THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISCELLANEOUS. APPLICATION 368 OF 2020

(Arising from CS 254 of 2017 & Originating Summons No. 2 of 2018)

1. **FRANCIS NEKUUSA**
2. **STELLA NEKUUSA ::APPLICANT**

VERSUS

1. **STEPHEN ZIMULA**
2. **MMAKS ADVOCATES::RESPONDENT**

BEFORE JUSTICE RICHARD WEJULI WABWIRE

RULING

The Applicants seek for orders that the 1st and 2nd Respondents be added as defendants in Civil Suit No. 254 of 2017 and Originating Summons No. 2 of 2018 and that costs be in the cause.

The two suits are for recovery of money by Diamond Trust Bank (DTB) from the Applicants.

The Application is premised on grounds stated in the Affidavit in support deponed by Francis Nekuusa, but in summary are that the Applicants have discovered new evidence incriminating Stephen Zimula (a partner in MMAKS Advocates) and MMAKS Advocates, which makes it imperative that both are added as defendant parties to the main suits.

He avers that the Respondents were involved in forgery of documents which were intended to cause unlawful sale of the Applicants' mortgage securities and that therefore the inclusion of the Respondents as defendants will enable the Applicants /Defendants to ably prosecute their defence in Civil Suit No. 254 of 2017 and in Originating Summons 2 of 2018.

In their elaborate averments to illustrate and support their proposition, they Applicants stated that;

- there is need to cross examine the Respondents concerning documents which the Applicants believe were fraudulently authored by the Respondents.

- the Respondents are required to answer questions regarding acquisition of the Applicants' Bank account information by which the Applicants believe the Respondents must have

participated in the fraudulent transactions on the Applicants' Bank account.

- the Respondents fraudulently and illegally tried to sell off the Applicants mortgage securities.

The Respondents contested the Application and averred that it was brought in bad faith and was only intended to delay the trial process of the main suit and that the Affidavit in support of the Application was full of falsehoods. They controverted the allegations of forgery of the 1st Applicant's signature and denial by the applicant of prior knowledge of the letter of 13/9/2016.

They further averred that the issues raised in the Application were *res judicata,* because Court had already pronounced itself on the impugned letter of 13/9/2016 and that whereas the said letter was indeed typed at MMAKS Advocates, this was at the request of the 1st Applicant who signed it and that notices of default and demand had been duly and properly served on the Applicants at their rightful address.

The Applicants filed an Affidavit in rejoinder whereupon the Respondents filed an Affidavit in sur-rejoinder and the Applicants in turn filed an Affidavit in reply to the sur-rejoinder, to reiterate their

respective positions.

In their Affidavits and submissions, both parties dwelt at great length on the authenticity of the various transaction documents, including whether they were the handicraft of the Respondents or not, whether there had been due service of the Default and Sale Notices on the Applicants and the dispute over whether the postal address box numbers used was the Applicants' rightful address of service. They also dwelt on the question as whether the issues raised by the Application were *res judicata*.

The Applicants were represented by Godfrey S. Lule Advocates, while the Respondents were represented by MMAKS Advocates.

I have carefully considered the lengthy averments and submissions made by the parties. With much respect, they both were largely argumentative and digressed into areas which I did not find particularly relevant for determination of the Application. I will not reproduce the submissions here as they are properly on the record.

The issue for this Court to determine is whether the Respondents can be added as defendants in Civil Suit No. 254 of 2017 and Originating Summons No. 2 of 2018.

Order 1 Rule 10 (2) CPR provides that;

"The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that ……. the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added".

The import of order 1 rule 10(2) CPR is that while determining the question of impleadment of a party to the proceedings the primary consideration for court to make is whether the said party is a necessary or proper party and the presence of such party is necessary for complete and effective adjudication of the subject matter.

A person may be added as a defendant when; (a) he ought to have been joined as a party or (b) his presence is necessary in order to dispose of the suit completely and effectively.

Who then is a proper and or necessary party?

A proper party is one whose presence is necessary for the complete and final decision of the proceedings – **Sarvinder Singh V Dailip**

Singh 1996 (6) Scale 59. A necessary party is one without whom no order can be made effectively.

If a suit can be effectively and completely adjudicated without the presence of the intended additional party, then such a party should not be impleaded- see **NC Garai V Matru Bharder, AIR 1974 Cal 358.**

To give purpose to Order1 Rule10(2) CPR, the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action.

The issue for determination in the main suits, CS 254 of 2017 and OS 2 of 2018, is whether the Applicants / defendants are indebted to the Plaintiff Bank – DTB and to what extent.

On the other hand, the grief expressed by the Applicants against the Respondents, is the Respondents' alleged role in an attempted illicit sale of the Applicants' properties.

The Applicants' possible cause of action against the Respondent would be for loss arising from alleged fraud against them premised upon various documents allegedly forged by the Respondents. The intended sale was injuncted and therefore has never taken place.

