Last Updated: 25 May 2007

Kampala City Council V Victoria International Trading Co. Ltd- HCT-00-CC-MA-0666-2006
[2007] UGCommC 19 (26 February 2007)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-0666-2006
(Arising out of Civil Suit No. 21 of 2006)

Kampala City Council Applicant

Versus

Victoria International Trading Co. Ltd Respondent

26th February 2007

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G

This application is purportedly under 0.11 r (d) of the Civil Procedure Rules; S. 2 (1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap. 72 and Regulation 26 (1) of the Third Schedule to the Local Governments Act, Cap 243. It is for orders that on the grounds set out in the attached affidavit of Mrs Ruth Kijjambu, the plaintiff's action against the defendant be struck out with costs; and that costs of this application be provided for.
The application arises out of ***HCCS No. 21 of 2006, Victoria International Trading Co. Ltd –Vs- City Council of Kampala,*** wherein the plaintiff claims that it entered into a market management contract with the defendant and that the defendant has breached terms of the contract by advertising for bids in the Daily Monitor Newspaper of 23/12/2005. It is the plaintiff's contention in that case that it will suffer great loss and damages if its prayers in the plaint are not granted by this Honourable Court as the plaintiff has invested a huge sum of money in the development of the said market.

In its written statement of defence, the plaintiff avers that the suit is incompetent and unsustainable due to non-compliance with the Civil Procedure and Limitation (Miscellaneous Provisions) Act and the Local Government (sic) Act. The two cited laws relate to the mode of service of summons, etc. In paragraph 8 of the plaint, the plaintiff avers that Notice of Intention to sue was duly served on the defendant who ignored it. The defendant having denied the contents of paragraph 8 of the plaint, the service of the statutory notice became an issue for determination in that suit. Accordingly, it was not necessary, in my view, to file yet another application, the instant one, since the issue could have been determined therein. I'm saying so because under 0.7 r. 11 (d) of the Civil Procedure Rules, once it is proved that the suit is barred by any law, the plaint must be rejected and struck out. So why would it be necessary to file yet another application when the issue can be addressed in the

main suit itself?
Be that as it may, it was submitted by Mr. Sendege, counsel for the defendant/applicant, that no notice of intention to sue was served on the defendant before the suit was instituted. That this is averred in the affidavit of Ruth Kijjambu in support of the application. That after the issue had been raised, Mr. Bashasha swore an affidavit in general and sweeping terms contending that service had been effected. Counsel has taken issue with this case because the deponent does not state who was served or even who effected service. Counsel concedes that the copy of the Notice purportedly served on the defendant bears a stamp, a signature and the word '*received'*, but that these are not enough. In these circumstances, counsel states that there was non-compliance with the law and that the suit should accordingly be struck out.

The two learned counsel for the defendant do not agree. They think that the application is incompetent, given that Ruth Kijjambu who swore the affidavit in support of the chamber summons was not the Town Clerk at the material time. They think that as such, her averment that what she states in that affidavit is based on knowledge is false. That based on the falsehood, the affidavit is bad and it should be rejected. In the alternative, learned counsel have argued that after the issue of the alleged non-service of the statutory notice was raised, they produced to the defendant a duly stamped and signed copy of the same. In their view, until it is shown that the stamp is not that of the Town Clerk's office, the defendants cannot be said to have proved their claim. They also raise another issue: that 0.11 r. (d) on which the application is based is non-existent. At the hearing, Mr. Sendege for the applicant conceded to the fact that 0.11 r. (d) does not exist. In view of that concession, I don't intend to waste any more time, ink and paper on that issue. In my view, the applicant intended to rely on 0.7 r. 11 (d) of the Civil Procedure Rules. I'm not sure that citing the wrong law has in this case occasioned any failure of justice.

As to the point of law raised by the applicant, both parties agree that service of a notice of an intended suit was mandatory. In view of that agreement, the only issue for determination is whether any such notice was served on the defendant. I have given due regard to the arguments of all counsel.

Following the defendant's denial of paragraph 8 of the plaint, one Bashasha Herbert has sworn an affidavit stating that the defendant was served. He has attached a copy of a statutory notice dated 15 November, 2005. The same bears a stamp of the Town Clerk of Kampala embossed on it, a word '*Received'* and a signature of someone who received it. In my view, once the defence puts up the operation of the law relied herein, relating to service or non-service of the Statutory Notice, the burden shifts to the plaintiff to prove that the necessary notice was served upon the defendant. Such proof can take different forms. In law a fact is said to be proved when the Court is satisfied as to its truth. The evidence by which that result is achieved is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. Relating the above principle to the instant case, the defendant alleged in its WSD that it had not been served with the statutory notice. It should be recalled that attaching it to the plaint at the time of filing is not a legal requirement. Therefore, raising the issue in the WSD created an obligation on the plaintiff to show, or rather prove, that the notice had actually been served. It has produced to the defendant a copy of the notice indicating evidence of service.

