

THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA
COMMERCIAL DIVISION

HCT - 00 - CC - MC - 23 – 2011

PEARLINE INVESTMENTS LTD. APPLICANT

VERSUS

1.KAMPALA CAPITAL CITY AUTHORITY
2.THE EXECUTIVE DIRECTOR KAMPALA } **RESPONDENTS.**
CAPITAL CITY AUTHORITY

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This ruling arises from two preliminary objections raised by both counsels in this application. Counsel for the respondent raised an objection that the affidavit in support of the application is not stamped, and can not be adduced in evidence and therefore the application fails.

On the other hand, counsel for the Respondent raised an objection to the effect that the applicant had not been served with the affidavit in reply to the application and therefore, the applicant’s application stands unchallenged and the applicant should be allowed to proceed *exparte*.

The brief background to these objections is that the applicant brought an application by Notice of Motion under S. 33 and 36 of the Judicature Act, S. 98 of the Civil Procedure Act and R. 3, 5, 6 and 7 of the Judicature (Judicial review) Rules S.I No. 11 of 2009 and O. 52 r 1 and 3 of the Civil Procedure Rules for orders of judicial review as follows;

- ***An order of mandamus directing the respondents to continue with and conclude the disposal process of property comprised in LHR Volume 450 Folio 2 Plot 2 Mabua Road, Kololo Kampala pursuant to the Kampala City Council decision of 20th July 2010.***
- ***An order of prohibition, prohibiting the respondents, its officers and all those claiming under it from taking any action in respect of the said property that would determine or interfere with the aforesaid process.***
- ***An order for general damages and costs.***

The facts leading to this application are that on 20th March 2010, the applicant made an application to the 1st respondent to lease Plot 2 Mabua Road Kololo Kampala (hereinafter referred to as “the suit land”). At an extraordinary meeting of the 1st respondent’s council which took place on 20th July 2010, it

was resolved through the contracts committee that the suit land should be disposed off to the applicant. On 13th August 2010, the 2nd respondent directed the valuation of the suit land, a valuation was carried out and a valuation report made on 19th April 2011, in which the suit land was valued at Ushs. 3,346,000,000/= . The matter was referred to the contracts committee of the 1st respondent for final disposal on 20th April 2011. On 1st July 2011, the contracts committee of the 1st respondent was ordered by the 2nd respondent to cease operations and the disposal process was stayed and or interfered with.

The applicant was represented by Mr. Kabayizi, while Mr. Ouma represented the respondent. The parties made oral submissions in respect of the preliminary objections.

In relation to counsel for the respondent's objection that the affidavit in support of the application is not stamped and therefore cannot be adduced in evidence, Counsel for the respondent submitted that Sections 40 to 42 of the Stamps Act provide for stamping of documents and that where a document is not stamped, it shall not be adduced in evidence. Furthermore, that item 4 of the first part of the schedule to the Stamps Act provides for "affidavits" without limitation as to the type of affidavits for which stamp duty is payable. Counsel for the respondent submitted that the affidavit in support of the application is not stamped and therefore, the application fails. Counsel relied on the case of **PROLINE SOCCER ACADEMY V MULINDWA** (MA 459 of 2009).

In reply to the objection, counsel for the applicant submitted that it is not relevant to pay stamp duty in this application. Counsel for the applicant submitted that an affidavit in support of the application is not the type of affidavit envisaged by the Stamps Act and that even if stamp duty has not been paid the parties can be allowed to pay the stamp duty as it is not fatal.

I have carefully considered the submissions of both counsels and the authorities referred to.

Section 2 (1) (a) of the stamps Act Cap 342 provides for instruments chargeable with Stamp duty. It provides as follows;

“...S 2. Instruments chargeable with duty.

(1) Subject to this Act and the exemptions contained in the Schedule to this Act, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor respectively—

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in Uganda after the commencement of this Act and relates to any property situate, or to any matter or thing done or to be done, in Uganda;”

The Stamps (Amendment) Act, 2002 in the first part under Item 4 provides for stamp duty on an affidavit including an affirmation or declaration.

Furthermore, S. 42 of the Stamps Act provides for the effect of failure to pay Stamp duty as follows,

“...Instruments not duly stamped inadmissible in evidence, etc.

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer, unless the instrument is duly stamped;...”

