THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; KITUMBA; TUMWESIGYE AND KISAAKYE; JJSC.)

CIVIL APPEAL NO. 26 OF 2010 BETWEEN

MULOWOOZA & BROTHERS LTD::::::::::::::::::APPELLANT AND

N. SHAH & CO. LTD :::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mpagi-Bahigeine, DCJ, Byamugisha and Nshimye, JJ.A.) dated 16th July 2010 in Civil Appeal No. 57 of 2009]

JUDGMENT OF TUMWESIGYE, JSC.

This appeal arises from the decision of the Court of Appeal which reversed the ruling of the High Court in Miscellaneous Application No. 143 of 2009. In that application N. Shah and Co. Ltd, the respondent, sought leave to amend its plaint in Civil Suit No. 80 of 2008 in which Mulowooza & Brothers Ltd, the appellant, is first defendant. The High Court declined to grant leave to amend the plaint, and on appeal by the respondent the Court of Appeal reversed the decision of the High Court and allowed the respondent to amend the plaint, hence this appeal.

BRIEF FACTS

In civil suit No. 80 of 2008 mentioned above, the appellant and the respondent both claim ownership of the same land located in Mawokota county, Wakiso District. Apparently this land (the suit land) had two certificates of title issued by the Land Registry, one a mailo title Block 107 Plot 3 through which the appellant originally claimed ownership, and another a freehold certificate of title FRV 29 Folio 4 through which the respondent claims ownership.

On 6th November, 2007 the Permanent Secretary Ministry of Energy and Mineral Development wrote a letter to the respondent expressing an interest to purchase part of the suit land for establishing an oil terminal. However, the Ministry later received from the appellant a mailo certificate of title relating to the same land. The appellant also wanted to sell part of that land to the Ministry for the same purpose. The Ministry sought clarification about the ownership of the suit land from the Land Registry and the Land Registry informed the Ministry that the suit land belonged to the appellant. On 26th February 2008 the Ministry informed the respondent that the Land Registry had informed it that the appellant was the owner of the suit land.

On 27th February 2008 the respondent filed High Court Civil Suit No. 80 of 2008 against the appellant and the Commissioner for

Land Registration seeking declarations that the respondent was the owner of the suit land.

On 27th February 2009 the respondent filed an application seeking leave to amend the plaint by substituting the Attorney General for the Commissioner for Land Registration. The High Court declined to grant leave to amend the plaint. On appeal the Court of Appeal reversed the decision of the High Court and allowed the appellant to amend.

The appellant being dissatisfied with the decision of the Court of Appeal filed this appeal. The appellant's memorandum of appeal contains five grounds framed as follows:

1. **The learned Justices of Appeal erred in law in holding that the intended amendment was a mere elaboration of the original particulars of fraud and not posing a new cause of action.**

2. **The learned Justices of Appeal erred in law in holding that the intended amendment would not prejudice the appellant by depriving it of the defence of limitation in an action against the Attorney General.**

3. **The learned Justices of Appeal erred in law in holding that the time of limitation would not begin to run against the Attorney General until he was joined as a party to the proceedings.**

4. The learned Justices of Appeal erred in law in holding that the intended amendment would not circumvent the period of limitation and deprive the appellant of his defence.

5. The learned Justices of Appeal erred in law when they awarded costs to the respondent and allowed it to amend its pleadings in a manner prejudicial to the appellant.

The appellant prayed that the appeal be allowed, the judgment of the Court of Appeal be set aside and the orders of the High Court be reinstated, and the appellant be granted costs in this court and the courts below.

Mr. Ambrose Tebyasa represented the appellant while Mr. Obiro Isaac Ekirapa represented the respondent. Both counsel filed written submissions. Counsel for the appellant argued grounds 1 and 2 together, 3 and 4 together and then ground 5. Counsel for the respondent argued grounds 2, 3 and 4 together and ground 1 and 5 separately. I will consider ground 1 and ground 2 together and grounds 3 and 4 together, then ground 5, in that order.

