**THE REPUBLIC OF UGANDA**

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

**COMMERCIAL DIVISION**

**MISCELLANEOUS APPLICATION NO. 1053 OF 2014**

**(Arising from High Court Miscellaneous Application No. 241 of 2013)**

**And**

**(Arising from High Court Civil Suit No. 178 of 2013)**

**UGANDA DEVEVELOPMENTT BANK LTD:::::::::::::::::::APPLICANT**

**VERSUS**

**TWO WAYS IMPORT & EXPORT LTD**

**& TWO OTHERS::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS**

**BEFORE THE HON MR. JUSTICE HENRY PETER ADONYO**

**RULING**

1. **Background:**

This is an application by way of chamber summons. It arises from HCCS No. 178 of 2013 and the Applicant seeks for orders of this court for leave to amend its written statement of defense, an enlargement of time within which to file its counterclaim against the respondents out of time and for the costs of this application to be provided. The application is accompanied by a draft amended defence as well as a proposed counterclaim.

The grounds of this application are more particularly contained in the affidavit of one Dorothy Ochola, stated to be an advocate of this court. They are seven in all with specific detailed background found in paragraphs 2, 3, 4, 5, 6 and 7 of the affidavit. In brief , these paragraphs shows that pursuant to a loan agreement between the Applicant and the First Respondent, the Applicant granted to the First Respondent a trade finance loan facility in the sum of US$ 1,000,000.00 and the facility was secured by personal guarantee of the Second and Third Respondents. The First Respondent is said to have failed to meet its obligations under the said loan agreement and thus the Applicant sought to enforce its legal rights under the said loan agreement against the Respondents but the Respondents filed HCCS No. 178 of 2013 against the Applicant wherein prayed for declarations that they are not indebted to the Applicant under the said loan and personal guarantee agreements and sought the discharge of the said agreements. This Honourable Court thus on the 28th day of August, 2013 granted the Respondents a temporary injunction vide its ruling in High Court Miscellaneous Application No. 241 of 2013.

The Applicant states that it duly filed its written statement of defence in HCCS No. 178 of 2013 on the 15th day of March, 2013 and that this was done within the prescribed time but that the same did not include all facts material to its defence and that neither did the defence include a counterclaim for the recovery of the sums due to it from the Respondents but that since then, the Applicant has reconciled the First Respondent’s statement with it and has established that the Respondents are indeed indebted to it justifying the bringing of this application now before this Court.

1. **Law Applicable and arguments in support of the Application:**

This is an Application for leave to amend the defence and it is brought under **Section 98 of the Civil Procedure Act, Cap 71** which gives this Court the inherent powers to make orders necessary for the ends of justice to be met. Also under **Order 6 Rule 19 of the Civil Procedure Rules SI 71-1** this court is empowered to allow amendments to pleadings in the following terms:

**Order 6 Rule 19 of the Civil Procedure Rules SI 71-1:**

**“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 may be necessary for the purpose of determining the real questions in controversy between the parties.”**

On the other hand the prayer for enlargement of time within which to file the counterclaim is brought under **Section 98 of the Civil Procedure Act** with **Section 33 of the Judicature Act, Cap 13** empowering this court to make orders in matters properly before it to avoid a multiplicity of suits.

**Order 8 Rule 1(2) , 8, 18 (2) and 18(5) of the Civil Procedure Rules** on the other hand provides for the filing of a counterclaim within the time prescribed for filing a defense and **Order 51 Rule 6 of the Civil Procedure Rules** that gives Court discretion to enlarge time.

On the basis of the aw quoted above, it is submitted by the Applicant that this application to amend its defence be allowed for it duly meets the criteria upon which court may exercise its discretion as provided for under **Section 98 of the Civil Procedure Act** and **Order 6 Rule 19 of the Civil Procedure Rule** with the saidcriteria having been restated by the Supreme Court in its decision in the case of **Gaso Transport Services (Bus) Limited v Obene [1990-1994] EA 88** andcited in **High Court** **Miscellaneous Application No. 348 of 2008 (Arising from HCCS No. 292 of 2007) Lea Associates Ltd v Bunga Hill House Limited** thus;

*“The following principles appear to be recognized as governing the exercise of discretion in allowing amendments;-*

1. *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*
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 malafide should not be granted*
4. *No amendments should be allowed where it is expressly or impliedly prohibited by any law.”*

With the above in mind, the Applicant submits that amendment sought of the written statement of defence would put the Respondents on notice of the Applicant’s entire defence and would no way prejudice them since its claim against them would have been clearly brought out for indeed this go a long way in the direction of the court upholding the long settled position of the law that leave to amend pleadings sought before the hearing of a matter ought to be freely allowed unless it would occasion an injustice to the other party as was held in the case of **Eastern Bakery v Castelino [1958] EA 461** whereas in the instant matter that would not be the case for this application was brought in time and upon the collapse of the mediation process between the parties with the consequence that the Respondents would not suffer any injustices as a result if the amendment is allowed.

