THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 57 OF 2009

N. ASHAH & CO. LTD :: APPELLANT

VERSUS

1. **MULOWOOZA & BROTHER LTD**
2. **COMMISSIONER FOR LAND ::::::::::::::::: RESPONDENTS REGISTRATION**

CORAM: HON JUSTICE A.E.N MPAGI-BAHIGEINE, JA
HON JUSTICE C.K BYAMUGISHA, JA
HON JUSTICE A.S. NSHIMYE, JA

JUDGEMENT OF A.E.N.MPAGI-BAHIGEINE, JA

The appeal arises from the ruling and orders of the High Court, dated 11th May 2009, dismissing the appellant's application for leave to amend the plaint and join or substitute the Attorney General as a party to the suit.

When dealing with application for leave to amend, the learned judge was faced with the following issues, namely:

1. **Whether substitution and joining of parties mean the same thing;**
2. **Whether the applicant involved the correct procedure in seeking the substitution or joining the Attorney General as a party to the suit;**
3. **Whether there was new information and documents which the applicant intends to rely on at the trial which explains or expose the grounds of cancellation of the applicant's certificate of repossession and subsequent transfer of the suit land;**
4. **Whether the amendment and substitution of the Attorney General would enable all issues to be determined without prejudicing or impung the respondents;**

The 1st and 2nd issues were answered in the affirmative while the 3rd and 4th were in the negative. Leave to amend the plaint and join the Attorney General as a party was rejected. Hence this appeal.

The genesis of this matter is as follows.

N. Shah & Co Ltd (The appellant) claims to be the proprietor of 640 acres of land comprised in 7RV.29 Folio 4, the suit land, which was expropriated by the Amin Government.

In November 2007, the Ministry of Energy and Mineral Development (MEMD) expressed an interest in purchasing the suit land from the appellant. However, Mulowoza & Brothers Ltd, the 1st Respondent was also claiming ownership over the land and forwarded to MEMD a Mailo Certificate of Title over the suit land described therein as Block 107 Plot 3, Mawokota. This certificate was registered in favour of the 1st Respondent on 23rd January 2008 vide instrument No. KLA.364818.

On 30th January 2008, MEMD requested from the appellant and the 1st respondent for their respective titles for the suit land, to the commissioner for land Registration, hereinafter referred to as the 2nd respondent, for verification.

On 26th February 2008, MEMD informed the appellant that the 1st respondent was the owner of the suit land.

On 27th February 2008, the appellant filed **High Court Civil Suit No. 80 of 2008** against the 1st and 2nd respondents, alleging that the transfer to the 1st respondent was fraudulent, wrongful and illegal.

On 27th February 2009, the appellant filed the aforementioned **Misc. Application No. 143 of 2009** seeking leave to amend the plaint.

The issues before this Court read:

1. **Whether the learned judge erred in law and fact when he ruled that substituting or joining the Attorney General as a party would prejudice the 1st respondent's defence.**
2. **Whether or not the learned judge erred in law and fact when he made a second contradictory ruling on the issue of the appellant's failure to institute an appeal against the minister's decision within 30 days.**
3. **Whether the learned trial judge erred in law and fact when he ruled that the appellant's amendment introduced a new cause of action on completely new facts within new pleadings.**
4. **Whether the learned trial judge erred in law and fact when he refused to grant leave to amend the plaint.**

Parties opted to file written submissions under **Rule 98** of the Rules of this Court. They only appeared in Court to clarify a few points.

Mr. Obiro Ekirapa Isaac appeared for the Appellant while Mr. Ambrose Tebyasa represented the 1st Respondent and Mr. Madete Geoffrey was for the 2nd Respondent.

I prefer to deal with issues 1, 3 and 4 together as they are interrelated.