Ground 1 and 2 Learned counsel for the appellant argued In his written submissions that the learned Justices of Appeal erred when they held that the proposed amendment did not introduce a new cause of action but was a mere elaboration of the particulars of

fraud in the original plaint. He supported the finding of the learned trial judge who stated in his judgment that "the new plaint somehow introduces a new cause of action on completely new facts with different pleadings".

Counsel contended that the proposed amendment amends the entire original plaint of 3 pages with a new distinct plaint of 11 pages and with none of the parts in the original plaint retained. Furthermore, he argued, the new proposed amendment contains new causes and seeks new prayers and introduces new claims of estoppel and orders to direct the Registrar of Titles to register the respondent's Certificate of Repossession.

Counsel argued further that contrary to the respondent's assertion, there was no new information which the respondent obtained after filing the suit and the reply to the written statement of defence to warrant an amendment. The proposed amendment, in his opinion, was only intended to deprive the appellant of its defence that the respondent lacks the locus standi to bring the action to court since it was barred by Section 15(1) of the Expropriated Properties Act.

Learned counsel for the respondent, on the other hand, argued that there was no new cause of action introduced by the intended amendment and that in any case rules of procedure do not

necessarily bar introducing new causes of action in an amendment but what is prohibited is amending a plaint to substitute a distinct new cause of action for another. He argued that the right which is being claimed in the instant case IS ownership of the suit land, the original plaint sought a declaration that the respondent was the owner of the suit land and that the proposed amendment maintains this claim of ownership by the respondent to the suit land and that, therefore, there is no new cause of action being introduced.

Counsel argued further that the proposed amendment includes subsequent events affecting the suit land that occurred after both the plaint and the reply to the written statement of defence were filed by the respondent. He mentioned as examples the intervention by the Inspector General of Government, the issuance of a notice by the Commissioner for Land Registration of her intention to rectify the register and the opinion of the Solicitor General on the matter.

Counsel supported the finding of the Court of Appeal that the intended amendments were no more than an elaboration of the particulars of fraud in the plaint. He cited the case of **Tororo Cement Industries Co. Ltd vs Frokina International Ltd SCCA No.2 of 2001** to show that a plaint which discloses a cause of action can be amended to include particulars.

Counsel further argued that new prayers such as estoppel were introduced in the amendment because they followed facts which had been pleaded in the reply to the written statement of defence and prayers as a rule of practice are pleaded in the plaint and not in the reply, hence the necessity to amend the plaint.

The learned trial judge based his refusal to grant leave to amend on two reasons. The first reason which coincides with the appellant's first ground was stated in his judgment as follows:

> **After perusing the original plaint and the proposed amendment, I do find that the new plaint somehow introduces a new cause of action on completely new facts with different pleadings. They include new particulars of fraud and new prayers like estoppel, among others. Such an amendment was rejected in the case of Ntungamo District Local Council vs. John Karazarwe [1997] 111 KALR 52.**

The learned Justices of Appeal did not agree with the learned trial judge in this respect. They reproduced in their judgment the particulars of fraud which were added to the intended amendment and concluded:

> **A comparison of the intended amendment with the original indicates ... that the amendments are a mere elaboration on the original particulars of fraud against the officials of the said ministries of Government i.e Finance and Land Registry.**

> **It cannot be claimed even remotely that the intended amendments pose a new cause of action … the particulars of fraud do not constitute a new cause of action as claimed.**

I have seen both the original plaint and the intended amendment and I respectfully agree with the learned Justices of Appeal that the proposed amendment does not introduce any new cause of action. All that the amendment does is giving more facts and information about the particulars of fraud alleged in the plaint and this can not be said to constitute a new cause of action.

The fact that the proposed amendment contains more pages with underlined sentences and does not exactly reproduce sentences of the original cannot be a serious point to advance against the proposed amendment. The Civil Procedure Rules do not limit the number of pages an amendment should have or the style to be used when drafting an amendment.

