

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

CIVIL SUIT (OS) NO 008 OF 2013

JOHN PETER NAGEMI t/a}

NAGEMI AND CO ADVOCATES}.....PLAINTIFF

VERSUS

ISMAEL SEMAKULA}.....DEFENDANT

BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Plaintiff brought this action by way of Originating Summons under the provisions of Order 37 rule 6 of the Civil Procedure Rules for the determination of the following questions inter alia:

1. Whether or not the defendant, Mr Ssemakula Ismael is in breach of clause 2.4 of the sale agreement executed between him and Mr Ben Ntege Ddamulira in respect of private Mailo Busiro Block 509 plot numbers 14, 20 and 23 being land at Koba, Ssabawaali, Mengo District to pay the agreed sum of money due and owing to the plaintiff within the period of time stipulated therein.
2. Whether or not the defendant, Mr Ssemakula Ismael, being a purchaser of the land ought to perform and discharges his part of the bargain to the plaintiff by defraying payment in the agreed sum of Uganda shillings 305,750,000/= as stipulated under clause 2.4 (c) of the sale agreement.

This suit is also for consequential orders for the defendant to honour and discharge his undertaking or obligations to pay a total sum of Uganda shillings 305,750,000/= due and owing to the plaintiff in accordance with clause 2.4 (c) of the sale agreement and for costs of the suit. The originating summons is supported by the affidavit of Peter John Nagemi, the Managing Partner in the law firm of Messieurs Nagemi and Company Advocates wherein he deposes inter alia that he successfully represented Mr Ben Ntege Ddamulira, a grantor of probate in civil suit number 674 of 1995 between Ben Ntege Ddamulira vs. Jane Kabonge and others. On 1 March 2013 or thereabouts, the defendant and the said Ben Ntege executed an agreement of sale and purchase of property forming part of the estate of the late Bulazi Ddamulira as described in the originating summons. Pursuant to clause 2.4 (a) of the agreement, the defendant paid a non-refundable fee in the sum of Uganda shillings 50,000,000/= which was duly acknowledged. The attached acknowledgement is an acknowledgement by Ben Ntege and Peter John Nagemi. Under

Decision of Hon. Mr. Justice Christopher Madrama

the sale agreement the parties thereto expressly agreed that the defendant shall pay a sum of Uganda shillings 305,750,000/= directly to the plaintiff in accordance with the strict period of time stipulated under clause 2.4. In flagrant breach of the agreement, the defendant issued two cheques to the plaintiff which bounced and defaulted in the payment of the sum of money agreed under clause 2.4 up to date.

The plaintiff deposes that he honestly believes that the defendant is bound by the provisions of clause 2.4 (c) of the sale agreement to account and pay him the entire sum as covenanted under the agreement.

The affidavit in reply of the defendant is sworn by the defendant Mr Semakula Ismael. He deposes that the affidavit in support of the application is riddled with material falsehoods. He further contends based on the advice of his lawyers that the suit is misconceived and is an abuse of the process of court and ought to be dismissed with costs. The position of the defendant is that the suit cannot be determined by way of originating summons as it involves serious questions of fact and contentious matters which cannot be resolved by affidavit evidence. Firstly he deposes that he is not aware of the alleged agreement dated 1st of March 2013. The agreement he is aware of was drafted by the plaintiff himself on 23 February 2012 in which the plaintiff allegedly incorporated clauses for his own benefit without consulting Mr Ben Ntege, the vendor/administrator. At the time the alleged agreement was executed the administrator was on his death bed and was not aware of its contents and was just required to sign the agreement by his lawyers. The defendant claims to have paid the plaintiff up to Uganda shillings 100,000,000/= as part of the purchase price and when they informed the administrator of the estate, he was surprised and claimed not to be aware of the payment. Later on the administrator of the estate requested him to stop paying the plaintiff. Prior to the communication he had issued two cheques to the plaintiff but when he received communication from the administrator of the estate, he informed the plaintiff not to deposit the cheques and advised him to consult Mr Ben Ntege. The cheques eventually bounced when they were deposited and to avoid criminal liability, he paid the plaintiff up to Uganda shillings 10,000,000/= to cover the face value of the cheques that bounced and the plaintiff acknowledged receipt.

