The test of whether a matter is barred by *res judicata* was interpreted by the Court of Appeal in their decision in Maniraguha Gashumba v. Sam Nkundiye⁷, to be that;

'the Plaintiff in the second suit is trying to bring before court in another way, and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies, not only to points upon which the first court was actually required to adjudicate, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time'

- [25] Also see the same interpretation in Kamunye & Ors vs. Pioneer General Assurance Society Ltd⁸ & in Posiyano Semakula vs. Magala & Ors⁹

- [26] Applying the above test, I examined and compared the pleadings in the Head suit No. 120 of 2021 with the Judgment in Matrimonial Cause No. 50 of 2021, with a view to determine whether the issues and matters in the Head suit No. 120 of 2021 are the same issues and matters that had already been put before the court in Matrimonial Cause No. 50 of 2021, and had been heard and finally decided by that court?

- [27] I found on the one hand, that in Matrimonial Cause No. 50 of 2021 the issue that the court addressed and decided upon, which concerned the suit property, was 'whether Mr. Gebawaya has any interest therein, and what if any, were the

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⁷ COA Civ. Appeal No. 23 of 2005

⁸ 1971 EA page 263

⁹ 1979 HCB 90

respective contributions of each party to the purchase and construction of the suit property?'...On the other hand, I found in the Head suit, that one of the issues for this court's determination is 'whether Ms. Nanyonga obtained title and registration of the suit land in her names through fraud?

[28] The above said issues, although related, are not one and the same thing. While the former involves adjudication on which party owned the suit property, the latter involves adjudication on allegations of acts of fraud. The latter issue of alleged fraud was indeed neither pleaded, nor was it a matter raised or addressed, before the court in the Matrimonial cause.

[29] In the premises, it is my Ruling that the Head suit is not res judicata within the meaning of sec. 7 of the CPA. The first objection therefore fails and is overruled.

[30] Be that as it may, I am cognizant of the fact that the bulk¹⁰ of the declarations sought in the Head suit No. 120 of 2021, were overtaken by the Judgment and decree in Matrimonial Cause No. 50 of 2021. For clarity, prayers (b), (c), (d) & (e) under paragraph 12 of the plaint in the Head suit, were overtaken by the following Orders in Matrimonial Cause No. 50 of 2021:

- i) That the suit property together with plot 24167 are solely owned by Ms. Nanyonga.



¹⁰ Most, not all of the Declarations sought

- ii) That the Commissioner Land Registration should vacate any caveats lodged by Mr. Gebawaya on the suit property, and on plot 24167.

[31] I will now turn to address the second objection on *locus standi*.

[32] '*Locus Standi*' is defined in Black's Law Dictionary¹¹ as:

'A place of standing, the right to bring an action or to be heard in a given forum'

(Underlining added)

[33] In Kithende Appolonia & 2 others vs. Eleanor Wismer¹², the court of Appeal defined *locus standi* as;

'The right that one has to be heard in a court of law or other appropriate proceedings. Once one has a direct interest in a matter, then one is eligible to claim relief respecting that matter if that one's interest is being adversely affected'

(Underlining added)

[34] A perusal of the plaint in the Head suit shows that Mr. Gebawaya pleads and claims that he has an interest in the suit property as a co-purchaser. Although the Judgment in Matrimonial Cause No. 50 of 2021 pronounced otherwise, it is also true that Mr. Gebawaya has since appealed the said Judgment.

[35] In 'Francis Rutagarama Bantariza v Habre International Trading Co. Ltd¹³, when dealing with the interpretation of Order 21 Rule 9 (1) of the CPR (now Order 24 Rule 9 (1)), the Supreme Court pointed out that;

'It is a recognized rule that a suit must be tried in all stages of the cause of action as it existed at the date of commencement, and that in appeal the question is whether the decision of the trial

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¹¹ 9th ed. at page 1026

¹² COA C/A No. 34 of 2010

¹³ S/C C/Applic. No. 14 /1999 (arising from SCCA No. 016 / 2014)

court is correct on the facts as they stood when the judgment of the trial court was rendered,
and that no subsequent event or devolution of interest can affect that question...'

(Underlining added)

[36] For clarity, **Order 24 Rule 9 (1) of the CPR** reads that:

'In other cases of an assignment, creation, or devolvement of any interest during the pendency of a suit, the suit may, with the leave of the court, be continued by or against the person to or upon whom the interest has come or devolved'

[37] Guided by the above decision, it is clear to me that what is considered is the cause of action as it existed at the date of commencement of Matrimonial Cause No. 50 of 2021, to wit; before and not after the Judgment was rendered.

[38] In these premises, the alleged sale and transfer of the suit property to Mr. Mutebi by Ms. Nanyonga, does not take away Mr. Gebaway's right of appeal, his place of standing, his right to bring the present application, or any other action, and his right to be heard, provided such appeal, action or hearing, is not barred by any law.

[39] The right to be heard is sacrosanct¹⁴ and unless barred by any law, that right must not be derogated from, but rather, must be guarded and preserved by a court of law¹⁵.

[40] The second objection therefore also fails and likewise, is overruled.

[41] Having taken all the above factors into consideration, together with the averments of the parties, and the submissions of all Counsel, I agree with the

M. N. Nanyonga

¹⁴ Art. 28 of the Constitution of Uganda

¹⁵ Art. 44 "

propositions by Mr. Kiwanuka and Mr. ssekyanzi, learned Counsel for Mr. Gebawaya, that allowing the proposed amendment and joining Mr. Mutebi as a co-defendant in this suit, meets the criteria stated under Order 1 Rule 3 and Order 6 Rule 19 of the CPR.

[42] I find that Mr. Gebawaya's alleged claims to relief against both Ms. Nanyonga and Mr. Mutebi arise out of the same alleged acts and or series of alleged acts or transactions, and if separate suits were brought against them, common questions of law and or of fact would arise.

[43] I also find that since this application has been made prior to the scheduling and hearing of the Head Suit No. 120 of 2021, there will be no prejudice occasioned to the opposite parties. The proposed amendment shall not change the character of the existing action, rather, it shall enable this court effectively and effectually determine all the questions in controversy between all the persons claiming an interest in the suit property, and thereby it shall avoid a multiplicity of suits.

Decision of this Court:

[44] In the final result, this application succeeds and is allowed in the following terms;

1. Mr. Gebawaya is granted leave to amend his plaint in the Head suit No. 120 of 2021 and to add Mr. Mutebi Gerald as a co – Defendant therein.

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2. The proposed amendment shall be filed and served within fifteen (15) days from the date of this order, in any case not later than May 31, 2022.
3. The hearing of the Head Suit No. 120 of 2021 is stayed and shall not be taken until, and subject to, the outcome of Mr. Gebaway's Appeal vide Civil Appeal No. 45 of 2021 in the Court of Appeal.
4. The costs of this application shall be in the cause.

I so Order,



P. BASAZA - WASSWA

JUDGE

May 16, 2022

Ruling delivered via email to the parties and uploaded on the ECCMIS System.