**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO. 51 OF 2012**

**(Arising from Civil Suit No. 13 of 2010)**

**MICHAEL RICHARDSON::::::::::::::::::APPLICANT/THIRD PARTY**

**VERSUS**

1. **RAND BLAIR**

**T/A MOMENTUM FEEDS:::::::::::::::::1ST RESPONDENT/PLAINTIFF**

1. **BOKOMO UGANDA LIMITED:::::::::2ND RESPONDENT/DEFENDANT**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This is an application brought by the applicant/third party under Order 6 rules 19 and 31 of the Civil Procedure Rules (CPR) and section 98 of the Civil Procedure Act (CPA). It is seeking for orders that the applicant be granted leave to amend his Written Statement of Defence (WSD) in Civil Suit No. 13 of 2010 and that costs of the application be provided for.

The grounds of the application are contained in the affidavit of Mr. Michael Richardson, the applicant. The first ground is that the proposed amendment is necessary for the proper determination of the real questions in controversy. Secondly, that the respondent shall not be prejudiced by the amendment sought. Lastly, that it is only just, fair and equitable that the amendment sought be granted.

An affidavit in reply and opposition to the application was deposed by Mr. Latigo G. Washington. The grounds are that the amendment sought is bad in law and untenable and would prejudice the 1st respondent as it introduces new causes of action. Further that the intended amendment does not answer the issues between the plaintiff and the defendant.

When this application came up for hearing, Mr. Jimmy Muyanja appeared for the applicant and informed court that he was also holding brief for Mrs. Deepa Verma Jivram, counsel for the second respondent who did not intend to oppose the application and for that reason, no affidavit in reply was filed. Mr. Titus Kamya appeared for the 1st respondent.

Mr. Muyanja relied on the affidavit in support and submitted that as stated in paragraph 3 of that affidavit, what was set out in the plaint are acts and what are not set out therein are omissions regarding the transactions between the first respondent/plaintiff, the second respondent/defendant and the applicant/third party. Further that in paragraph 4 of that affidavit, the deponent averred that the proposed amended WSD which was attached to the affidavit in support as annexture ‘A’ is comprised of documents and facts which are well within the knowledge of the first respondent/plaintiff.

He pointed out that paragraphs 3 and 4 in effect rebut Mr. Latigo’s affidavit in reply which stated that the proposed amendment introduces new causes of action. He referred to the decision of Tumwesigye, JSC in the case of **Mulowooza and Brothers Ltd v N. Shah & Co. Ltd; Supreme Court Civil Appeal No. 26 of 2010** where it was stated at page 7 that;

*“Moreover learned counsel for the respondent is right to state as he does*

*in his submission that the Civil Procedure Rules do not bar introducing a new cause of action through an amendment to the plaint. On the contrary Order2 rule 4(1) of the Civil Procedure Rules allow uniting in the same suit several causes of action which is intended to promote just disposal of suits and to guard against the multiplicity of suits.”*

He submitted that the proposed amended WSD reveals that the applicant seeks to use this opportunity to exhaustively elaborate all issues which were stated in the current WSD which was filed by the applicant/third party and specifically alludes to illegality in paragraph 6 thereof which paragraph 18 of the proposed amended WSD elaborates on by setting out the facts relating to it.

He argued that the applicant/third party is not fettered by the CPR in filing a defence which will afford him his day in court. He referred to the Supreme Court decision in **Mulowooza and Brothers** (Supra) and submitted that the test on the admissibility of amendments was settled to the effect that it should be allowed if any prejudice which arises can be sufficiently compensated for by costs.

Counsel for the applicant contested the averment in the affidavit in reply that the amendment seeks to introduce new causes of action. He relied on the case of **Laltu Advani v A.A.R Health Services Ltd; H.C.C.S. No. 143 of 2008** where the learned Principal Judge Bamwine, J adopted the definition of a cause of action set out in Harlsbury’s Laws of England, 4th Edition Vol. 37 at page 24 where it is defined as;

*“A cause of action is simply a factual situation the existence of which entitles one person to obtain from court a remedy against the other.”*

He therefore concluded that what is set out in the proposed amended WSD is a mere exhaustive elaboration of facts which were alluded to by the applicant/third party in the current WSD and the relevant documents.

