

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

**HCT - 00 - CC - CS - 271 - 2010**

**ANN ARINITWE BANYA ..... PLAINTIFF**

**VERSUS**

- 1. BARCLAYS BANK (U) LTD**
- 2. BANK OF AFRICA (U) LTD ..... DEFENDANT**

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE**

**R U L I N G**

This is a reference to Court under Rule 20 of the Judicature (Commercial Court Division) (Mediation) Rules of 2007 (hereinafter referred to as the Mediation Rules).

The suit had been referred to Mediation under the rules of this court, however, only the Plaintiff and the second Defendant together with their respective counsel appeared before His Worship John Arutu for mediation on a number of occasions.

The Plaintiff then proposed to withdraw the suit against the second Defendant. However, the second Defendant insisted that the Plaintiff pays costs in the main suit to the second Defendant. Upon perusal of the court file, it is a case for the second Defendant that they found a mediation reports stating that by agreement of the parties the Plaintiff had withdrawn the suit against the second Defendant and each party should bear the cost of the suit.

The second Defendant protested the reference to each party bearing its own costs to the suit in a letter dated 29<sup>th</sup> of March 2011 to the Mediation Registrar and hence this file being referred to this court for determination on the issue of costs under the Rule 20 (2) of the Mediation Rules.

The brief facts of the case in the head suit were that the Plaintiff sued the Defendants; Barclays Bank (U) Ltd and Bank of Africa (U) Ltd jointly and severally for blocking her Account No. 01206010009 in the second Defendant's bank. The Plaintiff prayed that the Defendants unblock her account and also prayed for general damages and interests and costs of the suit.

The second Defendant in their defence agreed that they opened a fixed deposit account for the Plaintiff for a period of 12 months where no debts were allowed. However, conceded that they blocked the account on request from the first Defendant pending investigations into funds in that account.

It is this matter that the Plaintiff during mediation chose to withdraw.

When the matter came up before me for hearing only counsel for the second Defendant appeared in court and it was agreed that he file submissions and advise counsel for the plaintiff to file submissions in reply if he had any. The plaintiffs did not file any submissions.

At the hearing the second Defendant was represented by Mr Nkuruziza.

It is the case for the second Defendant that though they participated in the mediation and the Plaintiff withdrew the case but there was no agreement as to costs. He referred me to Rule 20 sub-rules 1 and 2 of the Mediation Rules which provides

*“(1) If there is an agreement resolving some or all the issues in dispute, it shall be signed by the parties and filed with the Registrar for endorsement as a Consent Judgment.*

*(2) If there is no agreement, the mediator shall refer the matter back to the court...”*

It is the case for the second Defendant that Rule 22 of the Mediation Rules only provides that each party shall bear its costs and expenses in participating in the mediation under those rules unless otherwise agreed.

Counsel for the second Defendant submitted that whereas there was agreement to withdraw of the case, there was no agreement that each party bears its own costs.

Counsel for the second Defendant referred me to Order 25 r 1 which provides that where a Plaintiff withdraws a suit before taking any other proceedings in the suit except for an application in chambers after the defence has been delivered then he shall pay the Defendant's costs of the suit.

In this regard he also referred me to the case of **PCCW Global Bank Ltd V Gemtel Ltd** High Court Miscellaneous Application No. 247 of 2011.

Counsel for the second Defendant therefore prayed that his client be awarded costs following the withdrawal of the main suit against them by the Plaintiff.

I have considered the submission of counsel and I have also considered the law and cases cited. Rule 2 of the Mediation Rules provide that the Rules

*“... shall apply to all civil action filed in or referred to in court”.*

Rules 22 of the Mediation Rules also provide

*“...each party shall bear its own costs and expense of its participation in the mediation under these rules unless otherwise agreed”.*

Order 25 r 1 of the Civil Procedure Rules provides

***“ 1. The Plaintiff may at any time before delivery of the Defendant’s defence or after the receipt of that defence before taking any other proceedings in the suit (except any application in Chambers) by notice in writing wholly discontinue his or her suit against all or any of the Defendants or withdraw any part or parts or his or her alleged cause of complaint and thereupon he or she shall pay the Defendant’s costs of the suit, or if the suit is not wholly discontinued the costs occasion by the matter so withdrawn. Upon filing the notice of discontinuance the costs shall be taxed but the discontinuance or withdraw as the case may be shall not be a defence to any subsequent action“.***

Where a defence has been filed then the operative words under Order 25 r 1 are *“... before taking any other proceedings in the suit except any application in Chambers”* the question therefore is whether a mediation is a proceeding.

Rule 8 of the Mediation Rules make a Mediation reference mandatory. Rule 8(1) in particular provides

*“...a party may not opt out of mediation except allowed by an order of court if the matter is brought to the attention of the court...”*

Rule 8 (4) of the Mediation Rules further suspends the time lines under Order 12 Rules 2 (2) of the CPR

It would therefore appear to me that mediation is a necessary proceeding in the suit under the rules.

However, Rule 21 of the Mediation Rules make whatever happens during the mediation to be confidential and therefore court cannot know what has taken place during the mediation.

That notwithstanding, it is clear from the record that the mediation process took place over one month and four sessions of mediation were held under the mediation report, namely;

- 29<sup>th</sup> of September 2010,
- 11<sup>th</sup> of October 2010,
- 20<sup>th</sup> of October 2010 and
- 25<sup>th</sup> of October 2010.

Mediation by its very nature is not adjudication on the merits of a suit however; it is a give and take process.

Whereas it is true that Rule 22 of the Mediation Rules provides for costs and expenditures incurred during mediation alone, Section 27 (1) of the Civil Procedure Act provides that

***“(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force the costs of and incidental to all the suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by who and out of what property and to what extent those costs are to be paid and to give all the necessary directions for purposes of the aforesaid.***

***(2) The fact that the court or Judge has no jurisdiction to try the suit, shall be no Bar the exercise of the powers in Subsection (1) but the costs of any action cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”***

It would appear to me on the facts before court that the withdrawal of the suit by the Plaintiff against the second Defendant followed four sessions of mediation which as I have said is normally the process of give and take.

In those circumstances taking into account Order 25 Rule 1 CPR and Section 27 of the CPA read together with the Mediation Rules I find that the discretion of court is best exercised by each party bearing their own costs.

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Justice Geoffrey Kiryabwire  
**JUDGE**  
Date: 12/03/13

12/03/13

9: 35 a.m.

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

- A. Karungi for 2<sup>nd</sup> Defendant

**In Court**

- None of the parties
- Rose Emeru – Court Clerk

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**Geoffrey Kiryabwire**

**JUDGE**

**Date: 12/03/13**