When rejecting the appellant's application for leave to amend the plaint, the learned judge ruled:

"*After perusing the original plaint and the proposed amendment, I do find that the new plaint some how introduces a new cause of action on completely new facts within different pleadings. They include new particulars of fraud and new prayers like estoppel, among others. Such an amendment was rejected in the case of* ***Ntungamo District Local Council v john Karazarwe [1997] 111 KARL 52,*** *in that case Musoke – Kibuuka, J held inter alia that although* ***Order 6 Rule 18*** *confers a very wide discretion to Court to grant leave to parties to amend their pleadings, an amendment that would introduce a new distinctive cause of action or would prejudice the right of the other party would not be allowed".*

It was argued for the appellant that the grounds and events leading to the cancellation of the appellant's certificate of repossession and certificate of title were not known to the appellant at the time of filing the suit. These were subsequent events that occurred after filing the suit that necessitated the amendment. Though the respondent obtained the suit through the minister's order which was never challenged, Mr. Ekirapa pointed out that the minister's decision can be challenged by way of an ordinary suit without appealing such decision. He asserted that there was no defence under any statute that could have been prejudiced had the Attorney General been joined as a party. The suit is against the conduct of various government officials for which the Attorney General is vicariously responsible or liable.

Most importantly the letter cancelling the appellant's certificate of repossession was sent to the address the appellant had used way back in 1947 and not the one he used at the time of repossession. Hence the appellant's inability to appeal the minister's decision within the prescribed time.

The amendment contained nothing new only it merely gave a chorological order of the events - **Tororo Cement Co. Ltd v Frolcive International Ltd SCCA No. 2 of 2001 and Odgers on Civil Court Action, 24th Edition [1996].**

Learned counsel submitted that the pleadings had clearly shown that the suit property was fraudulently transferred to the 1st respondent and the facts in the amended pleadings did not reflect a departure therefrom.

Mr. Ekirapa also pointed out that the documents to be incorporated in the plaint were pleaded in the appellant's reply to the 1st respondent's written statement of defence. The 1st respondent in his affidavit had stated that all the documents to be brought by amendment had been pleaded in reply to the written statement of defence. At the time of filing suit the appellant did not know about the order of cancellation. There was no new cause of action.

Citing **Eastern Bakery V Castelino [1958] E.A.461,** Mr. Ekirapa contended that the learned judge erred in refusing leave to amend. It should have avoided a multiplicity of suits. Relying on **G.L Baker Ltd v Meding Building & Supplies Ltd [1958] 3 ALL ER 540,** counsel submitted that on the discovery of a new fact by the plaintiff, an amendment should have been allowed. Mr. Ekirapa prayed court to allow the appeal.

For the 1st respondent, Mr. Ambrose Tebyasa submitted that allowing the amendment would be tantamount to suing the Attorney General out of time and on new and different pleadings. This kind of amendment is outside the ambit of **Order 6 rule 19 Civil Procedure Rules; Mohanlal Pethras Shah v Queen Land Insurance Co. Ltd [1962] EA 269; Stanley & Sons v Tobias [1975] EA 84.** He argued that there was no need to join the Attorney General since the appellant can maintain the suit against the 1st respondent alone. His view was that the learned judge properly exercised his discretion in disallowing the application because the minister's decision cannot be challenged out of time as it would be resurrecting an action already time barred against the Attorney General. He prayed court to disallow the appeal.

It is well settled that the court may at any stage of the proceedings either upon or without the application of any party' and on such terms as may appear to the court to be just, order that the names of any parties improperly joined, whether as plaintiffs or

defendants be stuck out and that the names of any parties, whether plaintiffs or defendants who ought to have been joined, or whose presence before court may be necessary in order to enable court effectually and completely adjudicate upon and settle all questions involved in the cause or matter finally be added.

- **Order 1 rule 10 (2) Civil Procedure Rules.**

This rule intends to secure the determination of all disputes relating to the same subject matter without delay and expense of separate actions.

Montgomery v Foy [1895] 2 QB 321.