In reply, Mr. Kamya that the proposed amendment seeks to introduce a counterclaim whereas there is no such a provision for a counterclaim in a third party WSD. Further that Order 1 rule 15 of the CPR is restricted to the question of indemnity and it is not envisaged there under that a third party can set up a counterclaim or seek for prayers as though it had filed a counterclaim. He cited the authority of **Total Oil Products Ltd v William M.K Malu and Others [1965] EA 164** where it was held that the scope of third party proceedings and trials there under is limited to the liability of the third party to make contribution or indemnity claimed in whole or in part and any claim arising by counterclaim or set-off is excluded.

He also submitted that the amendment sought prejudices the first respondent/plaintiff as it seeks to set out additional or alternative causes of action. He referred to paragraph 16 of the proposed amended WSD which spells out blackmail and alleged extravagant lifestyle of the plaintiff which was not pleaded in the current WSD. He argued that the reason for the amendment was to embarrass the first respondent/plaintiff. He singled out paragraph 16(c) of the proposed amended WSD which raises misrepresentation as an entirely new cause of action which does not address the issues between the plaintiff and defendant in the main suit.

He submitted further that the case of **Mulowooza and Brothers Ltd** (Supra) relied upon by the applicant was factually distinguishable from the instant case as it related to a defendant’s WSD and not that of a third party. He argued that a third party’s defence is limited to the issues for trial between the plaintiff and defendant and therefore cannot be seen to set up alternative causes of action as if he was a defendant.

He contended that the issue between the plaintiff and defendant was majorly whether the defendant is liable to pay the sum of Shs. 121,881,076/= for poultry feeds supplied to it by the plaintiff. He took the view that the proposed amendment does not answer that issue but set up alternative causes of action intended to delay the trial and derail court from the issues between the plaintiff and defendant.

He submitted further that paragraph 15(k) of the intended amended WSD introduces a new cause of action as it alludes to the fact that the plaintiff put the partnership in jeopardy by its non-compliance with the statutory requirements. He prayed that the application be disallowed with costs to the first respondent/plaintiff since the amendment sought was due to the omissions and errors of the applicant. He also noted that this was the third time the applicant was seeking to amend the WSD.

In a brief rejoinder, Mr. Muyanja submitted that there was only one unsuccessful attempt to amend the WSD. He conceded that the prayers appearing in the proposed amended WSD was a drafting error which can be cured. He contended that under Order 6 of the CPR there is no requirement to attach the proposed amended WSD and that case law authority is to the effect that attaching the same is a matter of prudence as was stated by Mulyagonja, J. in **Misc. Application No. 189 of 2011** arising from **Civil Suit No. 96 of 2010; Huawei Technologies (U) Co. Ltd v Evepeak Consults & Technical Services Ltd.**

He submitted that Order 1 rule 15 of the CPR does not encumber the third party on what can be presented as a defence to the court. In his view, it is for that reason that under Order 1 rule 21 the defendant is permitted to claim contribution or indemnity against a third party. He contended that the third party can introduce new causes of action, if any, because Order 1 rule 15 of the CPR does not limit the application of section 33 of the Judicature Act which enjoins the court to avoid multiplicity of proceedings. Further that the proposed amended WSD does not introduce a new cause of action of blackmail as the same had been referred to in paragraph 4 of the current WSD. He concluded that the first respondent/plaintiff will not suffer any prejudice because the trial of the suit has not yet commenced and prayed that the application be allowed.

