



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE MISC. APPLICATION NO.65 OF 2022
ARISING FROM LDR NO. 278/2016,
ARISING FROM KCCA/CENT/LC/093/2016

VICTORIA UNIVERSITY :.....: RESPONDENT
VERSUS

MATHIAS BBAALE :.....: CLAIMANT

15 **Before:**

The Ag. Head Judge Linda Lillian Tumusiime Mugisha

Panelists:

- 1. **Hon. Rose Gidongo**
- 20 2. **Hon. Charles Wacha Angulo**
- 3. **Hon. Beatrice Aciro Okeny**

RULING

25 This ruling is in respect of an application by chamber Summons, under section 33 of the
 Judicature Act, section 40 of the Labour disputes (Arbitration and Settlement) Act, 2006,
 Section 98 of the Civil Procedure Act Cap 71 , Order 6 rule 19 and 31 and, Order 1 rule 3,

10(2), Order 5, rules 18, and 32 of the Civil Procedure Rules S.I. 71, seeking the following orders:

1. Leave be granted to the Applicant to amend its memorandum in reply filed on 12/01/2017, in Labour Dispute Reference No.278 of 2016.
2. Leave be granted to the Applicant to file a Counter claim against the Respondent/Claimant.
3. A one Dr. Micheal Kakooza be added as a party to the Applicant's intended counter claim against the Respondent.
4. Service be effected on the said Dr. Micheal Kakooza by way of substituted service.
5. Costs of the application be in the cause.

The Grounds in support of the application were set out in the chamber summons and the Affidavit of Venkatachalam Ramaswamy Iyer, who deponed, that the Applicant instructed Nangwala, Rezida & Co Advocates to file its memorandum of claim in this court under LDR No. 278 of 2016, which was done. However, the Advocates did not follow her instructions and thus omitted to file a counter claim against the Respondent and to add a one Dr. Micheal Kakooza as a counter Respondent. The Applicant opted to withdraw instructions from this firm and instructed Mugisa, Namutale and Co Advocates instead, thus necessitating an amendment of its memorandum in reply, to make it more comprehensive by including a counter claim and to avoid a multiplicity of claims stemming from and related to the dispute now before Court. He averred that, the amendment would not prejudice the Respondent/Claimant and it will enable the Court to determine the real issues in controversy between the parties.

The Respondent opposed the Application, in his Affidavit in reply and stated that, after his unlawful termination, he filed his claim before the KCCA Labour officer Office in accordance with the law and the same claim was served on the Applicant, and it did not counter claim against him nor did it bring a counter claim during the period the matter was

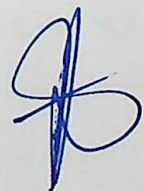
before the Labour officer. When the Labour officer failed to resolve the matter, he referred it to the Industrial Court as Labour Reference No 93 of 2016. When it was formerly
55 registered in this court, the Applicant never counter claimed.

On several occasions, the Applicant's new Counsel entered Court appearance in this matter, until the Respondent/Claimant took the witness stand and was cross examined. And it was only at this point that, Counsel for the Applicant brought to the attention of court a document allegedly forged by a one Dr. Micheal Kakooza, yet the Applicant did
60 not institute any claim against the said Dr. Kakooza even though he was one of its employees. According to him, the Applicant had opportunity to subject r. Kakooza to the laws that govern employee- employer relationships but she did not do so. That the counter claim which the Applicant is raising is a separate suit which cannot stand unless it originated from a matter before the Labour office and in this case it did not and it was not
65 referred to this court by the Labour Officer, therefore it cannot be entertained as a reference. He further averred that, the intended amendment was barred by law because this court does not have original Jurisdiction to entertain matters filed in it directly and it only entertains references from the Labour Officer. In the circumstances the amendment is an afterthought brought after the Respondent/Claimant's cross examination and if granted it
70 will be prejudicial to his case. In any case the counterclaim is barred by limitation as it is more than 6 years since the alleged forgery was imputed against the Claimant/Respondent. The Applicant did not file an Affidavit in rejoinder.