Moreover, learned counsel for the respondent is right to state as he does in his submissions that the Civil procedure Rules do not bar introducing a new cause or causes of action through an amendment to a plaint. On the contrary, Order 2 Rule 4(1) of the Civil Procedure

Rules allow uniting in the same suit several causes of action against a defendant or defendants. This is intended to promote just disposal of suits and to guard against multiplicity of suits, see **Mohan Musisi Kiwanuka vs. Asha Chand** SCCA No. 14 of 2002.What case law seems to prohibit IS introducing an amendment that would be prejudicial to the other party's case, but as it will be shown later in this judgment, even such an amendment will be allowed if the prejudice can be sufficiently compensated for by costs.

Order 6 Rule 19 of the Civil Procedure Rules states:

> **A court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such 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.**

It is, therefore, right to unite in the same suit several causes of action and courts should not discourage it even if it is to be done through an amendment to pleadings.

In the case of **Eastern Bakery v. Castelino** (supra) Sir Kenneth O'Connor stated:

> **[A]mendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and ... there is no injustice if the other side can be compensated by costs ... 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 ... 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 a defence of limitation.

This is I think the correct statement of the law on amendments to pleadings. Amendments are allowed by courts so that the real question in controversy between the parties IS determined and justice is administered without undue regard to technicalities in accordance with **Article 126(2) (e) of the Constitution.** Therefore, if a plaintiff applies for leave to amend his pleadings, courts should in the interest of promoting justice, freely allow him to do so unless this would cause an injustice to the opposite party which cannot be compensated for by an award of costs, or unless the amendment would introduce a distinct cause of action in place of the original cause.

The question in this case, therefore, is whether the respondent's proposed amendment substitutes an entirely different new cause of action for the original or whether the amendment would cause

injustice to the appellant. In his submissions, learned counsel for the appellant cited the case of **Ntungamo District Council vs Karazarwe** (1997) 111 KLR 52 and **Mohanlal Pethras shah v. Queunsland Insurance Co. Ltd** [1962] EA 269 to support his argument that an amendment should not cause an injustice to the opposite party or introduce an entirely different case.

However, he did not show how this principle applied to his case. His contention that the amendments introduced a new cause of action for the original was based on his claim that the amendment amended the entire original plaint of 3 pages and replaced it with a new distinct plaint of 11 pages with all the lines underlined; that it sought new prayers and new claims of estoppel and other orders; that there were no new information and documents which came to the knowledge of the respondent after it filed the suit, and that the amendment was seeking to join a new party to the proceedings, i.e. the Attorney General who has to be given a Statutory Notice of 45 days.

Joining of a new party to the suit and whether the correct procedure of joining the Attorney General to the suit was followed were issues which were canvassed by the appellant at the trial stage and considered at length by the learned trial judge. He decided them in favour of the respondent and correctly so in my view. Counsel for the appellant never complained about the trial judge's

decision on these issues in the Court of Appeal and it is surprising that he should do so here. This argument in my view lacks merit.

I considered counsel for the appellant's argument that the new amendment has more pages and seeks new prayers earlier and found it to lack merit. It is on whether there was no new information and documents available to the respondent after the filing of the suit that the learned trial judge found in favour of the appellant and ruled against the respondent. The learned trial judge stated that there was no justification for suing the Attorney General late through an amendment because the information for the plaint was available to the respondent before it filed the suit.

The learned trial judge was wrong to reject the application to amend on this ground. He misdirected himself on the law relating to amendment of pleadings by dismissing the application on the ground that the alleged information was there before the suit was filed and that the applicant delayed and was not acting in good faith. In my view, he should have focused his mind on whether the test shown above i.e. whether the proposed amendment introduced a distinct new cause of action instead of the original or whether and in what way it would prejudice the rights of the appellant if it was allowed, in order for him to have a sound basis for allowing or dismissing the application. Amendments to pleadings sought before

the hearing should be freely allowed unless they violate the above stated principle.

