THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0603-2008
(Arising out of HCT-00-CC-CS-473-2003)

KIBUUKA MUSOKE ……..…… APPLICANT

VERSUS

TOUR & TRAVEL CENTRE LTD ……..……RESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING

This is an application by Notice of Motion brought under Order 27 Rule 1, Order 52 Rules 1, 2, and 3 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act. The Applicant, Kibuuka Musoke A. S is one of the plaintiffs and one of the defendants on the Counter Claim in HCT-00-CC-CS-0437 -2003.

The Applicant is seeking leave to deposit security for the sum of USD47,780 (United States Dollars Forty seven thousand , seven hundred eighty only) in Court being payment of the money secured by the legal mortgage dated June 30, 2003 and to release the title free of any incumbrances.

The brief background to this application is that by an Acknowledgement of Indebtedness / Memorandum of Understanding dated 26th June 2003 signed by the Applicant for and on behalf of the 1st Plaintiff, Ms Travobase Ltd, the Applicant as director/shareholder of the 1st Plaintiff deposited with the Respondent his Certificate of Title to the land and developments comprised in LRV 237 Folio 11 Plot 41 at Kiira Road Kampala as security for the repayment and personally guaranteed the repayment of the sum of Shs.15,000,000/= and US$47,780 to the Respondent. The Applicant executed a legal mortgage dated 30th June 2003 over the said property in favour of the Respondent for the above sums.

The Applicant and Travobase Ltd filed Civil Suit No 437 of 2003 against the Respondent and Stephen Mworozi whereby he contends that he executed the Acknowledgement/ Memorandum and the Legal mortgage under duress and seeks orders, interalia, that the Acknowledgement/ Memorandum and Legal mortgage be set aside and for delivery of the Title Deed for the property to the Applicant.

The Respondent filed a Counter-claim against the Applicant, Beatrice Kabatesi (now deceased) and Travobase Ltd whereby it counter-claims and seeks from them jointly and severally the payment of US $48,080 plus costs.

The Applicant has since repaid the sum of Uganda shs15,000,000/= to the Respondent. In his affidavit in support of the application, paragraph 9, the Applicant states:-

> "9. THAT I wish to deposit in court a Bank Guarantee for the sum of US$47,780 (United States Dollars Forty seven thousand, seven hundred eighty only) to discharge my obligations under the legal mortgage so that the title deed for the property comprised in LRV 237 Folio 11 Plot No. 41 Kiira Road Kololo now held by the Respondent may be released to me free of any incumbrance by the Respondents. "

Mr. Kiryowa Kiwanuka, Counsel for the applicant, submitted that the only amount outstanding on the mortgage is US$47,780. That a dispute has since arisen whereby the mortgagee/Applicant contends that the mortgage was signed by him under duress. He contends that pending the determination of the dispute in CS No 437 of 2003 the Applicant should be granted leave to deposit a bank guarantee in the sum of US$47,780 to secure the discharge of the Applicant's obligation under the mortgage and have the title deed released. He argued that under a mortgage the mortgagor always has the right to redeem his property. The Applicants intention is to redeem his property by deposit of an alternative security in the form of a bank guarantee. Counsel cited *Pethras Shah Vs Queenland, Mohanlal Insurance Company Ltd (1962) EA 269*. The case concerned an amendment denying liability subsequent to payment into court with admission of liability and how court is to deal with money paid into court under Order 27. With due respect to Counsel I find the above authority of no particular relevancy to the issue before me.

Mr. Blaze Babigumira, Counsel for the Respondent, strongly opposed the application. He relied on the Respondent's affidavit in reply and sworn by its Managing director Steven Mworozi and raised several reasons. Firstly that the Applicant who was a plaintiff to the main suit could not bring an application under Order 27 rule 1 of the Civil Procedure Rules. Counsel submitted that rule 1 limits itself to an application by a defendant.

The rule states:-

> "Where any suit is brought to recover a debt or damages any defendant may before or at the time of filing his defence or at any later time by leave of the Court pay into Court a sum of money by way of satisfaction which shall be taken to admit the claim or cause of action in respect of which the payment is made; she may with a defence denying liability (except in suits or counterclaims for libel or slander), pay money into court which shall be subject to the provisions of rule 6 of this Order, except that in a suit on a bond, payment into court shall be admissible in respect of particular breaches only, and not of the whole suit. "

Order 27 rule 1 of the Civil Procedure Rules clearly limits its application to the defendant to a suit. I agree with Mr. Babigumira that it is only the defendant who can make an application under the rule. Secondly, the defendant can only make the application under the rule where the suit is brought to recover a debt or damages. In the instant suit Mr. Kibuuka Musoke AS, the Applicant, is the 2nd Plaintiff in Civil Suit No 4376 of 2003 out of which this application arises. The plaintiffs in that suit are not seeking to recover a debt or damages. They are seeking an order setting aside an agreement/ acknowledgement and a legal mortgage, an injunction against the sell of the applicant's property, an order for delivery of the Title Deed for the property to the Applicant and a return of the transfer deed forms signed by the Applicant. In the premises I find that the application is wrongly brought under rule 1 of Order 27.

