THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA,
MISCELLANEOUS APPLICATION NO. 37 of 2023
(Arising From Labour Dispute Reference No.040 of 2022 And KCCA Labour Dispute No. 317 of 2020)

KASOZI RONALD & 18 OTHERS::APPLICANT

VERSUS

UGANDA BAATI LTD:: RESPONDENT

Before:

The Hon. Mr. Justice Anthony Wabwire Musana

Panelists:

1. Hon. Jimmy Musimbi,
2. Hon. Robinah Kagoye &
3. Hon. Can Amos Lapenga.

Representation:

1. Mr. Simon Musana of M/s. Tumwebaze, Kasirye & Co. Advocates for the Applicants
2. Ms. Sheila Nabaale & Mr. Asiimwe Taremwa of M/s. Shonubi & Co. Advocates for the Respondent

RULING

Introduction

[1] By motion, under Order 6 Rules 19 and 31 of the Civil Procedure Rules S.I 71-1*(from now CPR),* the Applicants sought leave to amend their memorandum of claim to include an additional prayer for a declaration of unfair, unlawful or illegal collective termination. The application was supported by the affidavits of David Katwaza, sworn on the 24th of March, 2023. He deposed to the discovery of some facts on the alleged restructuring at the time of their termination from the annexures to the Respondent's memorandum in reply, which required several additional

prayers. They had made generalized claims for underpayment of overtime and unpaid accrued annual leave. It was also averred that the intended amendments put the claim in a proper perspective and did not substitute the earlier claims before the court. Mr. Katwaza also deposed the amendment, which was intended to avoid multiplicity suits.

[2] The Respondent opposed the application. In her affidavit in reply, Rachel Ateenyi Kivuna, the Respondent's Legal and Compliance Manager, averred that the application for amendment sought to change the nature of the Applicant's claim and introduce a new cause of action not previously pleaded. The Applicants should have perused the pleadings to determine what was maintained and that utilizing information gathered during mediation was legally barred.

[3] In the affidavit in rejoinder, Mr. Katwaza doubted the filing of the affidavit in reply on 20th April 2023. Regarding information gathered at mediation, Mr. Katwaza deposed that the information had been obtained at the mediation proceedings before the Labour Officer. He also deposed that the issue of the legality of termination was pleaded in the memorandum in reply. Unlawful and illegal termination were not new claims; the claim was still termination and entitlement arising from termination.

Submissions of the Applicant

[4] Mr. Musana, appearing for the Applicants submitted on the authority of **Mulowoza Brothers Ltd v N. Shah & Co Ltd SCCA No. 26 of 2020,** that amendments should be freely allowed to determine the real question in controversy without undue regard to technicalities except if it causes an injustice which cannot be compensated by costs or introduces a new cause of action. Counsel submitted that the Respondent introduced new facts in its reply to the memorandum of claim. Other facts were introduced at mediation. Counsel suggested that the proposed amendments correctly defined the nature of claims before the Court, precisely defined and narrowed the dispute on underpayment of overtime, and did not substitute the original cause of action.

[5] On failure to file an affidavit in reply, Mr. Musana submitted that the Respondent did not file its affidavit by the 20th of April 2023, as directed by the Court. In his view, the uncontroverted facts had been accepted. He buttressed this point on the decision of **Wasswa v Achen [1978] HCB 297.**

Submissions of the Respondent.

[6] Learned Counsel for the Respondent submitted that the principles governing amendment of pleadings included not working injustice to the other side, avoiding multiplicity of proceedings, absence of malafides and an amendment ought not to be allowed where any law expressly prohibits it.[1] Counsel also cited the case of **Mulowooza Brothers v Shah Ltd, SCCA No. 26 of 2010,** in support of the proposition that the test is whether the proposed amendment introduces a distinct new cause of action instead of the original. Counsel submitted that the Applicants sought to introduce the claim that they were illegally, unfairly, unlawfully and wrongfully terminated. Ms. Kivuna deposed that the original claim was for calculating terminal dues. It was submitted that the proposed amendments were new causes of action, significantly changing the character of the Applicants' suit. Counsel distinguished the **Mulowoza Brothers case** in that case, the Court dealt with the introduction of additional facts. Relying on **Bright Chicks Uganda Ltd v Dan Bahingine HCMA No. 254 of 2011** and **Mbayo J. Robert v Electoral Commission & Anor Election Petition No. 7 of 2006**, Counsel submitted that amendment cannot be allowed if it introduces a new inconsistent cause of action or occasions injustice to the other party.

