

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
M.A No. 1204 OF 2020

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(Arising out of H.C.C.S No. 234 Of 2019)

KYAMBOGO UNIVERSITY----- APPLICANT

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VERSUS

1.VICTORIA NAKALEMA

2.BETTY NAMUTEBI

3.NAKIBUUKA ESTHER

4.NANZIRI NORAH

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5.KYOMUHENDO GRACE

6.ALLEN ARUHO

7.MARGARET MURUNGI

8.KATENDE SUZAN

9.MWESIGWA JOSEPHINE

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10.MUSINGUZI LYDIA

11.NABAWAGGA JESCA

12.NAGAWA MIRIANA

13.ANGELA KOMUGISHA

14.AINEMBABAZI RACHAEL

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15.NAKIBUUKA ROBINAH

16.NALUNGA NAWUME

17.NAKABUGA HADIJAH

- 18.NABWAMI MABBLE**
- 19.KATUSIIME RUTH**
- 20.IRENE NAKITENDE**
- 21.DDAMBA FREDRICK**
- 5 **22.SEGAWA GODFREY**
- 23.KABAROLE WILSON**
- 24.NTALE MACLEEN**
- 25.ARTHUR MUKIZA**
- 26.NSUBUGA JOSEPH**
- 10 **27.MESSE KASUKU**
- 28.KAMBASTE FADHIL**
- 29.NIRINGIMANA KENNETH**
- 30.MUKIIBI SIMON**
- 31.SSENGENDO STEPHEN**
- 15 **32.SSALI JULIUS**
- 33.LUKWAGO DANIEL**
- 34.GALIWANGO ISAAC**
- 35.MUWAMBI ERIC MUBIRU**
- 36.SSERUNJOGI SYLVESTER**
- 20 **37.KAYE JOSEPH**
- 38.KIBIIRA AUGUSTINE**
- 39.ROBERT SANDE**
- 40.MUHAMAD KITAKA**
- 41.ADAM BYAMUNTUYO**
- 25 **42.RAYMOND KANYAIHE**
- 43.STEVEN TWINAMATSIKO-----RESPONDENTS**

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

RULING

5 The Applicant filed Chamber Summons under Order 6 rules 19 & 31 of the Civil Procedure Rules, Section 98 CPA, O.41 R 1,2,3 & 9 of the seeking the following orders;

a) That the Applicant be granted unconditional leave to amend her Defence in High Court Civil Suit No.234 of 2019(herein after to as
10 “the main suit”) so as to introduce a Counterclaim against the Respondents/Plaintiffs.

b) That a temporary injunction be granted restraining the respondents, their officers, agents and/or any persons deriving title or authority from
15 the respondents from building/developing, mutating, grading, selling, mortgaging or otherwise dealing in land comprised in Freehold Register Volume 461 Folio 13 Plot M.902 at Kyambogo, Kampala along Kabaka’s Road measuring approximately 137.51 Hectares in total (hereinafter referred to as “the suit land/property”), until the main
20 suit is finally determined by Court or until further orders of Court.

c) Costs of this application abide the final outcome of the main suit.

The grounds of this application are fully set out in the affidavit of Mr. Charles
25 Okello, the University Secretary of the Applicant herein but briefly are as follows;

- a) The Applicant is the registered proprietor of the suit land.
- b) The Respondents instituted the main suit against the Applicant seeking, among others, general and punitive damages, a permanent injunction and costs of the suit arising out of the Applicant's alleged attempt to evict the Respondents from the suit land.
- 5 c) Before the final determination of the main suit, the Respondents started cultivating and constructing makeshift structures on the suit land amidst protests from the Applicant.
- d) The temporary injunction is necessary to maintain the status quo pending the disposal of the main suit above named.
- 10 e) The applicant will suffer substantial and irreparable loss if the orders sought herein are not granted because the Respondents will construct permanent structures on and otherwise deal in the suit land, bring 3rd parties on the suit land and make it practically impossible for the Applicant to take possession of the area of encroachment measuring approximately four(4) acres of the Applicant's land.
- 15 f) That it is intended to seek for general and punitive damages as well as a permanent injunction in the proposed amended defence and Counterclaim because the Respondents/Plaintiffs are interfering with the Applicant's use and possessory rights over the Suit land and this amendment will not be prejudicial to the Respondents since it has been necessitated by their acts of encroachment.
- 20 g) The intended amendment of the Defense to introduce a Counterclaim is necessary for the purpose of determining the real questions in controversy between the parties to this suit and to avoid a multiplicity of suits.
- 25 h) It is just and equitable that the orders sought be granted.

