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The Republic of Uganda
In The High Court of Uganda at Kampala
Miscellaneous Application No. 884 Of 2020
[Arising Out of HCCS No. 867 Of 2014]

10 City Aluminum & Glass Services Ltd :::::::::::::::::::::::::::::::::: Applicant

Versus

Barclays Bank Uganda Limited :::::::::::::::::::::::::::::::::: Respondent

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Ruling

Before: Hon. Justice Dr. Henry Peter Adonyo

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a. Background:

This application was brought under Article 126 of the Constitution of Uganda, Section 33 of the Judicature Act, Sections 98 and 100 of the Civil Procedure Act and Order 6 rule 19 and 31 of the Civil Procedure Rules. It seeks the grant of the following orders;

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- i. Leave be granted to amend the plaint and allow the applicant to re-open its case to enable it take advantage of the orders in Miscellaneous Application No. 7 of 2019.
- ii. The costs of the application be provided for.

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5 The grounds of this application are underscored in an affidavit of Mr.
deposed by Onyango John Oketch which is on record which
principally espouses the fact of the applicant's original instructions
having been given to counsel Gerald Kakuba who allegedly did not
properly appreciate the same with Mr. Onyango Oketch John
10 thereafter coming across vital documentary evidence of which he
sought the leave of court to amend the applicant's/ plaintiff's original
plaint to reflect same since the applicants sought to rely on them yet
counsel Gerald Kakuba prematurely closed the applicant's/
plaintiff's case without having had the applicant's/plaintiff's plaint
15 amended and the newly discovered documents tendered in evidence.

That arising from the said mishap Mr Onyango Oketch sought the
advice of another counsel who advised that it was necessary to
withdraw the original suit against the Defendants, have the plaint
amended and then re-open the applicant's/ plaintiff's case against
20 the respondent/defendant so as to put the applicant's/plaintiff's case
in its proper perspective.

Mr. Onyango further averred that, in the alternative, he was advised
to file Miscellaneous Application No. 7 of 2019 on behalf of the
applicant which application sought to amend the plaint in the head
25 suit which application was granted and that thereafter although a
trial bundle was filed in the belief that it would constitute the
discovered and other evidence which the applicant/plaintiff would
rely on during trial it was later painfully discovered that some of those
documents had not been bundled and adduced in court reflecting the



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5 fact that the sought amendments and attachment of documents had
not been properly taken advantage of yet the parties had by then
closed their case consequently leading to this present application in
which the applicant/plaintiff sought to have the previously intended
amendments made so as to enable the applicant bring clarity to its
10 case which request if not allowed, would prejudice the applicant
tremendously.

This request is opposed on the other hand by the respondent /
defendant who through an affidavit deposed by one Gerald Emuron,
who is its Legal Counsel avers that the applicant had previously filed
15 Miscellaneous Application No. 7 of 2019 for discovery of documents
and amendment of the plaint in January 2019 which was consented
to by the respondent thus got the opportunity to amend its plaint but
did not take advantage of the same only to bring this application after
parties had concluded giving their evidence action not only intended
20 to fundamentally change the applicant's case but would extremely
prejudice the respondent thus the opposition that this application
should not be granted at this late stage.

b. Submissions:

Both parties presented written submissions which are on record.

25 *i. Applicant's submissions:*

In his argument in support to this application counsel for the
applicant argued that this application meets the criteria laid out
under Order 6 rule 19 of the Civil Procedure Rules which allows for

5 amendments of pleadings supported by the holdings in **Bright Chicks Uganda Ltd vs Dan Bahingire HCMA No. 254 of 2011** and **Walfee's (Uganda) Ltd vs Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188** both of which highlight the conditions for the grant of an application for leave to amend a plaint stating that the
10 plaint in the head suit should be allowed amended since it and the respondent's written statement of defence both omitted to mention the breach of the loan agreement on which the applicant's claim is based.

Counsel submitted further that the intended amendment sought to
15 show that liabilities of Babirye and the respondent arose differently and therefore could not be joined clearly proving that the applicant had no claim against Babirye yet this was a fact included in the plaint.

Additionally, counsel for the applicant observed that the applicant
20 had not previously envisaged relying on the loan agreement and the Credit Reference Bureau documents which documents, however were crucial to its case and thus should have been specifically included in the original plaint but was not due to negligence of previous counsel requiring thus the amendment of the original in order to enable the
25 proper facts to be brought out and the real issues of monetary claims and the clearance of the applicant's name to be enabled arguing that because of the mistakes of the applicant's previous lawyers and the fact that Mr. Onyango was not conversant with the law and procedure he ended up failing to take advantage of the concession which was



5 granted in MA No. 7 of 2019 leading him to file MA No. 1128 of 2019 which had similar prayers and then again prematurely closing the Applicant's case without amending the plaint and producing the necessary documents.

10 Furthermore, Counsel for the applicant submitted that this instant application sought to bring out clarity to the applicant's claim by having attached appropriate Annextures which the applicant intended to rely on, which Annextures were also well within the knowledge of the respondent and that if this was allowed then the parties would have the opportunity to frame the real issues in
15 controversy between the parties so that they are resolved accordingly.