[7] Regarding the mediation proceedings, it was submitted that discussions forming part of mediation proceedings are inadmissible as evidence and confidential under Rule 18 of the Judicature (Mediation) Rules, 2013. Counsel cited **Oola Peters & Others v Lanen Mary H.C.C.A No. 18 of 2017** for the proposition that what is said in mediation cannot be used in the adjudicatory process.

Submissions in rejoinder

[8] It was submitted in rejoinder that the affidavit in reply was smuggled onto the Court record on the 9th of May 2023, and the Court Stamp backdated to the 20th of April 2023. The Applicant also contended that the Respondent's written submissions were filed in Court on the 6th of June 2023 and served on the Applicants Counsel on the 12th of June 2023. Counsel distinguished the case of **Dr. Lam Lagoro James v Muni University**[2] on the ground that, in that case, the filing of a late reply was before the hearing date, and there was no breach or contempt of court filing directives.

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[1] Counsel cited Sarope Petroleum Ltd v Orient Bank & 2 Ors H.C.MA 72 of 2011, Gaso Transport Ltd v Obene [1990-1994] EA 88
[2] Miscellaneous Civil Cause No. 7 of 2016) [2017] UGHCCD 85 (15 June 2017)

[9] It was also submitted that Order 6 Rule 19 CPR does not bar an amendment introducing an additional cause of action provided the original cause of action is retained. Counsel cited the case of **Ham Enterprises Ltd & 2 Ors v Diamond Trust Bank (U) Ltd & Anor S.C.C.A No. 13 of 2021** in support of this proposition. Counsel argued that the *Sarope* and *Mbayo* cases cited by the Respondent supported the amendment and contended that the legality of termination was in contention from the pleadings.

[10] On the alleged delay in amending the claim, it was argued that the Respondent was hiding some information that became apparent at mediation. Counsel cited the **Ham case** in support of the proposition that illegality can be raised at any time and overrides pleadings. Counsel also contended that the partial consent entered with the 6th Claimant required an adjustment of the claim.

[11] On the matter of information disclosed at mediation, it was submitted for the Applicants that the rule did not apply to information that would be required to be disclosed in the main suit proceedings. Counsel distinguished the **Oola case** on this ground. Finally, it was submitted that since the Respondent conceded to specific errors, the mistakes of Counsel should not be visited on the litigant.

Analysis and Resolution

Preliminary points

[12] Regarding filing the affidavit in reply out of time, this Court issued filing directions on the 14th of April 2023. The Respondent was directed to file and serve the affidavit in reply by the 20th of April, 2023. The Applicant was required to rejoin with written submissions on the 28th of April 2023, to which the Respondent was to reply by 5th May 2023. A rejoinder was to be on the record by the 12th of May 2023 for the coram to be held on the 2nd of June 2023. The history of the registry file shows the following filings:

(i) The Respondent filed an affidavit in reply on the 20th of April 2023.
(ii) The Applicants filed their submissions on 2nd May 2023.
(iii) The Applicants' affidavit in rejoinder was filed on 16th May 2023.
(iv) The Respondent filed its submissions on the 6th of June 2023 and
(v) The Applicant filed its submissions in rejoinder on the 15th of June, 2023.

Except for the affidavit in reply filed on the 20th of April 2023, all the other pleadings and submissions were filed outside the timelines set by this Court.