Counsel for the appellant did not show either how the amendment introduced a distinct new cause of action in place of the original one. As counsel for the respondent rightly argued, both the original plaint and the proposed amendment concern the same claim of right of ownership of the suit land. The learned Justices of Appeal were right to find that the intended amendment did not even remotely introduce a distinct new cause of action and were justified to rule that because of the serious allegations of fraud against senior Government officials the Attorney General should be joined as a party to this suit. This was against the direction of the trial judge in his judgment that the "plaintiff should either proceed with the suit or withdraw it and file a fresh one against the Attorney General".

The observation of Mulenga, JSC (as he then was) in the case of **Mohan Musisi Kiwanuka vs. Asha Chand** SCCA No. 14 of 2002 is pertinent. He stated:

> **I am constrained to observe here, that this background demonstrates how undue regard to technicalities can obscure real issues, to the prejudice of substantive justice. It is a cardinal principle in our judicial procedure that courts must, as much as possible avoid multiplicity of**

suits. Thus it is that rules of procedure provide for, and permit where appropriate, joinder of causes of action and consolidation of suits.

With due respect, there was no sound reason why the appellant's application ... to join the Attorney General was not allowed ... "

The above-quoted opinion equally applies to the instant case.

It is true that new prayers such as estoppel were introduced in the amendment but they are just ancillary to the main claim of right of ownership of the suit land. What counsel for the appellant argued concerning the amendment would only relate to the defence of limitation which I will consider later when I deal with grounds 3 and 4 of appeal. **I,** therefore, find that ground 1 and 2 lack merit and should fail.

Grounds 3 and 4

Learned counsel for the appellant in his submission on these grounds of appeal argued that the Minister of Finance's order cancelling the respondent's certificate of repossession could only be challenged within 30 days of its communication to the respondent in accordance with Section 15(1) of the Expropriated Properties Act and that since the respondent did not challenge the Minister of Finance's order within this prescribed time, it could not circumvent

this statutory requirement by amending its plaint to sue the Attorney General.

Counsel further argued that the respondent, contrary to what the learned Justices of Appeal held, did not produce any evidence that the Minister's decision was sent to a defunct address of the respondent. Counsel cited the cases of **Heldon vs. Neal** (1887) QB Vol XIX394, **Hasham Meralli & Another vs. Javer Kassam & Sons** Ltd [1957] EA 503, **Hilton vs. Sutton Steam laundry** [1946] IKB 65 and **Dhanesvar v. Mentha v. Maminal M Shah** [1965] EA 321 to strongly argue that courts should not allow amendments which deprive a defendant of a defence under statutes of limitation.

Learned counsel for the respondent, on the other hand, argued that while the Minister's decision under the Expropriated Properties Act has to be appealed against within 30 days it has to be communicated to the aggrieved party at the time it is made and that was why applicants for repossession of expropriated property have to furnish the Minister with their current addresses at the time of making their applications. In this case, he argued, the decision of the Minister was sent to a defunct address of the respondent which was in use in 1947 even when the respondent's current address was provided. Counsel cited the case of **Maltglade Ltd & others v. St. Albans Rural District Council** [1972] 3 All ER 129 for the principle that serving of documents where time of serving is

important will be subject to challenge where the affected party does not receive them in time.

Counsel further argued that in the intended amendment there are paragraphs which show that the Minister's decision was sent to a defunct address and that the intended amendment was part of the affidavit supporting the application for leave to amend. Contents of documents attached to an affidavit are part of the affidavit, he argued.

The learned Justices of Appeal were of the View that an appeal against the Minister's decision lies to the High Court within 30 days only if the decision is communicated to the aggrieved party. It was their finding that the respondent never received the Minister's decision because it was not communicated to it. The decision of the Minister according to the learned Justices of Appeal was sent to a defunct address and the respondent had proved that he never received it, and this was never contradicted or disproved by the appellants.