REPRESENTATION

The Applicant is represented by Mr. Peter Allan Musoke of M/s Mugisa, Namutale & Co
75 Advocates, Kampala and the Respondent by Mr. John Mike Musisi of M/s JM Musisi Advocates and Legal Consultants, Kampala.

RESOLUTION OF THE APPLICATION



1. Whether the Application has merit?

It was submitted for the Applicant that, court should exercise its discretion to grant it
80 leave to amend its memorandum in reply in accordance with Order 6 rule 19 of the Civil
Procedure Rules and Section 98 of the Civil Procedure Act, which preserve the inherent
power of Court to make orders as it deems necessary. He also relied on *Gas Transport
Services Obene [1990]* in which Tsekooko JSC(as he then was) was of the legal
proposition that, four principles had to be complied with before Court can exercise its
85 discretion to allow an amendment as follows:

1. *The amendment should not work injustice to the other side or cause an injury which cannot be compensated by award of costs.*
2. *Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.*
- 90 3. *An application made malafide should not be granted.*
4. *No Amendment should be allowed where it is expressly or impliedly prohibited by law e.g. limitations of actions.*

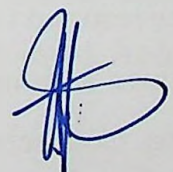
According to Counsel, in the Affidavit sworn by Venkataachalam Ramaswamy Iyer, the
Applicant demonstrated that this application will not prejudice the Respondent, because
95 the proposed amendment is intended to enable the court to determine the real issues in
controversy and no miscarriage of justice will be occasioned. This is because facts
surrounding his dismissal had not been included in the memorandum of reply. It was further
his submission that the amendment was intended to avoid a multiplicity of proceedings
because the Applicant claims fraud and forgery perpetrated by the Respondent together
100 with Dr. Micheal Kakooza and amendment is not in bad faith, because the hearing is at
tendering and hearing of evidence of the Respondent. He relied on **Muloowoza
&Brothers Ltd vs Shah & Co Ltd SCCA No. 26 of 2010** , for the legal proposition that
the correct law on amendment of pleadings is that they are allowed by courts “....so that

105 *the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities, in accordance with Article 126(2) (e) of the Constitution, unless this would prejudice the opposite party, which cannot be compensated by an award of costs, or unless the amendment would introduce a distinct cause of action in place of the original cause of action...*”

110 He reiterated that, the Applicant seeks leave to add a one Dr. Michael Kakooza as a party to the Applicant’s intended counter claim against the Respondent/Claimant and service of court process be effected on the said Dr. Michael by way of substituted service in accordance with Order 1 rule 10(2) of the Civil Procedure rules. It was his submission that the Applicant had demonstrated sufficient cause to file a counter claim for fraud and Forgery against the Claimant/Respondent and Dr. Kakooza since both generated the
115 Respondent’s appointment letter for the position of full lecturer forming the basis of the fraud and forgery. Therefore, Court should allow the Applicant to join him as a party/ Respondent to the counter claim against the Respondent to enable court effectually and completely adjudicate and resolve the questions involved. He relied on **Parombo Cotton farmers Ltd vs Uganda Ginners and cotton Exporters Association Ltd, HCMA No.**
120 **1073 of 2013.**

In Reply Counsel for the Respondent submitted that, on 6/10/2014, the Respondent was appointed as lecturer at the Applicant’s University for a duration of 2 years from 19/01/2015. He was unlawfully terminated leading him to report a complaint before a Labour Officer, who later referred the matter to this Court. He contested the application for
125 amendment on grounds that it was being brought at a time the Respondent is already at the witness stand.

According to Counsel “amend” is defined under Black’s law dictionary (8th Edition) at page 89 to mean:



130 *“To make right; to correct or rectify ... To fix a Clerical error ... To change the wording of; to formally alter.. by striking out inserting or substituting words..”*

At page 1191(supra) *“Amended pleading”* is defined as:

135 *“A pleading that replaces an earlier pleading and that contains matters omitted or not known at the time of earlier pleading.”- “An amendment is correction of error or supplementing of an omission in the process of pleadings. An amended pleading differs from supplementary pleadings in that the true function of the latter is to spread upon the record matter material to the issue which has arisen subsequent to the filing of the pleadings while matter of the amendment purely is matter that might have been pleaded at the time the pleadings sought to be amended was filed , but which through error or inadvertence was omitted or*
140 *misstated. It has been declared that allowance of amendments is incidental to the exercise of all judicial power and indispensable to the end of Justice.”*