With the above in mind, I do consider **Eastern Bakery v Castelino [1958] EA 461** relevant to the matter before us where it was stated:

".........amendments to pleadings sought before hearing should be freely allowed. If they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs. The court will not refuse to allow an amendment simply because it introduces a new case. But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment the subject matter of the suit. The court will refuse leave to amend whereby the amendment one would change the action into one of a substantially different character, or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the wait".

The hearing of this case has not commenced. The proposed amendment is intended to substitute the Commissioner for Lands Registration with the Attorney General in light of the fact that the appellant makes serious allegations of fraud against Senior Officials in the Ministry of Finance and in the Ministry of Lands, i.e. the Commissioner for Land Registration.

The intended additional particulars of fraud read:

"6. The plaintiff shall aver and contend that cancellation of its certificate of repossession and the subsequent transfer of the suit land in the name of the 1st Defendant were tainted with gross illegality and fraud committed by the 1st Defendant and or condoned by employees of the 2nd defendant".

Particulars of fraud/illegalities.

I. **Purporting to claim title to the suit land through a Mailo Certificate of Title the 1st defendant and the Commissioner Land Registration both knew was issued in error.**
II. **Alleging that the suit property formed part of the Estate of the late Patrick Lulunga Lwanga whereas not.**
III. **Misrepresentation by the 1st Defendant to the Minister of State for finance that the plaintiff had not taken physical possession or managed the suit land.**
IV. **Securing registration by the 1st Defendant to defeat the plaintiff's interest.**
V. **Ministry of Finance officials sending notices to an address they knew or had reason to believe was defunct.**
VI. **Misrepresentation by Ministry of Finance officials that the plaintiff had been compensated by the Government for the suit land whereas not.**
VII. **Disposing of the suit property without adhering to a competitive bidding process.**
VIII. **Disposing of the suit land without first valuing the same.**
IX. **Purporting to cancel a Certificate of Repossession for the suit land other than by a Court Order.**
X. **Swearing false statutory declaration in support of applications for a special title to the suit land.**
XI. **Issuing a special certificate of title without first gazetting the application for the mandatory 30 days".**

The original plaint has the following particulars of fraud:

5. ***The plaintiff contends that the second defendant had ACTUAL KNOWLEDGE of the plaintiff's proprietary interest in the land and acted fraudulently and in abuse of her office when she purported that the first defendant was the registered proprietor of the suit land THREE WEEKS after confirming that the plaintiff is indeed the registered proprietor.***

<u>Particulars of fraud</u>

a) **Uttering (by the 1st defendant) of a forged land title in a vain attempt to prove ownership.**
b) **Procuring (by the 1st defendant) of a transfer in respect of land they knew was owned by the plaintiff.**
c) **Authority (by the 2nd defendant) of a letter bestowing proprietorship on the first defendant well knowing that the plaintiff was the lawful proprietor.**

A comparison of the intended amendments with the original plaint clearly indicates to me that the amendments are a mere elaboration on the original particulars of fraud against the officials in the said Ministries of Government i.e. Finance and Land Registry.

It cannot be claimed even remotely that the intended amendments pose a new cause of action. Amendments, in my view, are for the benefit of the court to determine the action with more precision being armed with all necessary particulars/details. I would rule therefore that the particulars of fraud supplied do not constitute a new cause of action as claimed. The Attorney General being the principal legal advisor of the Government and whose functions include advising the Government on any subject and representing it in Courts. (See **Article 119(4) (a) and (c) of the Constitution),** should undoubtedly be joined as a party in this case. In **Mohan Musisi Kiwanuka V Asha Chand SCCA No. 14 of 2002,** a case under the **Expropriated Properties Act**, the appellant had made several unsuccessful applications to have the Attorney General joined to the main suit on the ground, inter alia, that it was necessary in order to enable the court to 'effectually and completely adjudicate upon and settle all issues involved'. This was never done. Mulenga, JSC (Rtd) in the lead judgement had this to say:

> *"I am constrained to observe here, that this background demonstrates how undue regard to technicalities can obscure real issues, to the prejudice of substantive justice. It is a cardinal principle in our judicial procedure that courts must, as much as possible avoid multiplicity of suits. Thus it is that rules of procedure provide for, and permit where appropriate, joinder of causes of action and consolidation of suit.*

With due respect, there was no sound reason why the appellant's application in 1994, to join the Attorney General to Civil Suit No. 1 of 94 was not allowed….."