The defendant further deposes that he was informed by Mr Ben Ntege, the administrator of the estate of the deceased that he would convene a family meeting and he accordingly did so. Thereafter on 25 April 2013 the defendant executed a new sale agreement with the administrator of the estate and the beneficiaries which agreement superseded the earlier agreement in respect of the said subject matter. The defendant asserts that he is not bound by the contents of the agreement dated 23rd of February 2012 and contests its contents.

In rejoinder Peter John Nagemi filed another deposition in which he asserts that the originating summons is properly before the court for construction of a clause in the document lawfully executed by the defendant conferring an explicit and ascertained pecuniary benefit to him. Secondly that there was no serious question involved to warrant filing an ordinary suit as the

Decision of Hon. Mr. Justice Christopher Madrama

main point at issue for determination was construction of a clause in the document executed and endorsed sequentially by the defendant. The affidavit in rejoinder is an elaborate rebuttal of the affidavit in reply and I need not going into it at this stage.

At the hearing of the suit the plaintiff was represented by Counsel Timothy Kwikirize while the defendant was represented by Counsel Kafeero Isaac

The defendants counsel raised preliminary points of law on the competence of the originating summons.

The defendants counsel contended that the point for determination is whether the current suit is properly brought by way of originating summons. He submitted that the suit is improperly brought and ought to be dismissed with costs under order 37 rules 11 CPR. This is because the procedure by originating summons was intended to enable simple matters to be resolved by courts without the expense of bringing an ordinary suit. Counsel relied on the case of **Vincent Kawunde T/a Oscar Associates vs. Damiano Kato HCCS No. 4 of 2007** it was held that the procedure of Originating Summons should be limited to simple and straightforward matters. Counsel further relied on **Official receiver vs. Sukhudev [1970] 1 EA 243** where it was held that Originating Summons is not a procedure by which decisions on disputed questions of fact ought to be obtained. Similarly it is not appropriate where the disputes involve a considerable amount of evidence. It is appropriate for construction of documents, statutes or resolution of points of law that require straightforward interpretation (See Makabugo vs. France Drake Serunjogi ([1981] HCB 58).

The defendants counsel submitted that the present dispute relates to the existence and enforceability of an agreement of sale of land which the plaintiff seeks to enforce. The defendant categorically disputes the agreement which the plaintiff wants to enforce and the plaintiff cannot be granted the prayers sought by way of OS before determination of the issue of whether the defendant is bound by the agreement. The defendant further avers that the sale agreement was drafted and witnessed by the plaintiff on behalf of his client the Late Ntege Ben Damulira who was not aware of the clauses but was just required to sign. It would be proper to permit the defendant to adduce evidence to that effect. There are further factual controversies which need to be resolved through a trial i.e. the defendants contention that he paid the plaintiff Uganda shillings 110,000,000/= as part of the purchase price but the vendor claimed that he was not aware of such payment since the plaintiff never remitted any and he was estopped from making any payments to the plaintiff as the vendors lawyers. In the case of Makabugo vs. Serujongi (supra), it was held that the originating summons raised matters of existence or validity of sale of land and these were questions of validity of document. The OS was inappropriate and ought to be dismissed with costs to the defendant. In conclusion the defendants counsel submitted that the pleadings and affidavits raise a number of triable issues which require the calling of witnesses.

In reply the plaintiff's counsel expressed shock at the objection. He contends that firstly order 37 rule 8 provides for the practice to be followed. The court issued the summons and the objection cannot be sustained because the present suit only seeks determination of questions of construction under an instrument that is a sale agreement. The sale agreement is between the defendant and one Ntege Damulira. The suit is for construction of clause 2 (4) of the agreement which the defendant duly executed by appending his signature thereon. The case of *Makabugo vs. Drake Serunjogi* (Supra) holds that Originating Summonses provide for a simple and speedy procedure. The defendant cannot deny the evidence and concedes to the existence of the agreement according to paragraphs 6 and 7 of his affidavit in reply. He paid money under the agreement and cannot disown it as he was part of it. The submission that Ntege Ddamulira disowned the agreement cannot be sustained. The defendant ought to have deposed to several affidavits to prove it. Furthermore the case of **Makabugo vs. Drake Serunjogi** (supra) is distinguishable because the matter in court is for construction while in the **Makabugo vs. Drake Serunjogi** (supra) the contract was denied. The case of **Official Receiver vs. Sukhdev [1970] 1 EA 243** involved determination of a trust and not construction of an agreement and was also distinguishable on that ground. Under Order 37 rule 6 of the Civil Procedure Rules, the matter before court is for simple determination of a clause and there is nothing complicated involved. Consequently it is a proper procedure and the objection ought not to be sustained.

