

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

MISC. APPLICATION NO. 3745 OF 2023

(Arising from HCCS No. 1066 of 2019)

1. KIBUUKA EMMANUEL

2. NAMULEME SPESIOZA ===== APPLICANTS

VERSUS

1. NANYANZI MARGARET

2. BUKIRWA TEOPISTA

3. MUGERWA KAYINGA JOHN BOSCO

4. BYEKWASO MUHIIRE ===== RESPONDENTS

BEFORE HON LADY JUSTICE AISHA NALUZZE BATALA

RULING

Introduction;

1. This Application is by Chamber Summons under Order 1 rule 13 and Order 6 rules 19 and 31 of the CPR, Section 33 of the Judicature Act and Section 98 of the Civil Procedure Rules for orders that;

- i) The Applicants be granted leave to amend their
Plaint in HCCS No.1066 of 2019.



- ii) This Honorable Court strikes out the 5th Defendant which is not a legal entity and adds the proposed 5th, 6th, 7th, 8th and 9th Defendants.
- iii) Costs of this Application be provided for.

Grounds of Application;

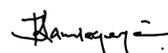
2. The grounds of the application are contained in the application and supporting affidavit of the 1st Applicant which are briefly are;

- i) That the 1st Applicant together with the 2nd Applicant are beneficiaries of the estate of their late grandfather DUMBA KABUGO STEFANO and they filed Civil Suit No. 1066 of 2019 against the Respondents/ Defendants however at the time could not secure services of lawyers.
- ii) That having obtained the services of their current lawyers IBC Advocates, they pointed out matters of technical legal nature like particulars of fraud and illegality which were not covered in their Plaint calling for amendment of the same.
- iii) That the person who presented their initial Plaint and first amendment did them an injustice as



there were several errors in the original Plaintiff only signed by the 2ND Applicant without reading through the same and the said person tried to rectify the errors with an amended Plaintiff before serving the Respondents.

- iv) That the 1st Applicant further advised by his lawyers which advice he believes to be correct that in their current amended plaintiff, aspects of trespass, fraud and other illegalities which occurred on the subject land were not properly captured, which makes another amendment by their lawyers necessary.
- v) That the Applicant verily believes as advised by their aforesaid lawyers that the 5th Defendant 'Church of Balokole' which is a non-existent legal entity was erroneously included thus ought to be struck out from the suit and other potential Defendants namely the 5th 6th 7th, 8th and 9th Defendants to this suit be added so as to aid Court to properly dispose of all issues in controversy.



- vi) That since the time of filing the suit in 2019, there have been numerous persistent acts of trespass, destruction of our gardens, purported sales, transfers of subdivided plots, illegal surveying and interruption of their use of the subject land by the intended additional Defendants together with their agents.
- vii) That the Applicants are advised by their lawyers and do believe the advice is correct that since they were unrepresented at the time of filing the Plaint and unaware of technical legal matters, many material aspects were omitted in their original pleadings and need to be rectified for the case to proceed to a logical conclusion.
- viii) That the Applicant is further advised by his aforesaid lawyers which advice he believes is correct that it is in the interest of justice that the 5th, 6th 7th , 8th and 9th Defendants be added as Defendants so that they can be heard and no prejudice shall be suffered by either side since hearing has not commenced.



ix) That the Applicants are advised by their lawyers' which advice they believe is true that the Amendment of the Plaint is brought in good faith and addition of the other Defendants will aid the course of justice and will help in proper disposition of the suit and whatever is stated herein above is correct and true to the best of his knowledge and belief save what is based on advice the source of which is disclosed therein.

3. The Grounds of Opposition of this Application are contained in the affidavit deponed by Jemba James, an advocate practising with M/s Lubega, Babu and Co. Advocates, said to be well versed with this matter before court. He states that;

- i) That he has perused the application and supporting affidavit and he responds thereto on points of law only as the law allows him to.
- ii) That the said application is similar to Miscellaneous Application No. 728 of 2023 on all facts and is therefore res-judicata.



- iii) That the applicants herein previously applied for amendment of the suit and their application was dismissed with costs.
- iv) That by bringing back a similar application, the same is res-judicata and cannot be entertained by the court.
- v) That in the event this court is to grant the current application and given the multitude of applications being fired by the applicants, he prays that the applicants deposit in court security for the Respondents costs as per the bill of costs pending taxation before this Honorable court in Miscellaneous Application No. 728 of 2023 which is to be taxed under Taxation Application No. 10 of 2024.
- vi) That this suit is already fixed for hearing on the 6th of March, 2024 and the current applications are merely delaying tactics and setbacks.

