

create confusion and misjoinder of causes of action; that the proposed amendment raises a new cause of action because the sale of property to the 2nd Defendant by the late Anna Maria Nambejja who is a mother to the late Nalumos Vincent Kitande Kusanze was not in the original claim and that there is already a suit by the 1st respondent against the applicants vide HCCS 795/2015 concerning the estate of Nambejja so the 2nd Defendant could be sought to be added there.

Representation

[4] The Applicants are represented by Counsel Busuulwa Edwin of M/S Buwule & Mayiga Advocates while the respondents are represented by Counsel Muchake Musa of M/S Muchake & Byereeta Advocates. Both counsel made oral submissions.

The case

[5] The gist of the application is that the applicants were sued in HCCS 175 of 2015 and filed their defence with a counterclaim; that their previous lawyer missed out material facts and other new facts have now come to light, all of which they would like to include in their counterclaim.

Preliminary Point of law

[6] When the application came up for hearing on 27th August 2019 Counsel Muchake for the respondent raised a preliminary point of law to the effect that the application offends Order 1 r.12 because it is brought by 3 applicants yet the Affidavit in support was deposed by the 1st applicant only without the authority of the rest and therefore prayed that court rules that the 2nd and 3rd applicants are not applicants and that since the 1st applicant swore without authority the application should be struck out for none compliance with the law.

Substance.

[7] On substantive issues counsel submitted that paragraphs 6 - 9 of the intended
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plaint seek to create another cause of action where the counter defendant is being
accused of having a forged agreement and being in possession of property of
Anna Maria Nambeja that was sold to 2nd counter defendant yet the subject of
this suit is in respect of another person, the late Nalumos Vincent under whom
the Applicants are claiming; that the claims are different and this would prejudice
the respondent; and that in any case there is a pending suit where the 1st
Respondent had sued the 1st & 2nd Applicants for mismanagement of the Estate of
the late Anna Maria Nambeja and so if the Applicants wish to proceed with
issues on Estate of Nambeja, they should amend the pleadings in the case of
Anna Maria. He prayed that the Application be dismissed with costs.

[8] Counsel Busulwa for the Applicant in reply to the point of law contended that; the
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affidavit in support under 0.1 r 12 of Civil Procedure Rules and written authority
under 0 1 r 8 (3) (b) envisages where one person is suing on behalf of the other;
The application here is lodged by the 3 parties and not by one and therefore the
circumstances are wrong; that the applicants in this case are Co-Administrators
(he referred to the grant) whose evidence and aspirations. . . in the administration
of the estate are the same and therefore the evidence by 1 touching the Estate is
sufficient to represent the interests of the Estate; that procedural non compliance
has been held to be a mere irregularity which should not stifle substantive justice;
that these rules were made by the 1995 Constitution. He retorted that the
respondents' were served on 23/5/2019 but their affidavit in reply was filed on
7/8/2019 - out of time but they the applicants are not challenging it; he reiterated
that the affidavit in support by the 1st applicant was deposed in his capacity as co-
administrator and the 2nd & 3rd applicants' failure to file affidavit in support when
the parties are Co-Administrators should not lead to dismissal.

New cause of action

[9] Counsel for the applicant in rejoinder to counsel for the respondents' reply on the substance of the application, argued that legal acquisition and possession of the estate of Anna Maria Nambeja is in issue in the original counter claim under paragraphs 3, 5 & 6 which is on the fraudulent illegal sale of estate which the proposed amended counter claim talks about. So the cause of action is illegality and fraud.

[10] On the estate of Anna Maria Nambeja he argued that no evidence has been adduced to support that argument. That in the agreement dated 4/11/2008 and the one dated 26/12/2004 nowhere is it indicated that the property is of Anna Maria Nambeja which is the basis of the proposed amendment so the argument is premature since it requires calling evidence; that the amendments relate to Vincent Nalumosu and that the clan members donated the estate to the 2nd defendant who is a clan member. He reiterated his prayer that the application be allowed.

[11] The issue for determination is; *whether this Application should be granted.*

Resolution of the Preliminary objection

[12] Before determining whether the application should be granted, the preliminary objection raised by respondents will be addressed. It is trite law that a preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion (**Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**).

[13] Counsel for the respondents submits that O. 1 r.12 CPR requires that the authority of the 2nd and 3rd applicants should be given to the 1st applicant for him to swear the affidavit on their behalf.

In reply, counsel for the applicant argued that the said provision applies where one person is suing on behalf of the other and yet the present application was lodged by the three applicants as co-administrators of the estate whose evidence in the matter is the same. He relied on the cases of **Sitenda Sebalu vs Sam K. Njuba & Anor. Supreme Court Election Petition No. 26 of 2007, Hon.Ababiku Jesca vs Eriyo Jesca Osuna MA No. 4/15, 31/15 and 37/15 and Otim & 3 Ors v URA MA 94/2017** and section 272 of the Succession Act.