Timelines set by statute or ordered by the Court are not set in vain. Court orders are to be obeyed. This is a central tenet of the justice system. The consequence of non-compliance with the filing orders would ordinarily be that the pleadings and submissions filed out of time would be expunged from the record.[3] The Supreme Court of Uganda was much more scathing of this conduct in the **Mulindwa George William v Kisibika Joseph S.C.C.A No. 12 of 2014.** The Court observed that it would be an absurdity for litigants to walk into Court and file pleadings at leisure in anticipation that Courts would validate them. The Court noted that even markets have days when they are open and close and times they operate. Put otherwise, timelines are to be obeyed. The submissions of Counsel for the Applicant were that they had not been served with the affidavit in reply on the 2nd of May 2023. The Respondent contended on the authority of **Lam Lagoro v Muni University**[4] that affidavits in reply may be filed at any time. We, with respect, do not find Counsel's view accurate. The order by this Court was for the affidavit to be filed by the 20th of April 2023. Following such an order, it would not be open to a party to file any pleading at any time. It is quite possible that the filing schedule was distorted by either late filing or service. Neither of the parties filed any affidavits of service. Given that both parties are culpable for late filing, we shall not, on this occasion, impose any sanction. This Court validates all pleadings and submissions by exercising our discretion and in the interest of justice.

[13] Regarding disclosures at mediation, it is trite that mediation matters are not to be used in the main trial. We agree with the dicta of Mubiru J in the *Oola* case as cited by Counsel for the Respondent. We think that the attempt to import facts from the mediation process, while these facts were not spelt out, is not within the realm of fair process. By attempting to justify the reliance on Rule 18(2) of the Judicature (Mediation) Rules 2013, Counsel for the Applicants was not forthright. Confidentiality is at the centre of the mediation process. As rightly pointed out by His Mubiru J, mediation cannot survive without true confidentiality. The very essence of mediation is that a party may not reveal any particulars obtained at mediation later at trial. We note that both Counsel did not point us to any particular facts arising from the mediation process that are now the object and purpose of the amendment. Paragraph 11 of Mr. Katwaza's affidavit in support points to the documents D1, D2, and D3, which were not attached. We think such an approach to be barred by the rules of confidentiality, but absent specific facts, we can only return to this point in our decision on the costs of this matter.

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[3] See Stop and See(U) Ltd v Tropical Arica Bank Ltd H.C.M.A No. 333 of 2010

[4] Miscellaneous Civil Cause No. 7 of 2016) [2017] UGHCCD 85 (15 June 2017)

[14] Regarding the inordinate delay in filing the application for amendment, Order 6 Rule 19 CPR empowers Court to permit the amendment of pleadings at any stage of the proceedings. Counsel for the Respondent cited the **Makubuya Enock v Umeme Ltd (supra)** in support of the proposition that the Applicants had applied more than six months after the main claim was filed. The *Makubuya* case concerned an application to adduce fresh evidence in an appeal before the Supreme Court. In this context, the Supreme Court found this delay to be dilatory conduct. Conversely, Order 6 Rule 19 CPR provides for the amendment of pleadings at **any stage of the proceedings.** The latitude of this rule permits for amendment of pleadings. Further, in the South African case of **Trans-Drakensberg Bank Limited v Combined Engineering & Anor[1967] 4 All SA(D),** the Court held that a delay by a litigant in bringing a formal application to amend in itself was not a ground for refusing the amendment unless the Respondent could show prejudice.[5] The Respondent's submission that inordinate delay is one of the grounds for denial of grant of leave for amendment is deprived of any force by the clear authorities. It is not one or any of the considerations in exercising the Court's discretion in granting leave, as the Respondent would have us believe. Accordingly, we would overrule the objection on this point.

Resolution of the merits

[15] The principles regarding a grant of leave for amendment of pleadings are well settled. Wamala J. set out a summary of the principles governing the exercise of the Courts's discretion in the case of **Okello Wilbert v Obel Ronald** (ibid). They include:

(a) Amendments are allowed by the Courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities.

(b) An amendment should not work injustice to the other side. An injury that an award of costs can compensate for is not treated as an injustice.

(c) Multiplicity of proceedings should be avoided as far as possible, and all amendments which avoid such multiplicity should be allowed.

(d) An application that is made malafide should not be granted.

[5] Cited in Okello Peters & Ors v Abacus Parenteral Drugs Ltd H.C.M.A No. 35 of 2022

(e) No amendments should be allowed where any law expressly or impliedly prohibits it.