In rejoinder, the defendant's Counsel maintained that the defendant admits knowledge of the agreement but his case is that the agreement was terminated and it was between the defendant and the plaintiff's client. The suit requires a considerable amount of evidence and witnesses before it can be resolved. The agreement was between the defendant and plaintiff's client and there is an issue of its enforceability which cannot be achieved by the plaintiff.

Ruling

I have duly considered the applicants application together with the affidavit evidence and the submissions of counsel on the preliminary objections of the defendant.

The gist of the objection is that the agreement that the plaintiff seeks to have construed by this court is disputed. The defendant contends that the agreement was superseded by another agreement. The defendant further raises other issues about the way the agreement was procured which would require the defendants to adduce evidence in support thereof so as to vitiate it. Lastly the agreement is between Mr Ben Ntege Ddamulira and the defendant. The plaintiffs reply on the other hand is that the suit was a straightforward suit for construction of clause 2.4 of the sale agreement which has been admitted by the defendant.

The plaintiff commenced this action for construction of a sale agreement between the defendant and the plaintiff's client one Mr Ben Ntege Ddamulira (deceased). The existence of the sale agreement is not in dispute. What is in dispute is whether it is valid or enforceable. Order 37 rule 6 of the Civil Procedure Rules provides as follows:

Decision of Hon. Mr. Justice Christopher Madrama

"Any person claiming to be interested under a deed, will or other written instrument may apply in Chambers by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested."

Order 37 rule 8 of the Civil Procedure Rules provides for the procedure upon application for summons. A person entitled to apply presents the application ex parte to a judge sitting in Chambers with an affidavit setting forth concisely the facts upon which the right to the reliefs sought by the summons is founded and the judge if satisfied that the facts alleged were sufficient and that the case is a proper one to be dealt with on an originating summons, shall sign the summons and give such directions for service as may be necessary. On the basis of the above rule 8 the plaintiff's counsel submitted that the defendant could not advance objections on the appropriateness of the procedure by originating summons after the court has issued the originating summons under Order 37 rule 8. On the other hand the defendant's counsel relied on order 37 rule 11 of the Civil Procedure Rules which provides that during the hearing, the judge may if he or she thinks fit, adjourn the hearing into court for taking evidence viva voce or hearing arguments and if it appears to the judge that the matters in respect of which relief is sought cannot properly be disposed of in a summary manner, may refuse to pass any order on the summons and may dismiss it referring the parties to a suit in the ordinary course and making such orders as to costs as may appear to be just.

I agree with the defendant's submissions that the defendant is entitled to object to the originating summons and the court is not functus officio on the issue of whether this suit was properly brought by way of originating summons. This is because the suit is commenced ex parte and the originating summons is issued on the basis of representations of the plaintiff. When the defendant is served, the defendant's right to be heard on the question of whether originating summons is the proper procedure cannot be saddled by an ex parte order issued in the summons. It is purely a right to a fair hearing that the defendant should be given an opportunity to object to the summons if they are any grounds for doing so. Secondly the defendant is entitled to contest averments of fact in the summons and give the basis for holding that the matter requires trial in an ordinary manner or by way of an ordinary suit.

It is obvious from the submissions of the parties that there are factual controversies which this court is being asked to adjudicate upon. Order 37 rule 6 of the Civil Procedure Rules as submitted by the plaintiff's counsel deals with determination of any question of construction arising under the instrument and for declarations of the rights of the person interested. It is apparent from the plaintiff's suit that the plaintiff does not only seek construction of an agreement but also seeks an order for the defendant to honour and discharge obligations or undertaking to pay a total sum of Uganda shillings 305,750,000/= said to be owing to the plaintiff.