While on the other hand, the Plaintiff Bank's cause of action against the Applicants is for recovery of money allegedly owing from the Applicants to the Bank.

In **Amon V Raphael Trek & Sons Ltd [1956]1 All ER 273,** court held that the person intended to be added must be directly or legally interested in the answers to the questions involved in the case. A person is legally interested in the answers only if he can say that it may lead to a result that will affect him legally by curtailing his rights.

I cannot fathom how and which, if any, of the respondents rights could be impacted by the outcome of the counterclaim and the main suits.

In the counter claim by the Applicants/Defendants, the claim is against the Plaintiffs and not the Respondents in the instant application who are not even a party to the suits and counterclaim.

When there is no allegation that the intended defendants interfered with the rights of the plaintiff, they are not necessary parties- **Gaura Naik V Arjun Charan Dash, AIR 1996 Ori 180.**

The Applicants did not demonstrate that the Respondents have any legal rights that might be affected by the answers to the claim in the

main suits.

The reason the defendant /Applicants want the Respondents added as defendants is so that they account for their alleged fraudulent acts in order for the Applicants/defendants to effectively put up a good defence to the claim against them(Applicants). They want the Respondents to be cross-examined on these documents and on their alleged fraudulent conduct.

The intended defendants/Respondents in the instant case are Counsel for the plaintiff Bank in the main suit. The answers sought in the main suit are intended to determine whether or not the plaintiffs are entitled to recovery of money from the Applicants/defendants and if so, how much money.

In the main suit, Diamond Trust Bank took the Applicants/ defendants to court, seeking to recover about Shs 10 billion allegedly outstanding from loans extended to the Applicants. This was after unsuccessful recovery efforts in which the Respondents are said to have been involved as Counsel for Diamond Trust Bank -the Plaintiff Bank.

In this matter however, the Respondents, who the Applicants seek to add as defendants, are also the lawyers for the Plaintiff in the main

suits from which this Application arises. Additionally, the causes of action are distinct and the Plaintiffs have no claim against the Respondents and thirdly neither the outcome of the main suit nor the counterclaim impact the Respondents legal rights or interests in any way.

Whereas the generally established position is that a person may be added as a proper party or defendant to the suit though no relief may be claimed against him provided his presence is necessary for a complete and final decision on the question involved in the suit, entitlement to the orders under Order 1 r 10(2) CPR is not absolute.

A defendant is not entitled as of right to, at their instance, have another person added as a co-defendant. Addition of a co-defendant is at the discretion of court, taking into account the circumstances of the particular case and the ultimate objective of dispensing justice with completeness and finality.

In the case of **Noris V Beazley (1874-80) All ER 774**, the plaintiffs brought an action to recover money from the defendants. The defendants alleged that a company for which he was a trustee had a counter claim against the plaintiff for fraud and applied that the company be added as defendants. Court held that, the rule to add a party was not intended to add a defendant, who had no interest in the

action, for the convenience of the defendant.

In that case, Court noted that the joinder sought would only embarrass the plaintiffs. Court refused the Application to add the company.

Exercise of Court's discretion is therefore predicated on judicious consideration, by Court, of the circumstances of each case and is informed by a holistic consideration of all relevant legislation and the imperative for Court to achieve and deliver substantive justice between the parties.

It is not in dispute that the Respondents are the lawyers for the Plaintiff Bank in the main suits. Indeed in his Affidavit in support of the Application, the 1st Applicant/Deponent states that Stephen Zimula is a partner with MMAKs Advocates, who are the lawyers on record representing Diamond Trust Bank, the Plaintiffs in CS 254 of 2017 and OS 2 of 2018.

T**he Advocates (Professional Conduct) Regulations SI 267-2,** restrain Advocates' liberties regarding divulgence of client information. **Regulation 7 of the Advocates (Professional Conduct) Regulations SI 267-2** provides that;

"An Advocate shall not disclose or divulge any information obtained or acquired as a result of his/her acting on behalf of a client except where this becomes necessary in the conduct of the affairs of that client or is otherwise required by law"

It was submitted for the Applicants that they believe that *"....the Respondents as lawyers for the Plaintiff Bank, performed acts calculated to aid the Bank ....."*

Section 125 of the Evidence Act provides that;

"No Advocate shall at any time be permitted , unless with his or her client's express consent, to disclose any communication made to him in the course of and for the purpose of his or her employment as an advocate by or on behalf of his or her client or state the contents or condition of any document with which he or she has become acquainted in the course and for this purpose of his or her professional employment to disclose any advice given by him or her or her client in the course and for the purpose of that employment" .

The reason the Applicants seek to have the Respondents added as defendants is so that they can cross-examine the Respondents concerning certain documents which the Applicants/Defendants believe were fraudulently authored by the Respondents. The

documents include a letter dated 13th September ostensibly acknowledging indebtedness, a letter dated 10th May 2017 by the 2nd Respondents to the Director CIID, a Notice of default dated 17th May 2016, a Notice of Sale dated 5th August 2016 and a Mortgage Deed and further that the Respondents need to answer questions concerning acquisition of the Applicant's bank account information.