4. In rejoinder, it was deponed by the 1st Applicant that;

- i) That the Applicant is advised by his lawyers IBC Advocates that the said deponent is a stranger to these



pleadings and is not possessed with the capacity to depone the affidavit.

ii) That in rejoinder to Paragraph 3,4 and 5, the Applicant states that the instant Application is properly before court and competent because Misc Application No.728 of 2023 was never determined on merit, but was dismissed on mere preliminary objection/ technicality that their affidavits lacked a certificate of Translation.

iii) That in rejoinder to paragraph 6, there is no legal justification whatsoever for security for costs as dismissal of the Applicant's earlier Application cannot act as a bar to the instant application.

iv) That in rejoinder to paragraph 7 and 8 the 1st Applicant is aware of the said mentioned date and he's eager for court to allow their amendment Application so that hearing of the suit can proceed accordingly with other defendants on board.

Representation;

5. The applicants were represented by Oriokot Emmanuel of M/S IMC Advocates whereas the 1st- 3rd respondents were represented by Babu Rashid of M/S Lubega, Babu & Co.

Advocates and there was no representation for the 4th respondent.

6. Both Counsel for the Applicants and Respondents filed written submissions which have been relied on by this court in determination of this application.

Issues for determination;

- i) Whether the applicants should be allowed leave to amend the pleadings/plaint.**
- ii) What remedies are available to the parties?**

Resolution and determination of the issues;

7. Counsel for the Applicants cited the **Supreme Court Case of Gaso Transport Services (Bus) Ltd V Martin Adala Obene Supreme Court Civil Appeal No.4 of 1994**, Tsekeko JSC held inter-ria; **i) Under O.6 r .19, the High Court has wide discretionary powers to permit the Amendment of Pleadings to be made at any stage of the proceedings and in appropriate cases, amendment to pleadings may be permitted as late as during an appeal by an appellate court.**

- iii) It is trite law that courts are more flexible in allowing amendments wherever applications**

H. M. M. M.

thereof are made promptly at the earliest stage in litigation. The more advanced the litigation, the greater the burden of the Applicant to satisfy court that leave for Amendment ought to be granted.

iv) The principles governing the exercise of discretion in allowing amendments is as follows;

a. The amendment should not occasion injustice to the opposite party. An injury which can be compensated by the award of costs is not an injustice.

b. Multiplicity of proceedings should be avoided as much as possible and all Amendments which would avoid such multiplicity should be allowed.

c. An application which is Malafide should not be granted.

d. No amendment should be allowed where it is expressly or impliedly prohibited by any law (e.g limitation of actions)

8. Counsel for the Applicants submitted that the Applicant deponed in paragraph 2 of the Affidavit in support that the Applicants/Plaintiffs filed the main suit No.1066 of 2019

against the Respondents at a time they could not secure services of lawyers, and that with the help of their lawyers, they found out the initial and first amended complaint had several errors, matters of technical legal nature like particulars of fraud and illegality which were not covered in the original complaint and in the amended complaint, aspects of trespass, fraud and other illegalities which occurred on the subject land have not been properly captured.

9. Counsel stated that the amendment is necessary and proper because unrepresented litigants cannot by themselves properly articulate the technical points in their pleadings.

10. Therefore, allowing the Applicants to amend their complaint will aid the interest of justice because the real issues in contention will be brought to the fore and therefore reading of the proposed amendment Complaint clearly brings out this point.

11. Counsel for the Applicants further submitted that the Applicant deponed in paragraph 8 of his Affidavit in support that since the time of filing the suit in 2019, there have been numerous persistent acts of trespass,



destruction of gardens, purported sales, transfers of subdivided plots, illegal surveying and interruptions of the Applicants on the suit land by the Defendants which pertinent facts arose after the filing of the main suit.

12. Counsel for the Respondents raised a preliminary objection stating that the Applicants suit be dismissed for failure to pay court fees. Counsel submitted that Upon perusal of the plaint filed in November, 2019 the same does not bear any stamp of court fees paid and no value of the subject matter is disclosed.

13. Upon perusal of the amended plaint filed on the 10th December, 2019, the same bears a court fees stamp No. 002720060 of Ugx.1500/= while the estimated value disclosed is Ugx. 90,000,000/=. The fees paid are not in tandem with the value estimated.