On whether this application leave to re-open the case could be entertained by this court, counsel cited the holding in the case of ***Micheal Fethun vs The State Case No 458/96 on appeal from the Cape Provincial Division of the High Court of South Africa Case***
20 ***No. 458/96*** where it was held that courts had the discretion to allow a case to be re-opened at any time before a judgment is issued taking into account such factors such as the finality of the case, the stage of the proceedings, reasons why the evidence was not led on time among others. In further support of this position, counsel for Counsel
25 for the applicant cited the case of ***Tolit Charles Okiro vs Otto Cypriano Civil Revision No. 002 of 2019*** which lays out four areas in which the court may grant leave to a party to reopen its case such as where there was an inadvertent error, where there is fresh evidence, where there is mistaken apprehension of the facts and



5 where there was a mistaken apprehension of the law which situations, counsel argued could be seen in the instant matter.

In conclusion, counsel for the applicant urged court to take note of the fact that the applicant had filed the head suit in pursuit of specific reliefs but since its former advocate did not appreciate the facts properly then the real facts were not presented in the plaint or framed
10 which lends credence to the prayers that this application be allowed as its dismissal would be tantamount to punishing the applicant for the mistakes of previous counsel.

ii. Respondent's submissions:

15 On the other hand counsel for the Respondent objected to the application and urged this court not to allow it citing the holding in ***Pascal Rwakahanda vs Uganda Posts & Telecommunications Corporation Misc. Application No. 484 of 2014 (Arising from HCCS No. 1565 of 2000)*** and ***Lea Associates Limited vs Bunga Hill House Limited Misc. Application No. 348 of 2008 and Mulwooza & Brothers Ltd vs N Shah & Co Ltd Supreme Court Civil Appeal No. 26 of 2010*** where it was held that an amendment
20 will not be allowed where it substantially changes the cause of action into a different one or deprives the defendant of an accrued right.

25 In making the above objection, counsel for the respondent argued that the circumstances surrounding this application did not satisfy the grounds on which a court could grant this application given the fact that this application to amend the plaint has brought long after both parties had given their evidence and had even closed their cases

5 clearly showing that this application was an afterthought brought by
the applicant only to fill gaps in its case which had been brought out
and highlighted by the Respondent for as the applicant sought to
circumvent its original claim by changing its basis to one of breach
of the legal mortgage between the parties rather than the breach of a
10 memorandum of understanding which was signed between one
Onyango John Oketch and a one Babirye Leah which document the
applicant and respondent were not privy to.

Furthermore, it was argued that the applicant sought to extinguish
the plaintiff's outstanding loan to the Respondent yet its claims was
15 not based on a deed of assignment but founded on the memorandum
of understanding, deed of assignment of rental income, reporting of
the applicant's loan default by the respondent to the credit reference
bureau and the Respondent's handing over of the loan security title
to the mortgagor when the loan was cleared without recourse to the
20 applicant with the proposed amendment seeking to base the
applicant's case on the terms of the mortgage under an offer letter
and mortgage deed which would change several material particulars,
facts and issues framed before court and the whole basis of the
original claim which action would be prejudicial and unfair to the
25 respondent given the fact that evidence had already been tendered in
court by either party and are on record.

Given the above scenario, counsel for the respondent urged court not
to allow this application but should proceed to dismiss it with in
addition to allowing the prayers for withdrawal of the head suit



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5 against the respondent and the withdrawal of Mr. Onyango John also
from it to be done so with costs.

c. Decision of Court:

Taking into account the pleadings and submissions of parties herein
as well as the authorities cited in support, I note from the
10 submissions from either party that the main issue for consideration
by this court is whether the proposed amendment changes the
character of the suit and introduces a new claim.

This application, it should be recalled is brought under **Order 6 rule
19 of the Civil Procedure Rules** which provides that;

15 ***“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 her
pleadings in such manner and on such terms as may be
just, and all such amendments shall be made as maybe
20 necessary for the purpose of determining the real
questions in controversy between the parties.”***

This utilization of the above rules of procedure entails the exercise by
a court its discretionary powers which always is exercised judiciously
and not arbitrarily with the holding in **Matagala Vincent vs Uganda
25 Revenue Authority Miscellaneous Application No. 25 of 2013**
laying out seven guiding principles for the grant of applications of
this nature and these are;

- 5 i. Amendments sought before the commencement of the hearing of the case which pleadings the intended amendment relates should be freely allowed if the amendment can be made without prejudice to the other party. Application for such amendment should be made at the earliest stage of the
- 10 proceedings.
- ii. Where an amendment is not any different in quality from the cause of action, it should be allowed. A court will, however, not exercise its discretion to allow an amendment which substitutes a distinctive cause of action for another or to
- 15 change by means of the amendment of the subject matter of the suit. The court will refuse to exercise its discretion where the amendment would change the action into one of a substantially different character.
- iii. No amendment would be allowed which would prejudice the rights of the opposite party existing at the date of the proposed amendment. The amendment should not work injustice to the
- 20 other side. However, an injury which can be compensated by the award of costs is not treated as an injustice.
- iv. An amendment would be necessary within the meaning of
- 25 Order 6 rule 19 of the Civil Procedure Rules if it is for the purpose of determining the real questions in controversy between the parties.
- v. Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity
- 30 should be allowed.