Also see **Habre International Co. Ltd V Ebrahim Alarakia Kassam & Others SCCA No. 4/99**.

In the instant case the appellant is claiming repossession of the property held under a leasehold while at the same time the 1st respondent is claiming ownership of the same property based on the Mailo Certificate of Title sanctioned by different officials in the Ministry of Lands and Finance for whom the Attorney General is vicariously liable. It is crucially important to join the Attorney General to explain the minister's power to cancel a Certificate of Title, a preserve of the High Court. In view of the foregoing I consider with respect the learned judge seems to have somehow misdirected himself, when he declined to allow the amendment to join the Attorney General to the suit.

Concerning the issue of limitation when the Attorney General is joined as a party, **Section 15(1) of the Expropriated Properties Act (Cap 78)** provides:

1. **Any person, who is aggrieved by any decision made by the minister under this Act, may, within thirty days from the date of communication of the decision to him or her appeal to the High Court against the decision.**
2. **Where the minister's decision is made in writing, the decision shall be deemed to have been communicated.**
   a) **Fourteen days after the date of posting, where is suit to an address outside Uganda, and**
   b) **Twenty one days after the date of posting, where it is suit to an address outside Uganda.**

This issue was dealt with in **Habre International Co. Ltd V Ebrahim Alaraka Kassam & Others (Supra)** that the minister's decision is purely administrative and any appeal against it lies to the High Court within thirty days; assuming such decision is communicated to the aggrieved party at the time it is made.

In this case it is stated by the appellant that the decision was directed to a defunct address used by the appellant way back in 1947. This was not contradicted or disproved by the respondents. In accordance with the decision in **Rossi's case (1956)**

1 ALL ER 670 (1956) 1 QB 682 the appellant had proved that he never received the letter. I think he discharged the burden incumbent upon him for later on discovering the alleged fraud, he promptly filed suit. There was no deliberate delay. This would go to show that he never received the minister's decision in the first place. It is noteworthy time would not begin to run against the Attorney General before he is joined as a party. This settles issues 1, 3 and 4 in my view.

Concerning issue No. 2 whether the judge contradicted himself, the preliminary hearing was to determine whether the initial plaint was incompetent, bad in law and unsustainable. The learned judge ruled in the appellant's favour allowing him to adduce evidence to prove fraud against the respondents who did not include the Attorney General then.

As already pointed out above the law allows an amendment at any time even after the hearing has commenced for just disposal of a suit and crucially to prevent a multiplicity of suit. **See Gaso Transport Services (Bus) Ltd V. Martin Adala Obeno, SCCA No. 4 of 1994.** The Court retains a wide discretion in allowing amendments. I believe this is one of the cases in which the judge should have exercised such discretion. The web of the facts of this case does warrant a joinder of the Attorney General, I reiterate.

I consider the appellant has acted in good faith and with due diligence on discovering the new facts, according to the record.

Since my lords C.K Byamugisha, JA and A. Nshimye, JA, both agree, the appeal succeeds with costs.

Dated at Kampala this…**16th** ..day of…**July**…2010.

…………..…………………`

A.E.N MPAGI-BAHIGEINE

JUSTICE OF APPEAL

JUDGMENT OF HON. A.S.NSHIMYE, JA;

I have had the benefit of reading in draft the lead judgment of Hon Justice A.E.N. Mpagi-Bahigeine, JA.

I agree that the appeal be allowed with costs.

Dated at Kampala this …**16th ..**. day of …**July**…2010.

…………………….

A.S.NSHINYE

JUSTICE OF APPEAL