This provision further lays down the exceptions in the following parts.

The issue of whether stamp duty is chargeable on an affidavit in support of an application has been dealt with in the case of **UGANDA TAXI OPERATORS AND DRIVERS ASSOCIATION V KAMPALA CITY COUNCIL AUTHORITY AND THE EXECUTIVE DIRECTOR KAMPALA CITY COUNCIL AUTHORITY** (MA 137 of 2011), where a similar preliminary objection was raised. Justice Mwangusya found as follows;

“This court is of the view that an affidavit in support of a Notice of Motion which is pending before this court does not create a right or liability like in the case of PROLINE ACADEMY V LAWRENCE MULINDWA cited in this trial. If any right or liability was to arise out of this pleading it would arise at the conclusion of the trial and this affidavit which is part of the Notice of Motion is not such an instrument as envisaged in the Stamps Act. The inclusion of ‘Affidavits’ in the schedule to the Act would only refer to the affidavits that create, transfer, limit, extend or create a right or liability which the affidavit in question does not...”

I agree with the Learned Judge in the case of **UTODA V KCCA & ANOR** above, that the affidavits referred to under the Stamps Act for which Stamp duty is payable are those that confer a right or liability on a party, but this is not the case with an affidavit in support of an application by way of a motion which is a pleading. In the premises, the preliminary objection by counsel for the respondent fails.

I shall consider the objection raised by counsel for the applicant, regarding the failure of the respondent to serve the applicant with an affidavit in reply to the application.

Counsel for the applicant submitted that the Judicature (Judicial Review) Rules provide for service of the affidavit in reply to the application within 56 days unless the court extends the time. Counsel for the applicant submitted that in this case, the court fixed the application for hearing within 35 days and therefore, a reply should have been within a shorter period. Counsel for the applicant submitted that as a result, the applicant’s application stands unchallenged and the applicant should be allowed to proceed *ex parte*. Counsel in this regard relied on the case of **MWESIGWA PHILLIP V STANDARD CHATTERED BANK** (MA 200 of 2011) and **MAKERERE UNIVERSITY V ST. MARTIN EDUCATION LTD.** (HCCS 378 of 1993)

In reply, counsel for the respondent submitted that they had tried to serve the applicant but were told that Mr. Muwema is the only one who could accept service but he was abroad. Furthermore, that this matter has been the subject of criminal proceedings and therefore the respondent needed some evidence to include in their affidavits, hence the delay.

In rejoinder counsel for the applicant submitted that if there was refusal to accept service, then the respondent would have filed an affidavit to that effect, but none had been filed.

I have also carefully considered the submissions of both counsels and the authorities referred to for which I am grateful.

Rule 7 (3) of the Judicature (Judicial Review) Rules 2009, provides that,

“Any respondent who intends to use any affidavit at the hearing shall file it with the Registrar of the High Court as soon as practicable and in any event, unless the court otherwise directs, within fifty six days after service upon the respondent of the documents required to be served by sub rule (1).”

I have reviewed the motion and I find that the application was filed in court on 31st August 2011. It was served on the respondents on 1st September 2011 as proved by the affidavit of service deponed by Okello Gabriel, filed on 5th September 2011. The affidavits in reply to the application were filed on 4th October 2011. This implies that the affidavits in reply were filed within a period of about 34 days after service of the application by the applicant. This is therefore within the time prescribed under Rule 7 (3) above.

The issue in this application is service on the respondents. The application was fixed for hearing on 5th October 2011 but by this date, the respondent was still within time to serve. The time provided under Rule 7 (3) above had not lapsed and therefore, the respondent could still serve the affidavits in reply. In the premises, I find that the respondent cannot be faulted as having failed to serve the affidavits in reply which is accordingly accepted on record. That being my finding applicant’s preliminary also objection fails.

The result is that both preliminary objections are overruled and the parties are ordered to argue the main application.

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Geoffrey Kiryabwire

JUDGE

Date: 11/07/12

11/07/12

10:54am

Ruling read and signed in open court in the presence of;

- Ntamwe Yusuf for Applicant
- Mugisha for Respondent

In court

- None of the parties
- Rose Emeru – Court Clerk

- **Court:** Ruling read and signed in open court. Main application to be argued on 03/10/12.

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Geoffrey Kiryabwire

JUDGE

Date: 11/07/2012