(f) The court shall not exercise its discretion to allow an amendment that has the effect of substituting one distinctive cause of action for another. [6]

Cause of action

[16] As a starting point, we are of the mind to consider whether the Applicants introduce a new cause or causes of action. In the memorandum of claim filed on the 14th day of March 2022, the Applicants stated their claim as follows:

> *" The Claimant's claim against the Respondent is for declarations, declaratory orders, special damages, general damages, costs of the suit arising out of illegal deduction and erroneous calculation or computation of the claimants' terminal benefits at the time the respective services with the Respondent were determined."*[7]

Mr. Katwaza attached a copy of the intended amended memorandum of claim to his affidavit in support. It was annexure 'E.' It contained the following intended amendments:

> *"3. The Claimants claim against the Respondent is for declarations, declaratory orders, special damages, general damages, costs of the suit and interests arising out of unlawful, wrongful, illegal and unfair collective termination, illegal deduction and erroneous calculation or computation of the claimants' terminal benefits at the time the respective services with the respondent were determined.....*
>
> *d) In or about August 2020 the respective services of the Claimants were terminated on the purported account of restructuring, and the Claimants had reasonable expectation that, the terminal or the benefits that the Respondent undertook to pay under the termination letters for the period of service were to be computed in accordance with the formula under the prevailing terms and conditions under the collective bargaining agreement. .....*

[6] See also Eastern Bakery v Castelino [1958] 1 EA 461

[7] See paragraph 3 of the Memorandum of Claim in LDR 040 of 2022

g) The 2nd, 4th, 5th, 7th, 8th, 10th, 12th, 15th, 16th and 18th Claimants at the time of termination had an untaken and an unpaid annual leave allowances for the period between 2003 and 2011 which attracted interest or ought to have been computed at the prevailing salary scale at the date of termination.

8. The 2006 up to 2016 the 1st,3rd, 5th,6th, 7th, 8th, 10th,11th, 12th, 16th and 18th Claimants at the time of termination had an untaken and an unpaid annual leave allowances for the period between 2003 and 2011 which attracted interest or ought to have been computed at the prevailing salary scale at the date of termination.

[17] In the response to the memorandum of claim at paragraph 4.2 the Respondent contends that the Applicants' terminations were lawful. In paragraph 4.3, the Respondent argued that the restructuring exercise was valid and conducted per the law and prevailing Collective Bargaining Agreement (CBA). Based on the lawfulness of the terminations, the Respondent contends that the Applicants were paid correctly computed severance pay, salary and allowances. They received due notice, took all leave, and were not entitled to gratuity and overtime. In rejoinder, in paragraphs 2 and 5 of the Reply to Response to the Statement of Claim, the Applicants raise the illegality of terminations in breach of the CBA. And finally, in paragraph 9(a), the Applicants' Counsel, being as circumspect a pleader as possible, widened the scope of the pleadings by seeking additional prayers thus:

" The Claimants repeat prayers in the statement of claim with additional prayers for

a) Declaration that the Respondent unlawfully and illegally terminated the respective employments of the claimants.

b) Declaration that the respondent violated the right and freedom of association of unionized workers.

c) Damages for breach of the collective bargaining agreement and clear provisions of law.

d) *Claimants be reinstated."*

[18] In our view, the Applicants' claim, has at all times, arisen from their termination of employment with the Respondent. The declaratory orders sought in paragraph 3 of the memorandum of claim relate to terminal benefits out of the employment contract and its termination. In response to the memorandum of claim, the Respondents raise the lawfulness of the termination. In their rejoinder, the

Applicants make specific prayers for declarations of unlawful or illegal termination. The claims are, therefore, inextricably linked to the lawfulness of the termination and could not be said to be distinct causes of action. It is impossible to say that a claim for miscomputation of terminal benefits is delinked from a declaration that the termination was unlawful, particularly considering the additional prayers sought in reply to the response to the statement of claim. These other prayers may not have necessitated the application for amendment as it is now only sought to add these prayers to the main claim. The rights sought to be enforced in the claim arise from the employment contract or relationship.