According to Counsel, the above definitions clearly indicate that amendment of pleadings does include but is not limited to adding or striking out a party. He was in agreement with the principles to be followed by court as set out in **Gaso Transport Services(Bus) Ltd vs**
145 **Martin Obene (supra)** and the earlier case of **Copper vs Smith [1884] 26CHD700**, but he emphasized that the application should not be malafide and it should not occasion prejudice or injustice to the other party which cannot be compensated by costs.

He argued that the instant application was intended to prejudice the Respondent because it was brought in advanced stages of the Respondent’s case when he was at the witness
150 stand and after the Applicant’s Counsel failed to break him down during cross examination, that he resorted to a fishing expedition. He further submitted that the application intends to introduce a former employee on whom the Applicant has never instituted any labour claim against. Counsel cited Mulla’s Code of Civil Procedure 18th edition at page 55 of 110, for

155 the legal proposition that an amendment should not be allowed in the following circumstances:

a. *Where the Amendment is not necessary for purposes of determining the real question in controversy between the parties as where*

160 1. *Merely technical in a way that if after the evidence of the plaintiff has been taken, the defendant applies for an amendment merely for purposes of enabling him raise a purely technical objection to the plaintiff right to sue, the application should be rejected or*

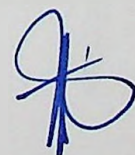
2. *Useless and of no substance .*

b. *When the plaintiff's suit will be wholly displaced by the proposed amendment*

165 c. *Where the amendment is to introduce a totally different, new and inconsistent case and the application made at the last stage of the proceedings.*

He also cited **Margaret Nabatanzi & Another vs Namutebi Stella & Anor Misc. Appln. No 468/2016**, in which it was stated that, Court will not exercise its discretion to allow an amendment which constitutes a distinct cause of action for another or change by means of amendment ,the subject matter of the suit. In this case Justice Namundi rejected the application because it was a counter claim which was based on a plaint/claim which was bad in law. Therefore, even if all documents are intended for the proper administration of Justice, and amendments are acceptable in law, they cannot be allowed where they distinctively substitute a cause of action for another or where they change the subject matter of the suit.

175 He insisted that, the Respondent's case is based on unlawful termination of his employment with the Applicant and the Applicant denied liability but never pleaded facts that point to forgery by either the Respondent or any other person yet the intended amendment intends to introduce forgery against the Respondent and a one Dr. Kokooza, who was its Human Resources Manager at the time the Claimant was appointed. According



180 to Counsel this amendment is totally different from the Respondent's claim, therefore it has no basis, to stand.

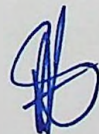
Counsel insisted that the amendment was prejudicial to the Respondent because it has come at the point where the Respondent has already taken the stand and testified, therefore it is an injustice.

185 He argued that this Court under section 8 of the Labour Disputes (Arbitration and Settlement) Act, 2006 bestows referral Jurisdiction on this Court, therefore the court only has jurisdiction over references made to it from the labour officer and has no original jurisdiction to entertain matters in its original Jurisdiction and the counterclaim which the applicants intend to introduce never went through the same process, therefore it cannot stand in law. He relied on **Mohan Musisi Kiwanuka vs Aisha Chand SCCA No. 14 of 2002**. He further submitted that the court was a specialized court that deals with employment matters and matters directly connected with Employment and arising from the Employment relationship as provided by law. Therefore, by Court allowing this application it will be assuming jurisdiction, which is not conferred on it by law, jurisdiction
190 being a creature of statute. He relied on **Uganda Telecom Limited vs Adratere Oreste, Misc. Appln. No. 0021 of 2015**.

Lastly he submitted that, the Counterclaim by the Respondent was barred by limitation and cannot therefore be entertained. According to Counsel, section 3(1) of the Limitation Act prohibits the bringing of actions based on contract after the expiry of 6 years from the date
200 the action arose. He insisted that the Applicant's letter dated 20/05/2016 marked 'R1' in its reply to the complaint before the Labour officer stated that the Respondent's contract was forged, and it was written 6 years ago.