There is a plethora of case law showing that courts should not allow amendments to pleadings which would take away a defendant's defence of limitation. Some of these authorities were cited earlier and others were cited by learned counsel for the appellant and it is therefore not necessary for me to reproduce them here.

However, in the instant case the learned Justices of Appeal were in my view right to hold that the defence of limitation does not apply to this case mainly because the Minister of Finance's decision was sent to a defunct address and there was no way the respondent could have appealed against it within 30 days of its being made when the respondent was not aware of its existence in the first place. Annexture 'A' to the respondent's affidavit contains statements to the effect that officials of the Ministry of Finance sent notices of cancellation of the respondent's certificate of repossession to an address they knew or had reason to believe was defunct. I agree that these annextures are part of the affidavit and if the appellant disputed this, it should have disproved it by producing contrary evidence. It did not. Moreover, as the learned Justices of Appeal found, the respondent acted speedily to file the suit against the appellant as soon as it obtained information from the Ministry of Energy and Mineral Development that it was not the owner of the suit land and this should lend credence to the view that if it had known the Minister's decision of cancellation of the certificate of repossession earlier, it would have contested it within the time prescribed.

Moreover, I do not think that a Minister's decision under the Expropriated Properties Act cannot be contested in the High Court even after 30 days have elapsed. Section 15 of the Act is headed

"Appeal" and Section 15(1) provides that any person who is aggrieved by any decision made by the Minister under this Act may, within 30 days from the date of communication of the decision to him or her, appeal to the High Court against the decision.

However, I respectfully agree with the opinion of Mulenga, JSC (as he then was) in **Habre International Co. Ltd vs. Ebrahim Alarakia Kassam** SCCA No.4 of 1999 where he stated that the "Appeal" as used. under the Act is not a judicial appeal because the Minister under the Act does not exercise judicial powers. The Minister's powers under the Act are only of an administrative nature. Therefore, the Act does not take away' the High Court's original jurisdiction and a person can contest the Minister's decision in the High Court even after 30 days have elapsed. It would, in my view, be a great injustice if the Minister's decision had the effect of taking away the right of ownership of land under the Act and the affected party could not bring an action in court to contest it because 30 days had elapsed. This could not have been the intention of Parliament when it enacted the Act. The period of limitation for land matters under the Limitation Act is 12 years.

Therefore, in my view, there is no defence of limitation being taken away by the proposed amendment from the appellant through its failure to contest the decision of the Minister within 30 days. The appellant cannot argue that he has a defence of limitation under

the Expropriated properties Act or any other Act which had accrued to it and which would be taken away if leave to amend was granted. Since I find no injustice that will be caused to the appellant if this amendment is allowed, ground 3 and 4 should fail.

Ground 5 Learned counsel for the appellant argued that the proposed amendment was a result of the admitted negligence for failure by the respondent to file a proper case in court and that therefore the learned Justices of Appeal erred to allow the respondent to amend the plaint with costs.

Learned counsel for the respondent on his part argued that costs follow the event and since the respondent was successful in the Court of Appeal it was entitled to costs and the Court of Appeal was right to award them.

I have carefully gone through the record of appeal and I do not see any respondent's admission of negligence for failure to file a proper plaint. On the contrary, it is evident that counsel for the respondent throughout the Record of Appeal went to great lengths to show that the application to amend was necessitated by the fact that the plaint was filed in a hurry, the respondent having learnt that it was no longer the owner of the suit land on 26th February 2008 and having filed the suit the next day on 27th February 2008. Clearly the

respondent could not have got all the information and documents leading to the cancellation of the certificate of repossession and transfer of the certificate of title of the suit land into the appellant's name in such a short time.

