THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-MA-CS-0125-2008

(From HCT-05-CV-CS-042-2007)

BEN MAKARU T/a CINEMATEX SERVICES.....APPLICANT

VS

JOHN TUMWEBAZE.....RESPONDENT

B E F O R E : THE HON. MR. JUSTICE LAWRENCE GIDUDU

R U L I N G

When M.A 125/2008 came before me for hearing, Counsel for the Respondent (Mr. Ngaruye) raised several preliminary objections summarized below:

(i) That M.A 78/2008 which was filed by the applicant was still pending before this court and that M.A 125/2008 cannot be heard by virtue of S.6 of CPA. Further, that the purported withdrawal of M.A 78/08 offended Rule 1 (2) of Order 25 CPR meaning the matter is still pending before this court.

(ii) Alternatively, that since costs attendant to the purported withdrawal of M.A. 78/2008 have not been paid, this application cannot be heard.

(iii) That service of M.A 125/08 was effected on 25/11/08 which was 3 days outside the 15 days allowed to effect service under

(iv) O. 12 r 3 (2) CPR. The summons were issued on 7/11/08 and should

have been served by 21/11/08.

(v) Alternatively, that since the original plaint discloses no cause of action, no amount of amendment can cure it. That it be struck out to collapse with the current application.

In Reply, Mr. Mwene-Kahima, learned Counsel for the applicant invited court to overrule the objections for the following reasons:-

(a) That the applicant concedes to costs for withdrawing M.A.78/2008.

(b) That Rules of procedure are hand maidens of justice and the fact that his clerk failed to serve within 15 days should not be counted against the applicant.

(c) That the original plaint disclosed a cause of action and the amendment was only clarifying matters in issue.

Both learned counsel referred me to a number of decided cases to back up their arguments. I shall refer to some of them in due course. I shall deal with the objections in the order they were raised.

The first objection is that this application cannot proceed because an earlier application to amend the same plaint is still pending before this court.

The court records shows that M/S Paul Tusubira Advocate filed M.A. 78/2008 on 9/7/08 in which he sought to amend the original plaint apparently by introducing 2 more defendants, i.e. The Uganda Land Commission and the Attorney General. He also sought to give further particulars in the plaint.

After a change of Advocates, it is this application that M/S Mwene- Kahima, Mwebesa & Co. Advocates issued a notice of withdrawal and filed the same in court on 5/11/08.

Mr. Ngaruye for the Respondent challenges this withdrawal submitting that it

contravenes Rule 1 (2) of Order 25 CPR.

Rule 1 (1) of Order 25 permits a plaintiff to withdraw or discontinue his/her suit at any time before the defence is filed or even after the defence is filed but no other steps have been taken in the suit. To that extent, no leave of court is required.

See *Muhondo* vs *Semakulo* [1982] HCB 27.

In the instant case, M.A. 78/2008 had been set down for hearing on 11th September 2008 meaning that it fell within the requirement imposed by Rule 1 (2) of Order 25 CPR which provides

> "Except as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw or discontinue a suit
> without leave of the court---------

In this case, the applicant should have sought leave of court by Chamber Summons as provided by Rule 7 of Order 25 or should have sought the consent of the Respondent as provided for under Rule 2 of Order 25 CPR. Mr. Mwene-Kahima had no defence to this objection save by conceding to costs.

Of course the costs would follow the event of withdrawal or discontinuance but cannot be awarded at this stage when M.A. 78/2008 is not before court for withdrawal.

My holding on this objection would mean that M.A. 125/2008 cannot be heard since M.A. 75/2008 is pending before this court. This prohibition is imposed by section 6 of the Civil Procedure Act (Cap. 71). I would choose to stop here but having perused the record of this rather bulky file, I am inclined to proceed to pronounce myself on the rest of the objections in order to do justice to the

entire file. I am justified in doing this because if the hurdles in order 25 CPR are eventually complied with, the same application shall return and objections of service outside time and want of a cause of action shall inevitably come up. The Respondent's Counsel concedes that service was done 3 days after the time for doing so expired but he invited court to overrule an objection on this issued by calling in aid Article 126 (2) (e) of the Constitution which in a nut shell provides that substantive justice shall be administered without undue regard to technicalities.

Further, Counsel for the Respondent relied on two decisions of the Court of Appeal which I find with due respect to be inapplicable to the situation in this case.

In *Mark Okello vrs. David Wasaiia* Civil Reference 54/2005 (Court of Appeal unreported) failure by counsel to serve was due to an omission or mistake by the Assistant Registrar of the Court. The court held that the omission on the part of the registrar should not, therefore, deprive the applicant of his right to be heard on appeal. In the instant case, it is not clear what confusion befell the clerk in the chambers of counsel. There is no affidavit to countenance or explain the failure but on the whole, the delay to effect service in this case was just 3 days outside the time provided in Order 12 rule 3 (2) CPR. This is a short period and moreover, the Respondent and his counsel turned up in court and opposed the Chamber Summons. I would hold that no injustice has been occasioned and would allow the applicant to argue the application. However, my finding on this ground is yet dependant on my consideration of the last objection that the intended amendment is a futile attempt to amend a plaint that in its original form does not disclose a cause of action.