He prayed that the application is dismissed because it was prejudicial to the Respondent.

In rejoinder, the Applicant averred that, the Respondent's definition of "amendment" amounted to an admission to the amendment and argued that, although he demystified what governed the exercise of discretion in allowing amendments, he did not demonstrate how he would be prejudiced by the proposed amendment. He averred that the amendment is intended to enable this court to determine the real question in controversy between the parties and specifically the facts surrounding the Respondent's dismissal, application, recruitment, contract signing and remuneration. He insisted that the issue of regarding the forgery and fraud was not an afterthought, because the Applicant has always taken issue of it and denied the issuance of the Respondent's contract of employment as evidenced under Annexure "A" and the Applicant ably demonstrated that its former lawyers did not plead forgery and fraud by the Claimant and a one Dr. Kakooza, yet it was a controversial question relevant to this dispute. Therefore, the amendment is related to the exercise of this court's judicial power. He relied on **Bright Emmanuel vs grand Victoria LDC No. 107 of 2018**, and insisted that, the allegations of fraud and forgery are central to the holistic determination of the claim and the resolution of the counter claim which is connected to the dispute between the parties which was referred to this court will avoid a multiplicity of claims. He further submitted that this court in **Industrial Promotion Services vs Nelson Kasingye & Another LDR No. 001 of 2022**, held *that where a matter is referred to this court by a labour officer, the court deals with it as if it was not entertained by the labour officer at all, that is why the parties are required to file fresh pleadings and the original complaint before the labour officer is not a pleading in this court.* He also cited **Eric Mugenzi vs Uganda Electricity Distribution Company Ltd (UEDCL)CA No. 157/2018**, in which the Court of Appeal, stated that although this court is not bound by the CPR, it is not barred from applying it especially where there is a lacuna in the Employment Legislation and **Justice Asaph Ntengye & Another vs Attorney General Const. Petition No. 33 of 2016**, in which it was held that this court has concurrent jurisdiction with that of



230 the High Court therefore it is vested with jurisdiction as vested under section 139(1) of the
Constitution of Uganda 1995(as amended).

Counsel insisted that the fraud and forgery alleged against the Respondent arise out of the
contract of employment on which his claim is based, therefore the counterclaim which is
based on the contract is not time barred, because time began to run when the contract in
235 issue was shown to the Applicant.

DECISION OF COURT

Whether the Respondent should be granted leave to amend her Memorandum in Reply?

We have carefully considered and analyzed the Application, the Affidavits in support and
240 opposition and the submissions of both Counsel and find as follows:

It is a principle of justice that every case, must be determined on its merit and courts, as
vehicles of justice should be slow to turn away a litigant or case without a hearing them,
unless of course, there are good reasons not to do so. It is for this reason that **Article**
126(2)(e) of the 1995 Constitution enjoins Courts to administer substantive justice
245 without undue regard to technicalities. Equally, the courts are given inherent and limitless
powers under section 98 of the Civil Procedure Act “...to make such orders as may be
necessary for the ends of justice or to prevent abuse of the process of the court.” Section
33 of the Judicature Act also empowers the High Court to grant such remedies as may be
just in the circumstances of any case.

250 **Order 6 Rule 19 of the Civil Procedure Rules as amended** provides that:

*“Court may at any stage of the proceeding allow either party to alter or amend his or her
pleadings in such a manner and on such terms as may be just and all such amendments*

shall be as may be necessary for the purpose of determining the real questions in controversy between the parties”.