As regards to the application for enlargement of time within which to file a counterclaim, the Applicant submits in order to avoid multiplicity of suits this Honorable Court is being asked to exercise its discretion under **Section 33 of the Judicature Act** for if the said order is not granted then the Applicant would be forced to file a separate suit to assert it rights under these very facts yet it was convenient for the court to concurrently dispose of the suit and counterclaim as they relate to the same or related causes of action. The Applicant thus prays that this court should be persuaded by the rulings **Miscellaneous Application No. 611 of 2013 (Arising from HCCS No. 137 of 2013) Nakanyonyi Development Associations (NADA) Ltd and 2 others v Stanbic bank (Uganda Ltd** , **Miscellaneous Application No. 1199 of 2013 (Arising from HCCS No. 326 of 2013 Omumbejja Namusisi Faridah Naluwembe aka Namirembe Bwanga Bwamirembe v Makerere University** and **Miscellaneous Application No. 149 of 2013 (Arising from Civil Suit No. 50 of 2010) Steven Kavuma and Another v Stanbic Bank (U) Ltd** in reaching its decision to grant an enlargement of time within which to file a counterclaim for in those cases leave for extension of time within which to file a counterclaim were granted and held that an application to introduce a counterclaim not filed within the time of filling a defence should be made by way of application for extension of time within which to file the counterclaim. Thus if the court heeds to the Applicant’s plea then the intended amendments would assist the court and the Respondents in properly understanding the nature of the it’s defence which would in no way prejudice the Respondent’s case as it would be convenient for the court to determine the main suit and counter claim together thus avoiding a multiplicity of suits and so the Applicant prayed that this application be wholly allowed and with its costs to abide the outcome of the substantive suit.

In Response to the above submissions, the Respondents opposes the application partly in respect to the order that the Applicant be granted leave to file a counter claim against it out of time and or that the time for filing the said counterclaim be enlarged. The Respondents doo so while relying on the affidavit in reply sworn by one Obadiah Ntebekaine dated 22nd January 2015 which they especially so as indicated under paragraphs 5, 6, 7 where it is stated that the Respondents filed their reply to the Applicant’s Written Statement of Defence on the 10th day of April, 2013 and did further filed the scheduling memorandum and served the Defendant/Applicant accordingly to enable both parties to formulate a Joint Scheduling Memorandum but the Applicant failed to heed the same to date as can be attested to by its Annexture “A” and “B” respectively.

That in respect to paragraph 9 of the affidavit in support of the application sworn by Dorothy Ochola which was to the effect that during mediation and subsequently thereto the Applicant had reconciled the First Respondent’s account and thus confirmed that the Respondents were indeed indebted to it in the sum of US$582,669.39 as at 31st March, 2014 together with interest thereon arising under the trade finance facility, debenture and personal guarantees between the parties yet the applicant had intended to foreclose by demanding US$642,608.17 from the Respondents meaning that what the intended foreclosure was illegal since in the counter claim the Applicant had disclosed the sum of USD 582,669.39 only after reconciling tits accounts thus showing that the figures in dispute being completely different. Therefore, arising from this contradiction, the Respondent contended that if the new figure constituted the Applicant’s claim then it would form another cause of action which cannot be brought under High Court Civil Suit No. 178 of 2013 and so the applicant should then file a separate suit in respect to this new claim.

The Respondents urged this court to note that in the Applicant’s draft counter claim there was an indication that the Applicant was seeking for an indemnity by bringing in a third party yet under the law a party seeking to bring on board a Third Party Notice must not do so through the use of a counter-claim and therefore if this was the case then this application should not be allowed even though the Respondents were not opposed to the Applicant amending its Written Statement of Defence. Additionally, the Respondents stated that the Applicant had not even advanced any sufficient reason to warrant a grant of leave to enlarge time to file its cross action out of time as it is now approximately two (2) years ever since the Applicant filed its Written Statement of Defence. That this latent inaction was indicatory of the fact that the applicant had opted to sit on its rights and hence this application can only be considered as an abuse of the court process since it was not brought to this Honorable Court promptly and that being so this application should be considered being brought in to delay justice at the expense of the Respondents as it offends the principles on how counterclaims should be applied for yet it was even at the instance of the Respondents’ counsel who had applied to court to direct the Applicant to file its draft amended written statement of defence and that is when the Applicant was cajoled into action and then attached the same together with the counter claim. Thus on the basis of these points the Respondents opposed this application and prayed that it be dismissed with costs to them.

1. **Resolution:**

After carefully considering the application and the submissions rendered to it, it is my belief that the interest of justice would best be served were the Applicant to be granted leave to amend its written statement of defense and time within to file a counterclaim as well put on record a counter claim. For I have considered the consequences that if this application is not allowed it would open a Pandora box of multiple suits between the parties herein yet according to the affidavits herein, it is apparent that there are specific issues which need addressing and which would be in the interest of justice of the matter for my consideration of the amendment sought shows that definite issues arising from an alleged contractual obligation is being pointed at which can be easily addressed without causing any injustice to any of the parties particularly the Respondents who would in any event have the opportunity to respond to any pleadings raised by the Applicant.

That being the case I would thus find it imperative that the grant of this application is in the interest of the dispute between the parties herein before me.

Therefore I am inclined to allow this application with its costs to be in the cause.

The Applicant is therefore granted Fifteen (15) days from the date of this ruling to amend its written statement of defence which may include any counterclaim of which I enlarge and grant the time within which it may be filed thus accordingly.

I do so order accordingly.

**Henry Peter Adonyo**

**Judge**

**7th April, 2015**