I have carefully considered the application and the supporting affidavit plus the affidavit in opposition and listened to the submissions of counsels. The only issue for determination is whether the amendment craved for should be allowed. It was strongly submitted for the applicant that it should be allowed as it will help this court to determine all the issues in controversy between the parties and that it will not occasion any prejudice to the 1st respondent/plaintiff.

Order 6 rule 19 under which this application was brought provides that:-

*“The 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 maybe necessary for the purpose of determining the real questions in controversy between the parties”.* (Emphasis added).

This provision has been elaborated on by courts in a number of cases thereby settling the legal principles that govern amendments of pleadings. One of the principle is that amendments should be freely allowed unless it is done mala fide and/or occasions prejudice or injustice to the other party which cannot be compensated by award of costs. See among others, the cases of: ***Eastern Bakery v Castelino [1958] EA 462 (CAU)***, ***Matico Stores Ltd & Another v James Mbabazi & Another [1995] 111 KALR 31***, ***Mbayo Jacob Robert v Electoral Commission & Another, Election Petition Appeal No. 07 of 2006 (Court of Appeal)***, ***Gaso Transport Services (Bus) Ltd v Obene [1990-1994] EA 88*** at page 96 ***(Supreme Court of Uganda), Muddu Awulira Enterprises Ltd & 2 Others v Stanbic Bank Uganda Ltd MA. No. 528 of 2010*** ***and Plessey (PTY) Ltd v Mutoni Construction Ltd MA No. 178 of 2011***.

In ***Gaso Transport Services (Bus) Ltd v Obene***  (supra) Tsekooko, JSC stated that the four principles that appear to be recognized as governing the exercise of discretion in allowing amendments are:-

1. *“The amendment should not work injustice to the other side. An injury which can be compensated by an award of costs is not treated as an injustice.*
2. *Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.*
3. *An application which is made mala fide should not be granted.*
4. *No amendment should be allowed where it is expressly or impliedly prohibited by any law (for example limitation actions)”.*

Courts have also taken the view that an amendment that substitute one distinct cause of action for another or change the subject matter of the suit or that which would change the action into one of a substantially different character should not be allowed. This was stated in the case of ***Eastern Bakery*** (supra) where Sir Kenneth O’Connor referred to the cases of **Ma Shwe Mya v. Maung Po Hnaung (4) (1921) 48 I.A 214; 48 Cal. 82** and **Raleigh v Goschen (5) [1898] 1 Ch. 73, 81.**

In the instant case, upon perusal of the proposed amended WSD, paragraph 16 introduces blackmail and misrepresentation while paragraphs 6 to 15 contain many other new allegations. It is therefore not true that the proposed amendment is a mere elaboration of what was already pleaded in the current WSD. The issue is whether these additions constitute new causes of action. It was argued for the applicant basing on the authority of **Mulowooza and Brothers Ltd** (supra) that since Order 2 rule 4 (1) of the CPR provides for joinder of causes of action, an amendment that introduces a new cause of action should be allowed.

On the other hand it was contended for the 1st respondent that the applicant as a third party to the main suit does not enjoy the right to join causes of action conferred by Order 2 rule 4 (1) of the CPR. It was argued that the applicant’s defence as a third party is restricted to the issue of indemnity or contribution as provided under Order 1 of the CPR and explained in the case of ***Total Oil Products Ltd*** (supra).

Order 1 rule 15 (a) of the CPR provides that if a person not a party to the suit who is served as mentioned in rule 14 of Order 1 (third party) desires to dispute the plaintiff’s claim in the suit against the defendant on whose behalf the notice has been given, or his or her own liability to the defendant he or she should enter appearance in the suit on or before the day specified in the notice.

Rule 18 of that Order provides for an application for direction on the manner in which the question of liability between the third party and the defendant giving the notice should be tried. In the instant case there was no formal application for direction but when parties sought guidance of court, the third party was directed to file a WSD so that his liability could be tried together with the main suit. He did file a WSD which is now sought to be amended.