[14] I agree with counsel for the Respondent on the position of the law that save in representative suits where the party who obtains the order to file the suit can swear affidavits binding on others on whose behalf the suit is brought, where an affidavit is sworn on one's behalf and on behalf of others there is need to prove that the others authorized the deponent to swear on their behalf. This proof of authorization is by a written document attached to the affidavit. Lack of the authority renders the affidavit defective and the application incompetent. (See Kaheru Yasin & Anor v Zinorumuri David MA 82/2017; Taremwa Kamishani & Ors v Attorney General MA 38/2012; Kaingana v Dabo Boubon [1986] HCB 59).

[15] In the present application, Ssenyimba Vincent in his affidavit in support of the application at paragraph 1 states, and I quote;

'That I am a male adult Ugandan of sound mind and a co- Administrator of the estate of the late Nalumoso Vincent KitandiKusanze, and one of the Applicants herein in which capacity I swear this affidavit (A copy of the Letters of Administration is attached as Annexure "A")'.

at paragraph 6 he further states;

'THAT there are also new facts concerning the suit land that have come into the Applicant's knowledge.....' (underlined for emphasis).

[16] The Affidavit appears to be sworn by the said Ssenyimba Vincent in his capacity as a co-administrator. While it is important that before one swears to particular

facts on another person's behalf, the other person must give his/her consent and authority, and the intent of such facts and their effect on the other person should in my view be considered. This was the spirit in the case of **Sitenda Sebalu vs Sam K. Njuba & Anor(supra) to wit**; The effect, it would appear to me, would be on the estate of the late Nalumoso Vincent Kitandi Kusanze; and in this regard section 272 here reproduced, would come into play to wit;

'When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration'.

[17] There is no evidence that the rest of the administrators have withdrawn their consent and for as long as the facts deposed, touch on the rights of the estate and not on any one of the administrators in their individual capacity and interests, any one of the administrators has mandate to exercise such right including deponing an affidavit like in this case, concerning the estate.

The preliminary point of law has no merit and it is hereby dismissed.

[18] I shall now consider whether the application for amendment of the counterclaim should be granted;

The application is premised on the fact that the counterclaim in CS No. 175/2015 requires amendment because the counterclaimant now applicant has changed lawyers and the previous lawyer did not include some material facts yet they are necessary for the determination of the real issues in controversy; that some facts concerning the suit land have come into the applicants' knowledge; that the application is brought in good faith, will avoid multiplicity of suits and will not prejudice the respondent. The arguments of both counsel have been chronicled above.

[19] It is trite that timely amendment of pleadings should not be denied if it is for the purpose of just and final resolution of disputes between parties before court. Such amendment must be in the interest of justice across the board and must not flimsily open causes of action not previously before court but should be solely for clarifying, and ensuring that once they are brought the matter previously before court and all related issues touching the subject matter concerning the parties are finally and fully disposed of.

The issue shall be resolved by determining;

- Whether there is a new cause of action emanating from seeking to bring in the estate of Anna Maria Nambeja when the suit is about the estate of Nalumoso Vincent.
- Whether the respondents shall be prejudiced if the application is granted.

New cause of action.

[20] CS No. 175/2015 concerns the estate of late Nalumoso Vincent Kitandi Kusanze.

Paragraph 6(b) of the Complaint states that and I quote;

‘The defendants have also willingly and negligently included properties that do not belong to the late Nalumoso Vincent Kitandi Kusanze’s estate in the petition for letters of administration. (A photostat copy of the petition is attached hereto marked as annexure “C”)

[21] I have taken the liberty to look at the copy of the petition for Letters of Administration and found that paragraph 3, among others, states and I quote;

‘The deceased has (sic) a fixed place of abode at Baliruno zone 5 LC 1 Nakulabye . . . and left the following property by the time of his death;

‘. . . A plot of land and house (This property is also mentioned under the Will of his late mother MARIA NANKYA NAMBEJJA in paragraph 6,7,8 and 15 see copy marked “A” & “B”. . .)’

[22] By the Plaintiffs (now counter defendants/respondents) bringing up the estate of the late MARIA NANKYA NAMBEJJA in their plaint, it opens the allegation and therefore the need by the defendants (now counter claimants/applicants) to seek to have the matter investigated by this court. I do not believe that this is bringing in a new cause of action and I so hold.

Whether the respondents shall be prejudiced if the application is granted.

[23] The allegation that the defendants /counterclaimants/applicants will prejudice the plaintiffs now counter defendants/respondents in this application by amending would in my view be unfounded. If they claim that the defendants/Respondents got Letters of Administration by falsely including property which did not belong to the estate of late Nalumos Vincent Kitandi Kusanze then it is vital that the suit seeks to unravel the 2 estates and thus an amendment to include all matters concerning the estates is in good faith and I hold so.

In the result the preliminary objection has no merit;

- 1) The Application is granted.
- 2) Costs awarded to the applicant but shall stay in the cause.

It is so ordered.

Dated at Kampala this 20th Day of December 2019.

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KETRAH KITARIISIBWA KATUNGUKA
JUDGE