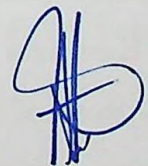
255 The principles governing amendment of pleadings are well settled as follows:

1. That the amendment does not work injustice to the other side, an injury which cannot be compensated for by award of costs.
2. That the amendment as far as possible avoids a multiplicity of proceedings should be allowed.
- 260 3. An application made mala fide should not be granted.
4. No Amendment is not expressly or impliedly prohibited by law e,g limitations of actions. (See **Gasu Transport Services vs Martin Obene [1990](supra)**)

Indeed, this Court is dressed with discretion to grant orders for the amendment of pleadings so that, the real question in controversy between the parties is determined and justice is administered without undue technicalities.(see **Muloowoza & Brothers Ltd vs Shah & Co Ltd SCCA No. 26 of 2010**). Therefore, for an applicant to succeed in an application for amendment the amendment sought should meet the principles governing amendment as stated in **Gasu Transport Services (inbid)** and most importantly it should not *prejudice* the opposite party, which cannot be compensated by an award of costs, and it should not introduce a distinct cause of action in place of the original cause of action...” The Applicant relied on **Mulwooza Brothers(supra)** in support of its argument that an amendment could be allowed at any time of the proceedings if it complied with the principles elucidated in **Gasu Transporters(supra)**. It is not in dispute that amendment of pleadings can be allowed at any time of the proceedings if they are not prejudicial or where they do not cause an injustice to the opposite party, that cannot be compensated by an award of costs or where they introduce a distinct cause of action in place of the original cause.

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Prejudice is defined by Black's law Dictionary 11th edition as '*1. Damage or detriment to one's legal rights or claim ..*

280 *Prejudicial: A condition that if shown by a party, will usu. defeat the opposing party's action esp. a condition that if shown by the defendant will defeat a plaintiff's motion to dismiss a case without prejudice...*"

Has the applicant fulfilled the principles for granting this application?

The Applicant's assertion that the Contract on which the Respondent's claim is based was
285 obtained through forgery and fraud thus requiring this court to consider a counter claim of fraud and forgery, requires a high standard of proof yet even if it were to be considered under civil liability yet as rightly submitted by Counsel for the Respondent, this Court is a specialized Court with Jurisdiction to handle labour disputes which are decided on the preponderance of evidence on a balance of probabilities. Labour disputes involve
290 employees and employers and the employment relationships between them and their resolution is governed by the Employment Act among other laws.

The main issue in controversy in the main claim is whether the Claimant/Respondent was unlawfully terminated by the Applicant/Respondent? Therefore, the existence or otherwise of a contract or whether it is authentic or not is a matter of evidence, the determination of
295 which need not be brought by counter claim on fraud and forgery, as the Applicant seeks to do in this application. The proposed Counter claim of forgery and fraud in our considered view substantially changes the character of the cause of action because fraud and forgery must be strictly proved, and the burden to do so is heavier than proof on a balance of probabilities applied in the resolution of labour matters which are civil in nature(
300 see **Kampala Bottlers ve Damanico (U) Ltd SCCA No. 22 of 1992**. Considering the provisions of the Employment Act under sections 66, and 68, the employer is justified in moving against an employee who is suspected of committing any infraction that the

employer believes breaches trust and confidence, and this is not necessarily proved beyond reasonable doubt, but on a balance of probabilities.

305 We have had an opportunity to peruse the memorandum of reply on the record in the main claim and established that the Applicant denies ever issuing the contract which the Respondent adduced as evidence of his employment and but it did not plead forgery and fraud, nor was anything regarding forgery and fraud placed on the record before the Labour Officer.

310 The record on the main file, indicates that, the Labour Officer referred the Respondent's complaint to this Court on 10/11/2016, the Respondent filed his memorandum of claim on 8/12/2016 and the Applicant /Respondent filed it reply 12/01/2017. Both parties filed separate Scheduling notes on 26/11/2021 for the Respondent/Claimant and 29/11/2021 for the Applicant /Respondent respectively. The matter was set down for hearing and on 315 6/12/2021, the Claimant/Respondent took the stand as a witness and was cross examined by counsel for the Respondent. Trial by ambush has long been outlawed by the requirement that parties must be apprised of the others case, evidence to be relied on as a basis for ensuring the right to a fair hearing is upheld. This is the reason parties are required to have a Joint scheduling conference resulting in a Joint scheduling memorandum which lays out 320 their individual cases, the witnesses that will be cross examined, the documents to be relied on, prior to the hearing. The Respondent did not at any point indicate that it intended to apply to amend its reply or to join another person as a party to this suit. In any case the Respondent did not indicate in its own scheduling notes that it intended to apply to amend its reply to include a counterclaim on fraud and forgery or to join another party.