It is discerned from the pleadings that the Respondents were at all times, when the impugned letters and documents were written and the alleged actions committed, acting in relation to and in furtherance of the Plaintiff Bank's business interests.

It is therefore inconceivable how the Respondents, who are also Counsel for the Plaintiffs in the main suit can possibly explain themselves regarding the impugned documents and the alleged fraudulent actions, without contravening the bounds set by the **Advocates (Professional Conduct) Regulations SI 267-2** (Supra) and the **Evidence Act** regarding divulgence of client information.

I do not agree with the proposition by Counsel for the Applicants that evidence given on the impugned letter **"R"** of 13/9/2016 would not fall within the ambit of the restraints imposed by the **Advocates (Professional Conduct) Regulations SI 267-2.**

I have considered the possible implications of allowing a scenario where counsel for a plaintiff is added as a defendant in the same matter, thereby being positioned as an adverse litigant against the very party whom they represent in that same matter. I find no justification for such an absurdity to be allowed.

The proposition by Counsel for the Applicants that if in the course of the hearing any question arises which, due to professional exigencies, the Respondents ought not to answer, Court will be there to overrule or give directions, is a very perilous and needless undertaking for which I find no account to knowingly venture into.

If this Application were allowed on the grounds stated by the Applicants and the facts as they are, that would, in my judgement, amount to injudicious exercise of Court's discretion. It would culminate into a legal absurdity and a travesty of the law, for Advocates representing a Plaintiff in a matter to be added as defendants in the same matter.

Based on my evaluation of the pleadings, the evidence on file and submissions by Counsel for the Parties and the law, it is my opinion that the issue between the parties in the main suits, which is whether or not the defendants /Applicants are indebted to the plaintiff Bank and if so to what extent, can be determined without adding the

Respondents as defendants in the suits.

260 The Respondents are neither proper nor necessary defendants for determination of the issues and grant of reliefs sought by the plaintiffs in the main suits, not even the Applicants/counter-claimants. They are not proper persons to be added because they are Counsel for the Plaintiff and additionally neither the Plaintiffs nor the
265 Applicants have a cause of action against them. The authenticity of the documents can be established without having the Respondents added as defendants. The defendants can effectively argue their defence and the issues resolved in the main suits without having the Respondents as co-defendants.

270 My decision in this matter is not to say that a co-defendant would never be added at the behest of the defendant, not at all. Rather when considering whether or not to give effect to Order 1 rule 10 CPR, regard must be had to the facts and circumstances of a particular case and the underlying imperative to dispense substantial justice.

275 The authenticity and validity of the impugned documents can be interrogated and determined without necessarily having the Respondents added as defendants in Civil Suit No. 254 of 2017 and Originating Summons 2 of 2018. This could avert any form of prejudice or even embarrassment to any of the parties in the main

suit.

Before I take leave of this matter, I hasten to state that my considerations are not informed by any imagination that there might be no grounds to justify inquiry into the Respondents' alleged misconduct. There might well be reason for that, if the interest parties are of the conviction to do so, but possibly only in a separate claim against the Respondents to inquire into their alleged misdeeds, certainly not as additional defendants in CS 254 of 2017 and OS 2 of 2018.

The main suit has also been long pending and is already sufficiently intricate with enormous interests of both parties at stake. For court to allow introduction of another collateral issue, which in my judgment has no material bearing on determination of the principal issues in dispute, would be to condone unnecessary delay.

Premised on the foregoing considerations, I refrain from allowing the Application and from granting the orders sought. The Application fails.

However, in the interest of justice and so that the matter is resolved comprehensively and with finality, I order as follows;

i. A forensic examination of the original letter dated 13th September 2016 be carried out by the Government handwriting expert to determine the authenticity of the letter, specifically whether the signature thereon is that of the Applicant or not and whether it is a scanned or original writing.

ii. The costs of the forensic examination and of the resultant Report shall be borne by both parties provided the unsuccessful party upon final determination of the main suits shall recompense the successful party.

iii. Witness summons do issue for Messrs Kavuma Kabenge Advocates to be examined on their possible role, if any, in the letters dated 20th October 2016 and 2nd February 2017 and on any other issues touching on this matter as this Court may deem appropriate.

iv. The General Post Master/ Executive Director of Posta Uganda be caused by order of this Court to furnish Court with the particulars of the registered operators of Postal Office Boxes No. 31101 6557 as at January 2016 to May 2017

v. The costs of this Application cannot be in the cause, the reason being that the Respondents are not a party to the main suits.

Costs follow the event and are accordingly awarded to the Respondents.

I so order.

Delivered at Kampala by email to Counsel for the respective parties and signed copies for the parties placed on file this 22nd day of December, 2020.

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RICHARD WEJULI WABWIRE

JUDGE