- 5 vi. An application made **malafides** should not be granted.
vii. No amendment should be allowed where it is expressly or
 impliedly prohibited by law (e.g. Limitation).

Applying the above principles to the instant application, especially principles ii, iii and vi above, I am of the considered view that this
10 instant application falls short of the requirement of **Order 6 rule 19 of the Civil Procedure Rules** for the following reasons;

- i. The proposed amendment introduces a totally new cause of action in as far as it intends to change the applicant's/plaintiff's cause of action as against the
15 respondent/defendant in the original plaint from that of the recovery of Uganda Shillings Two Billion Eight Hundred Fifty Four Million One Hundred Sixty Four Thousand Eight Hundred Seventy Nine Only (Ug.Shs.2,854,164,879/=) to the recovery of Uganda Shillings Three Hundred Eighty One Million Two
20 Hundred Thirty-Nine Thousand Two Hundred Eighty Only (Ug. Shs. 381,239,280/=), general and exemplary damages, interest and costs.
- ii. The intended amended plaint introduces and relies on an offer and acceptance letter marked as Annexure D to the plaint
25 which was not the case in the original plaint.
- iii. New pleadings and averments which were not pleaded in the original plaint are introduced in the proposed amended plaint including averments that the Defendant acted in breach of Annexure D when it disbursed the loan to the plaintiff in two

5 installments on 3rd July 2010 and 20th July 2010 in breach of
(xxiii) of Annexure D, the Defendant prematurely, wrongfully
and or unlawfully and/or maliciously debited the plaintiff's
account with Uganda shillings 63,637,799/= and that the
Defendant wrongfully and unlawfully advertised the mortgaged
10 land for sale in The New Vision paper for sale.

Given the above, I am thus in agreement with submissions of counsel
for the respondent that in bringing this application the applicant
seeks to change its case against the respondent by dropping the 2nd
plaintiff, Mr. Onyango John Oketch who was previously a party to
15 the suit and the 2nd Defendant, Ms. Babirye Leah yet these two
personalities are stated to have been privy to the memorandum of
understanding with the applicant now seeking to rely on the terms of
the legal mortgage and the offer and acceptance letter rather than the
memorandum of understanding which neither the applicant nor
20 respondent were party to.

Therefore, given the above were the applicant to be allowed to amend
its pleadings then its case against the respondent would
fundamentally shifts from the original pleadings yet evidence has
already been given in regard to the same and both parties have closed
25 their cases.

Furthermore, the removal of Mr. Onyango John Oketch and Ms. Leah
Babirye from the suit, again would substantively change in the
nature of the claim against the respondent in that though the
applicant argues that the liability of the parties arose differently and



5 could not be joint since it had no claim against Babirye yet fact was pleading was included in the plaint.

In my view I discern clear dishonesty and untruthfulness in the bringing of this application for its intention clearly is to have wholly changed the applicant's claim by introducing in the proposed
10 amendment the letter offer and acceptance as well as the mortgage deed documents , Credit Reference Bureau correspondences marked as Annextures LA and LB as well the CRB report which was marked as Annexature M which are stated to be crucial to the applicant's case whereas minimal reference to these correspondences in the original
15 plaint were made with the original plaint heavily depending on the deed of assignment, power of attorney and memorandum of understanding.

Invariably, therefore, any exercise this court's discretion to allow the sought amendment as prayed would, in my considered opinion and
20 view, clearly change and substitute one distinctive cause of action for another rendering a new cause action in character and clearly otherwise prejudice the rights of respondent and resulting in an occurrence of an injustice even if is submitted that the fundamental mistakes leading to this present scenario resulted from the
25 applicant's previous lawyers and the failure to take advantage of orders made in MA No. 7 of 2019 which I note has not ably demonstrated as no proof of these inadvertencies have been made.

In conclusion, therefore, I find that the applicant is clearly attempting to change the nature of its case and wholly introduce new evidence

5 which, with due respect, cannot be allowed at this stage given that both parties have presented their evidence which act I would deem to be an attempt in improving of the applicant's case to the detriment of the respondent.

10 Given the above the circumstances, I would thus find this application couched in deceitful assertions rendering it subsequently not warrant my exercising this court's discretion to allow this application and so accordingly I would decline to grant the same and make orders as below.

d. Orders:

15 This application having failed I do issue the following orders;

- i. This application for leave to amend the plaint and allow the applicant to re-open its case to enable it take advantage of the order in High Court Miscellaneous Application No. 7 of 2019 is denied.
- 20 ii. The Costs of this application is awarded to the respondent.

I so order.

 Hon. Justice Dr. H. P. Adonyo

25 Hon. Justice Dr. Henry Peter Adonyo

Judge

11th January 2021