Applicant's submissions

5 The Applicant seeks to amend paragraphs 5 (a)-(e) of her Written Statement of Defence earlier originated and filed by her former lawyers; M/s Owoyesigire –Kaggwa & Co. Advocates. This is primarily due to a misrepresentation of her case and/or facts by her former lawyers.

10 Counsel for the Applicant relied on the law and principles on Amendment of pleadings which were stated by the Justices of the Supreme Court in **Gaso Transport Services (Bus) Ltd. vs. Obene [1990-1994] E.A 88** adding that the same were further adopted and relied upon by Court in **Mulwooza & Brothers Ltd. vs. N. Shah & Co. Ltd. SCCA No. 26 of 2010** stating that;

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

Counsel for the applicant contended that her former lawyers misconstrued facts in the reading and interpretation of her documents in support of her defence. If the anomalies are not amended, the Applicant stands to be prejudiced at the instance of her former lawyer's inadvertence and/ or negligence. This was contrary to the law which discouraged visiting the inadvertence of Counsel upon a litigant who comes to courts of law seeking substantive justice.

Counsel further relied on the decision of Karokora, JSC (as he then was) in **Crane Finance Co. Ltd. Vs. Makerere Properties, SCCA No. 1 of 2001** cited in **SCCA No.03 Of 2012- Tropical Africa Bank Ltd vs. Grace Were Muhwana** where it was held that;

"It is now settled that omission or mistake or inadvertence of counsel ought not to be visited on to the litigant... thereby denying him justice...."

Counsel further added that in that case, the Court also held that;
"... where mistake or error or misunderstanding of the applicants' legal advisor, even though negligent have been accepted as a proper ground for granting relief"

The applicant's Counsel thus submitted that the application is brought in good faith and is meant to redirect court to the Applicant's correctly stated facts of her case to enable Court determine the real issues in controversy between the Applicant and the Respondent in Civil Suit 439 of 2013. He invited this Court to find that in the circumstances, the errors and lapses by the Applicant's

former lawyers should not the Applicant from the pursuit of her rights in the suit property.

5 Finally, Counsel prayed that this Court finds that the Applicant's case fully satisfies the requirements of the law on amendment of pleadings and shall not in any way suffer any injustice upon the Respondent.

The Respondents' submissions

10 In reply, Counsel for the respondent highlighted the guiding considerations for Court before granting such applications as stated in the case of **Gas**
o Transport Services Ltd vs Obene [1990-94] E.A. Counsel submitted that he was not persuaded that the applicant has sufficiently justified amendment of pleadings 7 years after her Written statement of Defence was filed. No reason has been furnished for the delay, the application is therefore an
15 afterthought intended to prejudice the Respondent in prosecuting his case to a logical conclusion.

Counsel for the respondent went on to argue that mistake of Counsel was not adequately explained. He further pointed out that apart from relying on the
20 case law on how and why amendment should be allowed, the applicant failed to explain why the application is crucial.

It was also Counsel for the respondent's submission that that the Applicant rightly submitted various documents including but not limited to a gift deed
25 from the late Amisi Ssembajjwe to the late Musa Musoke upon which the WSD dated is premised. He thus submitted that there was no coincidence for the removal of the said gift deed in the amended defence which would

prejudice the respondent by refusing him a chance to challenge such documents. Counsel relied on **Eastern Bakery versus Castelino [1958] EA 461** where it was held that the court will refuse leave to amend where the amendment would change the action into one of a substantially different character. Secondly, the court would refuse amendment where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment.

He further argued that the respondent would be prejudiced since the proposed amendment allows the applicant to deny facts in paragraph 4, 5,6,7 and 8 of the proposed written statement of defence of facts which were previously admitted on court record. It was thus his submission that the specific amendments as proposed departs from the previous admissions of fact which cannot be accepted.