14. Counsel further submitted that in **Mulwooza & Brothers Ltd vs N. Shah & Co. Ltd C.A. Civil Appeal No. 26 of 2010**, it was stated that **an amendment will be allowed if it seeks to elaborate the matter in the original plaint NOT if it seeks to alter or introduce a distinct cause of action**. The present application seeks to



alter the character of the original plaint and the first amended plaint.

15. Counsel also cited **0.6 R.7 CPR that** no pleading shall be allowed if it raises a new ground of claim **or** contain an allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.
16. The applicants filed the suit claiming under the estate of the late Kitalikibbe Kiddawalime with an unknown Block and Plot number. The said Kitalikibbe Kiddawalime was claimed to have died on 23rd February, 1973 whose estate was disclosed as Busiro, Entebbe Gombolola, Ssisa Wakiso District.
17. When the applicants filed the amended plaint on 10th December, 2019, they changed the entire claim now claiming under the estate of the late Ddumba Kabugo Stefano with Plot No. 12 volume 1730 Folio 8, Busiro with the land location as Nankonge, Mengo District. Counsel submitted that the first amendment in itself offends **0.6 R.7 CPR** because it was a complete departure and inconsistent with the previous pleading.



18. The applicants ought to have withdrawn the plaint and filed a fresh one. The remedy of such pleading lies in 0.7.R.12 CPR that the plaint should be rejected and thrown out for departure from previous pleadings. On this ground alone, this application cannot be allowed because it seeks to amend what is defective on the face of the record.

19. He stated that the law does not allow any amendment which substantially changes the cause of action into a different one. That on perusal of the original plaint and its illegal amendment of 10th December, 2019 show the cause of action to be similar but of different estates.

20. In rejoinder, counsel for the Applicants stated that Respondents and their Counsel have made no effort to oppose the merits of the Application. That in fact despite of being unrepresented, the Plaintiffs paid 200,000/= as court fees vide receipt number Y2023153 which is on court record.

21. He further submitted that Plaintiffs cannot be faulted from amending their plaint the first time on the basis of order 6 rule 7. the plaintiffs were lay men and were



unpresented at the time, the errors included by the drafter of the initial plaint and amended plaint should not be used to block the Applicants from attaining justice from this Honorable Court.

Analysis by Court;

22. The law on amendment of pleadings is governed by order 6 Rule 19 of the civil procedure Rules which states 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”**

23. The supreme court in **Gasu Transport Services (Bus) Ltd V Martin Adala Obene Supreme Court Civil Appeal No.4 of 1994, Tsekeko JSC** laid down the following principles which govern the exercise of discretion in allowing amendments:

i) The amendment should not work injustice to the other side. An injury that can be compensated for by way of costs is not treated as an injustice.



ii) Multiplicity of proceedings should be avoided as far as possible and all amendments, which avoid such multiplicity should be allowed.

iii) An application which is made malafide should not be granted.

iv) No amendment should be allowed where it is expressly or impliedly prohibited by any law.

24. Amendments may be allowed before trial or even during trial as long as the amendment shall not prejudice the other party and cause an injustice and as long as the other party can be compensated by costs.

25. Counsel for the Applicants relied on order 6 Rule 19 of the Civil Procedure Rules which provides that court may allow either party to alter or amend his or her pleadings. I agree with the submissions for counsel on this particular order for Amendment of pleadings can be at any time as long as the purpose is to determine the real questions of controversy between parties.

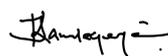
26. In this case before me, the Applicant seeks to amend the plaint in Civil Suit No.1066 of 2019 on the premise that The Applicants were unrepresented at the time of filing the



Plaint and many material aspects and particulars of fraud, trespass and illegality were omitted and need to be rectified for the case to proceed to a logical conclusion.

27. That there is alleged fraud, trespass and other illegalities which were not captured in the existing Plaint and since filing of the suit in 2019 several developments that have since taken place need to be captured in the amendment.

28. In reply the Respondents submitted that this Application is Res judicata and can't be determined by this honorable Court. However, the Applicants stated that this Application is not Res judicata as it has been dismissed by the registrar and not determined on merit since it was dismissed for not attaching a certificate of translation. In the case of **Boutique Shazim Limited v Norrattam Bhatia and Another C.A Civil Appeal No.36 Of 2006**, it was held that **essentially the test to be applied by court to determine the question of res judicata is this; is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form a new cause of action which he/she has already**



put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, 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 belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time.