Under S.2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, service of the notice should be delivered to or left at the office of the officer specified in the schedule, who is a Town Clerk in the instant case. Regulation 26 (1) of the Local Governments Act takes the matter of service further. Under this regulation, any summons, notice or other document required or

authorized to be served on an urban council shall be served by delivering it to, or by sending it by registered post addressed to, the Town Clerk.

The plaintiff's argument in this case is that the notice was delivered to the office of the Town Clerk. Evidence for that, according to them, is the stamp on the copy they have produced, the word 'Received' on it and a signature of some person who received it. In my view, this was sufficient evidence adduced by the plaintiffs raising a presumption that what they assert about service of notice in their plaint, is true. At this stage, the burden shifts to the other party to rebut the presumption. And this is where the point made by the respondents herein becomes pertinent. The defendant has not adduced any evidence to show that the stamp appearing on the notice is not the genuine stamp of the Town Clerk; or that the signature appearing next to the stamp is not that of the officer specified in the schedule, the Town Clerk, in the instant case. The person who has sworn the affidavit in support of the Chamber Summons, Ruth Kijjambu, was not in office at the material time, according to the respondents. This fact has not been challenged by evidence. The person who was in office at the time as the Town Clerk has not sworn any affidavit disowning the signature. This Court does not know the signatures of any of the defendant's officers at the time, or at all, to raise the inference that the signature appearing on the impugned notice is not that of the person authorized at the time, to receive summons, notice or other documents on behalf of the defendant. In these circumstances, the defendant has not adduced any evidence to rebut the presumption that what the plaintiff asserts in its paragraph 8 of the plaint is true. For this reason alone, I would find no merit in the preliminary point of law raised by the defendant and disallow it.

Mr. Sendege cited to me a number of authorities. They include HCCS No. 482/99 Michael Sansa & Others –Vs- K.C.C (unreported). In that case, what was in issue was service by the plaintiff, on a Clerk in the office of the City Advocate, of documents meant for the defendant. The Court held that the service was improper. The facts of that case are clearly distinguishable from the facts herein. Counsel also cited to me ***Fancy Stores Ltd & Anor –Vs- UCB, HCCS No. 9/92*** reproduced in ***[1994] IV KALR 18.*** In that case no service of the notice had been made. The plaintiff conceded so. The Court held that the suit was barred by law because of non-service of the notice. Clearly also, that case is distinguishable from the instant one.

I have addressed my mind to the arguments of counsel regarding the affidavit of Ruth Kijjambu. She states in that affidavit that she is the Ag. Town Clerk of the defendant and that as such, she is competent to swear the affidavit on the defendant's behalf. In the crucial paragraph, No. 3 thereof, she states:

> "3. That I have noted that contrary to the statutory requirements under S.2 (1) (b) of the Civil Procedure & Limitation (Misc. Provisions) Act, Cap 72 for service of statutory notice of 45 days on the Local Government before commencement of a suit against it, no such notice was served upon the applicant/defendant before institution of HCCS NO. 21 of 2006 by the respondent/plaintiff".

She then swears that whatever she has stated is true to the best of her knowledge. From the records, the notice is said to have been served in November, 2005 and the suit was filed in January 2006. From the unchallenged evidence of the plaintiff, Ruth Kijjambu did not become the Ag. Town Clerk till September 2006. Surely what she states in her affidavit, that is, that the fact of the alleged non-service of notice is based on her own knowledge, cannot be true. It is a naked falsehood. O.19 of the Civil Procedure Rules provides the manner and when affidavits must be sworn. Under this law, an affidavit must be confined to such facts as the deponent is able to his or her own knowledge to prove, except on interlocutory applications on which statements of his/her belief may be admitted. Even then, the grounds thereof must be stated. Bearing in mind the above Rule, and the unchallenged evidence of the respondents regarding when Ruth Kijjambu became the Ag. Town

Clerk, I think the affidavit sworn for the applicant would nowhere be near an affidavit. What she states can at best be an opinion not based on any facts, except perhaps allegations other people have told her. An opinion is not evidence at all. In these circumstances, I would agree with learned counsel for the respondent's argument that there is no affidavit accompanying the Chamber Summons. That being so, the application is incompetent.

For the reasons I have endeavoured to give, I have found no merit in the preliminary point of law raised by counsel for the applicant. It is dismissed with costs to the respondent, certified for one counsel only.
Yorokamu Bamwine
J U D G E
26/02/2007
26/2/2007
Mr. Sendege for applicant/defendant.
Mr. Tendo Simon holding brief for Mr. Kavuma Kabenge.

Court: Ruling delivered.

Yorokamu Bamwine
J U D G E
26/2/2007