325 We are not satisfied with the submission by the Applicant that, their initial, lawyers Nangwale, Resida & Co Advocates failed to follow their instructions by omitting to file the counter claim against the claimant and Dr. Kakooza among other facts that new counsel states in the affidavit in support as being essential to this case, because new Counsel took



over conduct of this case on 4/08/2021 and were always aware of these matters before the
330 commencement of the hearing, but they took no steps to bring them to the attention of
court, or raise the need or requirement for them to amend the Respondent's memorandum
of reply and only woke up on 6/12/2021 after the Claimant/Respondent had taken the
witness stand and commenced his testimony in cross examination. In **Eastern Bakery vs
Caetelino** which was cited in **Muloowoza & Brothers Ltd vs Shah & Co Ltd SCCA No.
335 26 of 2010**, Sir Kenneth O'Connor stated that:

*"[A]mendments to pleadings sought before the hearing (emphasis ours) should be
freely allowed if they can be made without injustice to the other side and ... 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...."*

340 **Article 28 (1) of the Constitution of the Republic of Uganda** guarantees the right to a
fair trial in all civil or criminal matters. For the realization of this right, all parties,
including courts have the responsibility of ensuring that proceedings are carried out
expeditiously in a manner consistent with the Law.

Therefore, by the Applicant/Respondent in the instant case waking up during Cross
345 examination of the Respondent /Claimant, to seek leave to amend its Memorandum in
Reply to add a counter claim and a party, on grounds that its previous Counsel made a
mistake is not only in violation of Article 28 of the Constitution(supra) but is dilatory
conduct on the part of the Applicant as stated in **Capt. Phillip Ongom vs Catherine Nyero
Owota SCCA No. 14 of 2001**, where Justice Mpagi-Bahigeine(JSC as she then was) agreed
350 with Justice Mulenga (JSC RIP) and stated that:

*"It would be absurd or ridiculous that every time an advocate takes a wrong step,
thereby losing a case, his client would seek to be exonerated. This is not what*

litigation is all about. Counsel applied a wrong strategy....no sufficient cause has been shown to entitle the applicant relief sought... ”

355 We reiterate that the Applicant’s new Counsel had sufficient time to raise any objections and amendments before the commencement of the hearing of the main suit, but they took not steps to do so and only waited until the Respondent took the stand and started cross examination. In our considered view the application for amendment at this point is in total breach of the principles of fair trial as already discussed above.

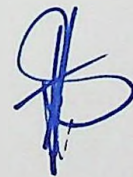
360 We are not satisfied that the Applicant has demonstrated that the proposed amendment will enable this court to fully determine the matter before it in the main claim, it will avoid a multiplicity of claims, this is because the proposed counter claim as already discussed, would substantially change the character of the cause of action and to allow it at this time when the Respondent has already taken the witness stand and testified, would render an
365 injustice to him which cannot be compensated by an award of costs. We are inclined to agree with Counsel for the Respondent that, the application was an afterthought brought in bad faith with the intention of delaying justice and it amounts to dilatory conduct on the part of the Applicant.

370 Even if court has the discretion to allow amendment of the pleadings of any party at any stage of the hearing, it would be absurd and ridiculous for this court to entertain this application after the commencement of Claimant’s cross examination.

We therefore find no merit in the Applicant, it is dismissed with costs to the Respondents.

Delivered and signed by:

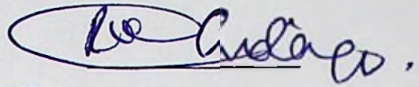
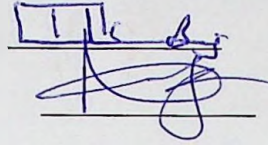
Hon. Ag. Head Judge Linda Lillian Tumusiime Mugisha



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Panelists

1. Hon. Ms. Rose Gidongo
2. Hon. Charles Wacha Angulo
3. Hon. Beatrice Aciro Okeny

380 DATE: 13/10/2023.

INDUSTRIAL COURT OF UGANDA