I have carefully considered the application and no question of construction have been raised. The agreement is clear and straightforward. Clause 2.4 clearly indicates that the plaintiff is to be paid

Decision of Hon. Mr. Justice Christopher Madrama

Uganda shillings 50,000,000/=. Clause 2.4 (c) indicates that Uganda shillings 305,750,000/= is the legal fees, costs and expenses owed to the defendants counsel Nangemi and Company Advocates in connection with the conveyance of sale of land to the purchaser and for successfully executing defendants instructions in HCCS No 674/1995, Civil Appeal No 35 of 1997 and HCCS No 122 of 2010 from the beginning to the end. It also provides that the amount as calculated upon a formula stated therein was payable directly to the vendors counsel by the purchaser till full realisation. The agreement is stamped by Sema Properties Ltd and was allegedly endorsed by the defendant on every page. I do not see any question of construction involved. A question of construction should relate to a controversy about the meaning of the clause or a disagreement about the proper construction of the clause.

That notwithstanding, the respondent has disputed the agreement on the ground that it was superseded by another agreement. Because the plaintiff seeks enforcement of clause 2.4, certain other pertinent issues arise. This includes the question of enforceability by the plaintiff on the basis of not being a party to the agreement. For there to be enforcement, the allegations of the defendant need to be investigated. The court cannot investigate the allegations which have been set up above through affidavit evidence. Consequently it is not a proper case for trial by way of originating summons. The remedies sought by the plaintiff on the basis of clause 2.4 have been contested on the ground of validity of the agreement or its enforceability. It would be improper on the basis of such allegations to determine that question without allowing the parties to adduce evidence for and against the factual controversies as contained in the affidavit evidence. In any case the agreement is clear enough and there is no question for construction involved. I have duly considered the case of **Official Receiver versus Sukhdev [1970] 1 EA 243** being a judgement of the High Court of Kenya at Nairobi per Madan J in which a similar question involving originating summons was issued under the equivalent of Order 37 rule 1 of the Civil Procedure Rules. In as much as this suit dealt with a different rule, the principle that originating summonses should not involve disputed questions of fact is captured by the words of the judge at page 247 when he said as follows:

"A question of law may be decided on originating summons..., but it may be both inadvisable and unsatisfactory, the court may find itself presented with an incomplete picture, to do so when the question is mixed up with several other questions the answer or answers to which can only be reached after determining a mass of facts in dispute; "

In the case of *Makabugo versus Serunjogi* [1981] HCB 58 Honourable Justice Odoki (judge of the High Court as he then was) held that it was trite law that when disputed facts are complex and involve a considerable amount of oral evidence, an originating summons is not the proper procedure to take. Originating summonses are intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way but are not meant to determine matters which involve a serious question. It is meant to be a simple and speedy procedure on its merits are based on the fact that there are no pleadings involved or in general no

witnesses the questions for decision being raised directly by the summons itself and the evidence given by affidavit. Justice Egonda Ntende in Vincent Kawunde t/a Oscar Associates vs. Damian Kato HCCS - OS – 0004 of 2007 agreed with the other authorities that the procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way and not to enable the court to determine matters which involve a serious question.

The matters of fact in dispute include whether the document sought to be construed was duly executed, whether it was superseded by another agreement between the same parties none of whom is the plaintiff and whether the consequential orders for payment of the plaintiff on the basis of factual controversy about the actual amounts already paid ought to be tried in a summary manner.

In those circumstances, let the plaintiff if enabled by law, file an ordinary suit and prove his case for payment by the defendant. Originating summons in the circumstances is inappropriate and the originating summons in this suit is accordingly dismissed under the provisions of Order 37 rule 11 of the Civil Procedure Rules.

On the question of costs, dismissal of the originating summons under Order 37 rule 11 of the Civil Procedure Rules is not a dismissal on the merits of the suit but on the appropriateness of the procedure. Consequently the costs of the dismissal shall be borne by the plaintiff who in any case is entitled to file a fresh ordinary suit on the basis of a cause of action.

Ruling delivered in open court 18 December 2013

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Mukwaya Edward holding brief for Kafeero Isaac counsel for the Defendant,

Defendant not in court

Peter John Nagemi plaintiff in court

Plaintiff's counsel organising to wed and is unable to attend.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

Decision of Hon. Mr. Justice Christopher Madrama

18/12/2013