Mr. Ngaruye, learned counsel for the Respondent argued at length that once the original plaint did not disclose a cause of action then the same cannot be amended in order to comply with the provisions of Order 7 CPR. He submitted that the application be struck out with the plaint that it seeks to amend. He cited the celebrated case of *Auto Garage vrs.Motokov* [1971] EA 514 and referred me to a Ruling of this court by Musoke-Kibuuka, J. in M.A. 72/2000 *Augustine Tibaruha & others vrs.Ibaka Group Credit Finance* (Unreported).

In Reply, Mr. Mwene-Kahima conceded to the position of law as stated in *Auto Gorage* (supra) but contended that the original plaint disclosed a cause of action. Further, that the applicant was an occupant of a property that belonged to government and that as such he was a sitting tenant. That when the plaint was filed the Respondent had not obtained a title to the premises and that since there is a title, there is need to amend the pleadings. That circumstances have changed drastically between the time the suit was filed and now.

A simple definition of cause of action by Osborn's Concise Law dictionary 7th Edition is:-

> "The fact or combination of facts which give rise to a right of action"
>
> While Order 7 r. 1(e) CPR provides that the plaint shall contain the facts constituting the cause of action and when it arose and rule 11 (9) of the same Order 7 provide that the plaint shall be rejected where it does not disclose a cause of action.

In East Africa, the courts are guided by the essential elements that constitute a cause of action which were laid down in the case of *AutoGarage vrs. Motokov (3)* (Supra). They are:-

(i) The plaintiff enjoyed a right

(ii) The right has been violated

(iii)The defendant is liable.

If any of these essential elements is missing, the plaint is a nullity and no amendment can be made as there is nothing to amend.

Looking at the original plaint filed on 22/3/07 by M/S Tusubira Advocate on behalf of the plaintiff. The plaintiff avers in the relevant paragraphs of the plaint thus:-

3. The plaintiff is the sitting tenant of plot M 11 Mbaguta Street.Mbarara and its landlord is the Government of Ugandathrough Privatization and Utility Sector Reform Project of theMinistry of Finance, Planning and Economic Development. SeeAnnexture "A".
4. The Uganda Land Commission is the Controlling Authority.
5. The defendant has approached the plaintiff and claimed thathe possesses a lease offer by the said Controlling Authorityoffering him the suit land aforesaid.
6. The said allocate is a stranger to the property contrary togovernment policy that such properties first be offered to thesitting tenants.

The plaint concludes with three prayers

(a) That the lease offer to he defendant is unlawful

(b) That the allocation by the Controlling Authority while there is asubsisting tenancy is improper.

(c) Costs.

It is this plaint that the applicant seeks to amend by what I consider to be a fresh plaint raising new issues and seeking fresh remedies like cancellation of

the defendant's title, an eviction order, a permanent injunction, general damages, mesne profits etc.

The tenancy being pleaded in the original plaint is not based on any facts or tenancy agreement. The policy of government of the so called "sitting tenant" is not cited or attached by way of annexture. It is not clear if this policy is a law or a certificate.

The Controlling Authority or landlord is not faulted nor is it joined as a party to the pleadings. It is no wonder that the original prayers are just declarations without judicial value to the plaintiff. There are no particulars as to when the defendant approached the plaintiff or what action was done by the defendant in order to bring him to court to answer.

The essentials in *Auto Garage's* case (supra) are wanting. The right to the tenancy of the premises should be backed up by a valid tenancy

agreement or facts that reveal a verbal tenancy. This essential element is lacking. It is the one that would give the plaintiff the right to sue. The defendant could not have violated a government policy of sitting tenants when the defendant is not a government official. The policy itself needs to be specifically cited in the pleadings as a gazette law or statutory instrument that can be justiceable in courts of law. These particulars are wanting in the original plaint and cannot be cured by way of amendment.

I appreciate that from the Annextures of the intended amendment; a lot of water has since passed under the bridge. The wisest thing to do is to bring a proper suit that takes care of the current legal realities and should cover all those persons or institutions whose actions have brought grief to the plaintiff.

In criminal cases, we have holding charges which can be amended or substituted with new ones. We do not have that position in civil cases. Subject to limitation, the plaintiff may come back with a proper document that meets the requirements of Order 7 CPR.

In the premises, the objection is well founded. The original plaint which is Civil Suit No. 42/2007 does not disclose a cause of action and no amendment to it can cure it. It is rejected under Order 7 r 11 (a).

This application is, therefore, dismissed. The Respondent/defendant shall have the costs for the main suit and this application.

J u d g e
15/12/2008

Order:

Since I am engaged in a criminal session, the Ag. Deputy Registrar shall deliver the Ruling.

Lawrence Gidudu

J u d g e

15/12/2008