

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 565 – 2011
(Arising from Civil Suit No. 275 of 2011)

M/s SIMON TENDO KABENGE ADVOCATES ::::::::::::::: APPLICANT

VERSUS

M/s MINERAL ACCESS SYSTEMS (U) LTD ::::::::::::::: RESPONDENTS

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This ruling arises from a preliminary objection raised by counsel for the applicant Dr. Akampumuza that the affidavit in reply to the Chamber Summons deponed by Ms. Eva Nalwanga an Advocate in the law firm representing the respondents contains contentious matters which are not within her knowledge.

Counsel for the applicant in particular referred paragraphs 3, 5 and 6 to 23 of the affidavit in reply.

Counsel for the applicant submitted that this said affidavit is prejudicial and should be struck out. In this regard he referred me to the case of

Banco Arabe Espanol V Bank of Uganda SCCA 08 of 98

In that case the Supreme Court held that an affidavit sworn by counsel for respondent was defective and should not have been allowed in evidence.

Counsel for the applicant also referred Court to the decision of Hon Justice Madrama in the case of

Mugoya Construction V Central Electricals International Ltd MA 699 of 2011

In that case the Learned Judge also struck out an affidavit sworn by one of the Counsel to the respondent.

Counsel for the applicant submitted that the affidavit in reply offends Order 3 rule 1 as it does not show that that the deponent is an agent of the respondent or is authorised as such. He further submits that the evidence of the said deponent at best is hearsay contrary to Order 19 rule 3 and for these additional reasons should also be struck out.

Counsel also raised an objection that the affidavit in reply reflects that fees had been paid yet in reality the fees receipt No URA 0379880 had been reused/recycled on several other court documents which amounted to forgery and therefore should be relied upon that ground as well.

In reply Mr Rutisya for the respondents submitted that with regard to payment of fees the Court Fees do not require the payment of fees on affidavit in reply. He further submitted that even if fees were to be paid the Court in its discretion could order that unpaid paid fees be paid in the interests of hearing the application on its merits.

He further submitted that Ms Nalwanga in her affidavit in reply did state the source of her information which was different from the situation in the **Banco Arabe Espanol case** (supra) so the two situations were distinguishable.

I have addressed my mind to these objections and the submission of both counsels for which I am grateful.

Before I address these objections let me make a few observations. This is one of several preliminary objections arising from applications made under Civil Suit No 275 of 2011.

I discussed the object of preliminary objections in the case of

Eng Yashwant Sidpra & ors V Sam Odaka & ors MA 365 of 2007.

In that case I held that preliminary objection should be made if the party so raising it is convinced that when raised the objection will dispose of the whole claim and thus save the parties expense and embarrassment in trying facts that will not determine the rights of the parties.

Many preliminary objections in a case may point to poor preparation before filing a case in Court. In this case I see that preparation has been a challenge on both sides. In another application in the Head suit M.A. 324 of 2011 I have ruled that the present applicant cannot sue in the firm name since it is sole proprietorship. That save for the auxiliary orders to cure this defect would make this application by the applicant raising the preliminary objection defective too. He who comes in equity must come with clean hands. Great care therefore should be taken by counsel to prepare cases to avoid these kinds of basic errors.

In this matter reusing a receipt on different court documents is truly unacceptable given even that the fee in question is a paltry Shs 1,500. I shall however not allow that to stand in the way of addressing the substantive dispute and order that the respondents pay all relevant fees in the head suit and all applications with evidence to court before the hearing of the main suit.

As to the affidavit in reply by Ms Nalwanga an Advocate with the respondent's advocates yet making an affidavit on behalf of her client, I have always cautioned counsel informally about this. This not the best practice with regard to affidavits. Clients should make their own affidavits and leave the advocates with the function of representation. This is clearly a contentious matter that Ms Nalwanga seeks give evidence on. In paragraph 1 of her affidavit she states that she is fully conversant with the factual matters in the application and she deposes the affidavit in such a capacity. She however does not state that she is authorised by her client M/s Mineral Access Systems Uganda Ltd to do so within the meaning of Order 3 rule 1 of the CPR a situation that was rightly faulted by Hon Justice Madrama in the **Mugoya Construction and Engineering Ltd case** (supra).

Furthermore contrary to what counsel for the respondent submitted Ms Nalwanga does not disclose her source of information. In paragraph 22 of her affidavit she simply states

“...That what is stated herein above is true and correct to the best of my knowledge and belief”

Such is the exact situation involving an affidavit made by a counsel that was faulted by the Supreme Court in the case of the Banco Arabe Espanol (supra relying on the case of ***Caspir Ltd v Harry Gandy*** [1962] EA 414). Such an affidavit was held to be defective and should not be accepted.

Lastly this affidavit in reply in what to my mind is clearly a contentious matter opens up counsel to a possibility cross examination which contravenes Rule 9 of the Advocates (Professional Conduct) Regulations (SI 267-2). This is a professional matter which advocates should not allow themselves to fall pray to.

All in all I agree with the objection and reject the affidavit in reply by Ms Nalwanga. The Respondents are given 14 days from this ruling to file a proper affidavit in reply.

The objection is upheld but for the reasons given above with regard to the preparation of this case no order to costs is made.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 27/08/12

27/08/12

10:00 a.m.

Ruling read and signed in Court in the presence of:

- Rutisya for Respondents
- Dr. Akampumuza for Applicant

In Court

- Applicant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 27/08/12