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Counsel for the Respondent submitted that this application is an abuse of court process and incompetent both in law and in fact. Abuse of Court Process as was defined in Black's Law dictionary (6th Ed) as

20 *“A malicious abuse of the legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect, in other words a perversion of it.”*

Counsel added that it was court's duty to disallow applications of such a nature which tend to change pleadings under a shield of mistake of counsel. He proceeded to argue that it is trite that a man or woman who empowers an agent to act for him/her is not allowed to plead ignorance of his/her agent's

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dealings as was enunciated in the case of Twiga Chemicals v. Viola Bamusedde Bwambale, C/A Civil Appeal No 9 of 2002.

5 Counsel for the Respondent prayed for dismissal of the application submitting that the applicant was bound by her pleadings and the documents attached unless she can prove that the documents were doctored.

Submissions in rejoinder.

10 In rejoinder, Counsel for the Applicant submitted the Respondent did not object to the amendment at all. He explained that Counsel rather opted to argue the merits of the case which are not the prerequisite for consideration on amendment of pleadings.

15 On the point of the respondent not being persuaded by the applicant's filing the application seven years after filing the defence, Counsel argued that amendment of pleadings is not barred by limitation.

20 Counsel further pointed out that the Respondent's Counsel further contends that the intended amendment is an abuse of Court process; a malicious abuse of the legal process against the integrity of the judicial process but has not at all laboured to expressly show how so.

25 On the argument that the proposed amendment introduces one form of prejudice to the Plaintiff which is the denial of admitted facts in paragraph 5 of the original written statement of defence, Counsel contended that this argument was ambiguous and does not at all justify the Respondent's opposition to the intended amendment.

The Applicant's prayers to be allowed to amend her Written Statement of Defence were accordingly reiterated.

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Issue

Whether the Applicant has established grounds to be granted leave to amend her Written Statement of Defence?

10 It is trite law that amendments are usually allowed unless they will substantially change the cause of action or deprive the opposite party of a defence, such as, Limitation. Counsel for the Respondent argued against the application and implored this Court to dismiss it with costs.

15 In the matter of **Cropper v Smith (1884) 26 CHD 700**, Bowen LJ had this to say;

'I think it is a well-established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their
20 rights...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought to correct, if it can be done without injustice to the other party- courts do not exist for the sake of discipline but for the sake of deciding matters in controversy; and I don't regard such amendment as a matter of grace...it seems to me that as soon as it appears
25 that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to

have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.’

5 In the instant application, the amendment sought is to add clarification to the 2nd Defendant’s defence. The proposed amendment, which I have perused does not introduce new facts after the filing of this suit. The trial in this matter has not started and this Court cannot see how the Respondent would be prejudiced by the amendment.

10 Mistake of Counsel is not the same as mistake of an agent. A party to a suit is advised by Counsel, and more often than not follows that advice, while an agent takes instruction from his/her principal. The case of **Twiga Chemicals v. Viola Bamusedde Bwambale, C/A Civil Appeal No 9 of 2002** is therefore not applicable in this matter. If parties were bound by their pleadings before
15 conclusion of the trial, Order 6 rule 19 of the Civil Procedure Rules would be redundant.

The arguments against the amendment made by Counsel for the Respondent, go into the merits of the suit which Court is not enjoined to consider at this
20 stage. As far as the delay of 7 years, the rules are clear that the amendment may be allowed at any stage before and during the trial. I am persuaded by the holding in *Cropper v Smith*, supra, and satisfied that the Applicant has established sufficient grounds to be granted leave to amend her written statement of defence and the no injustice that cannot be compensated for in
25 damages shall be occasioned to the Respondent.

Application is granted and I hereby order as follows;

- 1. Applicant is granted leave to amend her Written Statement of Defence and should do so by the 28th September 2020.**
- 2. Plaintiff to file Reply by the 5th October 2020**
- 3. Costs of this Application shall be in the cause.**

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Olive Kazaarwe Mukwaya

10 **Judge**

21 September 2020

Delivered by email to: Mr. Felix Abaine for the Applicant

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