

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT No. 389 OF 2016

5 **KABAGAMBE MATHIAS :::PLAINTIFF**

VERSUS

KAHIIRE NOBERT :::DEFENDANT

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling on Preliminary objection.

10 The plaintiff in this suit raised a preliminary objection on two grounds. First,
that the defendant filed an amended Written Statement of Defence and
counter claim out of time and did not seek prior to that leave of court or
consent of the plaintiff.

Secondly, that the amended written statement of defence was not highlighted
15 to show what had been added to the statement of defence. He in effect seeks
that the amended written statement of defence and counter claim be struck
off the record for offending the rules of practice.

The plaintiff was represented by Mr. Simon Kiiza of **M/s S. K. Kiiza & Co.**
Advocates. Mr. Bariyo Allan of **M/s Allan & Festo Advocates** on the other
20 part represented the defendant.



Consideration of the objection:

I have carefully read and considered the written submissions of both parties, details of which are on court record. **Order 6. r. 19 CPR** which governs amendment of pleadings generally grants power to a court at any stage of the proceedings, to allow either party to alter or amend his or her pleadings in such a manner and on such terms as may be just.

It has wide discretion to allow all such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties, and on such terms as may be just, for the purpose of determining the real question in controversy between the parties so as to avoid multiplicity of proceedings.

Thus in the case **of Harani vs Kassam (1952) EACA 131**, in which it approved and adopted the following passage from **Seton on Judgments and orders 7th Edition Vol. 1 page 124;**

“prima facie, any order made in presence and with consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to policy of the Court.....

A perusal of the court record reveals that this court granted the defendant leave to amend his written statement of defence and counterclaim on **8th July, 2019.**

It was granted in the presence of counsel for the plaintiff, Mr. Simon Kiiza and counsel for the defendant, Mr. Bariyo Allan, in the terms below:

Prayer to amend the Written Statement of Defence and include the alleged acts of fraud is granted since counsel for the plaintiff has no objection.

Order 6 rule 25 CPR provides that where leave is granted to the party to amend the pleadings it must be done within the time as stipulated in the order of court. A party cannot be permitted to amend the pleadings after the expiration of the time set unless the time is extended by court.

In the present case the defence sought and duly obtained leave of this court to amend the written statement of defence and counter claim. Timelines were fixed by this court on 8th July, 2019, to enable the filing and service of the amendment by 18th July, 2019. The plaintiff side was to file its reply by 25th July, 2019.

However, the filing by the defence had been made on 19th July, 2019, a day after the actual date as court had directed. According to counsel for the defendant, a copy of the amendment had been mailed to counsel for the plaintiff, which he ignored on the basis that the amendments had not been highlighted.

A meeting that had been scheduled between the two counsel however never took off on account of the busy schedule of learned counsel for the plaintiff. Counsel for the defendant relied on a letter dated 7th September, 2020 and an affidavit of service (neither of which he however attached), by which counsel Simon Kiiza is purported to have acknowledged receipt of the highlighted amendment of the defence and counterclaim. The said letter dated 7th September, 2020 as alluded to by counsel for the defendant was neither

copied nor availed to this court. Court also was quick to observe that indeed what was availed to court had not been highlighted.

Counsel for the defendant was also faulted for his failure (whichever reasons he may have had), to comply with the court directives. Having failed to receive
5 cooperation from his learned colleague as claimed, he could have at least filed and served the amendment in within the time as fixed in court in his presence.

He did not seek extension of the time or validation of the amendment through this court. Some of those arguments which he later raised in his submissions- including the alleged failure by, or lack of cooperation on the part of the
10 plaintiff were matters that could have been pointed out in an affidavit of service.

Be that as it may, I will allow the amendment of the WSD and counterclaim, given the fact that the learned counsel for the plaintiff who admitted having received the amendment, did not raise the issue of late filing at the earliest
15 opportunity he had.

He only drew the attention of this court to the anomaly on 14th September, 2020, almost a year after receiving the amendment. This was several months after court had even directed parties to file other court documents, based on the very same amendment.

20 Learned counsel did not explain to court why he himself had not complied with the orders of court dated 16th January, 2020 by which parties had been directed to prepare the joint trial bundles and joint scheduling memorandum. The court had even proceeded to fix the date for hearing, although the matter

M. J. G.

never took off. It is at that point in time that counsel for the plaintiff could have raised the matters for consideration by court, not eight months later.

Finally, counsel did not point out any prejudice which the plaintiff may have suffered on account of the anomalies as raised in his objections.

5 **Conclusion:**

All in all, and for the above reasons as stated, also driven by the need for this court to determine the real questions in controversy between the parties, I would accordingly reject the objections as raised; admit the amended WSD and counterclaim with amendment duly highlighted; to be filed and served
10 within two weeks from date of delivery of this ruling.

The plaintiff is also directed to file an amended reply to the amended defence and counterclaim; and serve together with a Joint Scheduling Memorandum and joint trial bundle, generated with the consent of the defendant's counsel).

The documents are to be filed in court within thirty days upon receiving the
15 amended/highlighted version of the WSD and counterclaim.

Costs in the cause.



20 **Alexandra Nkonge Rugadya**

Judge.

15th October, 2020.