[19] We are satisfied that the Applicants have not introduced a new or distinct cause of action and that permitting the amendment would allow for the parties and the Court to address all matters in controversy between the parties. We are fortified in this view by the decision of the Industrial Court in the case of **Oyuko Moses v Centenary Rural Development Bank,**[8] where the Court noted that the introduction of a discrimination claim justified the origin of a claim for alleged unfair dismissal. In this regard, the **Mulowoza case** cited by both parties would be distinguishable. There is no smuggling of a new cause of action or a substantial change in the nature of the claim.

[20] In our view, the resolution of the question on cause of action addresses two other considerations for a grant of leave to amend pleadings. Firstly, it caters to avoiding a multiplicity of proceedings or suits. Secondly, it would address the fundamental question of controversy between the parties. We do not think it necessary to venture further into these two considerations from this purview.

Express of Implied Prohibition

[21] We were not addressed, nor did we find any specific provision of law that expressly or impliedly bars the Applicants' intended amendment. The action would not be barred by any statute of limitation. Additionally, having established that the prayers for declaratory relief on the termination's lawfulness were included in the response to the memorandum of claim, the consideration of the question of prohibition would merit no further comment by this Court.

Prejudice

[22] The Respondent contended that the Applicants were deceitful in suggesting they were unaware of the reason for exit until mediation. For this reason, the

[8] LDMA 130 of 2018 Per Ntengye Chief Judge, Tumusiime Mugisha Head Judge, Panellsts Rwomushana, Gidongo and Wanyama

application was not made in good faith. Counsel coupled it with the submission that the mistake of Counsel was not demonstrable. There is some grain in this argument. We found that the declaratory relief now sought in the intended amendment was included in the reply to the response to the memorandum of claim. Therefore, at the date of filing the reply, by making the additional prayers for a declaration of unlawful and illegal termination and violation of the right and freedom of association of unionized workers, Counsel for the Applicants was aware of the reason for termination. The averments in Mr. Kataza's paragraph 4 of the affidavit in support, which was repeated in paragraph 4 of the supplementary affidavit, confirm this position. We are satisfied that there appears to have been some mistake by Counsel in the original memorandum of claim, which Counsel attempted to correct on filing the reply to the response to the Claim. The difficulty is that the Respondent did not show this Court with precision the prejudice that the intended amendment would cause. In any event, the same would be addressed by exercising a right to reply and granting an order of costs of the application to which we shall return.

Malafide

[23] Malafides refers to an act done with bad faith or without honest intentions. It can also refer to a person who acts in bad faith. Mala fide actions are often malicious and done with the intent to harm others. We do not think the intended amendment intends to harm the Respondent in any manner. The trial is intended to address the parties' grievances and offer redress, as it shall.

Conclusion

[24] Ultimately, this Court exists and sits to decide matters of controversy, to determine the real questions between the disputants. We are satisfied that granting an amendment will enable the Court to determine the dispute between the parties.

Costs of the Application

[25] We suggested that we would return to the matter of good faith, injustice, and prejudice. Our dicta in **Joseph Kalule v GIZ**[9] regarding costs is that in employment disputes, costs are the exception rather than the rule. In that case, we observed that costs may be awarded against a party for misconduct. The element of confidentiality in Rule 18 of the Judicature (Mediation) Rules 2013 ought to be maintained. It is improper for a party to disregard an explicit provision of the law.

[9] LDR 109 of 2020

For this reason, we think it appropriate to grant the Respondent costs of this application in any event.

Decisions and Orders of the Court

[26] For the reasons above, the Applicants are granted leave to amend the memorandum of claim. The same shall be filed in Court within seven days from the date of this order. The Respondent shall file a reply within seven days from the date of service of the amended claim. The Respondent shall have taxed costs of the application in any event.

It is so ordered and dated at Kampala this 30th day of August 2023.

Anthony Wabwire Musana,
Judge, Industrial Court

THE PANELISTS AGREE:

1. **Hon. Jimmy Musimbi,**
2. **Hon. Robinah Kagoye &**
3. **Hon. Can Amos Lapenga.**

Ruling delivered in open Court this 30th day of August 2023 at 9.52 a.m. in the presence of:

1. For the Applicant: None
2. For the Respondent: Ms. Sheila Nabbaale

Court Clerk: **Mr. Samuel Mukiza.**

Anthony Wabwire Musana,
Judge, Industrial Court