However, I wish to point out that these rules still refer to entering appearance which was abolished by the 1998 amendment of the CPR in so far as the defendant is concerned. I want to believe that the retention of the requirement for a third party to enter appearance under those rules was an oversight by the Rules Committee.

Order 1 rule 18 of the Civil Procedure Rules of Kenya that was considered in ***Total Oil Products Ltd*** (supra) and interpreted to be narrower in scope than in England is in para materia with our current Order 1 rule 18 of the CPR. I have not come across any case law in Uganda that interpreted that provision to the contrary. I am therefore persuaded by the decision in that case to the effect that the only question which can be tried in a third party proceeding is the liability of the third party to make contribution or indemnity claimed in whole or in part.

I will not delve into determining whether a counterclaim or set–off can be made by a third party because there is no pleading to that effect in this case. Counsel for the applicant submitted that the prayers for relief in the proposed amended WSD was a mere drafting error which he sought leave of court to correct if leave to amend the WSD is granted. In any case, Order 8 rule 7 of the CPR provides that a defendant who seeks to rely upon any grounds as supporting a right of counterclaim shall state specifically that he or she does so by way of a counterclaim. This was not done in the instant case.

On the issue of new causes of action, I find that the applicant has included misrepresentation which was never pleaded in the current WSD. Upon perusal of all the paragraphs related thereto, I am of the opinion that they are not at all relevant for determining the liability of the third party to make contribution or indemnity claimed or even for purposes of determining the dispute between the plaintiff and the defendant. It just gives a historical background of the relationship between the plaintiff and the third party and other dealings between the third party and other persons that have nothing to do with the issues in the main suit.

To my mind, trying the issue of misrepresentation as pleaded in the proposed amended WSD would most likely derail this court from determining the real questions in controversy between the plaintiff and the defendant as they are at variance. This, in my view, would be contrary to one of the principles for amendment of pleadings, that is, it would work injustice to the plaintiff that would not be compensated by an award of costs.

While I agree with counsel for the applicant that Order 1 rule 15 of the CPR does not limit the application of section 33 of the Judicature Act which enjoins this court to avoid multiplicity of proceedings, I find that the way it was pleaded is superfluous and as such cannot conveniently be tried or disposed of together. Indeed Order 2 rule 7 allows such matters to be tried separately. Even section 33 of the Judicature Act itself qualifies matters where all such remedies as parties are entitled to should be granted absolutely as those properly brought before court.

For the above reasons, I find that what is pleaded from paragraphs 6 to 17 of the proposed amended WSD are irrelevant and unnecessary in determining the dispute between the parties in the main suit and the liability of the third party. I accordingly decline to allow inclusion of those paragraphs as well as the corresponding prayers from paragraphs 6 to 13, with the exception of paragraph 12 on costs, in the proposed amendment.

As regards the pleadings on illegality, I find that it was pleaded in the current WSD and what is sought to be amended is just giving the particulars. It appears to be the applicant/third party’s main ground for disputing the plaintiff’s claim and his liability to the defendant. Consequently, I am of the opinion that allowing that amendment will not offend any of the principles that govern amendment of pleadings. In the circumstances, leave is granted to the applicant to amend as contained in paragraphs 1 to 5 and paragraphs 18 to 20 of the proposed amended WSD. Prayers number 1 to 5 and 12 in the proposed amended WSD are also allowed as well as the correction of the third party’s rightful title in the heading. The rest of the proposed amendments are not allowed and I order that it should be expunged from the proposed amended WSD.

In the result, this application partly succeeds as elucidated above and costs are awarded to the 1st respondent/plaintiff who opposed the same.

I so order.

Dated this 8th day of May 2012.

Hellen Obura

**JUDGE**

Delivered in chambers at 3.30 pm before Mr. Titus Kamya for the 1st respondent and Ms. Linda Nabalende watching brief for Mrs. Deepa Virma Jivram for the 2nd respondent. The applicant and his counsel were absent.

**JUDGE**

08/05/2012