Mr. Kiryowa – Kiwanuka argued that the Applicant had brought the application as a defendant to the Counter-claim in the suit. True the Respondent, together with its Written Statement of defence, filed a counter-claim whereby it seeks to recover a debt or special damages of US$47,780 and the Applicant is one of the defendants to the Counter-claim. However there is a specific provision under which a plaintiff who is a defendant to a counter-claim can bring the application. This is under rule 9 of the Order, which provides:-

> "9. A plaintiff or any person made defendant to a Counter claim may in answer to a Counter-Claim in answer to a counter claim pay money into Court in satisfaction of the Counter-claim, subject to the like conditions as to costs and otherwise as upon payment into court by a defendant."

Counsel for the Respondent argued that the Applicant could not enjoy the provisions of rule 9 since he had not brought the application under the rule. He relied on *Peragio Munyangira Vs Andrew Mutayitwako HC Misc. App No. 37 of 1993*. In that matter, the application was brought under section 18 of the Civil Procedure Act seeking an order of the High Court to transfer Mengo Civil Suit G.K. 1056/91 from the Chief Magistrates Court of Mengo to the High Court for trial.

It did not cite any rule. Justice Okello relied on *Adongkara Vs Kamanda (1968) EA 210* and held that the application was defective for failure to cite the rule under which it was brought to Court.

Counsel also relied on *Kibuuka Musoke AS Vs Travobase Centre Ltd HCT-00-CC-MA-308-2008*. I dismissed the above application for reasons that it had been wrongly brought under Order 27 rules 10 and 12 of the Civil Procedure Rules and had been brought by the wrong procedure of chamber summons instead of a Notice of Motion.

However, in *Intraship (U) Ltd Vs G. M. Combine (U) Ltd (1994) VI KALR 42* Court found that the application had been brought under the wrong law. While considering whether in the circumstances the application should be struck out Justice Sempa –Lugayizi held that the question should be whether the irregularity is serious enough to prevent the Court from hearing the application and determining it on its own merits. That the answer would depend on whether the non-observance of the procedural rule in issue would lead to injustice. If it would not then the court would be willing to over look it, otherwise it would not. Article 126 (2) (e) of the Constitution requires court to administer substantive justice without undue regard to technicalities. In *Alcon International Vs Kasirye, Byaruhanga & Co Advocates (1995) III KALR 91* Justice Musoke-Kibuuka held that procedural defects can be cured by the invocation of Article 126 (2) (e) of the Constitution. In *Salume Namukasa Vs Yosefu Bulya (1966) EA 433* while considering the invocation of the Courts inherent powers under the equivalent of section 98 of the Civil Procedure Act, Sir Udo Udoma CJ observed that before the provisions of the section can be invoked the matter or the proceedings concerned must have been brought to the Court the proper way in terms of the procedure prescribed by the rules. That is in the manner prescribed by law.

Order 27 does not provide for the procedure to follow in an application under rule 9 thereof. However Order 52 Rule 1 provides.

> "All applications to the Court, except where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open court."

This application is by Notice of Motion. Therefore brought by the right procedure, though, brought under a wrong rule by a defendant to a counter claim.

On the authorities I have cited above I find the irregularity's not so serious as to prevent me from entertaining the application under rule 9. However, both rules 1 and 9 of the Order specifically address payment of money into court in satisfaction of the claim. In the instant application the Applicant is seeking leave "to deposit security for the sum of US$47,780 -----"

In ground 8 of the application and in paragraph 9 of the Applicant's affidavit in support the Applicant states that he is prepared to deposit a Bank Guarantee for the sum of US$47,780 to discharge his obligations under the mortgage.

A deposit of security in court for the payment of money is not payment of money into court in satisfaction of the claim. The Order does not cover deposit of security for the money claimed in the suit. The relief sought is outside the scope of Order 29.

The Applicant is tactfully inviting this Court to order a substitution of the security deposited. That is to substitute the Certificate of Title with a Bank Guarantee. The mortgagee has a right of choice of the security to be deposited.
Further annexture B to the application is a Crane Bank Ltd letter dated 25th February 2008. It is "Re: Bank Guarantee No 2008/041 dated 25.02.2008 for US$57,000 in favour valid up to 24.02.2009" It states that the guarantee is valid for a period of one year from the 25th February 2008. This application was filed on 10th November 2008 and heard on 15th November 2008. The main suit is still under hearing. Inevitably by the time of judgment in the main suit the guarantee, if allowed to be deposited, would have already lapsed.

Considering all the above, I agree with Mr. Babigumira that, to make the Order sought will be prejudicial to the Respondent. The application accordingly fails and is dismissed with costs to the Respondent.

Hon Mr. Justice Lameck N. Mukasa

JUDGE

5th February 2009