The allegations of fraud in the proposed amendment are, of course, subject to proof in the substantive suit but still reasons for the respondent to amend are to me clear and understandable. The learned trial judge was wrong to deny the respondent leave to amend and the learned Justices of Appeal rightly corrected the mistake. After such lengthy and highly contested proceedings concerning an otherwise simple matter, the learned Justices of Appeal were justified to award costs to the successful party.

This appeal is dismissed and for the same reason, it is dismissed with costs here and in the courts below.

Dated at Kampala this ....l4th..................day of ....November..........2011

JOTHAM TUMWESIGYE JUSTICE OF THE SUPREME COURT

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THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, CJ, TSEKOOKO, KITUMBA, TUMWESIGYE, AND KISAAKYE JJ.SC)

CIVIL APPEAL NO. 26 OF 2010

BETWEEN

MULOWOOZA & BROTHERS LTD:::::::::::::::::::::::::::::::::::: APPELLANT

AND

SHAH & CO. LTD:::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mpagi- Bahigeine, DCJ, Byamugisha and Nshimye, JJ.A) dated 16t11 July 2011 in Civil Appeal No. 57 of 2009]

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tumwesigye JSC and I agree with it and the orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with costs in this Court and the Courts below.

Dated at Kampala this ....14th ....day of November 2011

B J ODOKI
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

CIVIL Appeal No. 26 OF 2010 {Appeal from the Judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine, Byamugisha and Nshimye JJA) dated 16th July, 2011 in Civil Appeal No. 570f2009.)

BETWEEN

MULOWOOZA & BROTHERS ::APPEALLANT

AND

N. SHAH & CO. LTD.::RESPONDENT

JUDGMENT OF TSEKOOKO, JSC

I have read in draft the judgment of my learned brother the Hon. Mr. Justice 1. Tumwesigye, JSc., which he has just delivered. I agree with his reasoning and conclusions. I also agree that the appeal be dismissed with costs to the respondent here and in the two Courts below.

Delivered at Kampala this 14th day of November **2011.**

JWN Tsekooko.
Justice of the Supreme Court.

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, TSEKOOKO, KITUMBA, TUMWES/GYE, & KISAAKYE, JJ.S.C.)

CIVIL APPEAL NO. 26 OF 2010

BETWEEN

MULOWOOZA & BROTHERS ::::::::::::::::::::::::::::::APPELLANT

AND

N.SHAH & CO.L TD :::::::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the Judgment of *the Court* of *Appeal at Kampala (MpagiBahigeine, Byamugisha* & *Shimye,JJA) dated 16th July 2010 in Civil Appeal NO.57* of *2009J*

JUDGMENT OF KITUMBA, JSC.

I have had the benefit of reading in draft the judgment of my learned brother Hon. Justice Tumwesigye, J.S.C and for the reasons he has ably given. I agree with him that this appeal be dismissed with costs to respondent in this court and the courts below.

Dated at Kampala this ---14th--- day of ---November--- 2011.

C.N.B. KITUMBA

JUSTICE OF SUPREME COURT***THE REPUBLIC OF UGANDA***

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, C.J., TSEI(OOI(O, KITUMBA, TUMWESIGYE AND KISAAKYE, JJ.S.C.)

CIVIL SUIT NO. 26 OF 2010

BETWEEN

MULOWOOZA & BROTHERS::::::::::::::::::APPELLANT

AND

N. SHAH & CO. LTD::::::::::::::::::::::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mpagi-Bahigeine, DC, Byamugisha and Nshimye, JJ.A) dated 16th July, 2010, in Civil Appeal No. 570f2009)

JUDGMENT OF DR. KISAAKYE, JSC

I have read in draft the judgment of my learned brother, Justice Tumwesigye, JSC.

I concur with him that this appeal has no merit and that it should be dismissed with costs in this court and in the courts below.

Dated at Kampala this 14th day of November 2011.

DR. ESTHER M. KISAAKYE JUSTICE
OF THE SUPREME COURT