29. However, to give effect to the plea of res judicata, **the matter directly and substantially in issue must have been heard and finally disposed in the former suit** as it was stated in **Lt David Kabarebe v Major Prossy Nalweyiso C.A Civil Appeal No.34 of 2003.**

30. In determining this point of law in the instant Application, the Applicant in his Affidavit in Rejoinder states that Miscellaneous Application No 728 of 2023 was never determined on merit but was dismissed on a preliminary objection / technicality that the Affidavits had no certificate of translation.

31. Again, this court in **Matco Stores Ltd & Ors v Muhwezi (Civil Appeal No.09 of 2012)** the court was faced with the



question as to whether the doctrine of res judicata applies in Miscellaneous applications. In answering the question Hon Justice Monica K. Mugenyi analyzed a set of authorities on the matter as follows; **Section 2(x) of the Civil Procedure Act** defines a suit as all proceedings commenced in any manner prescribed. **Section 2(q) of the Civil Procedure Act** defines the term “prescribed” as “prescribed by the rules” while the term “rules” is defined in Section 2(t) as rules and forms made by the rules committee to regulate the procedure of courts.

32. In defining a suit within the meaning of Section 2 of the Civil Procedure Act, the Learned Justice relied on **Mityana Ginners Ltd v Public Health Officer, Kampala (1958) 1 EA 339 at 341** Briggs VP citing **Mansion House Ltd v Wilkinson (1954) 21 EACA 98 at 101, 102** observed as follows: ***“Accordingly, a “suit” is any civil proceeding commenced in a manner prescribed by the rules and forms made by the rules committee to regulate the procedure of courts. I consider that “suit” must for purposes of these proceedings have its precise and statutorily defined meaning.”***

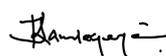


33. The learned Justice further observed that Order 4 rule 1 of the Civil Procedure Rules states that every suit shall be instituted by presenting a plaint to the court or such officer as it appoints for that purpose. It was also Her Lordship's observation that the suit envisaged in Section 2 of the Civil Procedure Rules is a substantive suit as opposed to miscellaneous applications. In other words, a miscellaneous application is not a suit for purposes of the bar of res judicata.

34. Therefore, it is my finding that the doctrine of res judicata does not apply in the circumstances.

35. The 1st Applicant in his Affidavit stated that having obtained the services of their current lawyers IBC Advocates, they pointed out matters of technical legal nature like particulars of fraud and illegality which were not covered in their Plaint calling for amendment of the same.

36. That the person who presented their initial Plaint and first amendment did them an injustice as there were several errors in the original Plaint only signed by the 2nd Applicant without reading through the same and the said



person tried to rectify the errors with an amended Complaint before serving the Respondents.

37. That in their current amended complaint, aspects of trespass, fraud and other illegalities which occurred on the subject land were not properly captured, which makes another amendment by their lawyers necessary.

38. Section 100 of the Civil Procedure Act states that amendments are allowed to enable determination of real issues between the parties. To ensure that there's no multiplicity of proceedings and a multiplicity of suits regarding the same estate, it is only prudent that this amendment is granted by court.

39. The Respondent has not proved to this honorable Court that the Respondents might suffer an injustice if this Application is allowed.

40. The amendment seeks to clearly indicate the particulars of fraud and trespass and add parties who can be sued and remove nonexistent parties. It is my view that allowing this amendment will enable the Applicants who were initially not represented to rectify their complaint to be able to bring out their cause of action against the right parties and

allow this honorable court to conclusively determine the issues of controversy between the parties.

41. Furthermore, the respondents will be given time to amend their defense in line with the amended plaint.

42. In the circumstances the instant Application succeeds and I hereby order that;

i) The Applicants are hereby granted leave to amend their Plaint in HCCS No.1066 of 2019.

ii) The Applicants are hereby granted leave to strike out the 5th Defendant which is not a legal entity and add the proposed 5th, 6th, 7th, 8th and 9th Defendants.

iii) The applicants should file and serve the amended plaint within 15 days on all defendants in civil suit No 1066 of 2019 from date of receipt of this ruling.

iv) The Defendants should file in their amended written statements of defence within 21 days from the date they are served with the amended plaint.

v) No orders at costs.



I SO ORDER.

Hanley

NALUZZE AISHA BATALA

JUDGE

4/04/2024